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Reform Committee  
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31 July 2024

Dear Convener

## Land Reform (Scotland) Bill

Thank you for your letter of 21 June in relation to delegated powers contained within the Bill. This letter responds to each of the Committee's queries, which I have retained below in italics, in turn.

### 1. Section 1(4) inserting section 44A into the Land Reform (Scotland) Act 2016 - Power to impose obligations on the owner of land

*The Committee asks the Scottish Government whether it has considered including a requirement for a statutory consultation with stakeholders prior to making regulations under this power similar to the requirement to consult the Land and Communities Commissioner?*

I want to assure the Committee that I have given careful consideration to including such provisions in the Bill. That is why section 44A(5) requires Ministers to consult the Land and Communities Commissioner, who will have a role in supporting delivery of the regulations. The Scottish Government also expects to consult with a wide range of stakeholders before making regulations under this power, as set out in the [Financial Memorandum](#) where the associated costs are identified. The nature of any consultation and who is to be consulted will depend on the type of changes that are proposed. I do not therefore consider that an additional statutory requirement in the Bill to consult any additional persons is necessary.

## 2. Section 1(4) inserting section 44M into the Land Reform (Scotland) Act 2016 - Power to modify community-engagement obligations for owners of large land holdings

*The part of the power that permits the modification of the land to which the community land obligations apply is wide. It does not define any criteria or limitations upon its exercise and there is little detail in the DPM on why the power is necessary or how it will be exercised. Regulations made under this provision could substantially alter the land to which community responsibility obligations apply with no consultation requirement, despite the significance of the obligations to be imposed on landowners, who are also subject to penalties for failure to comply with the obligations. Modifications made under these regulations could represent a significant policy change and amend primary legislation.*

*As such, the Committee asks the Scottish Government:*

- a) *To provide further detail on why the power to modify the land to which the obligations would apply is deemed necessary?*

A fundamental policy decision within the Bill is the definition of the threshold for the amount of land to which the provisions in the new Chapter should apply. The threshold has been set at a level which I am confident will deliver the policy objectives around transparency, without the additional requirements having a disproportionate impact on smaller landholdings.

I consider that is nevertheless important that there should be an ability to adjust the threshold in the future if monitoring of the effect of the measures indicates that those objectives are not being met. For example, we might want to modify the land to which obligations would apply if there was evidence of deliberate avoidance of the new obligations.

This is also a new land reform measure in Scotland. We may find on implementing the power that we need to make relatively small modifications and it would be appropriate to do so through secondary legislation.

I am also mindful that land reform is very much a process, rather than an event and that future Parliaments and governments may wish to **review key aspects of the proposals**, such as **whether** modifying the land to which the obligations would apply **is necessary following consultation (see response to 2(d) below)**. This power would allow that to happen without the need for primary legislation.

- b) *Why is this power to modify not more narrowly drafted to allow the Parliament to understand how it is likely to be exercised?*

Section 44D effectively defines a large landholding of land as being either a single or composite holding that is either over 3000 hectares or forms part of a permanently inhabited island that exceeds 1,000 hectares and accounts for more than 25% of the island.

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As well as these thresholds, section 44D also provides for landholdings to be in scope where they are contiguous to each other, owned by the same or connected persons, and collectively come to a combined size which exceeds either of the thresholds.

The criteria/thresholds in 44D are highly interrelated with other measures in the Bill, and changing just one element without the ability to make wider modifications to the new Chapter could create unintended consequences. There is therefore limited scope to narrow the drafting of this power while retaining the ability to respond meaningfully to monitoring and stakeholder feedback.

For example, section 46D(6) takes the same approach to connected persons as is the case for the equivalent provisions in respect of the transfer threshold in section 46K(4) and (5). Any change in respect of either threshold is likely to necessitate wider changes in the new Chapters in respect of the thresholds for the landholding measures in the Bill.

- c) *In what circumstances does the Scottish Government propose to use this power to modify and to what extent? How does the Scottish Government intend to assess Article 1 Protocol 1 (ECHR): Protection of Property (“A1P1”) compliance in the exercise of the power?*

I consider that the power would be used where feedback showed that doing so was appropriate or necessary in order to ensure that the policy objectives are being delivered. It might also require to be used in circumstances I have set out above.

To recap, this might include modifying the thresholds and making further or consequential changes in that respect.

For example, the land threshold is based mainly on the absolute size of the landholding (with special rules for islands). Other methods of identifying high levels of concentrated land ownership were explored through consultation, such as setting the threshold with reference to a percentage of the land in geographical area.

Alternative approaches of that type were however ruled out at this time: see in that respect paragraphs 138 to 140 of the [Policy Memorandum](#). It remains the case that monitoring of the effect of the measures will help identify additional considerations that would, if taken into account, make the measures more effective.

Another potential use of this power could be to make minor updating revisions to references, for example should further changes be made in respect of controlling interests in land under section 39 of the Land Reform (Scotland) Act 2016, or further transparency schemes be introduced in the future.

Any proposals for compatibility with A1P1 ECHR will be assessed in the usual way. Paragraphs 286 to 291 of the [Policy Memorandum](#) provide further information about how the Government has assessed relevant ECHR rights.

