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Land Reform (Scotland) Bill

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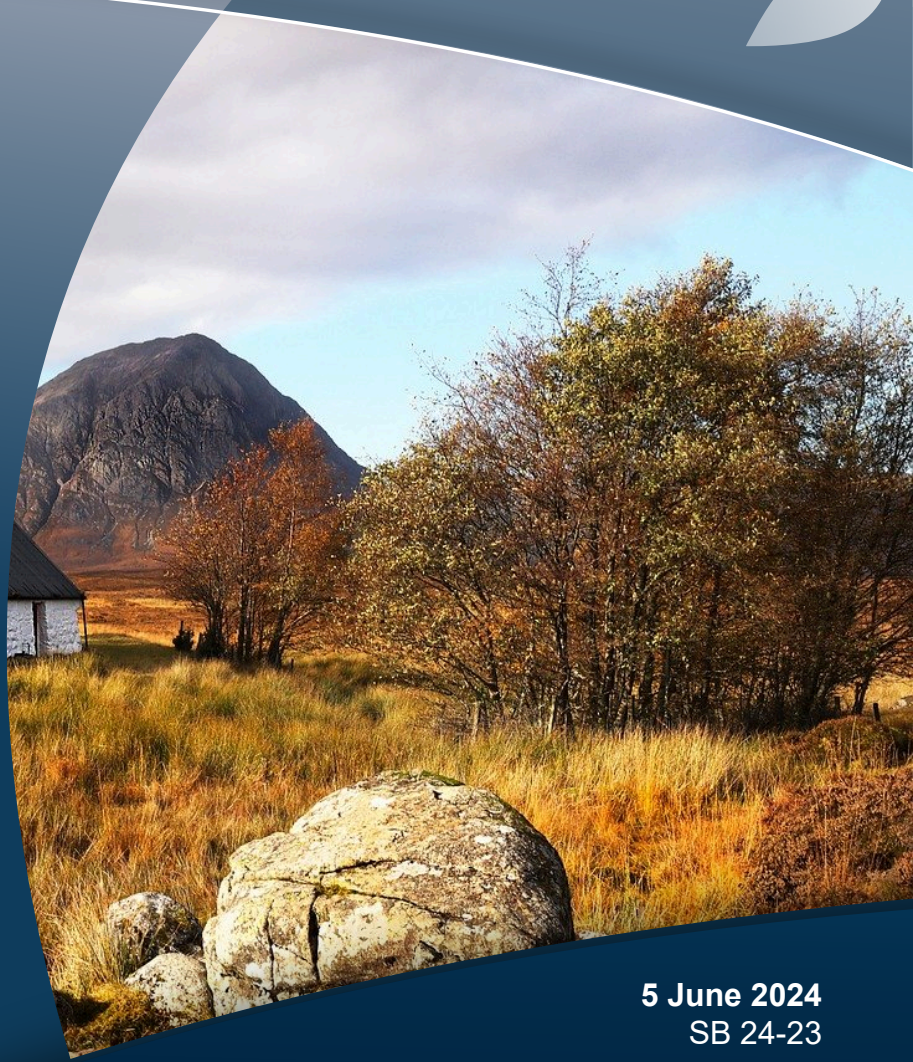
The Land Reform (Scotland) Bill makes provisions in relation to community engagement, community right to buy, the lotting of large land holdings, and the establishment of a Land and Communities Commissioner. It also provides for changes in agricultural tenancies and small landholdings.



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Summary

This briefing sets out background information and explains the provisions of the Land Reform (Scotland) Bill. The Bill was introduced to the Scottish Parliament on Wednesday 13 March 2024.

The Bill is split into two parts:

Part 1 has six sections, four of which are substantial:

- **Section 1** introduces new obligations on landowners to produce Land Management Plans and to engage with local communities, to support the principles of the Land Rights and Responsibilities Statement.
- **Section 2** ensures that community bodies receive prior notification in certain cases that the owner intends to transfer a large land holding, or part of it, and provides an opportunity for them to purchase the land.
- **Section 4** ensures that a large land holding (or more than 50ha of a large land holding) cannot be transferred without applying to Ministers for a decision on whether to sub-divide the land into “lots”.
- **Section 6** establishes the office of a new land commissioner called the Land and Communities Commissioner to oversee, investigate and report on some of the provisions in previous sections.

Part 2 has three chapters:

- **Chapter 1** concerns a model lease for environmental purposes
- **Chapter 2 and the Schedule** are about updating the legislation governing small landholdings
- **Chapter 3** makes provision in relation to agricultural tenancies, including changes to tenants' right to buy, resumption of agricultural tenancies, compensation for improvements, use of agricultural land for non-agricultural purposes, compensation for game damage, procedures for compensation claims, rent reviews and updating the rules of good husbandry and estate management.

Disclaimer: Legal advice

The information contained in this briefing is intended to inform Members of the Scottish Parliament and other interested parties on the background and provisions of the Land Reform (Scotland) Bill to support scrutiny of the legislation.

This briefing is aimed at supporting the work of MSPs. It is not intended as legal advice and should not be relied on for that purpose.

Background

The Land Reform (Scotland) Bill was introduced in the Scottish Parliament on Wednesday 13 March 2024. It is accompanied by the following key documents:

- Explanatory Notes (EN)
- Policy Memorandum (PM)
- Financial Memorandum (FM)
- Business and Regulatory Impact Assessment (BRIA)

The PM states that the Bill covers four principal policy areas:

- Land reform
- A new Land Management Tenancy
- Agricultural holdings
- Small landholdings

Land reform - A brief introduction

What is land reform?

Land reform is a broad concept and is considered to include **measures which modify or change the management, use and possession of land in the public interest**.

Prior to devolution, government policy on land reform was widely considered to be conspicuous by its absence. However, in the last 25 years, steps have been taken to address key issues, and land reform now spans topics as diverse as community ownership, urban renewal, housing, human rights, and agricultural land, as well as modernising property law and the fiscal systems which govern land ownership and management.

What action has been taken?

Significant early legislation included the Land Reform (Scotland) Act 2003 which introduced a right of responsible access to the countryside, a pre-emptive community right to buy, and an absolute crofting community right to buy. The Community Right to Buy was extended to include urban communities by the Community Empowerment (Scotland) Act 2015.

The Scottish Government's independent Land Reform Review Group reported in 2014 with over 60 recommendations, noting that there was [1]:

> " […] no single measure, or 'silver bullet', which would modernise land ownership patterns in Scotland and deliver land reform measures which would better serve the public interest."

The Land Reform (Scotland) Act 2016 took account of some of the Review Group's

recommendations, and contained a number of major reforms, including:

- Requiring the Scottish Government to prepare and publish a Land Rights and Responsibilities Statement (LRRS).
- Establishing the , which is required to "have regard to" the LRRS.
- A public Register of Persons Holding a Controlled Interest in Land (ROCI).
- Requiring the publication of Guidance on Engaging Communities in Decisions Relating to Land .
- Introducing a right to buy land to further sustainable development.

The Scottish Land Commission (SLC) has five land commissioners, and one tenant farming commissioner . Whilst having regard to the LRRS, the commissioners are required to address issues which relate to the ownership of land and land rights, the management of land, the use of land, and the Government's Land Use Strategy . Their functions are, on any matter relating to Scottish land to:

- Review the impact and effectiveness, and recommend changes to any law or policy.
- Gather evidence, carry out research, prepare reports and provide information and guidance.

More detailed consideration of the land reform measures summarised above is set out in the following SPICe Blogs:

- Land Reform at 20 – What does a post-feudal era look like?
- Register of Persons Holding a Controlled Interest in Land – What is it and how does it work?

Land reform and agricultural holdings

Land reform legislation has also more recently made further reforms to the law on tenanted agricultural holdings. While previous reforms were made in dedicated agricultural holdings acts, the 2016 Act made a number of changes affecting agricultural tenancies, outlined in more detail in later sections of this briefing. This included creating the role of the Tenant Farming Commissioner, as noted above.

The role of the Tenant Farming Commissioner is set out in Chapter 3 of the 2016 Act, and includes, among other things, to prepare and promote codes of practice on agricultural holdings, inquire into breaches of the codes of practice, to prepare recommendations for a modern list of improvements to agricultural holdings, and to refer legal questions on agricultural holdings to the Land Court.

Human rights and the public interest

Human rights and land reform to date

During the passage of the 2015 Land Reform (Scotland) Bill (which became the 2016 Act) the Parliament's Rural Affairs, Climate Change and Environment Committee paid specific attention to human rights and its compatibility with the European Convention on Human Rights (ECHR) and other international agreements.

The Committee's Stage 1 Report [2] explained that taking a human rights centred approach offered a new lens with which to consider land reform and recognised that the often cited [3] ECHR “right to peaceful enjoyment of possessions” (Article 1 Protocol 1), and the “right to respect for private and family life” (Article 8) “are not absolute rights, and states may interfere with them in order to pursue public interest objectives”, as long as that interference is proportional.

The 2016 Act requires the LRRS to “have regard to promoting respect for, and observance of, relevant human rights”, and specifies the UN's International Covenant on Economic, Social and Cultural Rights (ICESCR) in relation to this.

Subsequently, the SLC set up a Land and Human Rights Advisory Forum and published an independent discussion paper on Balancing rights and interests in Scottish land reform this makes the following key points [4] :

- There are both common law and statutory protections for property rights in Scotland. The UK is obliged by international treaties to protect property rights, and also to promote fair use and access to land for the public as a whole.
- The Scottish Government's devolved competencies, and how these interact with ECHR (through the UK Human Rights Act 1998) "have created a legal framework the limits of which are still being worked out".
- The concept of the ‘public interest’ is wide, and the Scottish Parliament has broad discretion in identifying what is in the public interest.
- Many European countries restrict the acquisition, use and management of land, some of which go further than Scotland.

Therefore:

> “ As long as all parties abide by the legal framework discussed in the paper, there is in principle no reason why similar measures could not be introduced in Scotland.”

However:

> “ When it comes to particular legislation, [...], and especially individual decisions that have an impact on a person’s property rights, it ultimately falls to the independent judiciary to consider the evidence and to apply legal rules to decide whether in the circumstances the individual property owner has been asked to bear an excessive burden in order to allow the public interest to be promoted.”

The Scottish Government consulted on A Human Rights Bill for Scotland in 2023. Anticipated legislation is expected to incorporate the ICESCR into Scots law, as well as recognising and including the right to a healthy environment. Former chair of the Scottish Human Rights Commission, and Professor of Practice in Human Rights Law, Alan Miller, has noted that he would expect there to be "links to the economic and socially productive use of land" in the forthcoming Human Rights Bill, and that [5] :

> “ the “human rights” dimension of land reform should develop beyond the perceived “red card” of the private property right under the ECHR.”

A Human Rights Bill is expected to be introduced this parliamentary session.

Human rights and the Land Reform (Scotland) Bill

As noted in the SLC's paper above [4] , it is up to the courts to consider individual cases, and to take a view on the balance of individual burden vs public interest. There are also certain steps that are taken beforehand to ensure that the legislation (rather than Ministerial decisions) are ECHR compatible.

At the start of the scrutiny process, the Presiding Officer of the Scottish Parliament must consider, before a Bill is introduced, whether it is within legislative competence. This is defined according to five criteria, including that "legislation must be compatible with the European Convention on Human Rights" [6] . The Bill's Statement on Legislative Competence confirms this [7] .

The PM states:

> “ The Scottish Government has considered the effect of the provisions of the Bill on Human Rights in particular the following Articles of the European Convention on Human Rights (“ECHR”), Article 6 (right to a fair hearing), and Article 1 Protocol 1 (“A1P1”) ECHR in relation to the impact of policies on an individual’s property rights. Any interference with A1P1 must be justified by reference to the three-part test of lawfulness, pursuit of a legitimate aim, and proportionality.”

It recognises that the provisions in the Bill which extend the opportunity to register a community right to buy, and those in relation to lotting of large land holdings will interfere with an individual’s A1P1 rights.

The PM sets out the Government's justification for what is considered to be "proportionate interference" (paras 286 - 291).

It explains that the Bill creates a new Land and Communities Commissioner to investigate and enforce breaches, where there is a right of appeal. The PM goes on to outline that the Bill fulfils the criteria of lawfulness by clearly setting out the procedures and provisions which apply, and explains the policy rationale of community benefit and sustainability (pursuit of legitimate aim) behind these, as well as exemptions, rights of appeal, review provisions, and compensation (proportionality).

The PM details how the Government considers the Bill to be compliant, and cites exemptions, rights of appeal, review, compensation, clear prohibitions, and legitimate policies for community benefit and sustainability. When considered overall, the PM states that these safeguards ensure that the provisions are a “proportionate interference” with an individual’s property rights.

The three-part test of lawfulness, pursuit of a legitimate aim, and proportionality will be considered in more detail as parliamentary scrutiny proceeds.

Consultations on the Bill

The Scottish Government held the consultation 'Land Reform in a Net Zero Nation' between 4 July and 30 October 2022, which asked for views on the main land reform proposals.

Separately, the Scottish Government held a consultation on proposals for modernising the law of small landholdings. This is a specific, rare, type of land tenure found in Scotland; more background on this is set out in the section on small landholdings.

The Scottish Government also consulted on proposed changes to more general agricultural holdings legislation, but this was carried out as part of the consultation on legislative proposals for a new agriculture bill, held between 29 August and 5 December 2022.

A separate consultation as part of the Strategic Environmental Assessment on the agricultural tenancies, small landholdings and land use tenancy proposals was also carried out between October and December 2023, and a consultation analysis published in March 2024.

The consultations are discussed in more detail in later sections of this briefing.

Large land holdings

The provisions set out in Part 1 of the Bill came about following a Ministerial request in 2019 to the Land Commission to undertake a Review of Scale and Concentration of Land Ownership. A series of recommendations for legislative change were made, and developed into Legislative Proposals for Addressing Concentrated Ownership. The Scottish Government subsequently made a series of proposals in the 2022 consultation, which included:

- Defining large scale land holdings as those over 3,000 hectares (ha) or more than a specified minimum proportion of an inhabited island.
- Legal duty to comply with the LRRS.
- Legal duty for large scale land holdings to produce land management plans.
- Regulating the market in large scale land transfers by applying a Public Interest Test, and introducing a requirement to notify an intention to sell.

A series of SPICe Blogs considers the origin of the proposals, and the consultation in more detail, as well as the reaction of key stakeholders:

- Routes to further land reform – the origins of current Scottish Government proposals
- What do the Scottish Government's proposals for land reform look like?
- Land Reform Consultation – What are the key stakeholders saying?

Small landholdings

The Scottish Government's guide to small landholdings legislation explains that 'small landholdings' are small tenanted farms of less than 50 hectares, subject to a series of laws collectively called the Small Landholders (Scotland) Acts 1886 to 1931 ("the Landholders Acts")[i]. These holdings only exist in Scotland, outwith the traditional 'crofting counties' of

Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney and Shetland. [8] [ii]

In essence, ‘small landholders’ are tenanted holdings under a specific, and quite rare, type of agricultural tenancy governed by this older legislation. The Policy Memorandum for the Bill states that there are 59 small landholdings remaining in Scotland, and a recent consultation on small landholdings (discussed further below) states that small landholdings can be found in "Arran, Bute, Moray, and parts of the Highlands, with the largest number on Arran. Concentrations of small landholdings remain in Ayrshire, Aberdeenshire, Moray, Dumfriesshire, the Scottish Borders and east central Scotland".

Small landholdings are different from 'smallholdings', which is a more general term for small farms. The Scottish Government notes that smallholdings are typically smaller than 20 hectares, and can be either tenanted or owner-occupied. There are an estimated 20,000 smallholdings.

Further reading on the history of small landholdings

The following sections provide a brief overview of the process of reforming small landholdings. More detailed background information can be found in the following reports:

- p.7-11 of the Scottish Government's 'Review of Legislation Governing Small Landholdings' (2017)
- p.191-194 of 'The Land of Scotland and the Common Good' (2014)
- p.15-16 of 'Small Landholdings Legislation: A guide to the law in Scotland' (2018)

Reforming small landholdings legislation

The statute law governing agricultural holdings and crofting has been successively updated in the 20th and 21st centuries. Both crofters and other agricultural tenants have rights, such as certain rights to buy their holdings, which are enshrined in modern legislation. However, the law governing small landholdings has not been updated for nearly a century. The small number of remaining holdings with this form of tenure therefore don't have these same rights. [9] The process of reforming this legislation to extend similar rights to small landholders has been ongoing for some time.

The Crofting Reform etc. Act 2007

The Crofting Reform etc. Act 2007 allowed Ministers to designate parts of Scotland outside the traditional crofting counties for crofting tenure, and also provided that small landholders in those areas could convert their holding into a croft.

The Land Reform Review Group

The Land Reform Review Group, established by the Scottish Government in 2012,

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i The specific acts are listed on page 14 in the Scottish Government's legislative guide

ii The crofting counties were extended in 2010 to include parts of Highland, Moray, Argyll and Bute, and North Ayrshire, using powers in the Crofting Reform etc. Act 2007.

published the report 'The Land of Scotland and the Common Good' in 2014. The Review Group considered small landholdings, noting in its report that -

> “ The Government’s limited expansion of the area designated for crofting tenure only covers some of Scotland’s small landholdings. For those covered, the process of converting to a croft has proved very difficult and potentially very expensive for small landholders to try to implement. An unhelpful or hostile landlord can present additional difficulties. The Group’s understanding is that to date no small landholders have succeeded in converting their holdings to a croft.”

The Review Group concluded that -

> “ ...there should be major improvements in the position of tenants under the Small Landholders (Scotland) Act 1911. The Group recommends that these tenants should, like crofters, have a statutory right to buy their holdings.”

The Agricultural Holdings Legislation Review

In November 2013, the Scottish Government announced details of its planned review of agricultural holdings legislation, and subsequently appointed a six person group to advise the Cabinet Secretary at the time. The potential role of small landholdings in achieving the Government’s aspirations for the tenanted sector, and the Land Reform Review Group's recommendation to give small landholders a right to buy, were considered as part of the review. The Agricultural Holdings Legislation Review published its final report on 27 January 2015.

The Agricultural Holdings Review highlighted the same issues with a lack of rights for small landholders, but noted, as the Land Reform Review Group had done, that there is no complete record of small landholdings and that there are issues with identifying them, with landlords and tenants themselves being unsure whether they have a tenancy which falls under the Small Landholders Acts.

The Agricultural Holdings Review therefore stated that -

> “ The Review Group recognises and agrees with the need for change to modernise the legislative framework for small landholders and to look to bring them more in line with 1991 Act tenants. Further work needs to be done with industry bodies to help fully understand the extent of small landholdings across Scotland and the potential impact of any further changes.”

But the group also felt that "there is a sufficient understanding of the issues facing the sector" to recommend that "further consideration should be given to providing small landholders with an automatic pre-emptive right to buy their holdings, should they come up for sale."

The recommendations from the two groups in relation to the right to buy are slightly different. A 'statutory right to buy', recommended by the Land Reform Review Group, is the ability to require a landlord to sell the holding to the tenant. A crofter has an absolute right to purchase their croft house and a reasonable size of garden (which the landlord, generally speaking, cannot refuse), and a right to apply to buy the croft land. The landlord can refuse this application, but the Land Court can authorise the sale under certain circumstances. A 'pre-emptive right to buy' is the right to buy where the landlord chooses to sell. Agricultural tenants with 1991 Act tenancies (a tenancy that began before 2003, or where the terms of the tenancy agreement are regulated by the Agricultural Holdings

(Scotland) Act 1991) have a pre-emptive right to buy their holding so long as they register their interest in doing so in advance with the Registers of Scotland.

The Land Reform (Scotland) Act 2016

The Land Reform Scotland Act 2016 ('the 2016 Act') did not implement the recommendation to create a right to buy for small landholders and the bill as introduced did not mention small landholdings. However, the Scottish Government wrote to the Rural Affairs, Climate Change and Environment Committee (the lead committee on the bill) on 9 February 2016 committing to carry out a consultation on the future of tenanted small landholdings later in 2016, and to make any changes based on that work. An amendment at Stage 3 made this review a legal requirement and as a consequence the 2016 Act required Scottish Ministers to review small landholdings legislation and lay a report in the Scottish Parliament by 31 March 2017.

