Supplementary written submission from Scottish Land and Estates

Dear Convener,

**Land Reform (Scotland) Bill: Succession and Assignation Provisions**

During the Rural Affairs, Climate Change and Environment Committee’s session on the 16th September the panel members were asked if they had any concerns about the provisions in the Bill with regard to their ECHR compatibility. I sought to raise our concerns about the succession and assignation provisions in particular and I thought that it would be useful to the Committee if I followed up my comments with a more detailed explanation of our thinking.

Scottish Land & Estates is concerned that the succession and assignation provisions (which extend the class of people that could succeed to an agricultural tenancy or have that tenancy assigned to them, as well as extending the class of near relative and restricting the grounds for landlord objection) are likely to have a detrimental impact on achieving our aim of a vibrant tenanted sector. We believe that the provisions as drafted are unbalanced and that they will, if passed, breach landlord property rights and therefore potentially be open to challenge.

Scottish Land & Estates wants to avoid this from happening because the last thing the sector needs once the current Bill is passed is lengthy litigation as someone seeks to challenge its legality. What the sector needs is stability and a period of calm but if the legislation includes provisions that breach landlord property rights the let sector would be subject to ongoing uncertainty, increasing rather than solving the problems in the sector.

In what follows we seek to set out our thinking on the current provisions and what could be done to make them less likely to be challenged thus providing the sector with the stability it needs. Our position has been informed by legal advice that we have sought on the provisions, which is attached for your information.

We are all too aware that providing this Advice to the Committee could be interpreted negatively, so before moving on to explain our thinking I want to stress that we are taking this step in a genuine attempt to inform the parliamentary process and ensure that the legislation that is eventually passed serves the tenanted sector well. Scottish Land & Estates genuinely wants to see a vibrant tenanted sector in Scottish agriculture. The let sector is vitally important to farming because of the valuable flexibility it provides and so it is important that legislation enhances rather than undermines it. Unfortunately, we have genuinely held concerns that what is proposed could indeed damage the sector and so we feel we must do all we can to draw these to the attention of the Committee.

We had hoped that the Scottish Government would have clarified why it believes that the succession and assignation provisions are ECHR compliant in evidence to the Committee, but unfortunately neither the answers provided by the Bill Team on 2nd September 2015 nor the written commentary on ECHR issues provided in writing to the Committee (RACCE/S4/15/27/A) have clarified the situation. It is because of this ongoing lack of clarity that we felt it was important to put our view to the Committee as part of this process, if only to inform robust scrutiny of the Bill provisions. We
sincerely hope that this contribution to your deliberations is taken in the constructive way it is intended.

I would wish to make it clear at the outset that Scottish Land & Estates’ position is that we will seek to find a solution where there are identified and specific problems which most parties feel warrant a remedy. We are therefore not absolutely opposed to any changes in succession and assignation provisions; we simply think that these particular provisions in the Bill as introduced are highly problematic. There are situations in the let sector where the current succession provisions in particular have resulted in hardship and difficulty for tenants and Scottish Land & Estates supports the exploration of changes that are focused on dealing with these issues.

To be clear, we acknowledge that ECHR does not offer an absolute protection of property rights; there can be instances where public interests take precedence over private interests. It is just that when this is the case it is important that there is a robust rationale, that the measures to deliver the public interest are proportionate to the policy problem, that the least obstructive measure is utilised and that a fair balance is achieved. As far as we can see, the current provisions do not meet these requirements. However that is not to say that other options would not.

**What are the problems with the Bill provisions from our perspective?**

As we understand it, for the succession and assignation provisions to be compliant with the European Convention on Human Rights, the Scottish Government has to demonstrate that there is a legitimate aim which could justify a restriction of the relevant protected right; that the measure proposed is rationally connected to that aim; that the aim could not have been achieved by a less intrusive measure; and that a fair balance has been achieved. Unfortunately, as far as we can see, the Scottish Government has not met these requirements in several respects.

Firstly, the aims appear confused. For example, the Policy Memorandum states that “the overall aim behind the AHLRG’s recommendations on changes to the assignation of and succession to tenancies is to encourage tenants to retire or move on from tenancies with dignity and confidence in order to release land to younger tenants and ensure land continues in productive agricultural use.” However, framing succession as helping tenants to retire does not seem to make sense as these provisions apply on the tenant’s death. Indeed, we believe that when these provisions are combined with the removal of the viable unit test, they also fail to meet the desired objective of facilitating productive agriculture.

Secondly, if the policy intention is to encourage tenants to retire or move on from tenancies with dignity and confidence there are alternative measures that achieve the aim in a more proportionate way. For example, conversion of the tenancy from a secure tenancy to a limited term tenancy that can then be assigned for value could be seen as being a much more focused mechanism to achieve the desired objective (provided that it is done in a way that safeguards the landlord’s legitimate interest).

Thirdly, there is no recognition of the negative impact on landlords and no attempt at achieving a fair balance. As we understand it, assuming that the government has met the need to provide a legitimate aim, a rational connection with the aim and adopted the least intrusive measure, the government could still proceed with
measures that contravened property rights provided they were in the public interest and provided that a fair balance is achieved. In most instances we understand that a fair balance is achieved through the provision of compensation, yet there is no provision for compensation in the Bill.

Consequently, Scottish Land & Estates believes that the provisions as drafted are at significant risk of being challenged under ECHR.

**Is there a solution?**

Scottish Land & Estates believes that the Bill and future Act would be much more likely to be ECHR compliant, and therefore much less prone to future challenge, if the changes to succession and assignation were much more focused on a clear policy problem and tightly defined so as to deal with that problem and if the Scottish Government provided a mechanism to compensate negatively affected landlords.

Importantly, we believe that for clarity of thinking and analysis succession and assignation should be dealt with separately in terms of defining the legitimate aims of these changes. Referring to them together with a single objective has created ambiguity.

With regard to succession, there appears to be a wide acknowledgement that there is an issue in cases where an individual is named as tenant on the lease and a wider family member is an active participant in a farming business but is prevented from succeeding to a tenancy because he/she is not a near relative. This situation can cause hardship to that individual because they may lose their business and potentially their home if the tenant dies. Dealing specifically with these cases of hardship would be one sort of change to succession that would appear to be focused on a policy problem and potentially sufficiently circumscribed as to limit the impact on landlords generally.

With regard to assignation, if the policy intention is to facilitate timely retirement of tenant farmers, we struggle to see why such an extensive widening of assignation rights is justified. The less intrusive measure (to landlord property rights), which is actually also more likely to achieve the policy objective because of the ability of the tenant to realise value in order to retire with dignity, is likely to be conversion.