- d) *the potential significant impact on landowners of any modification to the land to which the obligations would apply, has the Scottish Government considered including a requirement to consult with stakeholders and the Land and Communities Commissioner before exercising this power to modify the land? Further, has consideration been given to including a requirement to lay consultation documents or reports on any consultation carried out alongside regulations made under this power?*

The Scottish Ministers are committed to making policy in a way that involves engagement with stakeholders and co-production wherever possible. Any significant amendment to these powers is anticipated to be the result of monitoring of their real world application, and so would be subject to the following basic stages:

- Ongoing monitoring of policy OR impact evaluation identifies and reports on potential issue
- Stakeholder consultation on appropriate response
- Impact assessment
- Laying of regulations

For minor corrective legislative fixes, we consider that a more narrowly targeted consultation process rather than for example through a written consultation paper may in some cases be more appropriate.

I considered whether there should be a statutory requirement to consult, but given that the Scottish Government is under a legal obligation to undertake consultation where appropriate with persons affected by any decision, such a specific duty is not needed.

The Scottish Government will make information available following a public consultation in the usual way. For smaller changes, the costs involved in preparing and publishing a report are not considered proportionate to the benefit. I do not therefore consider that a duty to publish or lay consultation documents or reports is required although the Explanatory Memorandum accompanying any regulations would detail what consultation had taken place.

- e) *Given this power is significant, why does the Scottish Government consider it appropriate to change the land to which the obligations would apply by way of subordinate legislation and not by primary legislation in order that the Parliament could properly debate and scrutinise the proposals given the significance of the policy provision that could be made by this power?*

For the reasons explained in my earlier answers, I do not consider that the changes that could be made under this power are so extensive that primary legislation alone is appropriate. The power would need to be exercised with reference to the overall objectives and purposes of the Bill, with appropriate consultation and with reference to eg ECHR A1 P1 as set out in response to question c) above. Such changes can only be made if they are approved by the Parliament through the affirmative procedure to ensure the Parliament is able to scrutinise any use of the power. I consider that

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secondary legislation is an appropriate mechanism to enable the principal policy in the Bill to continue to be achieved.

The power will ensure that changes can when necessary or appropriate be made in a timely and flexible manner, taking due account of ongoing monitoring and continuing stakeholder engagement, so that the policy aims can continue to be met.

### **3. Section 2(4) inserting section 46L into the Land Reform (Scotland) Act 2003 - Power to modify the extended opportunity to register interest in relation to large land holdings**

*The power is wide. It permits the modification of the land to which the prohibition will apply and the length of the prohibition without defining any criteria or limitations upon its exercise. There is little detail in the DPM on why the power is necessary or how it will be exercised. The exercise of this power could have a significant impact on landowners and creditors. It could lengthen the period of prohibition creating further delays to the sale or transfer of land. It could also result in more landowners being subject to a prohibition if the power is used to widen the definition of land in new section 46K. Further there is no consultation requirement on the face of the Bill despite the significance of the prohibition on landowners and creditors. Modifications made under these regulations could represent a substantial policy change and amend primary legislation.*

*As such, the Committee asks the Scottish Government:*

- a) *To provide further detail why the power to modify the length of the prohibition and the land to which the prohibition would apply is deemed necessary?*

There are two powers here, to modify 46F(2)(b) and 46K. The justification for each of these are considered below.

The power to modify 46F(2)(b) allows for modification of the 40 day period provided to community bodies to make an application to register an interest in the land. I do not consider that this is a wide power.

The power to modify 46K allows for modification of the land affected by the prohibition, and could be used to make more extensive changes to the new Chapter.

#### Modification of 46F(2)(b) – timescales

46F(2)(b) establishes the 40 day time period during which a further prohibition applies on the land to allow for an application to register an interest in the land, in cases where the requirements in 46F(3) are met. It is proposed that it should be possible to amend this period by secondary legislation.

This particular prohibition is ancillary to the general prohibition on transfer as provided for in new sections 46A and 46B of the Land Reform (Scotland) Act 2003. That power does not for example enable the Scottish Ministers to modify the two year period on section 46B(2)(b).

The periods specified in the Bill – and the 40 day period in particular - have been set having regard to community right to buy timescales, and the need to balance the rights and interests of landowners and community groups (see also our comments in response to question 3(c) below).

I consider that it is appropriate to take a power to modify the 40 day period following monitoring and review of the operation of the transfer measures, particularly given that the operation of the land market can be impacted by a wide range of factors (see again the question 3(c) below).

It would be my intention only to make such changes if satisfied that doing so is within devolved competence, and that they are in particular compatible with A1P1 ECHR.

#### Modification of 46K – modification of the land affected by the prohibition

46K sets a threshold for the land that is to be subject to the transfer prohibitions, by reference to the area of the land in the holding (46K(2)), as well as providing definitions of composite holdings and connected ownership for the purposes of establishing whether this area requirement is met.

My comments above in reply to question 2 about being able to change the land to which those requirements apply are also applicable here in relation to the prohibitions.

Again, it is important that there is the ability for these definitions to be amended in light of monitoring of the Bill provisions in practice, particularly since this is a new area of policy. Monitoring may identify an avoidance route which should be addressed, or a suggest that a revision of definitions of land in scope would improve the effectiveness of proposals. These examples are considered in more detail in response to 3(c) below.

*b) Why is this power to modify not more narrowly drafted to allow the Parliament to understand how this power is likely to be exercised?*

As the power to modify section 46F(2)(b) is narrowly drafted, this response relates to the power to modify section 46K.

My comments above in reply to question 2 are equally relevant here.