Review of legislation governing small landholdings

The completed 'Review of Legislation Governing Small Landholdings' was published on 31 March 2017 and highlighted key issues facing these types of agricultural tenants:

“ Some of the issues small landholders face stem from a lack of understanding of how the legislation works in this area. Small landholders do have rights of security of tenure, but, they do not share the same benefits or legal rights as crofters or tenant farmers with secure 1991 Act agricultural tenancies:”

- The legislation governing small landholdings was last updated in 1931. The legislation can appear inaccessible either because small landholders and landlords do not know where to access it, do not understand it or find it unwieldy and can be uncertain where they can go to get expert advice.”

- Small landholders have to provide and maintain the entire infrastructure of their farms: housing, drainage, fencing and buildings (i.e. fixed equipment). The burden of maintenance falls entirely to them. This position stems from small landholders originally providing the fixed equipment and buildings on the holding; often with a government grant. This is the same regime as applies to crofters under the Crofters (Scotland) Act 1993, who also have to provide and maintain their own fixed equipment. Under the Agricultural Holdings (Scotland) Acts 1991 & 2003, obligations are subject to a more equitable split between landlord and tenant farmer.”

- In certain circumstances buildings, housing and land can fall into disrepair if the small landholder is unable to manage the land. This can raise concerns about eviction on the part of those individuals if they fear they are not meeting the statutory standards for maintaining the land.”

- Some small landholders are uncertain of their rights and how small landholding legislation works in relation to succession or assignation. This has led to fears of homelessness upon retirement, as they do not own the house that they or their predecessor may have built and/or invested in.”

- Legal provisions for compensation on improvements are similar to those applied to crofts, although some small landholders consider they are not fairly compensated for investments at resumption or waygo [the end of a tenancy] e.g. as a crofter can assign a croft for value they can realise the value of their investment.”

- There is no right to buy for small landholders. Crofters have a statutory right to buy their croft (introduced by the Crofting Reform (Scotland) Act 1976) and tenant farmers with secure 1991 Act agricultural tenancies have a pre-emptive right to buy (introduced through the Agricultural Holdings (Scotland) Act 2003).”

- There is significant uncertainty as to tenancy type: some small landholders are unsure whether they have a small landholding tenancy; in addition the Scottish Government no longer links tenancies to the old development loans and no formal register is kept.”

The review considered these issues in more depth, as well as other issues, such as the creation of new small landholdings - very few small landholdings have been created since the 1930s. It identified three broad options as a way forward:

- **Retain status quo:** under this option, the review noted that "it seems likely that the number of small landholdings will diminish yet further and they may cease to exist altogether".

- **Convert small landholdings into other forms of agricultural tenancies:** The Review highlighted that there are some similarities with crofts and with 1991 Act tenancies, but conversion to either would require careful consideration of the impacts. The review noted that "it is not clear that stakeholders would welcome [conversion into other tenancy forms]", and the impacts on landlords would also need to be considered.

- **Reform and modernise the small landholdings sector**: In particular, the Review noted that this would need to address the clarity of the existing legislation, and the right to buy.

In addition, the Review noted that "having recourse to a representative body could resolve some of the issues raised by stakeholders", and put forward the Crofting Commission or Tenant Farming Commissioner as alternatives.

The Review concluded that "from the point of view of retaining diversity within the sector, it makes sense for small landholdings to remain, and it then follows that they must be reformed and modernised", though this requires careful consideration. The review committed the Scottish Government to the following actions:

- Commission an independent legal expert to write a guide to the legislation.

- Commission additional research on smallholdings to:

    - Review the historical changes to small landholdings ownership, including identifying estates and landlords of the land subject to small landholding tenure and any government support provided to those estates to encourage the creation and establishment of small landholdings and Statutory Small Tenancies, and consider the feasibility of establishing a modern administrative register of small landholdings.

    - Assess the socio-economic benefits of small landholding to rural Scotland including comparison to other types of agricultural tenancies and potential opportunities to develop small landholdings with public and private landlords.

- Keep under review the possibility of requesting the Scottish Law Commission to review the law on small landholdings and to recommend reforms.

- Keep under review the issues surrounding right to buy in the context of small landholdings.

- Consider further whether small landholdings could be included within the remit of either the Crofting Commission or the Tenant Farming Commissioner.

- Review current grant schemes available to small landholders, including consideration of take up rates, use of the farm advisory service and consider any constraints around borrowing faced by small landholders when compared to crofters and other areas of the agricultural sector.

- Ensure that small landholders are included in the Farm Advisory Service provision to small farms on succession planning.

- Maintain a Scottish Government web page for small landholders, providing them with a resource that will point them towards advice and support on a wide range of

agricultural issues.

The guide to small landholdings legislation was commissioned from and written by a specialist in agricultural law, Sir Crispin Agnew of Lochnaw, Bt QC, and published in 2018, and some other elements of the above actions are being taken forward by the Bill.

Proposals for reform

The consultation on legislative proposals for a Land Reform Bill - Land Reform in a Net Zero Nation - stated that “We will be undertaking a separate public consultation with [small landholders]; this will form part of the consultation process for the Land Reform Bill, though it is not part of the main Bill consultation.” That specific consultation on small landholdings was published in October 2022, and ran until 14 January 2023.

The proposal set out in the Small Landholdings consultation was to bring small landholdings into line with other forms of land tenure. The consultation proposed a package of legislative reform measures on:

- **The tenant’s right to buy:** The consultation proposed that the small landholder be given an absolute right to buy the land under their house and garden, and a pre-emptive right to buy the remainder of the landholding - effectively a mix between the right to buy for crofters and the right afforded to some other agricultural tenants.
- **Permitted forms of diversification:** The Scottish Government proposed to enable small landholders to carry out more diverse non-agricultural activities on their farm in similar ways to crofters and other agricultural tenants.
- **Assignation and succession:** The Scottish Government proposed to amend the rules around small landholders transferring or bequeathing a holding to someone else. Small landholders would be able to assign their holding to the same types of people as tenant farmers with secure 1991 Act agricultural tenancies. It was also proposed that landlords should be able to object to the person identified to be assigned or succeed the holding for similar reasons as for 1991 Act tenancies.
- **Access to an umbrella body:** The Scottish Government proposed to give small landholders access to an existing umbrella body to provide support and expertise to holdings with this type of tenancy.

The consultation document sets out useful comparisons between what is proposed for small landholders and what is currently afforded to crofters and other agricultural tenants (note that this does not take the changes proposed by the Bill into account).

A consultation analysis was published on 2 June 2023. Overall, respondents were broadly supportive of the proposals on the right to buy, and access to an umbrella body. There was also broad support for enabling small landholders to diversify, though views on the detail of how this should be enabled (e.g. whether permission from the landlord should be required) were more mixed. Views on assignation and succession were also more mixed, though more than half agreed that assignation and succession should be updated so that small landholders have similar rights to 1991 Act tenancies.

More generally, there was also one group of respondents who broadly favoured aligning small landholdings with crofting legislation, whilst others were more in favour of alignment

with 1991 Act tenancies.

How does the Bill compare?

The proposals in the Bill in relation to diversification, assignation and succession broadly reflect the proposals that were consulted on. In relation to the umbrella body, the Bill proposes that the Tenant Farming Commissioner be given this role (the consultation asked whether an umbrella body should have responsibility for small landholders, but did not propose a specific body).

In relation to the right to buy however the proposals in the Bill differ, and only take forward the pre-emptive right to buy the holding should the landlord wish to sell, and not the absolute right to buy the land under the house and garden.

The Bill also makes provision for restating and updating the law around rent and compensation and making consequential modifications, particularly stemming from enabling greater diversification. These provisions were not consulted on, but according to the Policy Memorandum were "deemed a necessary consequential associated with [the other provisions]".

Agricultural holdings

Tenant farmers are those who rent, rather than own, their farms.

'Agricultural holdings' typically refers to tenanted agricultural land other than crofts. The term 'agricultural holdings' does not usually encompass crofts because tenanted crofts are under a distinct form of tenure, and are regulated under separate legislation. Crofting is not dealt with in this briefing or in the provisions of the Bill.

There are different types of agricultural tenancies. The main types in Scotland are:

- Leases of less than a year for **grazing or mowing**.
- **Short Limited Duration Tenancies** (SLDT) of up to 5 years.
- **Limited Duration Tenancies** (LDT) of a minimum of 10 years. These have been replaced by Modern Limited Duration Tenancies, new LDTs cannot be entered into.
- **Modern Limited Duration Tenancies**, a variation on LDTs created in the Land Reform (Scotland) Act 2016. These are designed to reduce risk to the landlord to encourage providing tenancies to new entrants (e.g. by including a 'break clause' after 5 years).
- **Repairing Tenancies**, long tenancies of at least 35 years, typically on a run-down farm, with an initial 'repairing period' of 5 years during which the aim is to improve the land to a standard to be farmed.
- **“1991 Act tenancies” or “secure tenancies”** entered into under the Agricultural Holdings (Scotland) 1991 Act or preceding legislation, where the tenant’s interest is capable of being passed to the next generation.

More information on different tenancy types can be found in the Farm Advisory Service's

guide to agricultural tenancies for new entrants.

The Scottish Government's consultation on a new agriculture bill, which includes proposals for agricultural tenancies (more on this in the section on proposals for further reform) states that just over 20% of agricultural land is tenanted and the Scottish agricultural holdings sector has around 6,000 agricultural tenancies of which:

- 3,821 are 1991 Act tenancies
- 1,258 are Short Limited Duration Tenancies,
- 743 are Limited Duration Tenancies
- 175 are Modern Limited Duration Tenancies. [10]

Depending on the type of tenancy, the tenant has different rights and responsibilities. These have evolved over time following legislative reforms. In general, the effect of agricultural holdings legislation since 1991 is to apply those rights and responsibilities for the majority of leaseholders of a given tenancy type. Legal firm Davidson Chalmers Stuart notes that:

> “ The lease of agricultural land in Scotland is complex and regulated by a number of different statutes which have been amended on various occasions. It is commonly the case that the statutory provisions are imposed on all affected tenancies irrespective of whether the written tenancy agreement agreed between the parties is either silent in this respect or attempts to contradict the statutory provisions. Essentially, in the majority of cases, the statute takes precedence and cannot be contracted out of.”

Reforming agricultural holdings legislation

The process of updating the law governing agricultural holdings has been ongoing for several decades, with significant changes in the early 1990s and early 2000s. This section includes a brief summary of agricultural tenancy reform. More detailed background information on the older reforms up until 2014, as well as a history of tenant farming in Scotland, can be found in a previous SPICe briefing.

The first significant piece of more recent legislation to modernise and standardise the rights and responsibilities of agricultural tenants was the Agricultural Holdings Act 1991.

A guidance document from the Scottish Government’s Farm Advisory Service explains:

> “ Before 1991 there were many different forms of heritable tenancy, the rights and obligations in which were dictated by the legislation (and fashion) when these tenancies were originally created, often several generations previously. A change in legislation in 1991 effectively brought all of these arrangements together, thereafter to be referred to as ‘a 1991 Act Tenancy’ and governed by a single set of regulations, for instance in connection with assignation and succession of the tenancy, rules around tenant’s improvements etc.”

Subsequent legislation has since made further changes and reforms, and introduced new types of agricultural tenancies. The main pieces of legislation governing agricultural holdings today are:

- The Agricultural Holdings (Scotland) Act 1991

- The Agricultural Holdings (Scotland) Act 2003
- The Land Reform (Scotland) Act 2016

A brief explanation of the changes made with each of these acts is set out below.

The Agricultural Holdings (Scotland) Act 1991

The 1991 Act was a consolidating Act and brought together legislation on farm tenancies made between 1949 and 1991. The Act established security of tenure by restricting the conditions under which 'notices to quit' (i.e. a notice made by the landlord to terminate the tenancy) can be served, made provision to compensate the tenant for improvements, and provided rules about rent variations including a periodic right to a rent review. The 1991 Act also set rules around succession to and assignation of tenancies.

Full agricultural tenancies with security of tenure and succession rights under the 1991 Act are referred to as 'secure tenancies' or '1991 Act tenancies'. Long-term tenancies entered into before 2003 (or after 2003 with explicit agreement that it is governed by the 1991 Act) are typically 1991 Act tenancies.

Just over half of existing agricultural tenancies are 1991 Act tenancies [10] . However, the Farm Advisory Service's guide to agricultural tenancies for new entrants notes that:

> “ Since 2003 it has not been possible to inadvertently create a secure heritable tenancy [i.e. a 1991 Act tenancy]- it is still possible to create one but it must be explicitly stated that this is the case and the landlord would have to do so in the knowledge that they are unlikely to ever have possession of their farm again in the future. [11] ”

The Agricultural Holdings (Scotland) Act 2003

The Agricultural Holdings (Scotland) Act 2003 created two new types of farm tenancy: Limited Duration Tenancies (LDTs) which have since 2011 had a minimum term of 10 years (if entered into before 2011, the minimum term was 15 years) and Short Limited Duration Tenancies, which cannot be any longer than 5 years.

The Act also introduced a pre-emptive right to buy for secure tenants who have tenancies under the Agricultural Holdings (Scotland) Act 1991 or earlier legislation. This means that tenants have first refusal on buying their farm when the landlord wants to sell.

In addition, it provided tenant farmers with a right to diversify and carry out non-agricultural activities, subject to consent from the landlord. It also among other things, provided for disputes to be referred to the Land Court, improved tenants’ right to compensation at the end of their tenancy for improvements they have made to their holding, and provided that 1991 Act tenants could assign (e.g. transfer) their tenancy to certain family members before their death (with the landlord given the right to object).

The Agricultural Holdings Legislation Review, and the Land Reform (Scotland) Act 2016

The 2016 Act was broader than agricultural tenancies but nevertheless made some important changes to agricultural holdings legislation.

This followed an extensive review of agricultural holdings legislation between 2013 and

2015. The Agricultural Holdings Legislation Review published its final report on 27 January 2015 and made wide-ranging recommendations in relation to improving landlord/tenant relationships; rent and rent reviews; investment, improvements, compensation and waygo (the end of the tenancy); retirement, succession and assignation; the right to buy; new tenancy types "for the 21st century"; new entrants and reducing barriers to entry; and taxation, agricultural support and fiscal incentives. Many, but not all of these reforms were taken forward in the 2016 Act.[iii]

Changes made by the 2016 Act included, among other things:

- Establishing two new types of agricultural tenancy:
  - Modern Limited Duration Tenancies, and
  - Repairing Tenancies (this provision has not yet come into force, and this Bill makes some prospective changes to that type of tenancy).
- Allowing for conversion of 1991 Act tenancies or Limited Duration Tenancies into Modern Limited Duration Tenancies.
- Removing the requirement for a tenant to pre-register their interest in exercising their pre-emptive right to buy the holding (though as discussed later in this briefing, this provision has never come into force and further changes are being made by the current Bill),
- Enabling a tenant to apply to the Land Court to order the sale of a holding to a tenant or third party where a landlord is in breach of certain obligations under the tenancy,
- Changing the basis for a rent review from the market rent to a fair rent by reference to productive capacity, and changing the process for carrying out a rent review by, for example, providing for a new notice of review (these changes are also being further amended in this Bill, discussed in more detail below),
- Changes to the rules around assignation and succession of agricultural tenancies, for example, extending the types of people that tenants can assign or bequeath their tenancy to, and limiting the grounds on which a landlord can object to a tenancy being assigned or bequeathed to a near relative.
- Establishing a process by which a tenant with a 1991 Act tenancy can either relinquish their tenancy to the landlord in exchange for compensation or, if the landlord does not wish to buy them out, assign the tenancy to a new entrant or progressing farmer for the tenancy's market value.
- Establishing an 'amnesty period' where certain tenants can serve a notice on their landlord detailing improvements that have been made that they would like compensation for when their tenancy ends, and a process around this. This was known as the 'Waygo Amnesty' and ran from 2017 to 2020,
- Providing a right for tenants to object to certain improvements proposed by the landlord if they are considered unnecessary,

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iii The SPICe briefing on the previous Land Reform (Scotland) Bill in 2016 contains a table on p.37-47 outlining which recommendations were fully or partially taken forward in the Bill. Note that this briefing was for the Bill as introduced, and was not updated following amendments.

- Establishing the role of the Tenant Farming Commissioner as part of the new Scottish Land Commission, and
- Requiring the Scottish Government to undertake a review of small landholdings legislation (discussed in more depth in the section on small landholdings above).

The Explanatory Notes on Part 10 of the 2016 Act outline the provisions on agricultural holdings in more detail.

Proposals for further reform

Since the 2016 Act, work has been ongoing to complete reforms that were already in motion, and new reforms have become necessary as a result of other developments.

Some provisions in the 2016 Act were never commenced (that is, regulations were never brought forward to bring the provisions into force). This includes, among other things, provisions on rent reviews and on removing the requirement for tenants to pre-register their interest in exercising their pre-emptive right to buy. New approaches are being taken in both of these areas, with provisions to progress them included in the Bill. Reasons behind this are discussed further in later sections of this briefing.[iv]

In addition, **the EU referendum** in June 2016 and **EU exit** have led to Scotland (and the rest of the UK nations) developing new agricultural policies to replace the EU's Common Agricultural Policy. At the same time, concern for **climate change and biodiversity loss** has grown, with the Scottish Government declaring a 'climate emergency' in 2019. This has driven changes across policy areas, including in agriculture.

In the 2021-22 Programme for Government (the first programme published by the current government), the Scottish Government made a commitment to -

> " ...continue to modernise tenant farming – a key part of the rural economy and, for some farmers and new entrants, the only route to entry. We will bring the remaining provisions of the Land Reform (Scotland) Act 2016 into force, with regulations to **tackle issues of enforced sale** *,* and **removing the requirement to register an interest in pre-emptive right to buy**. We will also legislate as part of wider agricultural support reform **to ensure tenant farmers and smallholders have the same access to climate change and mitigation measures** *;* a revised approach to rent reviews; and consider how valuation for resumption should be assessed. We will also begin to modernise small landholding legislation and will consult on the reform of trust law that enables avoidance of legal obligations like the pre-emptive right to buy for tenant farmers."

In March 2022, the Scottish Government published a new 'vision for agriculture'. This outlined an ambition to "transform how we support farming and food production in Scotland to become a global leader in sustainable and regenerative agriculture", which "delivers high quality food production, climate mitigation and adaptation and nature restoration". An Agricultural Reform Route Map was published in February 2023 and has been periodically updated since. This sets out plans for reforming agricultural policy and support to deliver the vision. A new system of agricultural support is expected to place greater emphasis on actions which mitigate and adapt to climate change and restore nature, alongside food

iv See Tenants' right to buy and Rent review.

production.

More detailed background information on the development of a new agriculture policy since 2016 can be found in in the SPICe briefing on the Agriculture and Rural Communities (Scotland) Bill ('the Agriculture Bill'), which at the time of writing has completed Stage 2 scrutiny in the Scottish Parliament. This new Agriculture Bill is intended to be the vehicle for implementing Scotland's new agriculture policy.

As a result of these developments, a goal for tenancy reform has also become to ensure that tenant farmers can participate equally in a transition to 'sustainable and regenerative agriculture', and access any support available to facilitate this. This goal is reflected in the Policy Memorandum to the Land Reform (Scotland) Bill, which links a number of the tenancy reforms to this ambition, particularly in relation to the ability to diversify the activities on an agricultural holding. Proposals for tenancy reforms were originally consulted on as part of the consultation on the Agriculture Bill, rather than in the consultation on the Land Reform Bill. This is discussed further in the next section.