In closing, I would like to stress that Scottish Land & Estates has tried to and will continue to engage in the debate about the let sector as constructively as possible. Scottish Land & Estates acknowledges that there are important areas that need to be addressed, which I hope was evident in the latest evidence session. Scottish Land & Estates does not want to simply defend the status quo, it wants to see positive change so that the let sector works for both tenants and landlords. If we are highlighting concerns with proposed changes it is not because we want everything to remain the same, it is simply that we want to make sure legislation is enacted that provides sound foundations for moving forward.
SCOTTISH LAND & ESTATES LIMITED

RE: THE LAND REFORM (SCOTLAND) BILL 2015 AND THE FUNDAMENTAL RIGHTS OF LANDOWNERS IN SCOTLAND

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ADVICE
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September 2015

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1. INTRODUCTION

1.1 I refer to the E-mails between my instructing solicitor and my Edinburgh practice team dated 26 August and 14 September 2015.

1.2 I am asked to advise on whether the provisions contained in Part 10, Chapter 5 of The Land Reform (Scotland) Bill 2015 (which has been introduced and is currently being promoted before the Scottish Parliament by the Scottish Government) proposing to reform the current law on the assignation of, and succession to, agricultural tenancies are properly within the legislative competence of the Scottish Parliament.

2. PART 10—AGRICULTURAL HOLDINGS CHAPTER 5—ASSIGNATION OF AND SUCCESSION TO AGRICULTURAL TENANCIES

2.1 Sections 84 to 89 of the 2015 Land Reform Bill seek to amend the law to allow secure tenancies under Agricultural Holdings (Scotland) Act 1991 and limited duration tenancies under the Agricultural Holdings (Scotland) Act 2003 (“LDTs”) to be more readily assigned by the tenant farmer in his or her lifetime or bequeathed where this is permitted in the lease and transferred by a tenant’s executors on death.

2.2 The Scottish Government’s Policy Memorandum states (at paras 368-9) that the overall aim of these proposed changes to the assignation of and succession to agricultural
tenancies is “to encourage tenants to retire or move on from tenancies with dignity and confidence in order to release land to younger tenants and ensure land continues in productive agricultural use” and to “encourage and facilitate within-lifetime planning for succession of family farming businesses” on the basis that “the lack of an eligible successor” is identified as “one of the key factors that inhibit retirement amongst tenant farmers”. At paragraph 373 the Scottish Ministers claim that

“in circumstances of significant under supply of tenanted land, it is in the public interest as well as that of older tenants, that they should be encouraged to retire with dignity and confidence so as to release land to younger tenant farmers”.

Extension of the class of possible successors to a 1991 Act tenancy

2.3 The law concerning the class of persons to whom a 1991 Act tenancy may be bequeathed by the existing tenant on his or her death is currently set out in Section 11 of Agricultural Holdings (Scotland) Act 1991 as follows:

“11.— Bequest of lease.
(1) Subject to subsections (2) to (8) below, the tenant of an agricultural holding may, by will or other testamentary writing, bequeath his lease of the holding to his son-in-law or daughter-in-law or to any one of the persons who would be, or would in any circumstances have been, entitled to succeed to the estate on intestacy by virtue of the Succession (Scotland) Act 1964.”

(2) A person to whom the lease of a holding is so bequeathed (in this section referred to as “the legatee”) shall, if he accepts the bequest, give notice of the bequest to the landlord of the holding within 21 days after the death of the tenant, or, if he is prevented by some unavoidable cause from giving such notice within that period, as soon as practicable thereafter.

(3) The giving of a notice under subsection (2) above shall import acceptance of the lease and, unless the landlord gives a counter-notice under subsection (4) below, the lease shall be binding on the landlord and on the legatee, as landlord and tenant respectively, as from the date of the death of the deceased tenant.

(4) Where notice has been given under subsection (2) above, the landlord may within one month thereafter give to the legatee a counter-notice intimating that he objects to receiving him as tenant under the lease.

(5) If the landlord gives a counter-notice under subsection (4) above, the legatee may make application to the Land Court for an order declaring him to be tenant under the lease as from the date of the death of the deceased tenant.

(6) If, on the hearing of such an application, any reasonable ground of objection stated by the landlord is established to the satisfaction of the Land Court, they shall declare the bequest to be null and void, but in any other case they shall make an order in terms of the application.
Pending any proceedings under this section, the legatee, with the consent of the executor in whom the lease is vested under section 14 of the Succession (Scotland) Act 1964, shall, unless the Land Court on cause shown otherwise direct, have possession of the holding.

If the legatee does not accept the bequest, or if the bequest is declared null and void under subsection (6) above, the right to the lease shall be treated as intestate estate of the deceased tenant in accordance with Part I of the Succession (Scotland) Act 1964.

2.4 The class of persons to whom a 1991 Act tenancy may be bequeathed by the existing agricultural tenant is proposed to be extended under the 2015 Bill to include (the issue of) a host of collateral and descendant in-laws, step-siblings and step-children, specified thus:

(a) a spouse or civil partner of a child of the tenant,
(b) a spouse or civil partner of a grandchild of the tenant,
(c) a spouse or civil partner of a brother or sister of the tenant,
(d) a brother or sister of the tenant’s spouse or civil partner,
(e) a spouse or civil partner of such a brother or sister,
(f) a child (including a step-child) of such a brother or sister,
(g) a grandchild (including a step-grandchild) of such a brother or sister,
(h) a step-child of the tenant,
(i) a spouse or civil partner of such a step-child,
(j) a descendant of such a step-child,
(k) a step-brother or step-sister of the tenant,
(l) a spouse or civil partner of such a step-brother or step-sister,
(m) a descendant of such a step-brother or step-sister.

Proportionality of the measure

2.5 Because this measure falls within the ambit of fundamental right to respect for property which is protected both at common law \(^1\) and also under and in terms of Article 1 Protocol 1 ECHR \(^2\) the Scottish Government has an obligation properly to evidence and

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\(^1\) See *Pham v. Home Secretary* [2015] UKSC 19 [2015] 1 WLR 3947 per Lord Reed at paragraph 119: “Where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality.”

\(^2\) *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38 [2013] UKSC 39 [2014] AC 700 per Lord Sumption at paras 9, 20: “The judge found that since the direction, the bank has been unable to make profitable use of the goodwill which it had established in the United Kingdom, which was a ‘possession’ for the purpose of
explain what its aim is in proposing this change in the law in a coherent and systematic manner in order to conform to the requirements of proportionality.