Section 46K defines a large landholding of land as being over 1000 hectares, and includes various supporting definitions to take account of the variety of ways in which land can be held. These supporting definitions allow for landholdings to be considered as in scope where they are contiguous to each other, owned by the same or connected persons and come to a combined size of over 1000 hectares.

The specific requirements in section 46K are highly interrelated, and changing just one element without the ability to review the Chapter as a whole could also create unintended consequences.

There is limited scope to narrow the drafting of this power while retaining the ability to respond meaningfully to monitoring and stakeholder feedback (for further background see paragraph 138-140 of the policy memorandum).

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I intend that the operation of the prohibitions will be closely monitored, and should be capable of being modified as proposed where that is warranted having regard to the purpose of the measures. For example, it might be appropriate to change the land to which the prohibitions apply to exclude land used for particular purposes (such as operational use for energy or water supply) or on account of particular land features.

- c) *In what circumstances does the Scottish Government propose to use this power to modify and to what extent? How does the Scottish Government intend to assess A1P1 compliance in the exercise of the power?*

#### Modification of 46F(2)(b) – timescales

Monitoring might for example reveal that a high number of successful applications under the existing Part 2 community right to buy 'late application' process (as established in the Land Reform Act 2003) are made within 5 days of the end of the 40 day period set out in 46(2)(b).

In that event it could be sensible to explore with stakeholders whether a small extension to the 40 day period in the legislation would provide more certainty to both landowners and community bodies as regards the new measures, and if appropriate to provide for that under this power.

As noted in the response to 3(a) above, it would be my intention only to only make such changes if satisfied that doing so is within devolved competence, and that they are in particular compatible with A1P1 ECHR.

#### Changes to the land subject to the prohibitions

As set out above, any revisions to the land in scope of the prohibitions are anticipated to come from ongoing monitoring of provisions once in force.

Use of this power could include the need to exclude land from the prohibitions on some basis or could be triggered by evidence of an avoidance route that was not identified in the Bill but emerges after the provisions are in force.

Alternatively, monitoring and impact assessment of the operation of these provisions may reveal other amendments to definitions of land that would improve the effectiveness of the proposals.

For example, the threshold is set by reference to an area of land. Other methods of identifying situations where there may be high levels of concentrated land ownership, such as a percentage of a geographical area, were explored through consultation but not taken forward.

Another potential use of this power could be to make minor updating revisions to references, for example should transparency regimes referenced at s46K(5) be replaced or amended, or additional transparency regimes added that should be captured in the definition.

Any proposals for compatibility with A1P1 ECHR would be assessed in the usual way Paragraphs 286 to 291 of the [Policy Memorandum](#) provide further information about how the Scottish Government has assessed relevant ECHR rights.

- d) *Given the potential significant impact on landowners and creditors of any modification to the land and the length of the prohibition, has the Scottish Government considered including a requirement to consult with stakeholders and the Land and Communities Commissioner before exercising this power? Further, has consideration been given to including a requirement to lay consultation documents or reports on any consultation carried out alongside regulations made under this power?*

The Scottish Ministers are committed to making policy in a way that involves engagement with stakeholders and co-production wherever possible. As noted, any significant amendment to these powers is anticipated to be the result of monitoring of their real world application, and so would be subject to the following basic stages:

- Ongoing monitoring of policy OR impact evaluation identifies and reports on potential issue
- Stakeholder consultation on appropriate response
- Impact assessment
- Laying of regulations

For minor corrective legislative fixes, I consider that a more narrowly targeted consultation process rather than through a written consultation paper may in some cases be more appropriate.

I considered whether there should be a statutory requirement to consult, but given that the Scottish Government is under a legal obligation to undertake consultation where appropriate with persons affected by any decision, such a specific duty is not needed.

Information will be made available following a public consultation in the usual way. For smaller changes, the costs involved in preparing and publishing a report are not considered proportionate to the benefit. I therefore do not consider that a duty to publish or lay consultation documents or reports is required although the Explanatory Memorandum accompanying any regulations would detail what consultation had taken place.

- e) *Given this power is significant, why does the Scottish Government consider it appropriate to modify the land and the length of the prohibition by way of subordinate legislation and not by primary legislation in order that the Parliament could properly debate and scrutinise the proposals given the significance of the policy provision that could be made by this power?*

For the reasons explained in my earlier answers, I do not consider that the changes that could be made under this power are so extensive that primary legislation alone is appropriate. The power would need to be exercised with reference to the overall objectives and purposes of the legislation, with appropriate consultation and with

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reference to ECHR A1P1 as set out in response to question d) above. Such changes can only be made if they are approved by the Parliament through the affirmative procedure to ensure the Parliament is able to scrutinise any use of the power. I therefore consider that secondary legislation is an appropriate mechanism to enable the principal policy in the legislation to continue to be achieved.

The power will ensure that changes can when necessary or appropriate be made in a timely and flexible manner, taking due account of ongoing monitoring and continuing stakeholder engagement, so that the policy aims can continue to be met.

**4. Section 4(2) inserting section 67S(6) into Land Reform (Scotland) Act 2003 – Power to make further provision about buying land under section 67P, including about how land is to be valued**

*The Committee asks the Scottish Government whether it has given any consideration to including a statutory consultation requirement with stakeholders and the Land and Communities Commissioner prior to making regulations under this power?*

As set out in response to question 2c, it is expected that stakeholders would be consulted prior to making regulations under this power. A requirement for a statutory consultation with stakeholders was not included as the Scottish Government will be required to consult with affected individuals. The nature of any consultation will be dependent on the type of changes that are proposed.