During Stage 1 scrutiny of the Agriculture Bill in January 2024, the Scottish Tenant Farmers Association told the Rural Affairs and Islands Committee:

> “ ...modernisation of agricultural tenancies was originally part of the bill, but that has now been moved across to the land reform bill. However, it remains very important that tenant farmers have the same capacity to diversify, whether that is in the form of agri-environment diversifications or more tourism-based diversification...As measures are designed under secondary legislation for the bill, we need to make sure that the land reform bill allows tenants to participate as well.”

The Tenant Farming Advisory Forum, established by the new Tenant Farming Commissioner, has also continued to discuss issues affecting tenant farmers, and to advise the Commissioner on needs for codes of good practice. The Forum consists of tenant farming sector bodies, including:

- Scottish Tenant Farmers Association
- Scottish Land & Estates
- National Farmers Union Scotland
- Scottish Agricultural Arbiters & Valuers Association
- Royal Institution of Chartered Surveyors
- Agriculture Law Association
- Scottish Government.

What was in the consultation and how does the Bill compare?

As noted above, proposals for agricultural holdings were, by and large, not consulted on as part of the Land Reform Bill consultation - Land Reform in a Net Zero Nation - but rather as part of the Agriculture Bill consultation - Delivering our Vision for Scottish Agriculture.

A consultation analysis was published for the Agriculture Bill consultation on 22 June 2023.

Proposals were made in the following areas.

Agreement to diversification

Currently a tenant farmer requires their landlord's agreement before they undertake diversification activities - e.g. something not listed as allowed in their lease - on their holding. This might be activities like planting trees or restoring peatlands which are not traditionally 'agricultural'.

- The proposal in the consultation was for "a power for Scottish Ministers to determine what is an acceptable diversification".

The consultation analysis showed that around half of those who responded on this point agreed that Ministers should have this power.

Making improvements to the holding, and compensation for improvements at the end of a tenancy

Schedule 5 of the Agricultural Holdings (Scotland) Act 1991 sets out improvements for which compensation may be payable to the tenant at the end of the tenancy. This is a fixed list of actions and includes items such as planting orchards, drainage, making or removing permanent fences, erection of buildings, removing boulders, tree roots and stones, etc. These are divided into three parts: improvements for which consent is required from the landlord; improvement for which notice is required to be given to the landlord; and improvements for which no consent or notice is required.

When an agricultural tenancy ends, the tenant and landlord go through a process called 'waygo', which involves, among other things, agreeing on an amount of compensation to be paid to the tenant for improvements made to the holding during the tenancy.

The Scottish Government considers that Schedule 5 "needs to be modernised and does not include all of the agricultural improvements and fixed equipment necessary to enable tenant farmers to be able to support biodiversity and take action to mitigate or adapt to climate change." [10]

- To do so, the Scottish Government proposed in the consultation to "add a range of climate change mitigation and adaptation items to the Schedule 5, along with an enabling power to be able to further revise Schedule 5 in the future".

There were mixed views on this, with some feeling this is important to allow tenant farmers to meet modern challenges, but others feeling the proposals lacked detail. Some did not support the use of secondary legislation to determine this.

Other changes related to 'waygo'

In addition, the rules on compensation due to or by a tenant at waygo (the process that happens at the end of a tenancy) have developed over time, and there is no single process for determining those claims to a fixed timescale. This can result in claims taking a long time to be settled, which can cause problems for tenant farmers who are looking to move on to other things.

- To address this, the Scottish Government proposed to introduce a set timescale for concluding the waygo process.

There was broad agreement with this proposal, though some were hesitant without knowing what the timescales might be.

Amendment to the rules of good husbandry and good estate management

'Rules of good husbandry' apply to tenant farmers, and 'rules of good estate management' apply to landlords. These rules are defined in the Agricultural Holdings (Scotland) Act 1948 and have not been amended since this time.

- The Scottish Government proposed to "amend the rules of good husbandry and good estate management to enable tenant farmers and their landlords to undertake a wider range of activities on the land, to enable them to meet future global challenges such as food production, biodiversity, and climate change crises."

There was broad agreement with this proposal.

Rent reviews

As noted in a previous section, the Land Reform (Scotland) Act 2016 made provision for changes to rent reviews, though these have never come into force.

The consultation document explained:

> “ Currently, rents for agricultural tenancies are set using Section 13 of the Agricultural Holdings (Scotland) Act 1991 and Section 9 of the 2003 Agricultural Holdings (Scotland) Act. The 1991 Act provides for a rent review framework surrounding the concept of ‘open market rent’. The Land Reform (Scotland) Act 2016 (the ‘2016 Act’) proposed amendments to the 1991 Act to set out an alternative way to calculate rent. The 1991 Act focused on ‘open market rent’ which is no longer achievable given the lack of an ‘open market’ for secure tenancies. The 2016 Act tied the rent to the economic potential of the holding which has the potential to distort the rent calculation. In partnership, Scottish Government officials and the Tenant Farming Advisory Forum have worked through these methods of rent calculation and believe a hybrid process, which allows for adaptability and negotiation, is required to meet the global challenges of the future.”

- To achieve this, the Scottish Government proposed to "repeal the rent provisions in the Land Reform (Scotland) Act 2016 and introduce a new rent calculation, which will be a different approach to rent reviews. This will include balancing of the following 3 core elements and factors specific to the lease:
    - Comparable rents for secure or fixed duration tenancies;
    - Assessment of the earnings potential by means of a farm budget; and
    - Consideration of economic outlook for the next 3 years."

Most respondents agreed that adaptability and negotiation in rent calculations is required, but there was little consensus on what best practice would look like in calculating rent.

Resumption

Resumption is the landlord’s right to take back (resume) land let to a tenant, often for specific purposes. The circumstances in which landlords may do this, the process which must be followed, and the rights of the tenant in this situation, differs depending on the

type of tenancy and, in some cases, on the conditions of the lease.

If resumption goes ahead then compensation is paid to the tenant. This takes account of the 'disturbance' for the tenant, and some of the costs incurred. It does not take account of the value of the lease to the tenant, which is sometimes called the 'capital' value. This is different from the compensation provisions where the tenancy is brought to an end for other reasons.

- The Scottish Government proposed to "consider if the provisions relating to compensation for disturbance should be amended to reflect an alternative valuation formula for compensation".

Many respondents said that they do not know whether the valuation formula should be amended. Around a quarter of respondents felt that the valuation formula should be amended, but around a fifth did not.

A new 'land use tenancy'

This proposal was consulted on in the consultation for the Land Reform Bill, rather than the Agriculture Bill. The Scottish Government stated that "the current system of agricultural and small landholding tenancies creates a number of barriers to those who want to undertake a combination of agricultural and non-agricultural activity within a tenancy".

- To overcome this, the Scottish Government proposed "a new form of flexible tenancy, called a 'Land Use Tenancy', which would help...to deliver multiple eligible land use activities within one tenancy", such as woodland management, nature restoration and agriculture. The Scottish Government proposed to create a new legal framework for this tenancy, including key elements that both tenants and landlords would agree at the start of a tenancy, how benefits would be shared, a process for bringing the tenancy to an end, and the ability to convert existing agricultural tenancies to this new type of tenancy.

An analysis of consultation responses for the Land Reform Bill consultation was published on 2 June 2023. In relation to the land use tenancy, the majority of respondents supported the proposal as a way of creating greater flexibility in how let land can be used. The analysis highlighted, among other things, support for an approach which permits a 'freedom of contract lease' similar to what is allowed in England to "allow both parties to negotiate personal terms that will meet their specific requirements".

Of those who disagreed, some questioned what value this new tenancy type would add to what is already available, and others questioned why moves towards allowing greater diversification do not meet this policy aim. A number of other issues to consider were raised, which are outlined in more detail in the consultation analysis.

How does the Bill compare?

In relation to **diversification**, the Bill takes a different approach to what was proposed in the consultation. While the consultation proposed to create a power for Scottish Ministers to, by regulations, determine acceptable diversification, the Bill instead "amends the 1991 and 2003 Acts to reform the basis on which a landlord can consent (or not) to a proposed diversification, in order to ensure that environmental considerations are considered at all stages of the process" (as explained in the Policy Memorandum). There is a power for the Scottish Ministers, but it is specifically to modify a matter to be specified in a notice of diversification, or to add or remove grounds for objection to the notice by the landlord.

There are also provisions for compensation to be payable to the tenant when the tenant's diversification still enables the holding to be used for sustainable and regenerative agriculture by an incoming tenant farmer, and providing that the Tenant Farming Commissioner may produce codes of practice in relation to using land for non- agricultural purposes.

In relation to **compensation for improvements to the holding** at the end of a tenancy, the provisions in the Bill also differ to what was consulted on. While the consultation proposed to add certain climate-related elements to Schedule 5 and provide a power for Scottish Ministers to modify the schedule further, the Bill instead provides for more flexibility in what may be considered an improvement by moving to a "principles-based approach" and changing fixed lists to illustrative lists for the more significant changes that can be made.

In relation to **timescales for concluding the waygo process at the end of a tenancy**, these provisions reflect the broad proposals in the consultation. The Bill inserts a 'standard claims procedure' into the 2003 Act and provides the Scottish Ministers with the power to make regulations to apply this new procedure to any relevant type of statutory claim for compensation, and modify that procedure when it is applied to a particular type of claim.

Likewise, the **rules on good estate management and good husbandry** are amended in a way which reflects the consultation proposals.

For the provisions on **rent reviews** the provisions in the Bill broadly reflect the principles that were consulted on. The Bill makes provision for rent reviews to be more flexible and based on negotiation, taking into account a non-exhaustive and non-hierarchical list of factors. Failure to agree rent will mean that either party can apply to the Land Court to fix the rent using the revised method of factors.

In relation to **resumption**, the consultation only proposed that the Scottish Government should "consider" an alternative valuation formula for compensation for disturbance. The Bill does provide for this, enabling a tenant to claim additional compensation in relation to a share of the capital value of the lease of the land, similar to what can be claimed in relation to relinquishment of land by the tenant provided for in the 2016 Act. The Bill also makes several additional provisions in relation to resumption.

In relation to a **new land use tenancy**, the Bill instead places a duty on Scottish Ministers to publish a "model lease for environmental purposes". The model lease is a different approach to what was proposed in the consultation. It is a template lease to provide guidance rather than creating a new legal framework.

The Bill also includes other changes that were not consulted on, such as provisions updating the compensation for game damage (though this was consulted on as part of the Strategic Environmental Assessment), and provisions relating to the requirement for tenants to register their interest in exercising their pre-emptive right to buy.

The Bill's provisions are discussed in more detail in the next sections.

The Bill

The Land Reform (Scotland) Bill has three parts; these are explored below.

Part 1: Large land holdings: management and transfer of ownership

This section of the briefing sets out the provisions in relation to large land holdings.

The Policy Memorandum sets out the Government's underlying vision of land reform as being to bring about:

> " a Scotland with a strong and dynamic relationship between its land and people, where all land contributes to a modern, sustainable and successful country, supports a just transition to net zero, and where rights and responsibilities in relation to land and its natural capital are fully recognised and fulfilled."

The Bill therefore brings forward new requirements "in relation to the ongoing management and transfer of large landholdings" which "are intended to be targeted and proportionate ways of addressing the risks identified by the Land Commission through their work on scale and concentration of land ownership". The work of the Scottish Land Commission is explored in previous SPICe blogs, and in their Land Reform Bill webpage which draws together relevant research and evidence.

These new requirements on the management and transfer of large land holdings aim to:

- Further improve the transparency of land ownership and management.
- Strengthen the rights of communities in rural areas by giving them greater involvement in decisions about the land on which they live and work.
- Improve the sustainable development of communities by increasing opportunities for community bodies to purchase land when it comes up for sale.
- Ensure a sufficient and adequate supply of land by enabling Ministers to require that the land is sold in lots if a large land holding is to be transferred, where that will help to promote the sustainability of local communities.

The PM provides a summary of the key measures which would apply to owners of large land holdings (emphasis added):

- New **obligations on landowners** to produce Land Management Plans and to engage with local communities, to support compliance with the principles of the Land Rights and Responsibilities Statement.
- Community bodies to receive **prior notification in certain cases that the owner intends to transfer a large land holding**, or part of it, and provide an opportunity for them to purchase the land.
- **Introduction of a transfer test** at the point of certain transfers of all (or part of a large land holding) if the land to be transferred is over 1000 hectares (ha), to determine if

the owner should be required to transfer the land in smaller parts (known as lotting).

The PM states that a “fundamental policy decision”, is the **definition of a large land holding**, and that the Bill sets out different thresholds for different purposes:

- For community engagement and land management plan requirements, the Bill defines a large land holding as more than 3000ha, or a land holding of at least 1000ha that accounts for more than 25% of a permanently inhabited island.
- For pre-notification and transfer test, the Bill defines a large land holding as more than 1000ha.

The following sections consider the proposals in more detail.

Section 1: Community-engagement obligations in relation to large land holding

Section 1 places new obligations on some landowners to produce Land Management Plans and to engage with local communities, to support the principles of the Land Rights and Responsibilities Statement (LRRS). It amends Part 4 of the Land Reform (Scotland) Act 2016, which (in section 44) required Ministers to issue Guidance on engaging communities in decisions relating to land. It changes the title of Part 4 from "Engaging communities in decisions relating to land" to "Community-engagement in relation to land".

Section 1 of the Bill turns Section 44 of the 2016 Act into Chapter 1, and a new Chapter 2 is inserted (s44A - M) which sets out "Community-engagement obligations for owners of large land holdings". These obligations are set out below.

Section 44A gives Ministers the power to introduce regulations at a later date, meaning that much of the detail will be in secondary legislation. These regulations will impose obligations on some land owners to have land management plans (s44B) and to consider community requests to lease land (s44C), this will only be applicable to land holdings above a certain size threshold (s44D). Regulations are to be informed by the LRRS in consultation with the (to be established) Land and Communities Commissioner, considered later in this briefing.

Section 44B stipulates that regulations under the previous section must require the owner of applicable land to produce and make a land management plan (LMP) publicly available. Engagement with communities on the development of and significant changes to the plan must also take place. It should be reviewed and (where appropriate) revised at a minimum every 5 years. Certain information must be included in the LMP, as follows:

- Details of the land to which the plan relates, including how the ownership is structured.
- The owner’s long-term vision and objectives for managing the land, including its potential sale.
- How the owner is complying with, or intends to comply with with obligations set out in the regulations produced under s44A, the Scottish Outdoor Access Code, and the code of practice on deer management.
- How the owner is managing or intends to manage the land in a way that contributes towards achieving net-zero greenhouse gas emissions, adapting to climate change,

and increasing or sustaining biodiversity.

Section 44C requires the regulations to impose an obligation on land owners to consider "reasonable requests" from Community Bodies (CBs) to lease land and/or buildings. This is not required to apply to all land to which the regulations apply. Ministers could impose this obligation in relation to only some of that land. The purpose is to allow Ministers to exclude some land if it is considered appropriate to do so following further consultation and development - for example, it may be appropriate to exclude land that forms part of military bases. CBs are defined in Section 34 of the Land Reform (Scotland) Act 2003, meaning that only CBs that are suitably incorporated can make a request under this section. What constitutes a "reasonable request" is not set out, however this may be contained in the regulations, or associated guidance.

Section 44D is significant, and defines the "land in relation to which obligations may be imposed". Therefore, the obligation to produce a land management plan applies to single or composite holdings of over 3,000ha or to a land holding of at least 1,000ha that accounts for more than 25% of a permanently inhabited island. The PM notes that:

> “ According to data from Registers of Scotland, approximately 40% of the land in Scotland is made up of landholdings of over 3000 hectares. The obligation for owners of these landholdings to publish Land Management Plans will therefore give local communities and the wider public access to high-level information about how a large percentage of the land is intended to be used and managed in the medium to long term.”

The Section 44D definition is relatively straightforward, however in the modern world of corporate and multi-layered land ownership, it is not sufficient to capture all of the different possibilities and entities who own land. Therefore, this section goes on to set out a cocktail of definitions that seeks to capture modern structures of land ownership; namely:

- A single holding is the whole of a contiguous[v] area of land in the ownership of one person or set of persons.
- There can be exclusive (single) ownership or co-ownership (shared with other people) of a single holding.
- One single holding (holding A) joins up with another (holding B) and becomes a composite holding if certain conditions are met, and that a composite holding may consist of any number of single holdings.
- These conditions are that the boundaries of holdings A and B are touching, and that there is a connection between owners. The Bill sets that when the owner of holding A is either:
    - also the owner of another single holding that forms part of a composite holding of which holding B forms part, or
    - connected to the owner of another single holding that forms part of a composite holding of which holding B forms part.

What is meant by "connection" is also defined to the extent that one person is connected

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v Meaning that all the land is connected, and it would be possible to go from one point on that holding to another point without entering someone else's land.

to another person if they are both companies in the same group in terms of tax treatment (under the Taxation of Chargeable Gains Act 1992); one has a controlling interest in the other (in terms of regulations made under Section 39 of the 2016 Act); or a person holds a controlling interest in them both. The Explanatory Notes provide a hypothetical example:

> " [...] if A Ltd and B Ltd are part of the same company group and A Ltd owns 2,000 hectares adjoining B Ltd's 2,000 hectares, the combined single holdings of A Ltd and B Ltd would be treated as forming a 4,000 hectare composite holding. [Community-engagement provisions] would apply to the land comprising that composite holding, and therefore regulations could… [impose] obligations on both A Ltd and B Ltd in relation to that land."

Section 44E allows for alleged breaches of obligations imposed by the regulations to be reported to the Scottish Land Commission's new Land and Communities Commissioner **(considered below**). These alleged breaches can only be reported by community bodies (appropriately constituted under the 2003 Act), or by statutory agencies i.e. Historic Environment Scotland, relevant local authorities, Scottish Environment Protection Agency, or NatureScot (legally known as Scottish Natural Heritage).

Section 44F sets out that the new Commissioner "may investigate" an alleged breach, but only if they have "sufficient information to proceed", and there has not already been a substantially similar report by the same person for that same alleged breach. Further information may be requested, by the Commissioner from the person alleging the breach, if appropriate. The Commissioner may decline to investigate if there is insufficient information to proceed, and no new or sufficient information is provided. Where an alleged breach is being investigated, the Commissioner must inform the complainant as well as the person alleged to have committed the breach.

Section 44G gives the new Commissioner the power to "require any person to provide any information that the Commissioner considers appropriate for the purposes of the investigation", and to impose a fine of up to £1,000 for failing to comply.

Section 44H provides the Commissioner with powers to impose a fine for breaching an obligation, of up to £5,000. However, a fine can only be imposed if the person who committed the breach has not taken the opportunity afforded to them to remedy it, or if the Commissioner "does not consider it appropriate" due to previous failures to comply.

A right of appeal is set out in **Section 44I**, and anyone fined has 28 days to appeal to the Lands Tribunal for Scotland on the grounds that it was:

- Based on an error of fact.
- Wrong in law, or
- Unfair or unreasonable for any reason (for example because the amount is unreasonable).

Sections 44J and 44K relate to notices imposing a fine being made in writing and setting out the relevant details, and that money received in payment must be paid into the Scottish Consolidated Fund.

Confidentiality in the investigation is provided for in **Section 44L**, making it a criminal offence to disclose information without consent.

Powers to modify the "land in relation to which obligations may be imposed" (s44A), and the list of persons who can report an alleged breach (s44E) are provided for in **Section 44M**.

Section 2: Community right to buy: registration of interest in large land holding

Section 2 amends Part 2 of the Land Reform (Scotland) Act 2003, which legislates for and sets out the Community Right to Buy (CRtB) process.

How does the community right to buy currently work?

Before considering the Bill's provisions in detail, it is perhaps helpful to understand a little how the current Community Right to Buy (CRtB) process works. There are two types of CRtB application - standard and late.

For a **standard application**, eligible Community Bodies (CBs) can register an interest in land before it comes on the market, and a temporary prohibition is then placed on the landowner preventing them from transferring the land without giving first refusal to the CB. Scottish Ministers will then consider all of the evidence and determine whether to approve or reject the application based on certain criteria, including whether the application [12] :

- Is compatible with furthering the achievement of sustainable development.
- Has sufficient community level support.
- Is in the public interest.