2.6 As was noted in *Axa General Insurance Company Ltd v Lord Advocate* (where the UK Supreme Court held that Acts of the Scottish Parliament were subject to a form of common law review, for breach of the rule of law and/or fundamental common law rights, in addition to review for compatibility with the express requirements of the Scotland Act 1998):

“The Scottish Parliament is not a sovereign parliament in the sense that Westminster can be described as sovereign: its powers were conferred by an Act of Parliament, and those powers, being defined, are limited. It is the function of the courts to interpret and apply those limits, and the Scottish Parliament is therefore subject to the jurisdiction of the courts”

2.7 In *In re Medical Costs for Asbestos Diseases (Wales) Bill*, a judicial review of legislation passed by the Welsh Assembly, Lord Mance noted:

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`Axa General Insurance Company Ltd v Lord Advocate*, 2012 SC (UKSC) 122 per Lord Reed at §138. See too Lord Hope at §§46-7:

“The UK Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision-making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament that, as Lord Bingham said in *R (Jackson and ors) v Attorney- General* (para 9), is the bedrock of the British constitution. Sovereignty remains with the UK Parliament. The Scottish Parliament’s power to legislate is not unconstrained. It cannot make or unmake any law it wishes. Section 29(1) declares that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. Then there is the role which has been conferred upon this court by the statute, if called upon to do so, to judge whether or not Acts of the Parliament are within its legislative competence (see sec 33(1) and paras 32 and 33 of sch 6, as amended by sec 40 of and paras 96 and 106 of sch 9 to the Constitutional Reform Act 2005 (cap 4)). The question whether an Act of the Scottish Parliament is within the competence of the Scottish Parliament is also a devolution issue within the meaning of para 1(a) of sch 6 to the Scotland Act in respect of which proceedings such as this may be brought in the Scottish courts.

[47] Against this background, as there is no provision in the Scotland Act which excludes this possibility, we think that it must follow that in principle Acts of the Scottish Parliament are amenable to the supervisory jurisdiction of the Court of Session at common law.”
“45. … The general principles according to which a court will review legislation for compliance with the Convention rights scheduled to the Human Rights Act 1998 have been comprehensively reviewed in recent case law

There are four stages, which I can summarise as involving consideration of
(i) whether there is a legitimate aim which could justify a restriction of the relevant protected right,
(ii) whether the measure adopted is rationally connected to that aim,
(iii) whether the aim could have been achieved by a less intrusive measure and
(iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

The European Court of Human Rights has however indicated that these stages apply in relation to A1P1 with modifications which have themselves been varied over the years.

…

52. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature’s decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of ‘manifest unreasonableness’.

In this connection, it is important that, at the fourth [fair balance] stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker.

53. It is also clear that the European Court of Human Rights scrutinises with particular circumspection legislation which confiscates property without compensation or operates retrospectively. In the case of confiscation, it will normally be disproportionate not to afford reasonable compensation, and a total lack of compensation will only be justifiable in ‘exceptional circumstances’. In the case of retrospective legislation, ‘special justification’ will be required before the court will accept that a fair balance has been struck.

…

60 … If, … when the court is considering whether a measure strikes a fair balance, weight attaches to the legislative choice, then the extent to which the legislature has as the primary decision maker been in or put in a position to evaluate the various interests may affect the weight attaching to its assessment.

Perhaps in the light of article 9 of the Bill of Rights there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions. It is, I think, unnecessary to go further into this difficult area on this reference.

On any view, if the admissible background material shows that the Bill was put before and passed by the Welsh Assembly on the basis of a supposed analogy or precedent, it must be possible to consider whether that analogy or precedent actually applies, and, if it does not, the same assistance cannot be obtained from the legislative choice as might otherwise be the case.”

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4 In re Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3 [2015] AC 1016 per Lord Mance at §§45, 52, 53, 60
2.8 As Advocate General Yves Bot has observed in his Opinion in *The Scotch Whisky Association and Others v The Lord Advocate*, the on-going challenge to the EU law compatibility of the prohibition against the sale of alcohol at a price below a minimum price calculated on the basis of the content in alcohol as contained in the Alcohol (Minimum Pricing) (Scotland) Act 2012:

“Identification of the objective of the rules at issue in the main proceedings

115. *It is necessary to identify the objective pursued by the measure at issue in the main proceedings in order to determine whether the measure is proportionate to that objective.*

116. The referring court observes that the measures at issue were presented in explanatory notes accompanying the draft legislation laid before the Scottish Parliament as being intended to implement the general and targeted strategies and interventions aimed at the population in general and at ‘harmful’ drinkers, in particular, that is to say, those with a consumption of more than 50 units of alcohol per week for men and more than 35 units for women. However, the referring court adds that a more recent study placed before the Scottish Parliament, entitled ‘Business and Regulatory Impact Assessment’, states that the objectives of the measures include combating ‘hazardous’ consumption, defined as being more than 21 units of alcohol per week for men and more than 14 units per week for women. That study concludes that the introduction of a minimum price enables the objective of reducing the consumption of alcoholic beverages which are cheap in relation to their alcohol strength to be attained, as hazardous or harmful drinkers are more affected than moderate drinkers, in terms of the amount they drink, the amounts spent and the benefits obtained from the reduction in harm to their health. The Court of Session observes, however, that when the measures were notified to the Commission pursuant to Directive 98/34/EC, they were presented as being restricted to the targeting of hazardous or harmful drinkers.

117. *The ambiguity that emerges from that development in the presentation of the objectives of the measure by the national authorities is not made any clearer by the written observations of the Lord Advocate*, since, while observing that a measure fixing an MUP is introduced in order to attain the twofold objective of targeting the part of the population whose health is at greatest risk and having a positive effect on the health of the entire population, they recognise that the justification for such a measure is based solely on the first of those objectives.

118. *That persistent ambiguity gives the false impression that the objective of reducing the consumption of alcohol, in general, is deliberately ignored* so that the measure at issue may more readily pass the ‘necessity’ test, when compared with a fiscal measure leading to a general increase in the price of alcoholic beverages.

…

The suitability of the measure for attaining the objective sought

121. The restrictions imposed by the Member States must first of all meet the ‘suitability’ test, by being appropriate for ensuring the attainment of the objective pursued.

122. In that context, it has repeatedly been held that national legislation is appropriate for ensuring the attainment of the objective pursued *only if it genuinely reflects a concern to attain that objective in a ‘consistent and systematic’ manner*: See, by analogy, judgment in

123. It also follows from the Court’s case-law that it is the Member State wishing to rely on an objective capable of justifying a restriction that must supply the court called on to rule on that question with all the evidence of such a kind as to enable it to be satisfied that the national rules do indeed comply with the requirements deriving from the principle of proportionality.  

Scottish Government’s given rationale for the proposed change to class of those who might be bequeathed and succeed to a 1991 Act tenancy

2.9 The Scottish Government now appear alive to the fact that an evidential burden rests upon those who would defend the validity of Scottish legislation in any Convention rights based challenge before the courts. The Scottish Government notes:

“The 33. While the determination of a question whether a provision of an Act of the Scottish Parliament involves legal tests, it is immediately obvious from the nature of the answers needed to satisfy them that when the courts come to look at them the discussion in court is not simply a legal question.

34. It requires assessment of the policy justification for a given provision; what matters is what the public interest is, how individuals might be affected by the provision, whether it is likely to achieve what it claims it will achieve etc. This is part of the evidence base for a policy. The Supreme Court has recently made clear that in relation to the difficult question whether the provisions strike the requisite fair balance, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests.”  