**5. Section 4(2) inserting section 67V(4) into Land Reform (Scotland) Act 2003 to make further provision about compensation.**

*The Committee asks the Scottish Government:*

*a) Whether it has considered that the power to make further provision about how the compensation payable is to be determined is more suitable to the affirmative procedure in order that the Parliament may have a sufficient degree of scrutiny over what is being proposed given the impact on landowners, creditors and the public purse?*

I want to assure the Committee that I have given careful consideration to whether affirmative procedure is appropriate for this power.

I would ask the Committee to note in that respect that equivalent powers in respect of other community rights to buy are also subject to negative procedure (see for example section 63(5) of the Land Reform (Scotland) Act 2003), and on this basis to ensure consistency of approach and minimise the risk of unintended consequences, it feels appropriate to also use negative procedure here.

*b) Whether it has given any consideration to including a statutory consultation requirement with stakeholders and the Land and Communities Commissioner prior to making regulations under this power?*

As noted in response to question 3(d), the Scottish Ministers are committed to making policy in a way that involves engagement with stakeholders and co-production wherever possible. The Scottish Government is also under a legal obligation to undertake appropriate consultation with persons affected by any decision, and this will apply to regulations made under this power. As such, I do not consider that a specific requirement for statutory consultation is merited.

A specific requirement is already included to consult with the Land and Communities Commissioner and this seems appropriate in relation to community engagement obligations, given the Commissioner's central role in supporting and enforcing these obligations. The Land and Communities Commissioner does not have a role in making compensation decisions: these are Ministerial decisions. Accordingly I do not consider that a specific consultation requirement to consult the Land and Communities Commissioner on regulations made under this power to be appropriate.

## **6. Section 4(2) inserting section 67Y into the Land Reform (Scotland) Act 2003 to modify various provisions**

*The power is wide. It permits the modification of what constitutes an exempt transfer, the land to which the prohibition on transfer without a lotting decision applies, the duration of the lotting decision and the period to make an application for review of a lotting decision without defining any criteria or limitations to be placed upon its exercise and with little detail on why the power is necessary or how it will be exercised.*

*This power permits the modification of several central definitions and integral aspects of this part of the Bill through regulations. The result is that regulations could be made which alter these definitions and could mean that lotting decisions could be applied to a different range of landowners and creditors who are not currently captured by the Bill's provisions. Such regulations could have a significant impact on landowners and creditors by widening those affected by the lotting decisions and narrowing those affected by exemptions; by creating further delays to the sale or transfer of land as well as widening the pool for compensation or for land purchases. Further there is no consultation requirement despite the significance that any modifications could have on landowners and creditors. Modifications made under these regulations could represent a substantial policy change and amend primary legislation.*

*As such, the Committee asks the Scottish Government:*

- a) *For further details on why the power to modify what constitutes an exempt transfer, the land to which the prohibition on transfer without a lotting decision applies, the duration of the lotting decision and the period to make an application for review of a lotting decision, is deemed necessary?*

The requirement to have the ability to modify the land to which the prohibition applies are the same as those set out in response to questions 3(a) and (b) above.

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The power is considered necessary in order to be able to ensure that the measures operate effectively in the light of experience, including addressing for avoidance should that be necessary.

b) *Why is this power to modify not more narrowly drafted to allow the Parliament to understand how this power is likely to be exercised?*

The drafting approach for these provisions is for the same reasons as set out in response to question 3(b).

c) *In what circumstances does the Scottish Government propose to use this power to modify and to what extent? How does the Scottish Government intend to assess A1P1 compliance in the exercise of the power?*

The power could for example be used:

- to provide for a new exemption, such as where practical operation of the provisions provided evidence that certain kinds of landholding were being found never to require a lotting decision;
- to limit the scope of a current exemption, should evidence show that it is being used to avoid the requirements;
- to reduce or increase the threshold at which the prohibition on transfer applies, based on ongoing evaluation of operation of the measures;
- to modify the period during which the lotting decision will subsist should evidence show that it is either too short or too long;
- to modify the period after which a landowner may make an application for variation or review of the lotting decision, should evidence show that a year is too long, or that some further flexibility is needed to allow for an agreed proposal to go ahead.

Instances in which this power would be used are consistent with those stated in response to question 3(c).

In general, the purpose of these provisions is to allow for adjustment where monitoring and practical experience of the proposals demonstrate that this is required.

As noted above, the Scottish Government will assess any proposals for compatibility with A1P1 ECHR in the usual way. Paragraphs 286 to 291 of the [Policy Memorandum](#) provide further information about how the Scottish Government has assessed relevant ECHR rights.

d) *Given the potential significant impact on landowners and creditors of any modifications, has the Scottish Government considered including a requirement to consult with stakeholders and the Land and Communities Commissioner before exercising this power to modify these various provisions? Further, has consideration been given to including a requirement to lay consultation documents or reports on any consultation carried out alongside regulations made under this power?*

The Scottish Ministers are committed to making policy in a way that involves engagement with stakeholders and co-production wherever possible. As noted, any significant amendment to these powers is anticipated to be the result of monitoring of their real world application, and so would be subject to the following basic stages:

- Ongoing monitoring of policy OR impact evaluation identifies and reports on potential issue

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- Stakeholder consultation on appropriate response
- Impact assessment
- Laying of regulations

For minor corrective legislative fixes, we consider that a more narrowly targeted stakeholder engagement process rather than full formal consultation may be more appropriate.