Late applications are defined as those that are made "after the owner or a creditor in a standard security[vi] with a right to sell the land has taken steps to transfer the land or sell it". The procedure for a late application is more onerous, with guidance making it clear [12] that these "are expected to be submitted only in exceptional circumstances", because "they have an effect on the live land market". These applications are required to demonstrate a significantly greater level of community support than that which Ministers would ordinarily consider to be sufficient for a standard application. The CB is also required to "provide strongly indicative reasons" of why the application is in the public interest, as well as showing steps that have been taken prior to this application to advance community ownership of land in the local area, for the same purpose.

Barriers to community right to buy

Nearly a decade ago, and with reference to observations made by the Land Reform Review Group, the Scottish Government commissioned research to explore the perceptions of barriers to community land based activities [13] . One of the key barriers identified was a lack of information on ownership, and a lack of experience in the land market, creating "uncertainty and a feeling of disempowerment". The research also noted that it:

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vi Commonly referred to as a mortgage

> “ often takes considerable time for communities to secure land rights. This in itself can be a barrier to developments as it increases the risk of a reduction in community capacity for any particular development and also it increases the likelihood of a sale to an alternative buyer.”

The Government's research is added to by a detailed review of the effectiveness of current community ownership mechanisms, published by the Land Commission in 2018 [14] which set out key strengths and challenges across a number of mechanisms for ownership, including CRtB, and noted that it "represents a complex, challenging mechanism, with a high failure rate, requiring communities to work on multiple work streams in parallel". In relation to process and timescales, "responding to an opportunity and completing the CRtB application process sufficiently quickly to avoid a late application was often challenging".

Factors communities identified as affecting relations between communities and landowners included:

- The paternalistic attitude of some owners.
- Vested interests.
- Personality clashes.
- Conflicts around planning applications.

Landowners also specifically referred to:

- Uncertainty and the potential for financial losses resulting from delayed/halted sales or selling at a value below what the open market might pay.
- Difficulties communicating with community bodies or communication breakdowns.
- Communities perceived as using CRtB to stop a sale or development.

Communities also faced challenges when identifying and/or communicating with landowners and clarifying the boundaries of a site.

One of the many factors that could lead to a late application is that communities may not expect land to come to market, or for that parcel of land to be considered by them to be too big for their purposes, meaning that when it does unexpectedly become available, the community may not be fully prepared.

The PM notes that:

> “ It is widely recognised that the best and most sustainable outcomes are achieved when community groups and landowners work together cooperatively on potential transfers as early as possible. Ideally, these discussions would take place ahead of any proposed sale.”

And echoing the research, that there are challenges in "establishing communication between community bodies and landowners, and shortcomings in transparency around land ownership". It is also not uncommon for private transfers of land to take place (known as off-market transactions), and even if the sale of the land is publicly advertised, the EN recognises that:

> “ If there is no registered community interest in an area of land, it can currently be sold without notice being given to a community that might have wanted to register an interest in buying it had it anticipated the land being sold.”

The PM asserts that:

> “ While these concerns exist generally, there is evidence to indicate that these issues are greater for landholdings over 1000 hectares. [...]. Additionally, landholdings of this scale tend to sell infrequently, with the result that a community may not think it is worthwhile to register an interest under the [CRtB] procedure.”

The Scottish Land Commission's 2022 Rural Land Market report [15] shows that 45% of estates were advertised off-market in 2020, with this rising to 64% in 2021.

Section 2 provisions - the detail

The EN states that this section:

> “ modifies existing community right to buy legislation so as to provide greater opportunity for a community body to register an interest in buying a large holding of land or, as will more usually be the case, part of one.”

Meaning that:

- Before ownership of a large holding of land can be transferred, (subject to exceptions) the possibility of registering a community interest in buying it will need to have been publicised at least 30 days earlier, and
- A modified form of the process for registering a community interest in the land from the one set out in the 2003 Act will be available to communities that begin the process during that 30 day period.

The PM states that these provisions "are designed to complement" the community engagement and land management plan obligations set out in Section 1, and:

> “ [...] should encourage landowners and community bodies to engage with each other on potential community land needs prior to any intended sale. Early engagement of that kind may lead to an agreed sale or lease, or allow a community body to be set up and note interest in the usual way.”

Section 2 starts by making minor procedural changes for applications under the modified CRtB legislation. It inserts a new eSection 39ZA into the 2003 Act.

The bulk of the changes in this section come with the **new Chapter 2A, inserted at the end of Part 2 of the 2003 Act (the Part that deals with CRtB) as Sections 47A-L**. Titled "Extended opportunity to register interest in relation to large land holding", the provisions in this chapter are set out sequentially below. However, it is worth noting in advance that this new system will apply to a lower size threshold than that which applies to land management plans under Section 1. In this section, a large land holding is defined as 1,000ha (s46K), so all of the following relates to parcels of land of over 1,000ha. The same ownership definitions also apply i.e. in relation to single or contiguous holdings and connected persons.

It should also be noted that this process is complicated. On reading the Bill, it may not be immediately apparent how it will work in practice. On 16 April, Scottish Government civil servants with responsibility for the Bill met informally with the Parliament's Net Zero, Energy and Transport Committee who will be scrutinising the Bill at Stage 1. They were asked for clarification on a number of points, including to provide a hypothetical case study showing how the new Part 2A would work in practice [16] . This is included at Annex A.

Section 46A requires Ministers to keep a list of contact details of those wishing to be told about any possible transfer of a large land holding in a particular area.

Section 46B gives the power to place a temporary prohibition on:

- Transferring relevant land, or
- Taking any action with a view to a transfer of that land.

This is until Ministers give notice that the prohibition is lifted, to allow sufficient time for interest to be registered by a community body. The PM notes that this ensures that:

> " the land cannot be sold without the community being given an opportunity to acquire the land, whilst at the same time providing that the land is not subject to restrictions longer than necessary to give effect to the community rights."

The existing late application procedure under the 2003 Act also remains a viable option, should the CB not be able to take advantage of the opportunity.

Section 46C allows owners or creditors in a standard security to make a request to Ministers to lift the prohibition (under S46B) so that the land can be transferred.

Section 46D sets out the next stage in the procedure. Having received a notice of intention to sell all or part of a parcel of land over 1,000ha (under S46C or under s48 of the 2003 Act), Ministers are to publicise this on a website, and to invite notes of intention to register an interest in the land from eligible persons in the community; namely:

- Registered community bodies.
- Those who are on the list held under S46A.
- The relevant local community council.
- The relevant local authority.
- The relevant National Park authority (if applicable).

This invitation for a note of intention runs for 30 days (under S46E).

The consultation had suggested including relevant housing associations on this list (known as registered social landlords), however they are not included.

Section 46E provides for Ministers to notify the person wishing to transfer the land that the (temporary - under S46B) prohibition is lifted after 30 days. However if Ministers have not yet come to a decision when the 30 day period expires, they should not give any notice until they have reached a decision about whether they should impose a (further) prohibition (in line with Section 46F).

Section 46F gives the power to place a further (40 day) prohibition on the transfer of relevant land to allow for those invited to apply to register their interest. The EN explains:

> " When Ministers invite applications to register an interest, the temporary prohibition placed on the transfer of the land by virtue of section 46B is lifted and a new prohibition is placed on the land (or parts of it) to which the successful notes of intention to register an interest invited under section 46D related [...]. The owner, or as the case may be the creditor, of any of the land which was the subject of the original notice under section 46C or 48 but which is not to be the subject of an application to register an interest is free, [unless S4 of the Bill applies], to transfer that land as they wish."

This further 40 day prohibition on transfer can apply when all of the following has taken place:

- When Ministers have publicised the possible transfer of the land, or a larger area of land of which it forms part, in accordance with section 46D.
- When a person has submitted to Ministers a suitable note expressing an intention on the part of the person, or another person, to register a community interest in the land (called a "note of intention to register").
- When the note of intention to register was received within 30 days of the Ministers sending information about the possible transfer in accordance with section 46D(2)(b); and
- When Ministers are satisfied that, before the expiry of this extra prohibition, it is likely that an application to register a community interest would be made in line with the note of intention to register and that there is a reasonable prospect of that application resulting in a community interest in the land being registered.

In short, this extra prohibition should only be allowed when someone has given a suitable notice of intention to register within the relevant timescales, and it is likely that this can be followed by a full and plausible registration application.

Section 46G is procedural, and ensures that those who submit a note of intention to register (under S46F) are invited to apply to register.

The EN explains that following the above process:

> " If an application is successful, the community body's interest in the land is registered in the Register of Community Interests in Land, the community body's right to buy the land under this Part is to be treated as having been activated under section 47 and the community body is to be treated as having confirmed its intention to proceed to buy the land. This means the existing community right to buy process under Part 2 of the 2003 Land Reform Act will operate as usual from that point."

Section 46H sets out that any transfers in breach of the prohibitions to sell are of "no effect", unless one of the existing exemptions in the 2003 Act apply i.e. transfers between spouses, transfers between companies in the same group, and transfer on inheritance.

Specific exemptions are also set out in **Section 46I**, and Ministers are allowed to "disapply" the prohibitions to sell if they are satisfied that this will "alleviate, or avoid, financial hardship", or if it will "cause, or worsen, financial hardship for the owner". This

can only be done if an appropriate request is made.

Section 46J is procedural and requires exemptions to be explained and specified in any transfer deed.

As noted at the start of this analysis of Section 2, **Section 46K** is significant, and introduces a threshold of 1,000ha which the new extended opportunity to register an interest applies to. It does this in largely the same way that the provision setting out the 3,000ha large land holding threshold for land management plans in Section 1 (s44D) does. Meaning that any community seeking to acquire land through Part 2 of the 2003 Act and dealing with a 1000ha+ parcel of land can now make use of a brand new regime, where they are invited to do so by Scottish Ministers.

The same definitions for single and composite holdings apply, as follows:

- A single holding is the whole of a contiguous[vii] area of land in the ownership of one person or set of persons.
- There can be exclusive (single) ownership or co-ownership (shared with other people) of a single holding.
- One single holding (holding A) joins up with another (holding B) and becomes a composite holding if certain conditions are met, and that a composite holding may consist of any number of single holdings.
- These conditions are that the boundaries of holdings A and B are touching, and that there is a connection between owners. The Bill sets that when the owner of holding A is either:
    - also the owner of another single holding that forms part of a composite holding of which holding B forms part, or
    - connected to the owner of another single holding that forms part of a composite holding of which holding B forms part.

What is meant by "connection" is also defined to the extent that one person is connected to another person if they are both companies in the same group in terms of tax treatment (under the Taxation of Chargeable Gains Act 1992); one has a controlling interest in the other (in terms of regulations made under Section 39 of the 2016 Act); or a person holds a controlling interest in them both.

Section 46L provides Ministers with the power (by regulations) to modify the 40 day period (s46F) prohibition on the transfer of relevant land to allow for those invited to apply to register an interest, and to modify the 1,000ha threshold (s46K).

Section 3: Modifications in connection with Section 2

This section makes minor and technical modifications to ensure compatibility with:

- The Conveyancing and Feudal Reform (Scotland) Act 1970 (regarding the

vii Meaning that all the land is connected, and it would be possible to go from one point on that holding to another point without entering someone else's land.

enforcement of standard securities)

- Land Reform (Scotland) Act 2003 (minor provisions)
- The Land Registration etc. (Scotland) Act 2012 (to allow the Keeper to flag any attempts to register a transfer that does not take account of the new regime to the Scottish Ministers).

Section 4: Lotting of large land holding

Having put in place pre-notification requirements for community bodies to receive advance notice in certain cases that the owner intends to transfer a large land holding, or part of it, and provide an opportunity for community bodies in the area to purchase land, this section introduces a "transfer test" at the point of certain transfers of all or part of a large land holding (if the land to be transferred is over 1,000ha), to determine if the owner should be required to transfer the land in smaller parts; known as "lotting". It does this by inserting a new Part 2A (with six chapters) into the 2003 Act.

Land Commission research

The PM notes that:

> “ Land ownership in Scotland is highly concentrated, with a relatively low number of owners holding a large proportion of Scotland’s land. Analysis [...] identifies 1066 landholdings above 1000 hectares, representing 4.32 million hectares, or 55% of Scotland’s land.”

And goes on to cite research carried out for the Land Commission [17] which states:

> “ Concern about who owns Scotland, and how much of it they own, has been central to the land reform debate for decades. While many people are utterly convinced that landownership is a key determinant of rural development outcomes, others insist it is irrelevant, and what is important is how land is managed.”

Key themes that were raised by this research included: local economic opportunities; community and social cohesion; the natural and built environment; local housing needs; agriculture; land management and local economic opportunities. The most frequently identified issues (40% of those raised) related to the link between how land is owned and the ability of rural communities to realise their economic potential, with the report stating:

> “ Most of the advantages identified related either to the value of private investment or economies of scale but the evidence to support these benefits was not clear cut. While private capital can (and does) play a transformative role in rural economies, the link between private capital and large-scale landownership is not automatic: recognising the value of the former does not imply acceptance of the inevitability of the latter. The evidence also suggested that outwith agriculture, economies of scale often appear to be more theoretical than real and more likely to benefit landowners than communities. The economic disadvantages identified related mainly to landowner’s ability to restrict availability of land for business development. An environment in which businesses can access land for expansion and business owners have the confidence to invest is crucial to rural economic development. In areas of concentrated land ownership, landowners have the power to control this environment, deciding whether and on what terms to make land available. The extent of this control can have significant adverse consequences.”

Relevant conclusions include:

- There is an urgent need for formal mechanisms to be put in place that would enable harmful land monopolies to be identified and changes in either ownership and/or management practice to be implemented that would protect fragile rural communities from the irresponsible exercise of power.
- Policies should be developed and implemented to encourage greater diversity in land ownership and avoid new harmful land monopolies being created.
- New mechanisms are required for attracting alternative sources of capital to support rural development, particularly smaller scale private ownership.

In summary, the authors note that "Scotland’s unusually concentrated pattern of landownership" or "a deficit in participation created by inadequate or poorly understood land-use decision making processes" have led to most of the issues identified, and that these "themes are connected by a common thread of unfairness".

The research makes a clear connection between this "perceived unfairness and sub-optimal rural development outcomes", cites work by Professor Joseph Stiglitz noting a "strong body of international evidence connecting inequality with sub-par economic performance", and states:

> “ Rural areas currently account for 27% of Scotland’s economy so improving economic performance in rural Scotland could make a significant contribution to Scotland’s overall economic performance. The overarching conclusion of this report is that increasing the diversity of rural landownership and enabling more effective participation in rural land-use decision making could make a major contribution to realising this potential.”

Part 2A of the Land Reform (Scotland) Act 2003

As previously noted, Section 4 introduces a new Part 2A into the 2003 Act.

These provisions are substantial, and do not require proactive community action. Like the previous provisions relating to an enhanced CRtB, they apply to parcels of land in excess of 1,000ha, but also to parcels over 50ha in area if they form part of a large holding of land

and other criteria are met. This is set out under Section 67G below.

Chapter One of Part 2A inserts Sections 67C - J, and imposes two prohibitions on transferring land, as well as setting out key concepts.

Section 67C prohibits the transfer of relevant land (>1,000ha under S67G) unless a "lotting decision" has been taken, or it is exempt. Section 67F sets out what a lotting decision is.

Section 67D prevents the transfer of land if a lotting decision is in effect where this transfer would be contrary to the lots specified in the decision, or would result in the same person or connected persons owning more than one lot.

Section 67E sets out anti-avoidance measures and requires relevant transfer deeds to include a declaration explaining if it is exempt from transfer. These exemptions (set out in S67J) are the same as those which apply elsewhere in this Bill, and in the 2003 Act i.e. transfers between spouses, transfers between companies in the same group, and transfer on inheritance.

Section 67F sets out the key concepts in relation to a lotting decision. With reference to the sections that defines types of lotting decision (67M, 67N and 67R), a lotting decision is a decision by Minsters about whether land is to be transferred in lots (i.e. in smaller parts). Any references to lotting decisions relate to the whole area of land as well as any part of that area. This section goes on to set out timescales for when these decisions come into effect, and when they cease to have effect.

Section 67G is crucial, and defines the land affected by a lotting decision as exceeding 1,000ha. However, parcels of land exceeding 50ha in area are also caught if they form part of a large land holding (i.e. >1,000ha) and there is a plan to transfer another part, or parts, of that holding (this intersects with provisions in Section 2 of the Bill which require notification of intention to transfer).

Sections 67H - J define large holdings of land, as well as what is meant by "connected persons" and an "exempt transfer". These are explained in detail under Section 46K.

Chapter 2 inserts five new sections (s67K - O), and provides more detail on the process for making a lotting decision.

Accordingly, **Section 67K** provides for a Ministerial duty to make a lotting decision. This happens in respect of relevant land when Ministers receive a valid application from the land owner wishing to sell, or where a lotting decision has been quashed following appeal. An application is valid if it is from the owner of a single or composite holding, or by a creditor. Following on, and linked to this, **Section 67L** allows for a request to be made (from owners etc) to Ministers to not make a lotting decision. Neither the EN nor the PM explain the circumstances in which this might be made, however it may simply be that a decision has subsequently been made not to sell.

The next section (**s67M**) makes similar provision to those in Section 46I, allowing for an expedited lotting decision, that the land does not need to be transferred in lots, if Ministers are satisfied that the owner is facing financial hardship.

The wording of the following sections is likely to be scrutinised in detail, and taken together **Sections 67N and 67O** set out the framework for making a Ministerial lotting decision, and the Report by the Land and Communities Commissioner that supports their decision.

Section 67N makes the only substantial reference to community sustainability in relation to lotting:

> “ Ministers may make a lotting decision under this section stating that land may only be transferred in lots only if they are satisfied that ownership of the land being transferred in accordance with the decision would be more likely to lead to its being used (in whole or in part) in ways that might make a community more sustainable than would be the case if all of the land were transferred to the same person.”

The following provisions also apply:

- If land is to be transferred in lots, then these lots must be specified.
- A decision may also be made not to make a lotting decision, but a decision must be made.
- A Report by the Land and Communities Commissioner must be requested and taken into account before making a lotting decision (under S67O).
- Ministers must also "have particular regard to" the frequency with which land in the community's vicinity becomes available for purchase on the open market, and the extent of ownership concentration in that area when considering the effect that a lotting decision might have on a community.

The Report by the Land and Communities Commissioner is to be prepared "in accordance with any instructions given by Ministers", and in coming to a lotting decision, Ministers are to have regard to the International Covenant on Economic, Social and Cultural Rights (s98 of the 2003 Act is amended to include this).

On 16 April, Scottish Government civil servants with responsibility for the Bill met informally with the Parliament's Net Zero, Energy and Transport Committee who will be scrutinising the Bill at Stage 1. They were asked to clarify a number of points, including for an explanation of what “making a community more sustainable” means in the context of new Section 67N, and replied as follows [16] :

> “ The Ministerial consideration of a lotting decision and what factors may be expected to make a community more sustainable will be based on the individual circumstances of the landholding and the particular communities. While this assessment will depend on these individual factors, in assessing potential contributions to the sustainability of communities, it is anticipated that this would include having regard given to high level objectives such as economic development, repopulation, maintenance of populations, regeneration, public health, social wellbeing and environmental well-being.”

The PM also states:

> “ It is anticipated that the Land and Communities Commissioner will conduct further investigation, which can include seeking advice from those with appropriate experience of lotting land on whether lotting would be appropriate in order to improve the availability of land in the area, and on how the land should be lotted (if viable). The investigation could for example reference information on the landholding provided, relevant documents such as local development plans, local housing strategies incorporating housing need and demand assessments, enterprise agency assessments, and consultation with the landowner, appropriate authorities (e.g. local authority, enterprise agency), and other parties (e.g. relevant community groups or community councils).”

Chapters 3 - 5 come into play following a lotting decision.

