AGRICULTURAL HOLDINGS (AMENDMENT) (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Agricultural Holdings (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 31 October 2011:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 3–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The policy objective of this Bill is to amend legislative provisions relating to succession and rent review in order to create a better environment for the letting of farmland to the tenant farming sector of the agricultural industry and to encourage new entrants into tenant farming. This Bill contains three main provisions:

- to extend the definition of “near relative” (being the class of successors who are entitled to serve counter notice to a notice to quit) to include a grandchild of a deceased tenant farmer;
- to prohibit lease terms which provide for upward only or landlord only initiated rent reviews in Limited Duration Tenancies; and
- to provide that changes in rent resulting from the exercise or revocation of the option to tax by a landlord, or a change in the rate of VAT where such an option has effect, do not qualify as a “variation of rent” such as would prevent parties from seeking a determination from the Land Court on the rent for a period of three years.

Succession

Section 1: Succession by near relatives

5. Section 1 replaces the current definition of “near relative” in paragraph 1 of Part III of Schedule 2 to the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”) with an extended definition. The definition has been extended to include a grandchild of a deceased tenant.

6. The definition was previously extended to include a surviving civil partner of a deceased tenant by article 2 of the Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2006 (SSI 2006/379).

7. The reference to an adopted child has been deleted. Section 40(1) of the Adoption and Children (Scotland) Act 2007 (status conferred by adoption) provides that “an adopted person is to be treated in law as if born as the child of the adopters or adopter.” As “child” automatically includes “adopted child” the reference to “adopted child” is unnecessary.
8. The definition operates within the context of Section 25 of the 1991 Act which is the operative provision. Section 25 applies where notice to quit is given to the tenant of an agricultural holding who acquired right to the lease of the holding by succession.

9. Where notice to quit is given to a successor tenant who is a “near relative” of the deceased tenant, that person is entitled to give the landlord a counter notice requiring that the Scottish Land Court consents to operation of the notice to quit.

10. A landlord can serve an incontestable notice to quit on any successor as tenant if they are not a near relative of the deceased tenant.

11. The addition of “grandchild” to the class of “near relatives” will afford a grandchild who succeeds a statutory protection, as it will confer upon him or her the right to serve a counter notice to a notice to quit.

**Review of rent etc.**

*Section 2: Prohibition of upward only rent reviews etc.*

12. Section 2 amends section 9 of the Agricultural Holdings (Scotland) Act 2003 through the insertion of a new subsection to provide that rent review provisions which provide for the upward only review of rent or for reviews which can be initiated only by the landlord in a limited duration tenancy, are void. Where such provisions appear, the rent shall instead be determined in accordance with the statutory formula set down in the remainder of section 9.

*Section 3: Effect of VAT changes on determination of rent*

13. Section 13 of the 1991 Act sets out circumstances under which the landlord or tenant farmer of an agricultural holding may seek to have the rent payable in respect of the holding determined by the Scottish Land Court. Subsection (8) states that a reference to the Scottish Land Court may not be made within 3 years of the commencement of the tenancy, the last variation of the rent or the last time a previous direction was given that the rent should remain unchanged. Subsection (9) sets out certain circumstances where subsection (8) may be disregarded.

14. Section 3 amends section 13 of the 1991 Act to the effect that the exercise or revocation of the option to tax, or a change in the rate of VAT where such an option has effect, does not qualify as a variation of rent for the purposes of the Section 13(8)(b) of the 1991 Act.

**General**

*Section 4: Transitional provisions*

15. Subsection (1) provides that the change in the definition of “near relative” has effect in respect of a notice to quit given by a landlord to a tenant who has acquired interest in the tenancy on succession only if the deceased tenant farmer to whom the notice relates died on or after the date on which section 1 comes into force.
16. Subsection (2) clarifies that the prohibition on upward only and landlord only initiated rent review clauses giving rise to annulment, has effect only in relation to such clauses where they are made after section 2 comes into force.

17. Subsection (3) provides that the changes made by section 3 of the Bill will apply to options, revocations or VAT rate changes that have effect before the date of Royal Assent. This means that in cases where an option to tax had effect, the changes in the rate of VAT which occurred in January 2010 and January 2011 will not prevent parties seeking a reference to the Scottish Land Court to determine the rent for a period of 3 years from the rate change.

FINANCIAL MEMORANDUM

INTRODUCTION

18. This document relates to the Agricultural Holdings (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 31 October 2011. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

19. This document sets out the financial implications of the Agricultural Holdings (Amendment) (Scotland) Bill. It should be read in conjunction with the Policy Memorandum and the Bill itself.

COSTS ON THE SCOTTISH ADMINISTRATION

20. The Bill concerns commercial lease arrangements between landlords and tenant farmers and as such there are no costs on the Scottish Administration arising out of this Bill. The Scottish Land Court is funded through the Scottish Consolidation Fund and its budget for 2011-12 is £410,682. This does not include judicial salaries. It is not expected any additional casework will arise as a consequence of the Bill. It is possible that someone could challenge the inclusion of an upward only or landlord only initiated rent review provision in a lease, however, this is considered to be unlikely given the clarification this Bill would provide. There is also the potential for rent review disputes to be brought forward as a consequence of the clarification of the definition of rent with respect to changes in VAT. However, this simply affects the timetable of any potential dispute. Consequently it is not considered that there will be any impact on legal aid.

COSTS ON LOCAL AUTHORITIES

21. A response to the consultation from Falkirk Council indicates that they, and possibly some other local authorities, are landlords of agricultural holdings. Where local authorities are landlords of agricultural holdings they will be affected by the proposed changes to the legislation prohibiting upward only or landlord only initiated rent reviews, in the same way that any other landlord will be affected. The legislative change will restrict the ability of landlords to include
upward only or landlord only rent review clauses within future leases. This will prevent local authorities from either insisting on increased rents or stopping tenants from requesting a rent review. Although this may prevent local authorities from generating additional income, it is unlikely that local authority leases would contain such provisions as they are deemed to be unfair insofar as they do not allow for adjustments to take account of market conditions.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Landlords and tenants

22. Paragraph 21 applies equally to private landlords as it does to local authorities and any other public bodies who are landlords of agricultural holdings.

23. It is possible, although extremely unlikely, that landlords will continue to include upward only or landlord only initiated provisions in leases following any enactment of this Bill. In such cases, it may be necessary for the tenant to challenge the legality of such a provision in the Scottish Land Court. Also, the effect of the VAT provision relating to rent reviews may result in reviews being brought forward, where it was previously thought that it was not possible for a review to be referred to the Scottish Land Court for 3 years. However, once again, this is extremely unlikely.

24. The costs of cases that come before the Scottish Land Court vary depending on the circumstances of each case. Cases can vary significantly in terms of complexity and length. The court currently charges a fee of £120 per day for a hearing in an agricultural holdings case, but by far the greatest element of the cost of a case will be the fees charged by the parties’ legal advisers. These can be in the region of £200 to £250 per hour for a solicitor with specialist knowledge of agricultural law, while counsel’s fees for appearing in court can be in the range of £1,500 to £3,500 per day depending on the experience and seniority of the advocate involved.

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

25. On 31 October 2011, the Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead MSP) made the following statement:

“In my view, the provisions of the Agricultural Holdings (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

26. On 26 October 2011, the Presiding Officer (Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Agricultural Holdings (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
These documents relate to the Agricultural Holdings (Amendment) (Scotland) Bill (SP Bill 3) as introduced in the Scottish Parliament on 31 October 2011

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EXPLANATORY NOTES

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