I considered whether there should be a statutory requirement to consult, but given that the Scottish Government is under a legal obligation to undertake consultation where appropriate with persons affected by any decision, such a specific duty is not needed. The Scottish Government will make information available following a public consultation in the usual way. For smaller changes, the costs involved in preparing and publishing a report are not considered proportionate to the benefit. I do not therefore consider that a duty to publish or lay consultation documents or reports is required although the Explanatory Memorandum accompanying any regulations would detail what consultation had taken place.

I am, however, open to feedback during your Committee's scrutiny of the provision.

- e) *Given the impact of this power is potentially significant, why does the Scottish Government consider it appropriate to modify these provisions by way of subordinate legislation and not by primary legislation in order that the Parliament could properly debate and scrutinise the proposals given the significance of the policy provision that could be made by this power?*

The response to this question is consistent with that given in response to question 2d above. In summary, I do not consider that the changes that could be made under this power are so extensive that primary legislation is appropriate, and notes that in any event changes can only be made if they are approved by the Parliament through the affirmative procedure to ensure the Parliament is able to scrutinise any use of the power.

The power will ensure that changes can when necessary or appropriate be made in a timely and flexible manner, taking due account of ongoing monitoring and continuing stakeholder engagement, so that the policy aims can continue to be met.

## **7. Schedule: paragraph 40(4) Assessment of compensation**

*The power is described as providing further detail, however, there is little detail on the face of the Bill as to how compensation is to be assessed by a valuer. There is no detail provided as to what a valuer is and is not to consider, although, there is some specification in relation to other aspects of the Bill. The power does provide some level of protection as it limits its exercise to making modifications to specify certain matters only, so the power cannot be exercised more widely than that. However, the decision on how compensation is to be calculated is being left to further policy development at a later date.*

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*The DPM states that the Scottish Government considers it very important that how compensation is calculated is clearly set out and that it is appropriate that the level of “further detail” required is set out in subordinate legislation. However, the type of provision to be made in regulations by this power is not clear from the information in the DPM, as all the detail is to be left to subsequent regulations. The power is also discretionary, in that the Scottish Ministers “may” make regulations.*

*As such, the Committee asks the Scottish Government:*

- a) *If it considered making provision on the face of the Bill in order that the Parliament could properly debate and scrutinise the proposals given the significance of the policy provision being made by this power on those involved in the compensation claims?*

I too recognise the potential significance of the use of the power on those involved in a compensation claim. However, I also recognise the benefit of being able to refine the basis upon which a valuer is to assess a compensation claim should evidence come to light that further specification is required.

The Bill does already provide some detail on how different types of compensation are to be calculated. For instance, paragraph 27(2) sets out how compensation is to be calculated where a landholder is due compensation for an improvement, and valuers will need to be cognisant of these provisions in carrying out any assessment. Furthermore, should the power be used, the affirmative procedure will ensure the Parliament is able to scrutinise any use of the power. Accordingly, it was not considered necessary to make further provision on the face of the Bill in relation to how compensation is to be assessed by a valuer. I am, however, open to feedback during your Committee’s scrutiny of the provision

- b) *What policy development and discussion with stakeholders has taken place to date on what these provisions may include?*

Detailed policy development and discussion with stakeholders has not as yet taken place, but any policy development would be informed by stakeholder feedback, for example from valuers and those with an interest in small landholdings.

- c) *Given the potential significant impact on stakeholders involved in compensation claims, has the Scottish Government considered including a requirement to consult with stakeholders before exercising this power?*

I considered whether there should be a statutory requirement to consult, but given that the Scottish Government is under a legal obligation to undertake consultation where appropriate with persons affected by any decision, such a specific duty is not needed.

The Scottish Ministers are committed to making policy in a way that involves engagement with stakeholders and co-production wherever possible. Any significant amendment to these powers is anticipated to be the result of monitoring of their real world application, and so would be subject to the following basic stages:

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- Ongoing monitoring of policy OR impact evaluation identifies and reports on potential issue
- Stakeholder consultation on appropriate response
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For minor corrective legislative fixes, I consider that a more narrowly targeted stakeholder engagement process rather than full formal consultation is more appropriate.

d) *Given the importance of clarity for valuers and those making claims for compensation, what consideration has the Scottish Government given to making this power an obligation on Ministers to specify these matters, rather than an option to do so?*

I considered making this power an obligation, but areas where further specification is required will depend on stakeholder feedback and it is possible that some forms of compensation will require greater clarity whilst others may not. Accordingly, an obligation on Scottish Ministers to specify what a valuer must consider may not be appropriate for all valuation assessments of compensation. I am, however, open to feedback during your Committee's scrutiny of the provision.

#### 8. **Schedule: paragraph 49(5): Transfers not requiring notice**

*The power, as currently drafted, is wide in that it permits modification of all sub-paragraphs in paragraph 49 of the schedule without any consultation taking place. It is permitting the amendment of primary legislation which could significantly affect the interests of landlords and creditors as it will change the types of transfers that will give rise to a pre-emptive right to buy. This could be considered to be an integral provision in this part of the Bill and the power has the ability to effect significant policy changes to how a pre-emptive right to buy is engaged.*

*Further, despite the references to consideration of stakeholder views in relation to the exercise of this power, there is no consultation requirement before exercising the power and no requirement to lay any consultation documents before the Parliament to allow consideration of those views.*

*As such, the Committee asks the Scottish Government:*

a) *For further detail on why this power is considered necessary?*

The power is considered to be necessary to enable the nature of exempt transfers to be refined, if required, once the legislation comes into force; for example, following stakeholder evidence on the operation of the provision.