Sections 67P - R (Chapter 3) allow for a request to be made to review a lotting decision after one year has passed (and thereafter on a yearly basis if they wish to continue reviewing). This review can be stopped following a valid request from a relevant person. Following a review (which must take advice from a suitably qualified and independent person), Ministers can do the following:

- Retain the original decision to transfer the land in lots.
- Decide that the land need not be transferred in lots.
- Buy the relevant land (explained below).

An offer to buy following review is the next stage **(s67S and 67T)**. The following provision is crucial:

> “ Ministers may offer to buy land [...] following a review of a lotting decision only if they are satisfied that it is likely that the fact that the land has not been transferred since the lotting decision was made is attributable to the land being less commercially attractive than it would have been had the lotting decision not prevented its being transferred along with other land.”

The price for this offer would be determined by an appointed valuer, or the Lands Tribunal (on appeal against the valuer's price). Allowance is made for further regulations in relation to the review process. Owners (or secured creditors) can also specifically request that Ministers buy the land, and Ministers must then consider this in the same way as above. Any decision here is subject to appeal at the Lands Tribunal.

Chapter 4 has one Section (67U), which allows:

> “ The owner of land or a creditor in a standard security with a right to sell land may appeal to the Court of Session against a lotting decision stating that the land (or land of which it forms part) may only be transferred in lots.”

Appeals under this section may be made on the grounds that the lotting decision is based on an error of fact, an error of law, or is unreasonable.

Section 67V (Chapter 5) makes provision for compensation. Owners etc are entitled to compensation from Ministers for "loss or expense" incurred in complying with the new regime, or attributable to a potential transfer of the land being prevented, or to a lotting decision stating that the land may only be transferred in lots. Ministers are to determine amounts of compensation payable, with routes of appeal to the Lands Tribunal. Further

regulations are to be made about how to claim compensation and determining amounts of compensation.

Further provision for the new Part 2A is made in **Chapter 6 (s67W-67Y)**. These sections relate to the publicity of lotting decisions, the treatment of secured creditors, and setting out what provisions can be changed by regulation (namely what constitutes an exempt transfer, the land which is caught, and time periods relating to how long lotting decisions last, and when they can be reviewed).

Section 5: Modifications in connection with section 4

A new **Section 5** makes minor modifications to the 2003 Act.

Section 6: Establishment of the Land and Communities Commissioner

Finally for Part One of the Bill, **Section 6 deals with the Establishment of the Land and Communities Commissioner** and modifies Section 4 of the 2016 Act. This is the section that deals with the Scottish Land Commission.

The roles of the Land and Communities Commissioner (LCC) are set out in previous sections of this briefing and include functions relating to the enforcement of the obligations provided for by S1 of the Bill and the making of lotting decisions provided for by s4 and 5.

Section 4 of the 2016 Act is amended to create and integrate the new LCC into the Land Commission. This Commissioner has a distinct remit and functions that are separate from the Tenant Farming Commissioner and other Land Commissioners, and as such is expected to have expertise or experience in land management and community empowerment. A person is disqualified from being appointed as the LCC if,"within the year preceding the date on which the appointment is to take effect" they have been the owner of land to which the new S67G of the 2003 Act applies; i.e. they have been either a single or composite owner of more than 1,000ha. They must also have regard to their functions, which are set out below.

The substantive provision in this section is the insertion of a new Chapter into the 2016 Act, as **Sections 38A-C**.

The functions of the LCC are to:

- Enforce obligations imposed by regulations under S44A (in relation to community-engagement obligations).
- Exercise the function conferred on the LCC by Part 2A of the 2003 Act (extended opportunity to register a community interest in land)
- Collaborate with the Land Commissioners in the exercise of their functions to the extent that those functions relate to the functions of the LCC
- Exercise any other functions conferred on the LCC by any enactment.

Provision is also made for the LCC to delegate their functions and for an acting Commissioner to be appointed "during a period in which the office is vacant".

Alignment with Land Commission recommendations

In 2021 the Land Commission's legislative proposals for addressing concentrated landownership [18] called for a proportionate and clear test:

> " [...] for significant land acquisition, at the point of transfer, to test whether there is a risk arising from the creation or continuation of a situation in which excessive power acts against the public interest."

And the Bill's consultation [19] undertook to:

> " [...] ensure that the public interest is considered on transfers of particularly large-scale landholdings [with an] aim to introduce a pre-emption in favour of community buy-out where the public interest test applies."

What has been proposed in the Bill is a test at the point of sale. The PM states:

> " The initial Land Commission proposal was that the test would apply to the prospective buyer, and that the test could have a number of outcomes, including denial of a sale, a requirement to lot, or requirements for future management and governance. Scottish Ministers noted these initial proposals and agreed that the issues identified by the Land Commission should be addressed, however after further policy consideration and consultation decided to take forward an amended proposal [...]."

Furthermore:

> " [..] the aim of the transfer test is to provide an opportunity for the Scottish Ministers to consider (prior to the transfer of a landholding over 1000 hectares) whether requiring this landholding to be sold in smaller lots to different purchasers could be anticipated to increase the supply of more varied plots of land in a way that might be expected to have a positive impact on the ongoing sustainability of communities in the area. This Ministerial consideration will be based on the individual circumstances of the landholding and the particular communities, and lotting is not expected to be appropriate in all cases. This transfer test, in combination with the other measures applying to large landholdings, is thought likely to allow for the supply of land to be increased and diversified by widening the number of potential purchasers. This is both through any lotting outcome, and through the (indirect) incentive the test provides for a landowner to engage constructively with local communities (supported through the other measures in the Bill such as land management plans and community engagement obligations)."

Part 2: Leasing land

This part of the Bill is split into three chapters:

- **Chapter 1** concerns a model lease for environmental purposes
- **Chapter 2 and the Schedule** are about updating the legislation governing small landholdings

- **Chapter 3** makes provision in relation to agricultural tenancies, including changes to tenants' right to buy, resumption of agricultural tenancies, compensation for improvements, use of agricultural land for non-agricultural purposes, compensation for game damage, procedures for compensation claims, rent reviews and updating the rules of good husbandry and estate management.

These concepts are explained in more detail in the following sections.

Chapter 1: Model lease for environmental purposes

Section 7 places a duty on Scottish Ministers to "publish a model lease designed for letting land so that it can be used (wholly or partly) for an environmental purpose" (Section 7(1)). A model lease must be published within 2 years of the day the Bill receives Royal Assent, but Section 7(3) includes a power to, by regulations, modify this date.

The Bill specifies that land is used for an environmental purpose if it is used:

- for sustainable and regenerative agriculture,
- in a way that contributes towards achieving the net zero emissions target set by Section A1 of the Climate Change (Scotland) Act 2009,
- in a way that contributes towards adaptation to climate change,
- in a way that contributes towards increasing or sustaining biodiversity.

The Policy Memorandum refers to this new model lease as a "land management tenancy", and notes that this proposal:

> “ is intended to support people to use and manage land in a way that will help develop the new types of land use that will help us to address the climate change and nature loss challenges. There is a strong public interest in supporting that transition. This proposal places a duty for Scottish Ministers to publish a model lease, and Scottish Ministers intend to engage closely with key stakeholders for that purpose.”

The consultation on the strategic environmental assessment for the Part 2 provisions provides a bit more background on these proposals:

> “ Stakeholders have asked for help in developing new types of agreement that can be adopted by landlords and tenants to enable a wider range of activities on land that will both promote our climate and nature objectives and model new ways of working with and on land. A Land Use Tenancy will complement existing types of lease, rather than replace them. In particular, it should not have an adverse effect on farm leases under agricultural holdings legislation. Officials will therefore continue to work with stakeholders, and we will consider whether any further measures are needed in that respect at stage 2.”

The model lease provisions are intended to create a template that can be used to agree a land management lease, providing an alternative to the standard commercial lease template. A commercial lease template is typically used for leasing urban buildings, and is not designed for land management agreements. To use it in this context requires the style of contract to be amended, which can come with legal costs (as it requires a solicitor to carry this out).

The Policy Memorandum clarifies that this new type of tenancy is intended to "complement" rather than "replace" existing types of land tenure -

> “ In particular, it will not impact farming on land let under an agricultural holding, small landholding or croft. Those forms of tenure will continue to ensure the rights of the parties to those types of lease are unaffected by the availability of the new model lease. The primary purpose of an agricultural tenancy is the carrying out of agricultural activities, and as such the main activity of the holding should be agricultural. The model lease template is only intended to be used where less than 50% of the land management activity is agricultural.”

The model lease is intended to provide a standard legal agreement template which is bespoke to land management, where the primary activity is not agriculture. The lease would not entitle the tenant to the rights provided under agricultural holdings legislation.

As it is a template, it will be possible to vary the terms, unless they are terms which cannot be varied for statutory reasons (for example, regulations made by the Scottish Ministers might specify that certain conditions must be included in a lease, although the Bill does not provide the Scottish Ministers with a power to make such regulations).[viii]

Chapter 2: Small landholdings

Section 8 introduces the Schedule, which makes changes to the law of small landholdings.

Small landholdings are small farms with a distinct form of tenure under the Small Landholders (Scotland) Acts 1911 to 1931 ('the small landholders acts'). Small landholdings are only found in Scotland, outside of the original crofting counties[ix].

This form of tenure is rare; the Policy Memorandum estimates that it applies to 59 holdings, over two-thirds of which are smaller than 20 hectares.

'Small landholdings' are different from 'smallholdings', which are simply small farms which can either be tenanted or owner-occupied.

More information can be found in the background sections on small landholdings.

The Policy Memorandum notes the Bill provides for the following:

- **pre-emptive right to buy** – providing small landholders with the opportunity to purchase the land if there is a sale,
- **diversification** – providing small landholders with greater opportunity to diversify their business, to support profitability and enable them to take action to help address climate change and biodiversity loss,
- **succession and assignation** – ensuring that small landholders can bequeath and assign their tenancy to broadly the same types of people as tenant farmers with

viii Explanations of the intentions behind these provisions have been provided to SPICe in communications with Scottish Government officials.

ix The original crofting counties are set out in the Crofters (Scotland) 1993 and are the former counties of Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland and Shetland (referred to as 'Zetland' in the legislation)

secure 1991 Act tenancies,

- **guidance** – extending the functions of the Tenant Farming Commissioner to include small landholdings,

- **rent and compensation** – modernising the law to ensure there is a fair balance between the interests of small landholders and their landlords.

The Policy Memorandum explains that -

> " The measures provide small landholders with a modernised legal framework which is more comparable to the rules for crofting and agricultural holdings. This will ensure that the legal framework will provide the support needed in the 21st Century, and enable small landholders to play their part in the Scottish Government's Vision for Agriculture."

More information explaining the specific changes is provided in the next section on the Schedule.

Section 9 extends the role of the Tenant Farming Commissioner to cover small landholdings. This section amends sections of the Land Reform (Scotland) Act 2016, which set out the process for appointing the Tenant Farming Commissioner and their role, in a variety of ways to ensure that the Commissioner covers small landholdings. Explanations of the specific changes being made can be found in the Explanatory Notes.

Schedule: Small landholdings

The schedule makes detailed changes to the law of small landholdings. Background to these changes can be found in earlier sections of this briefing. The following sections cover the changes in brief. However, the Explanatory Notes which accompany the Bill provides more detailed explanation of the changes and the reasons behind them (see page 50 onward).

According to the Explanatory Notes, the schedule:

> " introduces a number of rights in respect of small landholdings for the first time: specifically, in relation to diversification and the right to buy. It also consolidates (i.e. restates in one place) and makes a number of policy changes to the current archaic law on small landholdings in relation to certain topics: specifically, in relation to rent, assignation, succession, and compensation. The law on renunciation is also restated with only minor consequential changes (arising from the removal of provisions about loans which no longer apply). As a result of all of these changes, the current law as it applies to these topics is disapplied."

The existing law governing small landholdings is summarised in the Scottish Government's guide to this legislation.

Part 1: Rent

Part 1 of the schedule is about rent for small landholders.

Paragraph 1 provides that the rent payable by a small landholder is the rent agreed between the parties (on entering into a lease or on variation of a lease) or the rent fixed by the Land Court. This restates the existing law in simplified terms which remain relevant in

the modern day.

Paragraph 2 provides that a small landholder and their landlord may, by written agreement alter the rent. The written agreement must specify the period during which the altered rent is payable, and when this period expires, the rent will revert to what it was prior to the agreement unless a new agreement is entered into or an order of the Land Court in respect of the rent takes effect. This paragraph also largely restates the existing law, with some clarification.

Paragraph 3 makes some changes to rent provisions as a consequence of giving small landholders the option to diversify their activities. It provides that either the small landholder or the landlord can apply to the Land Court to make an order fixing the rent in one of two scenarios. The scenarios are either:

- At least 7 years have passed under the lease, or any previous order of the Land Court in relation to the rent was made more than 7 years ago, and there is no other written agreement on rent in place.

Or

- Diversification is intended to take place or has already taken place. This can apply in two scenarios:
    - The landholder intends to diversify their use of the land according to a diversification proposal or agreement with the landlord under Part 2 of the schedule, but the rent has not yet been agreed.
    - Alternatively, an application can be made to the Land Court where the landholder has already used the land for a purpose other than cultivation without the rent having been altered to take account of that new use. However, an application cannot be made to the Land Court if there is a rent agreement between the landlord and landholder or an existing order from the Land Court fixing the rent which takes account of that use, or if the landlord has agreed that the rent should remain unchanged regardless of the new use.

If the conditions above are met, the Land Court may fix a fair rent. In determining a fair rent, the Land Court may not:

- increase the rent to reflect any increased value of the holding resulting from improvements which the tenant would be entitled to compensation for if the tenancy were to end (to be able to do so would penalise the tenant for improving the holding), or
- decrease the rent to reflect any reduction in the value of the holding resulting from the use of the land for a purpose other than cultivation by the landholder or the landholder's predecessor. The Explanatory Notes state that "this protects the landlord by avoiding the rent being reduced due to changes brought about by the small landholder. However, it is at least theoretically possible that the rent may reduce if that reduction is attributable to other factors, such as a market downturn.".

Before fixing the rent, the Land Court must invite the landholder and landlord to make representations, and may visit the holding or take advice from assessors or valuers.

Paragraph 4 provides that the Land Court may make an order fixing the rent if:

- the Land Court decides that diversification activities can go ahead despite objections from the landlord (because the Land Court has deemed those objections to be unreasonable), **or**

- the Land Court has removed conditions imposed by the landlord on the proposed diversification, **and**

an application has been made to the Land Court to fix the rent as part of those proceedings.

Paragraph 5 restates the Land Court's existing powers in relation to rent arrears, particularly in relation to pausing proceedings regarding rent arrears while there is a rent review underway. These powers are also updated as a consequence of new provisions on diversification.

Part 2: Diversification

Part 2 of the schedule relates to diversification on small landholdings. The Explanatory Notes state that:

> “ Section 10 of the Small Landholders (Scotland) Act 1911 requires small landholders to cultivate their holdings. Cultivating the holding means using it for horticulture or husbandry (including the keeping or breeding of livestock, poultry or bees, and growing fruit and vegetables). Section 10 does permit the use of the land for certain subsidiary or auxiliary purposes, but these are limited to things that are not inconsistent with the cultivation of the holding. Part 2 of the schedule [to the Bill] makes provision enabling small landholders to diversify their use of their holdings, that is to use them for non-cultivation purposes. This brings small landholders into line with tenants of agricultural holdings who are already able to use their land for non-agricultural purposes (principally under Part 3 of the Agricultural Holdings (Scotland) Act 2003).”

In broad terms, **paragraphs 6-17** provide for a process for a landholder and landlord to reach an agreement on diversification, including what is to happen if they don't agree - e.g. the landlord's grounds for objecting to a proposal, and the processes to be followed by the Land Court.

Paragraph 6 provides that the small landholder and the landlord may enter into a "diversification agreement", agreeing that the land can be used for a purpose other than cultivation. The agreement must be in writing and specify a number of things such as the diverse purpose for which the land may be used, the land in question, and any conditions on using the land for that purpose.

Paragraph 7 provides that small landholders may give a "notice of diversification" to their landlord if they intend to use the land for a diverse purpose (i.e. other than cultivation) and the use of the land for that purpose is not already the subject of a diversification agreement. The notice must specify a number of things, including any environmental benefit intended to be provided and how it will be provided, and how changes will be financed and managed. These are similar to what other agricultural tenants need to provide in their notices of diversification.

The landholder must also address matters which may constitute grounds for objection by

the landlord (set out in paragraph 9(3)(a)(i) to (iii)). These are matters which may e.g. lessen the amenity of the land or be detrimental to management of the estate. This is explained in more detail in relation to paragraph 9.

The notice must be given in writing at least 70 days before the date the diversification is intended to commence, and be in such a form as the Scottish Ministers may by regulations prescribe (under the negative procedure). The Scottish Ministers are also given a power to make regulations (under the affirmative procedure) to modify paragraph 7 to make changes to the information which is to be included in a notice of diversification.

Paragraph 8 provides that the landlord may request additional "relevant information" from the small landholder in relation to a notice of proposed diversification. The landlord may only do so once, and within 30 days of the notice being given.

The Bill specifies that information is relevant if it relates to the proposed diversification, the intended use of the land is for business purposes and the information is relevant to the finance or management of the business, and the information is necessary for the landlord to consider whether there are grounds for objection.

If the landholder receives a request for information, they are to respond within 30 days of the request being made.

Paragraph 9 provides that the landlord must notify the landholder in writing to agree or object to a diversification proposal set out in a notice of diversification. The landlord must provide their response within 60 days (either of the original diversification notice being made, or, if a request for information has been made, within 60 days of that request).

The Bill specifies in paragraph 9(3)(a) to (c) that the landlord may only object to the proposal if:

- they "reasonably consider" that implementing the proposal would:
    - (i) Lessen significantly the amenity of the land or surrounding area,
    - (ii) Substantially prejudice the whole of the small landholding for cultivation in the future,
    - (iii) Be substantially detrimental to the sound management of the estate that the land is part of, or
    - (iv) Cause the landlord to suffer undue hardship.
- the landholder has provided information about how proposed changes will be financed and managed, or how any business stemming from the diversification of the land is to be financed and managed, but the landlord reasonably considers that the landholder has not demonstrated that the proposed changes or the business are viable, or
- the landholder has not provided requested information under paragraph 8 within 30 days.

This paragraph also specifies that where the landlord agrees to the proposal, they may impose reasonable conditions on the implementation of the proposal.

Grounds for objection and any conditions for approval must be set out in the landlord's written notification. The landlord must explain why they consider grounds or conditions to

be reasonable. Where the landlord objects, they must also apply to the Land Court for a determination on whether their objection is reasonable under **Paragraph 13** within a set timeframe (see below) for their objection to have an effect.

If the landlord does not notify the landholder in writing the landlord is taken to have agreed to the proposal without imposing conditions.

This paragraph provides the Scottish Ministers with a power to, by regulations under the affirmative procedure, add or remove a ground for objection to a proposal or make provision about the information that is to be included in a notice in relation to each ground of objection, and the manner in which that information is to be provided.

Paragraph 10 provides that a landlord and a tenant can negotiate a diversification agreement where a landlord has objected to a notice of diversification. Once the landlord objects, the landholder may notify them within 30 days that they wish to negotiate a diversification agreement. The Policy Memorandum explains that "this is intended to provide parties with an opportunity to see if any agreement can be reached without the need for the matter to be determined by the Land Court".

Paragraph 11 provides that a landlord may withdraw an objection to a diversification proposal within 60 days by notifying the landholder in writing that they now agree to the proposal and imposing any conditions on implementing the proposal. The landlord must justify the conditions and explain why they are reasonable. **Paragraph 10(5)** also specifies that if the landholder has notified the landlord that they wish to negotiate a diversification, the landlord has an extra 30 days to apply to withdraw their objection.

Paragraph 12 provides that the landlord has 60 days to modify or withdraw any conditions they have stipulated as part of agreeing to diversification by notifying the landholder in writing. The landlord must state the reasons for modifying any conditions and why these modifications are reasonable. The 60 days begin on the day that the conditions are notified to the landholder.