2.10 In terms of its rationale for broadening the class of those who might be entitled to be bequeathed an agricultural tenancy, the Scottish Government’s Policy Memorandum states (at paras 374-5):

“374. Current legislation in practice restricts succession to a near relative of the tenant farmer; preventing succession in most cases to other members of the tenant farmer’s wider family, including siblings, cousins, nieces, nephews etc.

375. Scottish Ministers wish to modernise the classes of successor to reflect modern family structures, and in turn, make it easier for tenant farmers to retire while removing obstacles to

5 Case C-333/14 The Scotch Whisky Association and Others v The Lord Advocate, Opinion of Advocate General Bot, 3 September 2015 at paras

6 See the Advice contained as an annex to the letter to the Rural Affairs, Climate Change and Environment Committee of 10 September 2015 from Stephen Sadler of the Land Reform and Tenancy Unit of the Scottish Governments Agriculture, Food and Rural Communities Directorate: RACCE/S4/15/27/1
those wishing to take up tenancies. Sections 87 and 88, therefore, extend the class of person to whom a tenancy can be bequeathed.”

2.11 In evidence before the Scottish Parliament’s Rural Affairs, Climate Change and Environment Committee given on 2 September 2015, civil servants from the Scottish Government gave some further explanation as to thinking behind this proposal so to broaden the range of family members who might be bequeathed a 1991 Act tenancy and succeed to it on the death of the original tenant farmer:

“Angus MacDonald (Falkirk East) (SNP): Section 84 of the bill will amend section 10A of the Agricultural Holdings (Scotland) Act 1991 to widen the classes of family member to whom 1991 act tenancies could be assigned, and section 87 seeks to amend section 11 of the 1991 act to widen the classes of family member to whom 1991 act tenancies could be bequeathed. The bill will substantially widen the classes of potential successors. In its submission, NFU Scotland broadly welcomes the move, and has said that

“If the policy aim is to extend the lifespan of secure tenancies then the proposals in the Bill will aid this, however if the policy aim is to address unfairness of death out of turn or the inability of direct family to take over a business, [then] the proposals seem to go wider than what is required.”

Would you explain what the policy intention of this part of the bill is? Is it to extend the lifespan of secure tenancies, or is it to address the unfairness of deaths out of turn or the inability of direct family members to take over a business?

Trudi Sharp (Scottish Government: Deputy Director for Agriculture, Rural development and Land reform): I will ask Fiona Buchanan to comment in a moment. The aim behind those provisions is to encourage and enable tenants to retire and move on, at a time they deem appropriate, in order to release land to younger tenants and ensure that it continues in productive agricultural use. That is the broad position from which we were coming at the proposals. The NFU’s submission refers to two particular categories of circumstance that might apply.

Fiona Buchanan (Scottish Government): In addition, the provisions will modernise the classes of successor to reflect modern family structures and to bring the provisions into line by providing the same rights for succession by bequest, transfer by an executor or assignation. As I am sure members are aware, modern family structures have changed considerably in recent years, and that applies equally to farming families.

The current legislation can have discriminatory consequences by not providing a spouse with the same rights as their partner on the death of the partner.

It also does not provide fairness to the sibling who is a partner in the business, because tenancies are normally in the name of an individual rather than of a company; if a person is a partner in a company and their brother or sister dies, there is no guarantee that they can take on the tenancy, so the farming business could end.

In 2014, the tenant farming survey had 3,095 responses, with 20 per cent of respondents having a family member who wanted to succeed to the tenancy but who currently fell outwith the classes of eligible successor. Over half of those respondents identified that person as a sibling, while a third identified the person as a niece or nephew.
The provisions also enable us to address issues of death out of turn, where someone unfortunately dies and the members of the family are too young to take on the tenancy at that point. That family farm would then fall out of agricultural tenancy. The provisions would enable succession to go back up and along and down the family tree to provide protection for the family farm and enable the continuation of the agricultural tenancy.”

2.12 It is quite unclear to me as to what is intended or understood by the claim made that “the current legislation can have discriminatory consequences by not providing a spouse with the same rights as their partner on the death of the partner.” It does not seem to be, however, a claim to the effect that these changes in the law are prompted or required by the Equality Act 2010 or similar EU legislation. I do not understand it to be said that the current law on intestate succession as set out in the current Succession (Scotland) Act 1964 may be said to embody unlawful discrimination on grounds say of marital status, or sex, or age or sexual orientation. If that is indeed the claim that is being made, then one would expect the Scottish Government to be proposing a reform to the whole of succession law if it is approaching these matters in a “consistent and systematic” manner, and not simply propose piecemeal reforms as to whom a 1991 Act tenant might bequeath his agricultural tenancy.

2.13 The Scottish Government says in its evidence to the Scottish Parliament that “20 percent of respondents having a family member who wanted to succeed to the tenancy but who currently fell outwith the classes of eligible successor. Over half of those respondents identified that person as a sibling.”

2.14 It should also be noted, however, that the Succession (Scotland) Act 1964 already classifies siblings as among the class of persons who might be entitled to succeed to the estate on intestacy. See, for example, Coats v Logan, 1985 SLT 221, OH which concerned the bequest of an agricultural tenancy to a brother of the tenant. Lord Ross observed:

“The pursuers contend that the first defender accepted the bequest but failed to give timeous intimation under s. 20 (2), whereas the defenders, although admitting that the notice was out of time, contend that this means that there was no valid acceptance of the bequest by the first defender. The matter is of crucial importance … [I]f the first defender did not accept the bequest the right to the lease would fall to be treated as intestate estate of the deceased, whereas if the first defender did accept the bequest, there would be no room for the right to the lease being so treated under s. 20 (7). … [T]he giving of notice is not designed to indicate acceptance of the bequest in a question with the deceased tenant’s representatives, but is designed to import acceptance of the lease in a question with the landlord. In my
2. — Rights of succession to intestate estate.
(1) Subject to the following provisions of this Part of this Act—
   (a) …;
   (b) where an intestate is survived by either of, or both, his parents and is also survived by brothers or sisters, but is not survived by any prior relative, the surviving parent or parents shall have right to one half of the intestate estate and the surviving brothers and sisters to the other half thereof;
   (c) where an intestate is survived by brothers or sisters, but is not survived by any prior relative, the surviving brothers and sisters shall have right to the whole of the intestate estate”.

2.15 Similarly, the issue of “death out of turn” 8 and the consequent possibility of nieces and nephews being among the class of persons entitled to succeed on intestacy – and so be lawfully bequeathed a 1991 Act tenancy under the legislation as it currently stands - is covered by the existing provisions of the 1964 Act which, in Section 5, states:

5. — Representation
(1) Subject to section 6 of this Act, where a person who, if he had survived an intestate, would, by virtue of any of the foregoing provisions of this Part of this Act, have had right (otherwise than as a parent, spouse or civil partner of the intestate) to the whole or to any part of the intestate estate has predeceased the intestate, but has left issue who survive the intestate, such issue shall have the like right to the whole or to that part of the intestate estate as the said person would have had if he had survived the intestate.”