The approach taken is consistent with that for agricultural holdings set out in section 27(5) of the Agricultural Holdings (Scotland) Act 2003. This section enables the Scottish Ministers to modify by order subsections 27(1)-(4) relating to exempt transfers. Taking a similar power for small landholdings helps to ensure an element of consistency among the legal frameworks. For instance, it would be unfortunate if an issue arose which

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requires amendment and which could be done by secondary legislation for agricultural holdings and not for small landholdings.

*b) What policy development and discussion with stakeholders has taken place to date on what these provisions may include?*

While no detailed or formal discussion has taken place as yet, any policy development around this provision would be informed by stakeholder feedback including from small landholders and their landlords. The power could be used to allow the Scottish Ministers to respond to stakeholder feedback, for example, in light of the Programme for Government 2021-22 commitment to consult on the avoidance of legal obligations like the pre-emptive right to buy for tenant farmers.

*c) Given the potential significant impact on stakeholders, has it considered including a requirement to consult with stakeholders before exercising this power?*

I considered whether there should be a statutory requirement to consult, but given that the Scottish Government is under a legal obligation to undertake consultation where appropriate with persons affected by any decision, such a specific duty is not needed.

The Scottish Ministers are committed to making policy in a way that involves engagement with stakeholders and co-production wherever possible. Any significant amendment to these powers is anticipated to be the result of monitoring of their real world application, and so would be subject to the following basic stages:

- Ongoing monitoring of policy OR impact evaluation identifies and reports on potential issue
- Stakeholder consultation on appropriate response
- Impact assessment
- Laying of regulations

For minor corrective legislative fixes, we consider that a more narrowly targeted stakeholder engagement process rather than full formal consultation may in some cases be more appropriate.

*d) Why is this power not more narrowly drafted to allow the Parliament to understand how this power is likely to be exercised?*

I note the Committee's concern about the extent of the power but wish to assure Members that the provision is drafted in this manner to ensure that the list of transfers that do not require notice remain relevant to small landholdings and to enable the list to be adjusted if it becomes clear in light of experience that adjustment is necessary. The provision mirrors a similar power in section 27 of the Agricultural Holdings (Scotland) Act 2003. I am, however, open to feedback during your Committee's scrutiny of the provision.

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I recognise that the effect of the power to make subordinate legislation is to amend a provision of primary legislation. Accordingly, the affirmative procedure will ensure the Parliament is able to scrutinise any use of the power.

## 9. Schedule: paragraph 50(7): Right to Buy

*The DPM says very little about why this power is necessary. As currently drafted, the power is wide in scope in that it permits modification of sub-paragraphs 50(3) and 50(4) in the schedule without any consultation taking place. It is permitting the amendment of primary legislation which could significantly affect the interests of landlords and creditors as it could change the circumstances which give rise to a pre-emptive right to buy. This could be considered to be an integral provision in this part of the Bill and the power has the ability to effect significant policy changes to how a pre-emptive right to buy is engaged.*

*Further, despite the references to consideration of stakeholder views in relation to the exercise of this power, there is no consultation requirement before exercising the power and no requirement to lay any consultation documents before the Parliament to allow consideration of those views.*

*As such, the Committee asks the Scottish Government:*

*a) For further detail on why this power is considered necessary?*

I note the Committee's concerns. For similar reasons to those set out in relation to paragraph 49, the power is considered to be necessary to ensure that the list of steps for acquiring the right to buy remains relevant and to enable appropriate response to stakeholder feedback on the operation of the provision. The power mirrors an equivalent power in section 28(5) of the Agricultural Holdings (Scotland) Act 2003 and thus helps to support a consistent approach among the legal frameworks should adjustment be required.

*b) What policy development and discussion with stakeholders has taken place to date on what these provisions may include?*

While no detailed or formal discussion has taken place on what these may include as yet, any policy development around this provision would be informed by stakeholder feedback including from small landholders and their landlords. The power allows the Scottish Ministers to respond to their feedback and evidence where required.

*c) Given the potential significant impact on stakeholders, has the Scottish Government considered including a requirement to consult with stakeholders before exercising this power?*

I considered whether there should be a statutory requirement to consult, but given that the Scottish Government is under a legal obligation to undertake consultation where appropriate with persons affected by any decision, such a specific duty is not needed. The equivalent provision in Section 28(5) of the Agricultural Holdings (Scotland) Act 2003 does not have a consultation requirement.

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The Scottish Ministers are committed to making policy in a way that involves engagement with stakeholders and co-production wherever possible. Any significant amendment to these powers is anticipated to be the result of monitoring of their real world application, and so would be subject to the following basic stages:

- Ongoing monitoring of policy OR impact evaluation identifies and reports on potential issue
- Stakeholder consultation on appropriate response
- Impact assessment
- Laying of regulations

For minor corrective legislative fixes, we consider that a more narrowly targeted stakeholder engagement process rather than full formal consultation may in some cases be more appropriate.

d) *Why is the power not more narrowly drafted to allow the Parliament to understand how it is likely to be exercised, for example, to add or remove matters from the list?*

The provision is drafted to ensure that the list of steps for acquiring a right to buy remain relevant to small landholdings and to enable the list to be adjusted if it becomes clear in light of experience that adjustment is necessary. The provision mirrors a similar power in section 28 of the Agricultural Holdings (Scotland) Act 2003. Taking a similar power for small landholdings helps to ensure an element of consistency among the legal frameworks. I am, however, open to feedback during your Committee's scrutiny of the provision.