Paragraph 13 provides that if a landlord objects to a notification proposal, they may apply to the Land Court for a determination that the objection is reasonable within 60 days of the objection being notified. **Paragraph 10(5)** also specifies that if the landholder has notified the landlord that they wish to negotiate a diversification, the landlord has an extra 30 days to apply to the Land Court to make this determination.

If the Land Court decides that the landlord's objection is reasonable, then the landholder may not implement their proposal. If the Land Court decides that the objection is unreasonable, the Court must approve the proposal and set a start date for implementation. The Court may also impose reasonable conditions on the landholder.

When making its decision, the Land Court is to consider whether the diversification is likely to benefit the environment, and if so, whether the positive effects outweigh any negative effects. The Bill specifies that potential negative effects to consider include the landlord's grounds for objection in 9(3)(a)(i) to (iii) (e.g. That it would affect the amenity, or be substantially detrimental to the sound management of the estate - the full list is provided above in relation to paragraph 9).

If the landlord does not make or follow through with an application to the Land Court and has not otherwise withdrawn their objection, the diversification proposal is treated as though the landlord has agreed to it, without conditions. The proposal may then be implemented from either the date specified in the notice of diversification, or the date on

which the proposal is treated as having been agreed to, whichever is later.

Paragraph 14 is relevant when:

- the landlord has initially objected to a notice of diversification, and
- the landlord has made an application to the Land Court to determine whether their objection is reasonable, but
- the landlord and landholder then manage to come to a diversification agreement *before* the Land Court has made its decision on the initial objection.

In this scenario the Land Court may simply determine that the original diversification proposal that the landlord objected to is not approved. The Explanatory Notes state that "this allows the Court to give effect to the agreement of the parties without having to determine whether the landlord's objection was reasonable or not."

Paragraph 15 provides that the landholder can apply to the Land Court asking them to consider whether conditions imposed by the landlord are unreasonable. The landholder must make this application within 60 days of the condition being notified or modified. The Land Court is to consider whether the intended use of the land is likely to have a positive effect on the environment and whether potential positive effects outweigh any negative effects, including any significant detriment to the management of the holding, the amenity of the land, etc.

If the Land Court decides that the condition is unreasonable, it may remove the condition and impose alternative conditions.

Paragraph 16 provides that a small landholding will not cease to be a small landholding if the only reason would be that the land is used for a diverse purpose in accordance with a diversification agreement or authorised diversification proposal. Terms of the lease which prohibit the use of the land for purposes other than cultivation will have no effect in these circumstances.

Part 3: Disposal of a holding by a small landholder

Paragraphs 18-24 provide for ways for a small landholder to dispose of their tenancy through:

- **renunciation**, where the tenancy is ended at the landholder's request and returned to the landlord,
- **assignation**, where the small landholder may appoint certain persons to take over the tenancy, or
- **succession**, where the small landholder bequeaths the tenancy to certain persons on their death (or it otherwise passes to another person in the event that there is no will).

Paragraph 18 consolidates and restates the landholders right to renounce their tenancy.

Paragraphs 19 and 20 provide for a small landholder's right to assign the tenancy, and a landlord's grounds for objecting. These provisions expand the existing rights for small landholders, giving these tenants similar rights to those afforded to 1991 Act tenants. The

Explanatory Notes state:

> “ 354. At present—
>
> - the ability to assign is provided for only where the small landholder is unable to work the holding through illness, old age, or infirmity,”
>
> - this statutory right to assign requires a successful application being made to the Land Court for permission to assign the holding,”
>
> - an assignation can only be authorised by the Court in favour of a very limited category of people (the small landholder’s son-in-law or someone who could inherit the small landholder’s estate under the laws of intestacy).”
>
> 355. In contrast, under the right to assign which is provided for in this Chapter—”
>
> - no element of necessity will require to be established before the assignation can be authorised: the starting point is simply that the small landholder gives 70 days’ written notice of the proposed assignation setting out details of the proposed assignee, the terms of the proposed assignation and the date on which it is proposed to take effect (see paragraph 19(4)),”
>
> - either the landlord’s consent or court authorisation is required, but where the proposed assignation is to a close family member as defined in paragraph 20(9) then the landlord may object only on specific grounds (see paragraph 20(1) and (2)); where the assignation is to a more distant relative then the landlord has a broader right of objection but must still have reasonable grounds for objecting (and paragraph 20(4) clarifies that the assignee being unable to pay the rent or cultivate the holding would be reasonable grounds),”
>
> - while the right to assign under these provisions is still limited to specified relationships, the list is much expanded from the present law and, for example, now includes various step-relations and the spouse or civil partner of various relatives as well as including widows and widowers in the same way as spouses and civil partners (see paragraph 19(2) and (3)).”

Under the new provisions, a small landholder may assign their tenancy to certain people, by giving the landlord 70 days' notice, and specifying a variety of details about the proposed assignation. Types of people which the landholder may assign the tenancy to are:

- Anyone who would be entitled to succeed the tenancy on intestacy (i.e. in a situation where there is no will) by virtue of the Succession (Scotland) Act 1964. This provides for parents, children and other immediate relatives to succeed a tenancy;
- A spouse/civil partner of the landholder's descendent or sibling;
- A sibling, spouse or civil partner of the sibling or a descendant of a sibling to the landholder's spouse or civil partner.

It is specified that siblings include half-siblings and step-siblings, and a child includes a step-child.

The landlord may object to a notice of the proposed assignation within 28 days on certain grounds. For "near relatives" as defined in the Bill (e.g. parents, children, siblings, spouses

and civil partners and immediate relations of those), the landlord may only object if they believe that the person proposed to assign the tenancy is:

- not of good character,
- does not have sufficient resources to be able to cultivate the holding with reasonable efficiency, or
- does not have sufficient training or experience to be able to cultivate the holding with reasonable efficiency, unless that person will undertake relevant training within specified timescales, and in the meantime, arrangements have been made to ensure the holding is cultivated with reasonable efficiency.

For people outwith the definition of "near relative", the landlord may object if there are "reasonable grounds" for doing so, including that the person would not have the ability to pay the rent or fund cultivation of the holding, or does not have relevant skills or experience.

If the landlord withholds consent for an assignation, the landholder may apply to the Land Court to authorise the assignation. The Land Court may do so if it considers that the landlord's objection is not reasonable.

Paragraphs 21-24 provide that the small landholder may bequeath their tenancy to the same types of people as they may assign them to. A process for a person to succeed the tenancy where there is no will (intestate succession) is also provided for.

As with assignation, these provisions are expanded from the existing law in relation to succession for small landholdings. The existing law compared with the new provisions for both intestate and testate succession[x] can be found in paragraphs 361-362 and 364-370 in the Explanatory Notes. The provisions for small landholders in the Bill are similar to the provisions for 1991 Act tenants.

The process for notification of succession, and the process for objecting and grounds under which the landlord may object, are broadly similar to assignation, though there are some differences.

It is the proposed successor (i.e. the person proposed to take over the small landholding) who would notify the landlord. In the case of a near relative, if the landlord objects, they would need to apply to the Land Court to give effect to their objection. They can only object on certain grounds; these are the same as for assignation. If the Land Court rules that the objection is valid, the bequest is null and void in the case of a named bequest by the landholder, and in the case of intestate succession, the lease is terminated.

In the case of a person not classed as a near relative, the landlord may object setting out their grounds for objection within 28 days. Unlike for near relatives, there are no fixed grounds for objection, and the bequest will be null and void, or, in the case of intestate succession, the lease terminated, unless the proposed successor appeals to the Land Court who will then decide on the matter.

Paragraph 25 provides that, generally speaking, the proposed successor is entitled to possession of the small landholding while matters related to the succession are being

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x "Intestate succession" is succession where the deceased has not left behind a will; "testate succession" is where there is a will.

decided. The exception to this is if the executor of the estate (under Section 14 of the Succession (Scotland) Act 1964) objects, or if, on application of the landlord, the Land Court decides otherwise.

Part 4: Compensation

Paragraphs 26-43 provide for certain rights to compensation at the end of a tenancy where:

- The small landholder is removed from the holding
- The small landholder renounces the tenancy,
- The small landholder enters into a new type of tenancy under other legislation (e.g. conversion to a croft, or another type of agricultural tenancy),
- In certain cases where a tenancy is terminated following the death of a small landholder (e.g. a bequest is successfully challenged by the landlord), or
- The small landholder has abandoned the holding.

According to the Explanatory Notes, the provisions expand on the existing rights to compensation for small landholders and landlords, and add new rights to compensation for the landholder/landlord where the value of the holding has increased/decreased due to diversification.

A detailed explanation of the provisions is set out on pages 66-72 of the Explanatory Notes.

Paragraphs 27 and 28 are about the small landholder's rights to compensation. Compensation is payable to the tenant where:

- they have made a permanent improvement which is suitable to the holding, it was paid for by the landholder or their predecessors under the same tenancy, and it was (in most cases) not made in order to comply with a specific written agreement (or it was made for this reason but fair consideration was not received for the improvement). Permanent improvements are those "relating to" e.g. a dwelling house, subsoil or drains, walls or fences, planting trees, or roads, (full list is in Paragraph 27(3)) or any other improvement which the Land Court considers adds to the value of the holding to an incoming tenant.

and/or

- an agreed plan for diversification under Part 2 of the Schedule has resulted in an increase in the value of the holding, so long as the diversification was wholly carried out after the paragraph comes into force.

Compensation is calculated based on the value of the improvement to the incoming tenant, less any benefits given by the landlord or grants received, and less any outstanding rent (as per **Paragraph 33**). This is the same principle on which compensation for improvements for other types of tenancies are paid. Likewise, as the Bill provides for other types of tenancies, no compensation is payable to the outgoing small landholder if the incoming tenant's ability to use the whole of the land comprised in the holding for the

purposes of cultivation is substantially prejudiced as a result of the diversification, unless the use or change has an environmental benefit.

Paragraphs 30 and 31 are about the landlord's rights to compensation. Compensation is payable to the landlord where:

- there is dilapidation, deterioration or damage to the holding or anything in or on the holding and this is due to the landholder or their predecessor (if under the same tenancy) failing to fulfil their responsibility to cultivate it or to use the holding as agreed under a diversification agreement,

and/or

- diversification activities, whether or not agreed under Part 2 of the Schedule, have reduced the value of the holding, where the diversification was wholly carried out after the paragraph comes into force.

In the former case, the landlord is entitled to compensation equal to the amount that the holding has decreased in value or the cost of making good the deterioration, dilapidation or damage (whichever is greater). In the latter case, the landlord is entitled to compensation equal to the amount that the holding has decreased in value.

Paragraph 32 provides that the landlord can only claim compensation if:

- Notice is given to the small landholder about the intention to claim compensation at least 3 months prior to the termination of the tenancy (unless the Land Court dispenses with the notice requirement based on the circumstances of the case), or

- The landholder abandons the small landholding.

Paragraph 34 provides that if it has been agreed that an incoming small landholder is to take on the outgoing landholder's rights and liabilities in relation to compensation, the incoming landholder is to be treated as if they were the outgoing landholder.

Paragraph 35 provides that a landlord or a small landholder may require a 'record of condition' (i.e. a formal record of the condition of the cultivation of the holding or anything in or on the holding, and who has paid for any permanent improvements) of the holding to be made at any point during the tenancy, and sets out a process for making such a record.

Paragraphs 36 to 43 are about how the compensation amount is determined. These paragraphs provide, among other things:

- That a landlord or small landholder may apply to the Tenant Farming Commissioner for an assessment of the amount of compensation, within 3 months of the tenancy coming to an end. Scottish Ministers are given a power to prescribe the form and content of an application by regulations under the negative procedure.

- That when the Commissioner receives an application, they must appoint a suitable valuer. The small landholder or landlord may apply to the Land Court to appoint a different valuer on the grounds that the appointed valuer do not meet the criteria for a suitable valuer within 14 days of the valuer being appointed. Criteria for the valuer and the process for appointing and objecting to the valuer are similar to compensation claims for other types of tenancies.

- That the valuer's expenses are to be met by the person by whom the compensation is payable in the case of a successful compensation award. Where there is no compensation award, the person who made the application is to meet the valuer's expenses.

- A process for assessing the value of compensation, which includes taking into account representations from the landlord and landholder. A power is given to Scottish Ministers to specify the basis on which a valuer is to assess the compensation payable. Scottish Ministers would need to do so by regulations under the affirmative procedure.

- A process for the valuer to give notice of their final assessment, and a process for appealing to the Lands Tribunal against the valuer's decision. These processes are similar to compensation arrangements for other types of tenancies.

- That the Lands Tribunal may refer appropriate issues to the Land Court.

Part 5: Right to buy for small landholders

The final part of the Schedule is about the right to buy for small landholders. As noted in the background section of this briefing, the right to buy has been one of the areas most discussed in relation to modernising small landholdings legislation.

Paragraphs 44-60 of the Schedule provide for a pre-emptive right to buy for small landholders. As discussed in an earlier section of this briefing, a 'pre-emptive right to buy', is the right to buy the holding should the landlord choose to sell. This type of right to buy is similar to the right afforded to 1991 Act tenants. This paragraph also provides a number of powers for Scottish Ministers to amend or further specify matters; these powers are also similar to powers given to Ministers in relation to the 1991 Act tenants' right to buy.

A full explanation of these provisions can be found on pages 72-79 of the Explanatory Notes.

Paragraphs 44-47 are about the requirement for a small landholder to pre-register their interest in buying the holding, should the landlord wish to sell. These paragraphs provide for:

- The Keeper of the Registers of Community Interests in Land (maintained by the Registers of Scotland) to maintain a register of small landholdings who are interested in buying their holding. The Keeper may charge a reasonable fee, which Scottish Ministers are given the power to prescribe by regulations under the negative procedure.

- A small landholder to apply to register their interest in buying the land by giving notice to the landlord and the Keeper. A power is given to Scottish Ministers to prescribe the form and additional content of the notice in regulations under the negative procedure.

- The owner of the land to challenge a registration on the grounds that a matter contained in it is inaccurate. If it is found to be inaccurate, the Keeper must rescind or amend the registration depending on the significance of the inaccuracy. The landholder or landowner may apply to the Land Court to appeal any decision made by the Keeper.

- The registration to be valid for 5 years, unless it is rescinded or the tenancy is terminated. The small landholder may renew their registration for additional 5-year periods.

These provisions are nearly identical to the requirement to pre-register interest in exercising their right to buy for 1991 Act tenants. However, as explored in a later section of this briefing, the Bill gives Ministers a power to amend the provisions on the registration requirements for 1991 Act tenants. A similar power to modify provisions on registration of small landholder's interest in exercising their right to buy is given to Scottish Ministers in **paragraph 59** of the Schedule. Modification would need to be made by regulations under the affirmative procedure.

Paragraph 48 provides that a landowner must notify a small landholder of their intention to transfer the land to another person, if the small landholder has a valid registration of their interest in buying the land. Scottish Ministers are given a power to prescribe the form and content of the notice by regulations under the negative procedure.

This requirement to notify the landholder applies unless the transfer is exempt under **Paragraph 49**. An exempt transfer is one that is e.g. not transferred for value, required under a court order, between spouses or civil partners, a transfer implementing the community right to buy under the Land Reform (Scotland) Act 2003, etc. The full list of exempt transfers can be found in Paragraph 49(1). Scottish Ministers are also given a power to amend the paragraph on exempt transfers, by regulations under the affirmative procedure.

Paragraph 50 provides for the small landholders right to buy the holding should the landowner intend to transfer the land. It also provides that, should the landowner transfer the land to another person, the landholder has the right to buy the land from that person. This paragraph specifies actions that are considered to be steps taken by the landlord with a view to a transfer of the land. Scottish Ministers are given a power to modify these actions by regulations under the affirmative procedure.

Paragraph 51 provides that, to exercise their right to buy, small landholders must give notice of their intention to buy the land within 28 days of being given notice by the landowner that there is an intention to transfer. Where a landowner has transferred the land to someone else despite the landholder's valid right to buy, the landholder may give notice to that new owner exercising their right to buy within 3 years of the transfer to that person (so long as the landholder's tenancy is in force when they give notice).

The landholder must give notice if they change their mind and do not intend to proceed. Failing to give notice within the specified time frames, or giving notice rescinding their intention to proceed extinguishes the right to buy for 12 months, unless the land is transferred to another person in that time and that person is required to give notice of a proposal to transfer land (as per **Paragraph 52**).

Paragraphs 53-58 set out a process for buying the land. This includes:

- That the price is to be agreed between the landholder and the seller, or determined by valuation if there is no agreement.
- Specified time frames for missives (the process of sale) to be concluded, date of entry and payment for the holding (within 6 months, unless the price is subject to appeals or a different date has been agreed between the landowner and landholder).

- If the landholder has not concluded the missives or taken reasonable steps to do so within the time frame, the landowner can apply to the Land Court for an order directing the landholder to do so. If the landholder fails to comply, their right to buy is extinguished. The right to buy can also be extinguished even if the landowner does not apply to the Land Court, if the landholder has not concluded the missives within a reasonable period.
- The appointment of a valuer, either by agreement between parties or nominated by the Land Court.
- The process for valuation, including matters to be taken into account by a valuer when determining the value of the holding. Scottish Ministers may also issue non-statutory guidance for the purposes of valuation. These matters are very similar to the matters in relation to valuing a holding for the purpose of a 1991 Act tenant's right to buy.
- That the valuer's expenses are to be met by the landholder (or landholders, if there are multiple tenants exercising their right to buy different parts of a larger estate) unless specific circumstances apply.
- Giving Scottish Ministers a power to make further provision in relation to the appointment of a valuer and valuation by regulations under the affirmative procedure.
- A process of appeal to the Lands Tribunal against the valuation, which may reassess the valuation and determine the price. Either the seller or the small landholder may appeal. These appeal provisions are very similar to provisions in relation to 1991 Act tenants' right to buy.
- That the Lands Tribunal may refer relevant matters to the Land Court for decision.

Chapter 3: Agricultural holdings

The following sections explain, in broad terms, the changes that are made to agricultural holdings legislation. The provisions are detailed, and as such this briefing focuses on the main changes and the aims behind the proposals in the Bill. Full details of each provision can be found in the Explanatory Notes published alongside the Bill. Each section below indicates on which pages of the Explanatory Notes more detailed information can be found.

Tenants' right to buy

Section 10 makes provision about agricultural tenants' right to buy.

Full details of the provisions can be found on page 21 of the Explanatory Notes.

The Agricultural Holdings (Scotland) Act 2003 provides that tenants with a 1991 Act Tenancy have a 'pre-emptive right to buy' the land covered by their tenancy if their landlord decides to sell. However, to be able to exercise this right, tenants must first apply to the Keeper of the Registers of Scotland to register their interest in buying their holding. More information on this is available in Scottish Government guidance.

Section 99 of the Land Reform (Scotland) Act 2016 sought to remove this requirement to register because, as the Policy Memorandum for the Bill notes, this can be "unduly

burdensome for the tenant farmer". However, Section 99 has never been commenced (in other words, it has never become law). The Policy Memorandum states that it was not commenced "in order for proposals to be developed that could deliver the benefits of registration while minimising the costs".

Section 10 of the Bill repeals Section 99 of the 2016 Act, and gives the Scottish Ministers the power to make regulations which modify the provisions in the 2003 Act regarding the prior registration of a tenant's interest in buying the land. Before making regulations, Scottish Ministers must consult the Keeper of the Registers of Scotland, and any others who Ministers consider have an interest in the registration requirement.

'Tenant's right to buy' is also added to the non-exhaustive list of matters on which the Tenant Farming Commissioner may produce codes of practice.

Resumption of agricultural tenancies

Resumption is **the landlord's ability to take back land under a tenancy agreement** under certain conditions before the lease has expired.

Sections 11 to 13 make provision in relation to resumption. A detailed explanation of each provision can be found on pages 21-26 of the Explanatory Notes.