2.16 Section 11 of the 1991 Act already allows, in principle, for “succession to go back up and along and down the family tree”, subject only to the landlord who objects to the bequest of a lease establishing to the satisfaction of the Land Court any reasonable ground of objection, in which case the Land Court shall declare the bequest to be null and void, but in any other case they shall make an order in terms of the application: Section 11(5) of the 1991 Act.

2.17 If the “social issue” which the Scottish Government seeks to address is indeed that 1991 Act tenants should be able to bequeath their agricultural tenancies to siblings and/or their nephews and nieces, then the law as it stands already allows for this in principle.

2.18 On examination, then, the given rationale for the Scottish Government’s proposing to change the law does not properly present the law as it currently stands. A broad range

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8 See for example Stephen v Innes Ker [2006] CSOH 66, 2006 SLT 1105 which concerned a bequest of a share in an agricultural tenancy by a grandmother to her grandson, following the untimely death of her son, his father.
of family members (including siblings and nephews and nieces of the tenant) can already be bequeathed or assigned secure agricultural tenancies.

2.19 It may be that the “mischief” in the current legislation which the Scottish Government now identifies and seeks to remedy is not that siblings and nephews and nieces cannot be bequeathed secure agricultural tenancies, but that landlord retains the right, under Section 25 of the 1991 Act, to serve a notice to quit against such legatees. If the landlord duly serves a notice to quit then the bequeathed tenancy will, broadly, come to an end at the term of outgo stipulated in the original lease. In other words, while siblings and nephews and nieces may be bequeathed a 1991 Act tenancy, they do not have a right to have it extended beyond its original term against the wishes of the landlord.

2.20 By contrast under the current law the “near relative” of a deceased tenant of an agricultural holding - meaning a surviving spouse, civil partner, child or grandchild of that tenant – who has been bequeathed a lease does have the right to contest before the Land Court any notice to quit which might have been served by the landlord, broadly on the grounds that “a fair and reasonable landlord would not insist on possession” in their case. But if the mischief is indeed the fact that siblings and their issue are unjustly being deprived of a right to take on a relative’s farm then the least restrictive and most targeted reform would be simply to include siblings and nephews and nieces in a slightly broadened definition of “near relative” under the current legislative framework.

2.21 Instead, Section 84 onward of the 2015 Land Reform Bill now seeks to bring, among others, siblings and their issue into this protected class of “near relative” and, at the same time further to restrict the grounds upon which a landlord might competently object to the bequest or assignation by a tenant under a 1991 Act tenancy, or under a 2003 Act LDT. In addition to a tenant’s spouse/civil partner and children and grandchildren, persons who are now to be considered as “near relatives” for the purposes of so restricting the grounds upon which a landlord may refuse consent to a lease being assigned or bequeathed are:

(a) a parent of the tenant,
(b) a brother or sister of the tenant,
(c) a spouse or civil partner of such a brother or sister,
(d) a child of a brother or sister of the tenant,
(e) a grandchild of a brother or sister of the tenant,
(f) a brother or sister of the tenant’s spouse or civil partner,
(g) a spouse or civil partner of such a brother or sister,
(h) a child of such a brother or sister,
(i) a grandchild of such a brother or sister.”

2.22 The grounds of objection which may be prayed in aid by a landlord to the proposed lifetime assignation to, or taking up of the bequest by, a tenant’s near relative are:
- lack of good character on the part of the proposed new tenant;
- lack of sufficient resources of the proposed new tenant to enable that person to farm the holding with reasonable efficiency;
- the proposed new tenant has neither sufficient training in agriculture nor sufficient experience in the farming of land to enable the person to farm the holding with reasonable efficiency. This objection can be countered in a case where the proposed new tenant is already on or about to start a course of relevant training and arrangements are in place for the continued reasonably efficient farming of the land pending the assignee’s completion of his course.

2.23 The 2015 Bill also proposes to remove the landlord’s ability to object to the succession or the lifetime assignation of a tenancy on the grounds that that the agricultural holding is not a “viable unit”.

2.24 The reason why these individuals are to fall within this new specified class of relatives of tenant farmers should be given rights at the expense of private landlords is unclear. Just what the supposed legitimate aim or social policy the Scottish Government claims to be furthering by this recommendation remains obscure. It is clearly not the social protection of existing tenants (since it gives rights to new tenants). Nor is it the protection of dependent family relationships (since there is no need for any dependency to be shown to these relative a right to inherit). And it is not at all clear just what social assumptions have changed since 1991 that would now require these new rights of succession to be given to person beyond the tenant’s farmer’s immediate nuclear family.

2.25 The proposed reforms appear to be not so much about any specific identified unmet social needs of tenant farmers’ broader family (including in-laws, steps and collaterals), which would require new social protections to allow them to succeed to an agricultural
tenancy. Rather what is happening is that a very broad new class of persons are being afforded the right against landlords to have the tenancy extended once they have succeeded to it after the death of their relative. The thrust of the proposed reforms is, then, to decrease the rights of landlord in the event of such a bequest or assignation.

2.26 Under the guise of extending social protection to the “extended and blended new families” of tenant farmers – which allows argument to be presented that the measures involve a balance of respect for the Article 8 ECHR rights of the families of tenant farmers against the property rights of landlord - what is in fact being furthered is a much broader social policy and aim. It is not about farmers’ families; it is about seeking to keep more agricultural land tenanted, by restricting the current rights and expectation of private landlord to recover their land on the otherwise natural expiry of the lease.

2.27 Such a broader social aim approach does not involve the balancing of one group’s Convention rights against another, but rather engages the starker or more straightforward question as to whether or not landlords are being required to shoulder an unfair and excessive burden for a general social reform measure aimed at maintaining a particular form of land tenure, namely agricultural tenancies.

2.28 Applying the tests set out by Advocate General Bot, the Scottish Government’s studied ambiguity or lack of clarity as to the aim of this proposal, might be said to call into question whether the Scottish Government has shown that the proposed measure “genuinely reflects a concern to attain that objective in a ‘consistent and systematic’ manner”. The Scottish Government has to be clear and unambiguous in its aim in order for a court before which this measure might be challenged “to be satisfied that the national rules do indeed comply with the requirements deriving from the principle of proportionality.”

Broadening of class of persons to whom a 1991 Act tenancy may be assigned during the lifetime of the existing tenant
2.29 Currently Section 10A of the Agricultural Holdings (Scotland) Act 1991 enables a 1991 Act Tenant to assign their tenancy to any person entitled to succeed on their death, subject to the landlord’s consent, which can only be withheld on reasonable grounds.