#### **10. Schedule: paragraph 59: Registration of small landholder's interest: power to modify provisions; and Section 10: Registration of interest and right to buy**

*The above powers are wide and permit the amendment of primary legislation which could significantly affect the interests of landlords and third parties who may acquire the land. They could be exercised in a manner that change the circumstances where an interest is registered.*

*The Bill does not specify any aspect of the process of registering an interest in land. It only provides non-exhaustive lists of some things which may be done through regulations. While it is not expected that the full detail of how to register an interest would appear on the face of the Bill, there is little to indicate at this stage what that may look like and operate and there is no explanation as to why the power requires to be so wide, being able to modify several paragraphs of the schedule. The result could be very significant policy changes being made to the Bill over time through subordinate legislation with potentially significant real-life consequences. Given how widely the power is currently drafted it could be exercised in any number of ways which may not be anticipated by the Parliament at this time.*

*As such, the Committee asks the Scottish Government:*

- a) *If it considered making some provision and detail about the registration process on the face of the Bill in order that the Parliament could properly debate and scrutinise the proposals given the significance of the policy provision being made by these powers on landlords and third parties?*

I considered alternatives to registration including the commencement of section 99 of the Land Reform (Scotland) Act 2016 and potentially a notice procedure which would have been on the face of the Bill. Ultimately the decision was taken that both of these provisions would not give the legal certainty to landlord, tenant and third parties which is important in any transfer of land. As set out in the Policy Memorandum, we acknowledge that the process of registering an interest in land should not be unduly burdensome for the tenant, but that it should still provide fair notice of that interest to the landlord and to third parties who might transact with the land.

I note that the power relates only to registration, and does not enable the Scottish Ministers to provide for any other method of notifying an intention to exercise the pre-emptive note to buy.

Subject to that general constraint, the power is intended to be wide enough to allow the Scottish Ministers to proactively address issues identified by stakeholders and to work with them to co-develop and improve the registration process. In that respect, the Bill requires the Scottish Ministers to consult the Keeper and such other persons as are considered likely to have an interest in the registration of interests to buy land.

I recognise the potential significance of the policy provision being made by these powers on landlords and third parties and, accordingly the affirmative procedure will ensure the Parliament is able to scrutinise any use of the power.

I am, however, open to feedback during your Committee's scrutiny of the provision.

- b) *What policy development and discussion with stakeholders has taken place to date on what these provisions may include?*

Scottish Government officials met with Tenant Farming Advisory Forum members prior to Bill introduction, to discuss section 99 of the Land Reform (Scotland) Act 2016 and potential solutions to improve the registration process. The requirement to periodically re-register an interest, and the amount of information required from the tenant on registration, were raised as potential areas for consideration around the use of the enabling power. I am, however, open to feedback during your Committee's scrutiny of the provision..

- c) *Whether consideration has been given to applying a requirement to lay consultation documents or reports on any consultation carried out alongside regulations made under these powers?*

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I considered whether there should be a statutory requirement to consult, but given that the Scottish Government is under a legal obligation to undertake consultation where appropriate with persons affected by any decision, such a specific duty is not needed.

The Scottish Government is committed to ensuring that decisions are made in a fair and transparent manner. In order to meet that commitment it consults on all significant decisions. A decision may indeed only be lawful if it has been consulted on in advance, whether or not there is a statutory requirement to consult.

The result is that the Scottish Ministers make policy in a way that involves engagement with stakeholders and co-production wherever possible, and in this case that will mean consulting both tenants and landlords on any proposed changes.

Any significant amendment to these powers is anticipated to be the result of monitoring of their real world application, and so would be subject to the following basic stages:

- Ongoing monitoring of policy OR impact evaluation identifies and reports on potential issue
- Stakeholder consultation on appropriate response
- Impact assessment
- Laying of regulations

For minor corrective legislative fixes, we consider that a more narrowly targeted stakeholder engagement process rather than full formal consultation may in some cases be more appropriate.

I also considered whether it would be appropriate to lay information about a consultation (whether or not there is a statutory requirement to consult), but I do not consider this is necessary as it is normal practice to make such information available.

*d) Why are these powers not more narrowly drafted to allow the Parliament to understand how the powers are likely to be exercised?*

I understand the Committee's concern here but would seek to reassure Members that the power is drafted appropriately, having regard to its purpose. It will enable necessary modifications to the legislation that are necessary or appropriate to ensure that changes made to deliver improvements to the registration process are fair and effective. The powers are also subject to affirmative procedure to ensure the Parliament is able to scrutinise any use of the power.

As set out in the Policy Memorandum, Scottish Ministers consider that this objective is best achieved, by working in a flexible way with stakeholders to co-develop an improved registration process. This co-development will shape the use of the power.

I am however, open to feedback during your Committee's scrutiny of the provision..