The circumstances in which landlords may resume land, the process which must be followed, and the rights of the tenant in this situation, differs depending on the type of tenancy and, in some cases, on the conditions of the lease. Usually, the right to resumption only applies if the landlord plans to use the land for non-agricultural purposes, and sometimes planning consent needs to be in place.

There is no statutory right to resumption (i.e. a right enshrined in legislation) for 1991 Act tenancies, but leases may provide this right to the landlord. If so, the 1991 Act regulates the exercise of that right, including in particular the right of the tenant to be paid compensation.

For limited duration tenancies (including short limited duration tenancies, limited duration tenancies and modern limited duration tenancies), the 2003 Act provides the landlord with a statutory right to resumption to use the land for non-agricultural purposes if planning consent has been obtained. In other words, the landlord's right is enshrined in the legislation for these types of tenancies, even if there is no specific provision in the lease (though the landlord and tenant may agree in the lease that there is no right to resumption).

A summary of resumption rules for different types of tenancies is outlined in a blog from the Tenant Farming Commissioner.

Notice period for 1991 Act tenancies

Section 11 amends the provisions for resumption for 1991 Act tenancies.

The 1991 Act does not set out a standard process for giving notice of resumption to 1991 Act tenants where their lease provides for this right. The Bill proposes to change this, and sets out a process for giving notice of resumption to tenants with 1991 Act tenancies. This includes, for example, a minimum notice period of one year.

The new provisions entitle a tenant who has received a notice of resumption to give the landlord notice to terminate the tenancy within 28 days. The provisions also entitles the landlord to withdraw a notice of resumption, unless the tenant has given notice terminating the tenancy due to the resumption notice.

If notice of resumption is withdrawn, the landlord must notify the Tenant Farming Commissioner and the tenant is entitled to recover losses or expenses incurred as part of the original resumption notice.

Compensation in respect of the value of the land

The Bill also entitles tenants with 1991 Act tenancies, the three types of limited duration tenancies, and repairing tenancies to compensation in respect of the value of the land being resumed (alongside other existing elements of compensation). **Section 11** provides this for 1991 Act tenancies, and **Section 12** provides this for the limited duration and repairing tenancy types. The proposals in the Bill are similar to the compensation arrangements for 1991 Act tenants in relation to the rights to relinquishment provided for by the 2016 Act.

The rationale for this proposed change is that the value of land in vacant possession (i.e. without a sitting tenant) is typically higher than for land sold with a tenant in occupation.

The Policy Memorandum explains:

> " The Scottish Ministers consider that the tenant has a financial interest in the value of the lease which is not covered by existing compensation arrangements. Rents are generally lower than the amount that might be obtained in an unregulated market, and that the tenant's interest can be assigned in some circumstances. The Scottish Ministers consider therefore that fixing compensation by reference only to rent multiples, disturbance, and reorganisation costs does not take due account of the 'capital value' in the lease. It is unfair to the tenant, and might act as an incentive to resuming land that might otherwise continue to be part of the farm business."

The process for calculating and arranging compensation for the value of the land is to be set out in a new Schedule 2A inserted into the 1991 Act (in respect of 1991 Act Tenancies) and in a new Schedule 2 in the 2003 Act (in respect of limited duration and repairing tenancies).

Both schedules are very similar, and set out a process for appointing and meeting the expenses of an independent valuer (expenses are to be met by the landlord). The valuer is to be appointed by the Tenant Farming Commissioner in accordance with the process set out in the Bill. There is an option for either landlord or tenant to object to the appointment and apply to the Land Court to appoint a different valuer.

The valuer must assess the value of the land if sold with vacant possession (i.e. with no tenant in occupation) and if sold with the tenant still in occupation, having regard to a variety of matters, including representations from the tenant and landlord. The Bill also stipulates matters which the valuer must not take account of when calculating the value. The valuer is then to calculate the amount of compensation in relation to this part of the compensation claim as half the difference between the value of the land being sold with vacant possession and the value if the tenant were still in possession. Scottish Ministers are conferred a power to add, remove, or vary the matters which are (or are not) to be taken into consideration by the valuer.

The schedules also provide that the valuation must be complete, and a notice of the assessment given, within 8 weeks from finalising the appointment of the valuer (with provision to take into account the process of objecting to the appointed valuer). The schedule also provides the landlord and tenant with a right to appeal the outcome of the assessment to the Lands Tribunal within 21 days of the notice of assessment.

Compensation for disturbance

Section 13 relates to 'compensation for disturbance' to be paid to tenants if a landlord decides to resume the tenancy. Compensation for disturbance reflects the costs incurred by a tenant in leaving the holding, such as removing any goods, livestock, machinery or other items as well as the costs of preparing the claim for compensation.

Compensation for disturbance in respect of certain things is already provided for in the existing legislation. The Bill provides that, in relation to 1991 Act tenancies, compensation for disturbance is also to be payable where the landlord resumes all or part of the holding (this is already provided for in relation to the limited duration tenancy types).

The Bill also more generally expands the provisions on compensation for disturbance in relation to all forms of termination of all or part of a tenancy: the Bill provides that compensation is to include reasonable costs incurred in connection with the development of the holding, such as professional fees ahead of obtaining planning permission or building warrants.

In relation to limited duration tenancy types, compensation for disturbance on resumption is already provided for by the 2003 Act by mirroring the provisions on compensation for disturbance in the 1991 Act. The Bill makes only minor consequential amendments in relation to these tenancy types.

Compensation for improvements

At the end of a tenancy (known as 'waygo'), the tenant may be entitled to compensation for certain improvements they have made to the holding. Improvements that are eligible are set out in Schedule 5 of the 1991 Act[xi], and includes things like planting orchards, or creating or removing permanent fences. Compensation that may be due is calculated on the basis of the value of an improvement to a hypothetical incoming tenant and is only payable where the appropriate process for obtaining consent from or giving notice to the landlord has been followed.

Section 14 makes changes to the rules around compensation for improvements. These provisions are summarised below. A detailed explanation of each provision can be found on pages 26-32 of the Explanatory Notes.

Changes to Schedule 5 of the 1991 Act

Schedule 5 of the 1991 Act currently sets out an exhaustive list of activities which are regarded as improvements. The improvements are split into three parts: those which require consent from the landlord, those which require notice to be given to the landlord, and those which require neither consent nor notice.

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xi Schedule 5 sets out improvements that are eligible for compensation where they were made after 1 November 1948. Schedule 3 concerns improvements carried out before July 1931, Schedule 4 concerns improvements carried out between 31 July 1931 and 1 November 1948.

Section 14 of the Bill replaces Schedule 5 with a new version of this schedule.

The new Schedule 5 replaces the existing exhaustive lists of improvements in Parts 1, 2 and 3 of the existing schedule with ‘illustrative’ lists of improvements which require consent and improvements which require notice. In the new schedule, improvements will require consent if they make "a change to land or fixed equipment on the holding that" -

> “ (a) means that the land or fixed equipment affected by the change cannot, or is unlikely to, return to its former agricultural use, or (b) otherwise, has a long term or significant impact on the management of the holding (as a whole).”
>
> (Paragraph 1, new Schedule 5, inserted by Section 14(9) of the Bill)

Improvements will require notice to be given to the landlord if it -

> “ ...makes a change to land or fixed equipment on the holding that does not have a long-term or significant impact on the management of the holding (as a whole)”
>
> (Paragraph 3, new Schedule 5, inserted by Section 14(9) of the Bill)

The list of improvements which do not require either notice to be given to, or consent to be obtained from, the landlord remains a 'fixed', or exhaustive, list. The Bill slightly expands this list compared to the existing Schedule 5 to include, for example, forming hedges, and creating field margins for habitats.

The new schedule also includes a fourth part which sets out examples of improvements which "are presumed to facilitate or enhance sustainable and regenerative agricultural production", and for which compensation may be payable. Improvements listed in the new Part 4 will still in principle require either consent or notice, so this new part is linked to the requirement on the Land Court to consider if any improvement is likely to facilitate or enhance sustainable and agricultural production on the holding (see further information below).

The Explanatory Notes state that “taken together, this means that only the most significant improvements, those which take land out of agricultural use or which have a significant impact on the holding or its management will require consent. Most other improvements will require to be notified to the landlord in order to be compensable”, unless they are improvements for which neither notice or consent is required.

Changes to the process for consenting to, and giving notice of, an improvement

Section 14 also establishes a process for the tenant obtaining and the landlord giving/ refusing **consent for an improvement**, and gives a power to Scottish Ministers to prescribe the form and content of a tenant's request for consent.[xii] The process includes:

- A requirement that the tenant request consent in a form and including information prescribed by Scottish Ministers in regulations.
- A 70-day period for giving or refusing consent/negotiating terms for consent. If the landlord does not respond within 70 days, unconditional consent is deemed to have been given.

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xii As set out in the Delegated Powers Memorandum, in subsection (1B) inserted by Section 14(5)(b), Scottish Ministers may "prescribe" the form/content of notice. Section 85(1) of the 1991 Act defines ‘prescribed’, with the effect that any such form or information is to be prescribed in negative procedure regulations made by the Scottish Ministers.

- If the landlord refuses consent, they must give reasons in writing, including by reference to:
    - whether or not the improvement is likely to have a positive effect on the efficient management of the holding, and/or
    - whether the improvement is likely to facilitate or enhance sustainable or regenerative agricultural production on the holding, and
    - whether or not the improvement is reasonable in the circumstances.
- Where the landlord refuses consent or the landlord and tenant have been unable to agree terms within 70 days, the tenant may apply to the Land Court to make a determination. In deciding whether to approve the improvement, the Land Court is also to consider the factors above in relation to the efficient management of the holding and/or the potential for facilitating or enhancing sustainable and regenerative agricultural production, as well as whether the improvement is reasonable based on the circumstances.

For improvements that require **notice to be given to the landlord** (as opposed to consent), the 1991 Act provides for timescales for giving notice. However, the Bill provides that notice must be given in a form and including content prescribed by Scottish Ministers by regulations.

Finally, the Bill provides the Scottish Ministers with a power to add, amend, or remove examples of improvements which require consent or notice or which are are presumed to facilitate or enhance sustainable and regenerative agriculture. Scottish Ministers may also amend the exhaustive list of improvements for which neither consent or notice is required. Regulations made under this power are subject to the negative procedure.

Significance of these changes

The Policy Memorandum states that the existing fixed lists in Schedule 5 of the 1991 Act “are no longer flexible enough to support activities that must now take place if tenant farmers are to play their part in tackling the twin climate and biodiversity crises”. The proposed new version therefore moves to a principles-based approach for more significant changes.

The wider purpose of these changes to the approach to compensation for improvements is to ensure that tenant farmers are able to participate equally in a transition to 'sustainable and regenerative agriculture', and access any support available to facilitate this as part of ongoing reform of Scotland's post-EU agricultural policy.

The Scottish Tenant Farmers Association highlighted during Stage 1 scrutiny of the Agriculture and Rural Communities (Scotland) Bill that there continue to be barriers to tenant farmers making climate- and nature-friendly changes to their holdings. The organisation told the Rural Affairs and Islands Committee on 31 January 2024 that there is a "huge job to be done" on Schedule 5 to ensure that the types of improvements that tenants can be compensated for are brought up to date.

The changes appear to intend to treat sustainable and regenerative agricultural practices more favourably when potential improvements are being considered. If a landlord refuses consent for an improvement, they must give reasons by reference to the likelihood of the improvement facilitating or enhancing sustainable or regenerative agriculture. Likewise,

the Land Court must factor this likelihood into its determinations. The new schedule sets out a list of practices which are *"presumed to"* facilitate or enhance sustainable or regenerative agricultural production, and includes practices such as organic conversion, installing renewable energy storage for use on the holding, and peatland restoration.

It also appears significant that the tests for whether consent or notice is required specify that consideration must be given to the impact on the management of the holding **"(as a whole)"**. This coheres with other changes made by the Bill (particularly in relation to diversification) which aim to focus more holistically on the impact of any changes (such as proposed improvements, or proposals for diversification) on the holding as a whole, rather than on the part of the holding on which the change is being made.

Use of agricultural land: diversification

Diversification refers to the ability of a tenant to use land for a purpose other than agriculture.

Sections 15 to 19 make changes to the rules around diversification. These provisions are summarised below. A detailed explanation of each provision can be found on pages 32-36 of the Explanatory Notes.

Existing process for diversification

Section 40 of the 2003 Act sets out a process for notifying and objecting to diversification. A tenant must give notice to the landlord at least 70 days in advance, and the notice must contain information prescribed in that section. Among other things, this includes a requirement to specify how the changes are to be financed and managed where the tenant proposes to change the use of the land to a non-agricultural purpose or use the land to further a business.

The landlord may object to a proposed diversification on specified grounds set out in the 2003 Act. To give effect to the objection, the landlord must apply to the Land Court for a determination that their objection is reasonable within 60 days of giving notice of the objection.

The Land Court may decide that the landlord's objection or conditions are unreasonable. In this case, the tenant may go ahead with their proposed diversification, subject to any conditions set by the Court.

Changes to the process for notifying and objecting to diversification

Section 15 of the Bill amends the information that the tenant must specify in the notice to include "any environmental benefit that is intended to be provided" as a result of the proposed diversification, and to specify how that benefit is to be provided.

This section also amends the grounds on which the landlord can object to a proposed diversification in Section 40(9) of the 2003 Act. Table 1 below compares the existing and new wording (added wording emphasised in column 2):

Table 1: Proposed changes to Section 40(9) of the 2003 Act

1: Current wording of Section 40(9)	2: New wording as amended by the Bill
The landlord may object to the notice of diversification if (and only if)—	The landlord may object to the notice of diversification if (and only if)—
(a)the landlord reasonably considers that the intended use of the land for the non-agricultural purpose (including any proposed changes to the land) would—	(a)the landlord reasonably considers that the intended use of the land for the non-agricultural purpose (including any proposed changes to the land) would—
(i)lessen significantly the amenity of the land or the surrounding area;	(i)lessen significantly the amenity of the land or the surrounding area;
(ii)substantially prejudice the use of the land for agricultural purposes in the future;	(ii)substantially prejudice the use of the **whole of the land comprised in the lease for the purpose of sustainable and regenerative agriculture** in the future;
(iii)be detrimental to the sound management of the estate of which the land consists or forms part; or	(iii)be **substantially** detrimental to the sound management of the estate of which the land consists or forms part; or
(iv)cause the landlord to suffer undue hardship;	(iv)cause the landlord to suffer undue hardship;
(b)where the notice specifies an intention to use the land for a non-agricultural or business purpose and sets out how these changes are to be financed and managed, the landlord reasonably considers that it fails to demonstrate that the proposed changes are, or, as the case may be, the business (so far as relating to the land) is, viable; or	(b)where the notice specifies an intention to use the land for a non-agricultural or business purpose and sets out how these changes are to be financed and managed, the landlord reasonably considers that it fails to demonstrate that the proposed changes are, or, as the case may be, the business (so far as relating to the land) is, viable; or
(c)the tenant has failed to provide information reasonably requested by the landlord within the specified timescales.	(c)the tenant has failed to provide information reasonably requested by the landlord within the specified timescales.

If the landlord objects to the notice of diversification or sets conditions for carrying out the diversification (as per Section 40(11) of the 2003 Act), the Bill provides that they must explain why they consider the grounds for objecting or the conditions for carrying out the diversification to be reasonable.

The Bill gives Scottish Ministers a power to add or remove a matter which is to be specified in a notice of diversification, or add or remove a ground for the landlord objecting to a diversification. In exercising this power, the instrument must be laid in draft and approved by a resolution of Parliament.

Section 16 of the Bill gives the tenant the ability to, on one occasion, extend the time period for the landlord to consider the diversification by 30 days. Currently, the landlord must notify the tenant of any objection or conditions within 60 days, and then has 60 days to make an application to the Land Court in the case of an objection. The tenant can do this by giving an "extension notice" to the landlord. This must be done before the landlord makes any application to the Land Court in relation to an objection.

The purpose of this is to allow the tenant to consider if they want to amend their proposal and for the landlord to reconsider their objection as a result, so that parties can try to reach agreement.

Section 17 of the Bill adds matters which the Land Court must consider when deciding if it is reasonable for the landlord to object to a diversification or to impose conditions. In this case, the Land Court is to consider:

- Whether the diversification is likely to have a positive effect in facilitating or enhancing sustainable or regenerative agricultural production on the whole of the land comprised in the lease and on the environment generally, and

- Whether any likely positive effects outweigh any potential negative effects. Potential negative effects include some of the landlord's grounds for objection in Section 40(9)(a) of the 2003 Act, as set out above (for example, that the diversification would lessen significantly the amenity of the land or surrounding area).

Changes to compensation arrangements for diversification

Currently, Section 45A of the 1991 Act sets out arrangements for paying compensation between landlord and tenant at the end of a tenancy where there has been a diversification. This provides both for compensation to the tenant if the diversification increases the value, and compensation to the landlord if the value is reduced.

45A(7)(a), however, provides that no compensation is payable to the tenant if, owing to a diversification, "the land is unsuitable for use for agriculture by an incoming tenant", even if the value of the agricultural holding has been increased by a diversification.

Section 18 of the Bill amends this provision to enable a tenant farmer to claim compensation where the value has increased unless the "use of the whole of the land comprised in the holding for the purposes of sustainable and regenerative agriculture by an incoming tenant has been substantially prejudiced".

This shifts the emphasis from the parcel of land on which the diversification has occurred, to looking more holistically at the impact of the diversification on the use of the whole holding for sustainable and regenerative agriculture.

Changes in relation to the Tenant Farming Commissioner

Section 19 provides that the Tenant Farming Commissioner may produce codes of practice in relation to using land for non-agricultural purposes.

Significance of these changes

As with some of the changes proposed by the Bill in relation to compensation for improvements, the amendments in relation to diversification aim to treat changes intended to increase environmental sustainability more favourably.

The changes encourage tenants to consider and state the intended environmental benefit from any proposed diversification, and requires the Land Court to take the potential for sustainable and regenerative agriculture and environmental benefit into account when weighing in on any objections from landlords in relation to diversification.

The changes also remove the ability of a landlord to object to a diversification if if will "substantially prejudice the use of the land for agricultural purposes in the future". Instead, it is only a ground for objecting if the proposed diversification will "substantially prejudice the use of the whole of the land comprised in the lease for the purpose of sustainable and regenerative agriculture in the future".

This change to the grounds for objecting, as well as the changes to the compensation arrangements in Section 18 also both shift the emphasis from the impact on the parcel of land on which a diversification takes place, to the impact of the diversification on the whole holding. This appears to aim for holdings to be viewed more holistically in relation to their productive capacity and sustainable land management.

Compensation for game damage

Landlords sometimes retain game sporting rights on land that is also under an agricultural tenancy which is either used by the landlord or let to a third party. Where the tenant does not have a right to kill game, they may be entitled to compensation where there has been direct damage to their crops from game.

Section 20 of the Bill broadens the existing rules in relation to game damage. A detailed explanation of this provision can be found on pages 37-39 of the Explanatory Notes.

Currently, compensation for game damage, provided for under Section 52 of the 1991 Act, is limited to damage to crops by the game itself under certain circumstances and if a specific process is followed. It does not provide for indirect damage to crops from game management or damage to any other aspect of the holding.

Section 20 replaces existing Section 52 with a new version of this section. This new section provides that compensation may be payable to a tenant if:

- there is direct or indirect damage by game or game management to
    - Crops grown, or seeds sown, for agricultural, or permitted non-agricultural, purposes,
    - Trees (where they are grown for agricultural, or permitted non-agricultural, purposes),
    - Fixed equipment (e.g. fences),
    - Livestock (e.g. spread of disease or impact on grazing), or
    - Habitats.

"Game" is defined as "deer, pheasants, partridges and grouse"; "game management" is defined as including "the killing and taking of game and any steps taken or not taken by a person in connection with the exercise of a right to kill and take game".

New Section 52 retains many of the same elements of the process which must be followed. The tenant is still required to give notice as soon as reasonably practicable, and within 6 months of the damage occurring. The new section gives a power to Scottish Ministers to prescribe the form and manner of the notice.