2.30 Again, the class of persons to whom a 1991 Act tenancy may be assigned is to be significantly extended by the 2015 Land Reform Bill beyond the current definition of “any person who would be, or would in any circumstances have been, entitled to succeed to the tenant’s estate on intestacy by virtue of the Succession (Scotland) Act 1964”.

2.31 The Scottish Government has noted:

47. The provisions in this Bill have expanded the class of person to whom a tenancy can be assigned in accordance with the new proposals for succession. In line with the 1991 Act, there is no provision for the landlord to take on the assigned lease for value.” ⁹

2.32 This extended class of potential life-team assignees is the same as for the proposed new extended class of those to whom a tenancy might be bequeathed and succeed to after death of the current tenant. Thus this extended class includes the same host of collateral and descendant in-laws, step-siblings and step-children as well as siblings and their issue, again specified thus:

(a) a spouse or civil partner of a child of the tenant,
(b) a spouse or civil partner of a grandchild of the tenant,
(c) a spouse or civil partner of a brother or sister of the tenant,
(d) a brother or sister of the tenant’s spouse or civil partner,
(e) a spouse or civil partner of such a brother or sister,
(f) a child (including a step-child) of such a brother or sister,
(g) a grandchild (including a step-grandchild) of such a brother or sister,
(h) a step-child of the tenant,
(i) a spouse or civil partner of such a step-child,
(j) a descendant of such a step-child,
(k) a step-brother or step-sister of the tenant,
(l) a spouse or civil partner of such a step-brother or step-sister,
(m) a descendant of such a step-brother or step-sister”.

⁹ See the Advice contained as an annex to the letter to the Rural Affairs, Climate Change and Environment Committee of 10 September 2015 from Stephen Sadler of the Land Reform and Tenancy Unit of the Scottish Governments Agriculture, Food and Rural Communities Directorate: RACCE/S4/15/27/1
2.33 The rationale offered by the Scottish Government specifically for the change to this rule to broaden the persons to whom assignation might be made beyond those entitled to succeed on the death of the 1991 Act tenant is set out in paragraph 376, 378 of the Policy Memorandum as follows:

“Well, widening the class of assignee has also been identified as a way to get more new entrants into tenant farming, help tenanted businesses with succession planning and help side-step some of the issues around waygo compensation when a tenancy comes to an end. … The policy intention is to bring forward into the tenant’s lifetime what would happen anyway on the tenant’s death, in order to encourage and facilitate within-lifetime planning.”

2.34 These stated aims - getting more new entrants into tenant farming, helping tenanted businesses with succession planning and helping side-step some of the issues around waygo compensation when a tenancy comes to an end – all would appear to be focussed on the benefits of the reform to tenant farmers, but no explanation is given as to why it is that this particular social group should be further favoured by the legislature over and against the interests, rights and legitimate expectations of farming landlords. And the reference “to bring[ing] forward into the tenant’s lifetime what would happen anyway on the tenant’s death” only makes sense against a background of the changes to the right to bequeath the tenancy which are outlined in the immediately previous section of this Advice.

2.35 Once again, in evidence before the Scottish Parliament’s Rural Affairs, Climate Change and Environment Committee given on 2 September 2015, civil servants from the Scottish Government were not entirely clear as to precisely why this decision so to broaden and give rights to a new class of family members to whom a 1991 Act tenant farmer could, in his lifetime, assign his or her lease, as the following exchanges with MSPs illustrate:

Dave Thompson (Skye, Lochaber and Badenoch) (SNP): …. Was consideration given to the fact that open assignation to anyone would simplify the situation and give greater certainty, because people would then know absolutely that a tenancy could go to anyone and everyone would know where they stood? Would that not allow secure tenants a flexibility that they could not achieve to the same extent otherwise? …. [O]ne might say that the range of family members who can take over tenancies has been increased pretty massively. Given that it is only a small step from there to open assignation, why would the current proposals lead to less letting by landlords while open assignation would not? After all, there is not a big degree of difference between the range of people that we are talking about.
Billy McKenzie (Scottish Government): To be honest, I cannot define the degree of difference. However, there is a difference, and we believe that what we are doing sends a stronger message than assignation or succession and that it is an improvement on the current situation. That said, we do not believe that going as far as full assignation would be appropriate.”

2.36 The same criticisms which were made by the Advocate General Bot at paragraph 117-8 of his Opinion about a “persistent ambiguity” in the Scottish Government presentation of the aims of minimum pricing legislation can be made of this proposal to broaden the class of potential lifetime assignees of 1991 Act tenancies.

Extension of rights of relatives who are not near relatives

2.37 A proposed new Section 12B(4) to the 1991 Act allows family members who are not in the class of “near relative” to have any objection by the landlord to their succession or inheriting of the tenancy to be overturned/quashed by the Land Court if “on the hearing of such an appeal, any reasonable ground stated by the person— (a) in the case of a legatee, for not declaring the bequest to be null and void, (b) in the case of an acquirer, for not terminating the lease, is established to the satisfaction of the Land Court”. These provisions significantly strengthen the non-near relative class of potential beneficiaries of a 1991 Tenancy to the detriment of the landlords’ interest. No explanation is given for this provision in the Policy Memorandum or Explanatory Notes.

2.38 It may be that the straightforward political policy aim of this measure is “to extend the lifespan” of existing secure tenancies under the 1991 Act. Yet it is being presented by the Scottish Government as a measure intended to address another claimed social mischief – namely the inability of all “family members”, as re-defined “to reflect modern family structures” - to be assigned a 1991 Act tenancy. I have seen no evidence that has been presented by the Scottish Government to show that there is any such social mischief.

2.39 Adapting the observations of Advocate General Yves Bot at paragraph 118 of his Opinion in the Scotch Whisky Association case to the circumstances of the present proposed reform on lifetime assignations of 1991 Act tenancies, one might say that that persistent ambiguity gives the false impression that the real or primary objective of extending the lifespan of existing secure tenancies under the 1991 Act, in general, and so keep more farming land held under leasehold is deliberately ignored or downplayed by a continued reference to the aim of protecting of “modern families”, so that the measure at
issue may more readily pass the “necessity” test required by the proportionality analysis for the measure to be shown to be Convention compatible.

3. **FUNDAMENTAL RIGHTS CONSIDERATIONS**

3.1 By extending the class of those who might succeed to or be assigned an existing secure agricultural tenancy, this proposed change in the law significantly reduces the likelihood of a lease coming back in hand to the landlord. This will consequently have inevitable implications for the value of the land. The expectation of vacant possession and the coming to the end of a secure tenancy undoubtedly has an economic value to the landlord.

3.2 It is clear that these provisions of the Land Reform Bill engage A1P1 ECHR considerations, since restrictions on a landlord’s right to terminate a tenant’s lease undoubtedly constitutes control of the use of property within the meaning of the second paragraph of the A1P1 ECHR. As the Strasbourg Court has recently reaffirmed:

52. [R]estrictions on an applicant’s right to terminate a tenant’s lease constitute control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1.