## **11. Section 11: Resumption in relation to 1991 Act tenancies, paragraph 4(5), schedule 2A to the 1991 Act; and**

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## **Section 12: Resumption in respect of limited duration tenancies and repairing tenancies, Paragraph 4(5), schedule 2 to the 2003 Act**

*The DPM says very little about why these powers are considered necessary. How resumed land is valued, and what is and is not to be considered when calculating that, can have significant consequences for landowners, bears directly on the interests of the parties to the lease and can be expected to affect the amount of compensation payable.*

*What valuers are to consider when making these calculations is outlined on the face of the Bill so parties to the leases can see how that will be calculated. However, changes to that through subordinate legislation can have significant consequences for those involved with the regulations also being able to effect significant policy changes in how these calculations are carried out and there is no requirement to consult with valuers, or anyone else involved in this process.*

*As such, the Committee asks the Scottish Government:*

*a) For further detail on the necessity of these powers?*

The powers are necessary to ensure that the valuation of compensation on resumption is fair to both the landlord and the tenant. In particular, it is necessary to ensure that paragraphs 4 of schedule 2A and 2 are capable of being modified to reflect the current views on the matters which should in fairness be taken into or left out of account when valuing a claim.

I note that section 32J of the Land Reform (Scotland) Act 2016 provides for an equivalent power in respect of the valuation of land being relinquished by a tenant. This power is equivalent and allows the Scottish Government to change and adapt to valuers' practice ensuring consistency in approach between practitioners.

I am also actively considering stakeholder evidence on the resumption valuation assessment including evidence submitted in the call for views which will inform any potential amendments to the Bill at Stage 2.

*b) How it is anticipated that these powers will be exercised?*

These powers will be exercised as required to ensure fairness for both landlords and tenants and in particular to seek to resolve any issues raised in stakeholder feedback, including from valuers, around any perceived lack of fairness or clarity in the legislation.

They will in that way help ensure that the provisions remain fit for purpose over time, subject of course to scrutiny by the Scottish Parliament under the affirmative procedure to ensure the Parliament is able to scrutinise any use of the power.

*c) What policy development and discussion with stakeholders has taken place to date on what these provisions may include?*

Further to the Bill being introduced, stakeholders have raised potential areas where clarity would be appreciated. Any policy development around this would be informed by

further stakeholder feedback. The power allows the Scottish Government to respond to this if required.

- d) *Given the potential significant impact on stakeholders, has the Scottish Government considered including a requirement to consult with stakeholders before exercising these powers?*

I considered whether there should be a statutory requirement to consult, but given that the Scottish Government is under a legal obligation to undertake consultation where appropriate with persons affected by any decision, such a specific duty is not needed. The Scottish Government is committed to ensuring that decisions are made in a fair and transparent manner. In order to meet that commitment it consults on all significant decisions. A decision may indeed only be lawful if it has been consulted on in advance, whether or not there is a statutory requirement to consult.

The Scottish Ministers are committed to making policy in a way that involves engagement with stakeholders and co-production wherever possible. Any significant amendment to these powers is anticipated to be the result of monitoring of their real world application, and so would be subject to the following basic stages:

- Ongoing monitoring of policy OR impact evaluation identifies and reports on potential issue
- Stakeholder consultation on appropriate response
- Impact assessment
- Laying of regulations

For minor corrective legislative fixes, we consider that a more narrowly targeted stakeholder engagement process rather than full formal consultation may in some cases be more appropriate.

- e) *Why are these powers not more narrowly drafted to allow the Parliament to understand how they are likely to be exercised?*

I consider that the powers are drafted in a manner that is consistent with achieving the purposes for which they are sought.

I note in that respect that section 32J of the Land Reform (Scotland) Act 2016 provides an equivalent power. The scope of the power is comparable and allows the Scottish Government to respond to issues identified by stakeholders. I am, however, open to feedback during your Committee's scrutiny of the provision.

## **12. Section 14: Compensation for improvements – section 73(1A) and 3(A)**

*The Committee asks the Scottish Government for further detail as to why it considers the negative procedure to be appropriate in this instance given it is permitting the amendment of primary legislation and whether the affirmative procedure would afford a better level of parliamentary scrutiny?*

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As set out in the Policy Memorandum, the Bill seeks to take a 'principles' based approach when determining whether an improvement requires consent (paragraph 1 of the new Schedule) or notice (paragraph 3 of the new Schedule).

The power does not affect the principle but rather the improvements listed by way of examples. As a result, Scottish Ministers consider this to be largely administrative and the negative procedure to be appropriate.

Scottish Ministers have previously used the affirmative procedure to modify the current list of agricultural improvement in Schedule 5 however, this list of improvements is a fixed list meaning the impact of amending Schedule 5 is more significant and therefore correctly subject to greater scrutiny requirements than is necessary for an illustrative list.

Scottish Ministers consider that it is necessary for them to be able to modify the illustrative lists in paragraphs 2, 4 and 6, and the fixed list in paragraph 5, in order to ensure that those lists properly reflect changes in understanding and in agricultural practice over time. Given the illustrative nature of the improvements list it was considered negative procedure was appropriate.

## Conclusion

I hope you find this response helpful and I look forward to discussing the delegated powers in the Bill with the Committee at the evidence session in September.

I also wish to assure the Committee that I want to ensure that the Bill provides the correct balance between implementing the policy provisions with suitable engagement and appropriate parliamentary scrutiny. I will of course consider further any views from Committee to ensure that the Bill best strikes that balance.

Yours sincerely,

**MAIRI GOUGEON**

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