The landlord is also still to be given reasonable opportunity to inspect the damage, and the new section provides detail on what this means (e.g. that there must be an opportunity to inspect the damage before trees are cropped or cut, or before damage to fixed equipment is carried out, unless delay is likely to cause further damage or injury).

However, the section makes consequential arrangements which take into account the need to act quickly where there is spread of disease or suffering of animals. In this case, the tenant does not need to give the landlord opportunity to inspect the livestock before action is taken.

The section also amends the definition of "game" to exclude "black game" from the definition, and removes the minimum damage claim of 12 pence per hectare. "Black game" refers to black grouse, which is removed due to their declining population.

Standard procedure for claiming compensation

Sections 21 and 22 establish a 'standard claims procedure' to be followed at the end of a tenancy. A detailed explanation of these provisions can be found on pages 39-42 of the Explanatory Notes.

The Policy Memorandum explains that:

> " Waygo is the term for the process that a tenant farmer and landlord go through at the end of tenancy, and includes determining and paying any compensation that is due by one party to the other. There are many different types of claim, all with a different process. It can be difficult for a tenant to progress in farming or to fully retire until a claim is settled. In some cases claims can take months or even years to be agreed, or paid when agreed. The aim is to ensure that waygo claims are settled in good time, and in a manner that is fair to both the tenant and the landlord."

Section 21 inserts a new schedule (Schedule 3) into the 2003 Act setting out the standard claims procedure. The new procedure sets out a process for:

- Giving notice of a claim,
- Appointing a valuer, and requirements to be appointed valuer,
- Objecting to a nominated valuer, the appointment of a valuer by the Tenant Farming Commissioner on request, and objecting to a valuer appointed by the Commissioner,
- Payment of the valuer's expenses,
- Assessing and reporting on the value of claims,
- Powers of the valuer (e.g. making reasonable requests or entering onto holdings with reasonable notice),
- A standard timescale for payments to be made once they have been determined,
- Rights of appeal to the Lands Tribunal[xiii] against the valuer's assessment, and
- The ability for the Lands Tribunal to refer certain matters to the Land Court.

These provisions include set timescales at most stages of the process.

Section 20 also inserts a new section (59B) into the 2003 Act introducing new Schedule 3, and giving Scottish Ministers the power to make regulations (under the affirmative procedure) to apply the procedure in the schedule to any relevant type of compensation claim. Scottish Ministers may also modify the procedure when it is applied to a particular type of claim.

Relevant compensation claims are those which entitle tenants and landlords of agricultural leases to compensation under the 1991 Act, 2003 Act, and "any other enactment which confers a right to compensation under a 1991 Act tenancy, a short limited duration tenancy, a limited duration tenancy, modern limited duration tenancy or a repairing

xiii The Lands Tribunal and the Land Court are two judicial bodies with slightly different jurisdictions to rule on different, but related, things. However, a 2020 consultation asked for views on merging the two bodies, with the result that the Scottish Government committed in September 2021 to a merger to form an expanded Scottish Land Court. To date, this merger has not occurred, and the Bill confers functions on the Land Court and Lands Tribunal separately.

tenancy".

Scottish Ministers may also modify the standard claim procedure in new Schedule 3 by regulations under the affirmative procedure.

Section 22 provides that interest is to be payable on overdue compensation claims, at 1.5% above the Bank of England Base Rate.

Rent review

The Land Reform (Scotland) Act 2016 made certain changes which aimed to modernise rent review procedures. However, the key reforms were never brought into force because they were subsequently deemed to be difficult to implement in practice (for more information on this see the previous section on what was in the consultation and the Bill compares).

Sections 23 to 25 of the Bill make new provisions on rent reviews regarding the basis for determining the rent. A detailed explanation of these provisions can be found on pages 42-48 of the Explanatory Notes.

Section 23 amends Schedule 1A of the 1991 Act (as inserted by the Land Reform (Scotland) Act 2016) to amend the provisions for rent reviews in relation to 1991 Act tenancies.

The amendments substitute the existing matters to be taken into account by the Land Court when determining rent, with a new list of matters. The old and new provisions compare as follows:

Table 2: Old and new provisions on rent reviews

Existing provisions under paragraph 7(4) of Schedule 1A of the 1991 Act	New Paragraph 7(4) inserted by Section 23(2) of the Bill
(4) In determining the fair rent for the holding, the Land Court must have regard, in particular, to—	(4) In determining the fair rent for the holding, the Land Court must have regard to—
(a)the productive capacity of the holding,	(a) the productive capacity of the holding,
(b)the open market rent of any surplus residential accommodation on the holding provided by the landlord, and	(b) the open market rent of any fixed equipment provided by the landlord for a purpose that is not an agricultural purpose,
(c)the open market rent of—	(c) the open market rent of any land forming part of the holding that is used for a purpose that is not an agricultural purpose,
(i)any fixed equipment on the holding provided by the landlord, or	(d) the rent payable on similar holdings,
(ii)any land forming part of the holding,	(e) the prevailing economic conditions in the sectors of agriculture relevant to the holding.
used for a purpose that is not an agricultural purpose.	

Paragraphs 250 to 257 of the Explanatory Notes to the Bill provides more information on what is meant by each of the new factors which the Land Court must have regard to.

This section also adds two new subparagraphs, (5) and (6), to paragraph 7 of Schedule 1A.

Subparagraph (5) defines "open market rent" as "the rent at which any fixed equipment or

land used for a purpose that is not an agricultural purpose might reasonably be expected to be let on the open market by a willing landlord to a willing tenant."

Subparagraph (6) sets out that the Land Court is to have regard to rent previously offered, agreed, or fixed by the Land Court in relation to that holding or another holding. The Land Court is also:

> " (b) to take account of a distortion in the market caused by the lack of available lets only for the purposes of— (i) identifying if the amount of rent offered or agreed for a holding is in excess of what might otherwise be considered the fair rent for the holding, and (ii) discounting the amount paid that is in excess of what might otherwise be considered fair."."

This section also gives the Scottish Ministers a power to (by regulations, under the affirmative procedure) make further provisions about the matters that the Land Court must have regard to in paragraph 7(4).

As a consequence of amending the basis for determining the rent, the Bill also repeals certain clarifying provisions on open market rent, and surplus residential accommodation (currently in paragraphs 10 and 11 of Schedule 1A) which relate to the existing matters which the Land Court must have regard to when determining the rent. The Bill also removes a power for the Land Court to phase in a new rent if the new rent is 30% higher or lower than the current rent on application of the tenant or landlord (currently paragraph 12 of Schedule 1A).

Section 24 makes similar changes to the 2003 Act applying to the limited duration tenancy types and repairing tenancies, with the same effect. **Section 25** makes provision for the rent review provisions not to apply to repairing tenancies during the repairing period. During the repairing period the holding may not have a productive capacity as the tenant will be in the process of improving the land, with the aim of it being farmed in accordance with the rules of good husbandry after this period.

The Policy Memorandum states that the aim of these changes is to create a more "flexible and proportionate system...which will enable the parties to provide evidence from a number of different sources, and places an increased emphasis on negotiation". It goes on to note that:

> " Where parties are unable to reach agreement on the rent payable, they will be able to access TFC [Tenant Farming Commissioner] mediation which will be supported by TFC guidance. Failure to agree rent will result in either party being able to apply to the Land Court to have the rent fixed using the revised method."

Rules of good husbandry and estate management

The Agriculture (Scotland) Act 1948 ('the 1948 Act') sets out 'rules of good husbandry' which are standards that apply to tenants, and 'rules of good estate management', which are standards that apply to landlords.

The rules have not been amended since 1948. They remain relevant for determining whether the owner and tenant of agricultural land are fulfilling their respective obligations.

The Policy Memorandum states that the aim of the changes is to "place a greater

emphasis on sustainable and regenerative production" and "modernise the statutory language to ensure that practices are reflective of modern standards and expectations".

Issues with the current rules were raised by the Scottish Tenant Farmer's Association during its Stage 1 evidence to the Rural Affairs and Islands Committee on the Agriculture and Rural Communities (Scotland) Bill. The organisation made reference to the rules of good husbandry and estate management in relation to the proposed new four-tier system of agricultural support. 'Tier 2' of the new agricultural support framework is expected to be an "'Enhanced Level Direct Payment' - a universally accessible payment...for applicants delivering Base requirements and undertaking further activity that delivers outcomes for nature and climate improvement, including recognition of wider land management." [20] . The organisation told the Committee:

> " Take, for example, the rules of good husbandry and good estate management. If you delve into those, you will find that an agricultural lease tells a tenant that they must adhere to the rules of good husbandry, which fly in the face of much of what will come under Tier 2 and environmental management. Therefore, there is, in theory, a potential risk of a tenant being in breach of their lease just by carrying out some environmental improvements. We need to sort that out."

For more information on the reform of agricultural support, see the previous section on 'Proposals for further reform' of agricultural holdings legislation.

Sections 26 and 27 of the Bill aim to amend the rules to reflect a more modern understanding of how good husbandry and estate management are understood, particularly in relation to sustainable and regenerative agriculture. A detailed explanation of these provisions can be found on pages 48-49 of the Explanatory Notes.

The following tables compare the existing wording of the rules, and the wording as amended by the Bill.

Table 3: Changes to the 'Rules of Good Estate Management' by Section 26

Existing rules in Schedule 5 of the 1948 Act	New rules as amended by the Bill
1. For the purposes of this Act, the owner of agricultural land shall be deemed to fulfil his responsibilities to manage it in accordance with the rules of good estate management in so far as his management of the land and (so far as it affects the management of that land) of other land managed by him is such as to be reasonably adequate, having regard to the character and situation of the land and other relevant circumstances, to enable an occupier of the land reasonably skilled in husbandry to maintain efficient production as respects both the kind of produce and the quality and quantity thereof.	1. For the purposes of this Act, the owner of agricultural land shall be deemed to fulfil his responsibilities to manage it in accordance with the rules of good estate management in so far as his management of the land and (so far as it affects the management of that land) of other land managed by him is such as to be reasonably adequate, having regard to the character and situation of the land and other relevant circumstances, to enable an occupier of the land reasonably skilled in husbandry to maintain efficient **, sustainable and regenerative** production as respects both the kind of produce and the quality and quantity thereof.
2. In determining whether the management of land is such as aforesaid regard shall be had, but without prejudice to the generality of the provisions of the last foregoing paragraph, to the extent to which the owner is making regular muirburn in the interests of sheep stock, exercising systematic control of vermin on land not in the control of a tenant, and undertaking the eradication of bracken, whins and broom so far as is reasonably practicable, and to the extent to which the owner is fulfilling his responsibilities in relation to the provision, improvement, replacement and renewal of the fixed equipment on the land in so far as is necessary to enable an occupier reasonably skilled in husbandry to maintain efficient production as aforesaid.	2. In determining whether the management of land is such as aforesaid regard shall be had, but without prejudice to the generality of the provisions of the last foregoing paragraph, to the extent to which the owner is making **~~regular~~** muirburn in the interests of sheep stock, exercising systematic control of vermin on land not in the control of a tenant, and undertaking the **~~eradication~~** **control** of bracken, whins and broom **~~so far as is reasonably practicable~~** , and to the extent to which the owner is fulfilling his responsibilities in relation to the provision, improvement, replacement and renewal of the fixed equipment on the land in so far as is necessary to enable an occupier reasonably skilled in husbandry to maintain efficient **, sustainable and regenerative** production as aforesaid.

Table 4: Changes to the 'Rules of Good Husbandry' by Section 26

Existing rules in Schedule 6 of the 1948 Act	New rules as amended by the Bill
1. For the purposes of this Act, the occupier of an agricultural unit shall be deemed to fulfil his responsibilities to farm it in accordance with the rules of good husbandry in so far as the extent to which and the manner in which the unit is being farmed (as respects both the kind of operations carried out and the way in which they are carried out) are such that, having regard to the character and situation of the unit, the standard of management thereof by the owner and other relevant circumstances, the occupier is maintaining a reasonable standard of efficient production, as respects both the kind of produce and the quality and quantity thereof, while keeping the unit in a condition to enable such a standard to be maintained in the future.	1. For the purposes of this Act, the occupier of an agricultural unit shall be deemed to fulfil his responsibilities to farm it in accordance with the rules of good husbandry in so far as the extent to which and the manner in which the unit is being farmed (as respects both the kind of operations carried out and the way in which they are carried out) are such that, having regard to the character and situation of the unit, the standard of management thereof by the owner and other relevant circumstances, the occupier is maintaining a reasonable standard of efficient , **sustainable and regenerative** production, as respects both the kind of produce and the quality and quantity thereof, while keeping the unit in a condition to enable such a standard to be maintained in the future.
2. In determining whether the manner in which a unit is being farmed is such as aforesaid regard shall be had, but without prejudice to the generality of the provisions of the last foregoing paragraph, to the following:— a. (a) the maintenance of permanent grassland (whether meadow or pasture) properly mown or grazed and in a good state of cultivation and fertility; b. (b) the handling or cropping of the arable land, including the treatment of temporary grass, so as to maintain it clean and in a good state of cultivation and fertility; c. (c) where the system of farming practised requires the keeping of livestock, the proper stocking of the holding; d. (d) the maintenance of an efficient standard of management of livestock; e. (e) as regards hill sheep farming in particular: i. (i) the maintenance of a sheep stock of a suitable breed and type in regular ages (so far as is reasonably possible) and the keeping and management thereof in accordance with the recognised practices of hill sheep farming; ii. (ii) the use of lug, horn or other stock marks for the purpose of determining ownership of stock sheep; iii. (iii) the regular selection and retention of the best female stock for breeding; iv. (iv) the regular selection and use of tups possessing the qualities most suitable and desirable for the flock; v. (v) the extent to which regular muirburn is made; f. (f) the extent to which the necessary steps are being taken— i. (i) to secure and maintain the freedom of crops and livestock from disease and from	2. In determining whether the manner in which a unit is being farmed is such as aforesaid regard shall be had, but without prejudice to the generality of the provisions of the last foregoing paragraph, to the following:— a. (a) the maintenance of permanent grassland (whether meadow or pasture) properly mown or grazed and in a good state of cultivation and fertility; b. (b) the handling or cropping of the arable land, including the treatment of temporary grass, so as to maintain it clean and in a good state of cultivation and fertility; c. (c) where the system of farming practised requires the keeping of livestock, the proper stocking of the holding; d. (d) the maintenance of an efficient standard of management of livestock; e. **(da) the health and welfare of livestock,** f. (e) as regards hill sheep farming in particular: i. (i) the maintenance of a sheep stock of a suitable breed and type in regular ages (so far as is reasonably possible) and the keeping and management thereof in accordance with the recognised practices of hill sheep farming; ii. (ii) the ~~**use of lug, horn or other stock marks**~~ **means of identifying animals** for the purpose of determining ownership of stock sheep; iii. (iii) the regular selection and retention of the best female stock for breeding; iv. (iv) the regular selection and use of tups possessing the qualities most suitable and desirable for the flock; v. (v) the extent to which ~~**regular**~~ muirburn is made; g. (f) the extent to which the necessary steps are being taken—

Existing rules in Schedule 6 of the 1948 Act	New rules as amended by the Bill
infestation by insects and other pests; ii. (ii) to exercise systematic control of vermin and of bracken, whins, broom and injurious weeds; iii. (iii) to protect and preserve crops harvested or in course of being harvested; iv. (iv) to carry out necessary work of maintenance and repaid of the fixed and other equipment.	i. (i) to secure and maintain the freedom of crops and livestock from disease and from infestation by insects and other pests; ii. (ii) to exercise systematic control of vermin and of bracken, whins, broom and injurious weeds; iii. (iii) to protect and preserve crops harvested or in course of being harvested; iv. (iv) to carry out necessary work of maintenance and repaid of the fixed and other equipment.

Section 27 also amends Section 85(2A) of the 1991 Act.

Section 85 of the 1991 Act currently states:

> " (2A) For the purposes of this Act, conservation activities are to be treated as being in accordance with the rules of good husbandry if they are carried out in accordance with— (a)an agreement entered into under any enactment by the tenant; or (b)the conditions of— (i)any grant for the purpose of such activities paid out of the Scottish Consolidated Fund; or (ii)such other grant of a public nature as may be prescribed."

The Bill gives Scottish Ministers the power to prescribe activities, by regulations, which are to be treated as "conservation activities" for the purpose of the above section.

Part 3: Final provisions

Part 3 makes final provisions, including specifying the procedures that regulation-making powers are subject to, and commencement dates. Section 7 (on the duty to publish a model lease for environmental purposes within two years) comes into force on the day after Royal Assent. All other provisions come into force on a day appointed by Scottish Ministers by regulations.

Annex A: Hypothetical case study showing how the pre-notification proposals are expected to work in practice

Scenario

Landowner A wishes to sell a mixed use estate of 1500 hectares and this will be the first time the land has been available for purchase in 150 years. It makes up the majority of land on a peninsula and includes a dozen cottages on the outskirts of Village B, ten of which are currently used as holiday lets and two which require refurbishment. Village B has seen a demand for additional housing. Community body C 'Village B Community Association' has been working with its local authority and development trust in recent years to develop a plan for delivering more affordable homes in the area.

Community body C had considered registering an interest under the community right to buy (in Part 2 of the Land Reform (Scotland) Act 2003 as a potential route to purchasing the land should it become available for purchase. As part of this, potential land, including some or all of the cottages on the estate, has been identified as being capable of being developed into additional housing, and Community body C has set themselves up as an eligible body able to access community right to buy. However, a completed application had not yet been made, as Community body C didn't expect the land to come onto the market, given that it had been in the same ownership for such a long duration.

Current position

The estate is sold without being publicly marketed (an 'off market sale'). Missives are completed before Community Body C is able to negotiate to purchase the land or register a community right to buy interest.

With 'pre-notification' requirement in Section 2 and 3 of the Bill

Community Body C registers to be informed of potential sales in the area as part of their planning for affordable housing (new section 46A).

Landowner A is prohibited from transferring the estate, with some exceptions, until Ministers lift this prohibition (new section 46B). To get the prohibition lifted then Landowner A must start by notifying Scottish Ministers that they wish to transfer the estate.

Scottish Ministers are required to publish information about Landowner A wanting to transfer the estate and this includes informing people who have registered to be informed about such sales (new section 46D) – this would include Community Body C.

Community Body C has 30 days from publication of information by Scottish Ministers to inform Scottish Ministers that they are interested in making a community right to buy application (new section 46E). They inform Scottish Ministers during this period that they are interested in making an application for 1 hectare of land on the estate, which includes the sites of the two cottages requiring refurbishment and surrounding land which they plan to develop into community space/garden.

Scottish Ministers consider if Community Body C would be likely to submit an application to register a community interest within the timescales that apply and if they did whether there is a reasonable prospect that such an application would result in a community interest being registered (new section 46F(3)).

In this case, as Community Body C is already set up as an eligible body for community right to buy and has begun planning for use of a site and funding avenues, Scottish Ministers are sufficiently confident that they will submit an application that has a reasonable prospect of leading to a successful registration of community interest. As a result, the Scottish Ministers invite Community Body C to make an application to register a community interest (new section 46G). In this situation the prohibition on Landowner A transferring the part of the estate that the Community Body C has noted an interest in buying continues for a further period of 40 days (new section 46F).

Once Community Body C submits an application to register an interest then a further prohibition on transfer of the part of the estate that Community Body C are seeking to buy applies until the application is rejected or if approved until the process has finished (existing section 37(5) of the Land Reform (Scotland) Act 2003). So if the Community Body C submits their application within the 40 day period then there will be no opportunity for

Landowner A to transfer the land before the further prohibition applies.

Community Body C submits an application which is approved by Ministers. This approval activates the right to buy the right and so Community Body C can seek to purchase the land in accordance with the procedure laid down in Part 2 of the Land Reform (Scotland) Act 2003. For further information on the existing community right to buy process and stages see Community right to buy (Part 2) - Land reform.

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