…

58. In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are ‘practical and effective’.

*It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the conditions of the rent received by individual landlords and the extent of the State’s interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord’s property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State’s conduct.*

…

60. The Court observes that in the present case the lease was subject to renewal by operation of law and the applicants had no possibility to evict the tenant on the basis of any of the limited grounds provided for by law.”

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10 *Anthony Aquilina v. Malta* [2014] ECHR 3851/12 (11 December 2014, Fifth Section):

“[W]hile he remained the owner of the property, he was subjected to a forced landlord-tenant relationship for what appears to be an indefinite period of time. He could only bring the lease to an end if his tenants failed to pay the rent or caused considerable damage to the house, or if they otherwise failed to comply with the conditions of the lease or their obligations thereunder, or if they used the premises for a purpose other than mainly as their ordinary residence. *The Court further considers that the possibility of the tenants leaving the premises voluntarily was remote, especially since the tenancy could be inherited*”

11 *Zammit and Attard Cassar v. Malta* [2015] ECHR 1046/12 (Fifth Section, 30 July 2015) at paras 52, 58, 60
3.3 In its consideration of the “human rights” impact of these proposals, the Scottish Government Policy Memorandum says this:

“408. The Scottish Government considers it in the general interest that agricultural leases continue to be subject to regulation.

In considering any changes to the regulatory framework for agricultural tenancies, it is necessary to consider any potential impact on rights set out in the ECHR, specifically under Article 1 Protocol 1 – right to peaceful enjoyment of possessions, and Article 8 – right to respect for private and family life.

409. The Scottish Government is satisfied that the provisions of this part of the Bill are compatible with the European Convention on Human Rights.…

Assignation of and succession to agricultural tenancies

424. Security of tenure and the ability adequately to plan for business succession are key to encouraging investment, forward planning and growth. The Scottish Government’s aim is to take forward the recommendations of the AHLRG to widen the class of ‘near relative’ successor and assignee and to bring uniformity to the classes of person who may succeed to a 1991 Act tenancy and those to whom it may be assigned.

425. The proposals are aimed at: re-dressing the weakening in tenant’s ability to assign and succeed occurring from external changes in social and family demographics; ensuring tenants are able to plan adequately for succession and assignation within the wider family unit that is more often, in modern agricultural practice, involved in the family business; to enable older tenants greater ability to retire and/or step back at an earlier stage; to provide younger tenants the ability to take over family business at an earlier stage; and to encourage movement in the sector to open up opportunities for new entrants.

426. Scottish Ministers believe it is in the general interest that these steps are taken to allow pre-existing tenancies to be transferred to new entrants and to remove barriers to tenancies continuing, as well as barriers to adequate business planning and investment, by allowing for willing successors to take on tenancies. This will help ensure people, and especially new entrants to the industry, will be able to move into, through and out of the tenanted sector as their business develops and can have the confidence to continue to invest in their business, and in the land throughout this journey.”

3.4 In the witness session of 2 September 2015 before the Scottish Parliament considering the Bill’s provisions the following exchange is noted:

Alex Fergusson (Galloway and West Dumfries) (Con): … I want to ask about ECHR issues in relation to part 10 of the bill. The policy memorandum gives quite a lot of detail on ECHR issues in other parts of the bill, but there is not a lot of detail on part 10. Why is that, and can you furnish us with a fuller explanation of the ECHR implications of part 10?

Trudi Sharp (Scottish Government): I ask Andrew Campbell to comment on that. Andrew Campbell (Scottish Government): Good morning. I can certainly speak to the legal aspects. The policy memorandum contains most of the policy justification. If it is helpful to the committee, I can explain the Scottish Government’s approach to article1, protocol 1 of the ECHR. I am not sure whether you might prefer to have that in writing.
The Convener: Would that answer Mr Fergusson’s question?
Andrew Campbell: At paragraphs 408 to 432, the policy memorandum contains
information about the human rights justification for part 10. Admittedly, the way in
which it is laid out does not name check article 1 or protocol 1 directly, but if you
look through those paragraphs, you can see that each particular topic—each chapter
in part 10—has been addressed. If there are particular concerns about the policy
justification that has been given in relation to the human rights paragraphs, my policy
colleagues are better placed to assist you.

Alex Fergusson: So you will furnish us with a commentary.
Andrew Campbell: I am more than happy to provide a commentary on the Scottish
Government’s approach to article 1, protocol 1, if that would be helpful. “

3.5 The Scottish Government has now provided the RACCE committee with the following
written response

“29. … There must be a reasonable relationship of proportionality between the means
employed and the aim sought to be realised. The European Court describes this by the notion
of “fair balance” that must be struck between the demands of the general interest and the
requirements of the protection of the individual’s fundamental rights. The requisite balance
will not be found if the person concerned has had to bear “an individual and excessive
burden”.

30. Where the prejudice is great, the public interest must also be great. In Salvesen v Riddell
the Court said the burden placed on the class of landlords affected by section 72(10) was too
great despite the pressing legitimate aim of preventing anti-avoidance. That class was
penalised in an arbitrary way and the difference in treatment was unfair and disproportionate.
The incompatibility arose from a combination of discriminatory treatment and punitive
effects. Retrospective provisions are not impossible but require a special justification over
and above that necessary for other types of prejudice. 12

3.6 This proposed legislative change would apply to all existing statutorily protected
agricultural leases. The proposed change in assignation and succession rights of tenant is
not limited simply to those agricultural tenancies which might be entered into, when and
if these proposals in the 2015 Land Reform Bill become law. These proposals therefore
have retrospective effect on existing contracts because they retrospectively alter the
existing legal liabilities of landlords and tenants who have entered into these leases and
impose on landlords potentially increased financial burdens and further restrictions on
their property rights.

3.7 As the Scottish Government now appear to recognise, the Strasbourg Court applies a
presumption against legislation which is retrospective in effect and requires that “special

12 Advice contained as an annex to the letter to the Rural Affairs, Climate Change and Environment Committee
of 10 September 2015 from Stephen Sadler of the Land Reform and Tenancy Unit of the Scottish Governments
Agriculture, Food and Rural Communities Directorate: RACCE/S4/15/27/1
justification” be shown before the court would accept that a fair balance has been struck between the demands of the general interest of the community and the requirement to protect individual (landlords’) rights.

3.8 But the failure to date to make provision for compensation for the adverse impact of these proposals on landowners’ property rights could well give rise to a cause for complaint (and ultimately a cause of action) based not only on A1P1 ECHR but also under Article 14 ECHR (discrimination on grounds of propertied status). 13 The legitimate interests of the community in these situations call for a fair distribution of the social and financial burdens involved in the transformation and reform of the country’s agricultural tenancy supply. This burden cannot be placed on one particular social group, however important the interests of the other group or the community as a whole. 14

3.9 Actuarial calculations can doubtless be made to give some idea of how this extension of the class of those with a right to inherit a 1991 tenancy will extend the average period of such tenancies with a consequent impact on the value of the landlord’s interest in the tenanted land. The anticipated actual cost of these proposals to landlords can form the basis for a claim for reasonable compensation for this further control of use of land and restriction on the rights of landlord in relation to their land. 15

13 Salvesen v Riddell [2013] UKSC 22 2013 SC (UKSC) 236 per Lord Hope at 38:
[38] A reader of what the deputy minister said during that debate [in the Scottish Parliament] might be forgiven for thinking that it displayed a marked bias against landlords. If there was, this was a regrettable attitude for a minister to adopt in a system where both the legislature and the executive are required to act compatibly with the Convention rights. As a minority group landlords, however unpopular, are as much entitled to the protection of the Convention rights as anyone else. .... In the present context this means that the rights and freedoms that it guarantees are not just for tenants, although their interests are important. They are for landlords too.”

14 See Bittó and Others v. Slovakia [2014] ECHR 30255/09 (Third Section, 28 January 2014) at § 115

15 See Bittó and Others v. Slovakia: just satisfaction [2015] ECHR 30255/09 (Third Section, 7 July 2015) at §§ 20, 27:
20. The Court reiterates that a judgment in which it finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If national law does not allow – or allows only partial – reparation to be made, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.

... 27. Under Article 41 of the Convention the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that it is a consequence of the violation found that cannot otherwise be remedied. It is therefore not for the Court to quantify the amount of any damage which some of the applicants may suffer as a result of implementation of the rent-control scheme in the future. The Court therefore dismisses the applicants’ claim for subsequent losses, without prejudice to any future claims they may have.
3.10 I am advised that, in the course of meetings with Scottish Government officials to discuss the Bill, the Scottish Government has stated that it believes these provisions of the Bill to be Convention compliant because, as I understand it, there is no certainty or guarantee under the current law that in any individual case a secure agricultural tenancy will come to an end and the land revert to the landlord. The argument is that the proposed changes in the law do not take away any actual vested right of the landlord – at most it might disappoint the landlord’s hopes regarding the reversion of the lease - and so cannot be said to cause any loss to the landlord. But the European Court of Human Rights has stated:

“‘Possessions’ within the meaning of Article 1 of Protocol No. 1 can be either ‘existing possessions’ or assets, including claims, in respect of which an applicant can argue that he or she has at least a ‘legitimate expectation’ that they will be realised.”16

3.11 This argument from the Scottish Government also ignores two matters:

- first, in the words of Trudi Sharp of the Scottish Government to the Scottish Parliament Committee,

  “the aim behind those provisions is to encourage and enable tenants to retire and move on, at a time they deem appropriate, in order to release land to younger tenants and ensure that it continues in productive agricultural use.”

The general policy aim of these provisions is, then, specifically to increase the life of existing agricultural secure tenancies from the situation which currently applies under the existing law by “remov[ing] barriers to tenancies continuing”

- secondly, individual landlords will be directly and individually affected by the proposed change in the law if it is made when and if they are no longer to take their land back from a 1991 Act secure tenancy or 2003 Act tenancy because it has been assigned or bequeathed by the tenant to a person who had no right of succession or assignation to such a tenancy under the law as it currently stands, and under which the landlord originally agreed to lease the land in question.

3.12 The Strasbourg case of Lindheim v. Norway17 also makes it clear that any increased rights given under statute to tenants to assign their rights under the lease cannot be such

16 See, for example, Application No. 41510/98 Jasiūnienė v. Lithuania, ECtHR 6 March 2003 at § 40
as to favour only the tenants and effectively allow the lease to continue with strangers for tenants for an unlimited period. 18

3.13 Yet, on the material currently available to me, there appears to be simply no consideration given by the Scottish Ministers to the interests and legitimate expectation of the landowners in relation to existing tenancies that have been entered into (in particular that the relevant tenancies would expire as originally agreed according to their particular terms).

4. CONCLUSION

4.1 The proposals set out in Part 10 of the Land Reform Bill 2015 to strengthen the rights of secure agricultural tenants to bequeath on their death or to assign in their lifetime their existing secure tenancies undoubtedly impacts upon the property rights of landlords, and their legitimate expectations anent the reversion of their property to their use with the coming to an end of an existing secure tenancy.

4.2 In order to be within the legislative competence of the Scottish Parliament, these proposals have to be demonstrated by coherent and consistent evidence – if necessary to the satisfaction of the courts – to conform to the requirements of proportionality.

4.3 On the evidence, the Scottish Government has not yet clearly and unambiguously specified just what its intended aim is in promoting these reforms to the law, which are apparently to the detriment of private landlords’ existing property interests, vested rights and legitimate expectations. It is, however, always necessary for the Scottish

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17 Lindheim v Norway [2012] ECHR 13221/08 and 2139/10 (Fourth Section, 12 June 2012) at §§ 133-4:
“133. …[T]he applicants could entertain a legitimate expectation that the relevant lease contracts would expire as agreed according to their terms, independently of the intervening discussions on and adoption of legislative measures.

134. In these circumstances, it does not appear that there was a fair distribution of the social and financial burden involved but, rather, that the burden was placed solely on the applicant lessors.”

18 See too Statileo v. Croatia [2014] 12027/10 (First Section, 10 July 2014) re housing legislation imposing restrictions on private landlords’ ability to obtain vacant possession of their properties. The Court considered that the legislation at issue to be interference amounting to the control of use of property within the meaning of the second paragraph of A1P1 ECHR and awarded compensation to cover the difference between the rent the applicant was entitled under the domestic legislation, and what the Court considered to be an adequate rent based on the market rent for comparable flats in the relevant period.
Government to identify the objective pursued by the measure at issue in the main proceedings in order to determine whether the measure is proportionate to that objective.

4.4 Further, the proposed changes in the law are intended to have retrospective effect, in that they will apply to all currently existing secure tenancies, irrespective of when they were originally entered into, and are intended to alter the terms of the landlords’ and tenants’ respective rights from the situation which applied when the lease contract was first entered into. The Strasbourg jurisprudence is clear that special justification has to be shown for any measure with such retrospective effects. I have not seen on the material currently available to me any such special justification for any requirement that these proposed changes apply not only to new agricultural tenancies negotiated between landlord and tenant once the proposed change in the law come into force, but to all existing secure tenancies.

4.5 On the face of it, then, these proposals do not currently conform to the requirements of proportionality and would therefore fall outwith the legislative competence of the Scottish Parliament.

4.6 I trust the foregoing is sufficient for the purposes of my instructing solicitors and their clients. I have nothing more to add at this stage but would be happy to advise further whether in writing or orally if that would be of assistance to those instructing me.