



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 19 March 2014



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**CONTENTS**

	<b>Col.</b>
<b>DECISION ON TAKING BUSINESS IN PRIVATE .....</b>	<b>3447</b>
<b>SUBORDINATE LEGISLATION.....</b>	<b>3448</b>
Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 [Draft] .....	3448

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**RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE**  
**8<sup>th</sup> Meeting 2014, Session 4**

**CONVENER**

\*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

**DEPUTY CONVENER**

\*Graeme Dey (Angus South) (SNP)

**COMMITTEE MEMBERS**

\*Claudia Beamish (South Scotland) (Lab)

\*Nigel Don (Angus North and Mearns) (SNP)

\*Alex Fergusson (Galloway and West Dumfries) (Con)

\*Cara Hilton (Dunfermline) (Lab)

\*Jim Hume (South Scotland) (LD)

\*Richard Lyle (Central Scotland) (SNP)

\*Angus MacDonald (Falkirk East) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Paul Cackette (Scottish Government)

Richard Lochhead (Cabinet Secretary for Rural Affairs and the Environment)

**CLERK TO THE COMMITTEE**

Lynn Tullis

**LOCATION**

Committee Room 6



## Scottish Parliament

### Rural Affairs, Climate Change and Environment Committee

*Wednesday 19 March 2014*

[The Convener *opened the meeting at 10:00*]

### Decision on Taking Business in Private

**The Convener (Rob Gibson):** Good morning and welcome to the eighth meeting in 2014 of the Rural Affairs, Climate Change and Environment Committee. Please remember to switch off your electronics, as they can interfere with the broadcasting system.

Agenda item 1 is a decision to take in private item 4, which is on our review of our climate change budget mainstreaming process. Are members agreed?

**Members** *indicated agreement.*

## Subordinate Legislation

### Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 [Draft]

10:01

**The Convener:** Agenda item 2 is an evidence-taking session with the Cabinet Secretary for Rural Affairs and the Environment on the proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014. As the order has been laid under the affirmative procedure, the Parliament must approve it before its provisions come into force. Following the evidence-taking session, the committee will be invited to consider the motion to approve the order.

I welcome the cabinet secretary, Richard Lochhead, and his team: David Balharry, project team leader on the European convention on human rights compliance order; and Paul Cackette, deputy solicitor and head of group 2 at the Scottish Government. I invite the cabinet secretary to speak to the order.

**The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead):** Thank you for the opportunity to say a few words, convener. I will be as brief as I can in describing the challenging and complex process behind the draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 order, which is now before the committee and has, as you indicated, been subject to the super-affirmative procedure.

As members will recall, the order came about as a result of a decision by the Supreme Court in April 2013 that an anti-avoidance provision in the Agricultural Holdings (Scotland) Act 2003 for any landlord who served a notice to quit during the period September 2002 to June 2003 was contrary to landlords' human rights on the grounds that it was arbitrary and disproportionate. The Supreme Court gave the Scottish Parliament, guided by ministers, until April this year to consider, in consultation with the industry, solutions that respect landlords' human rights under the European convention on human rights, and to bring those solutions into effect. Throughout the drafting process, stakeholders have engaged positively with my officials to find solutions to those complex and difficult issues, and I am extremely grateful to all those who have helped to find the best possible solution.

As part of the super-affirmative procedure, there was a 60-day period of public consultation, during which we received detailed responses from key stakeholder groups, individual tenants and landlords as well as much-appreciated detailed responses from the Delegated Powers and Law

Reform Committee and the Rural Affairs, Climate Change and Environment Committee. Working with officials, I have considered all the points that have been raised and have provided a detailed response in the statement of observations and reasons that was laid before the Parliament on 6 March 2014 and which I hope all of you have seen.

Although the draft order by and large remains the same as the proposed draft order that the committee has previously seen, there have been, in addition to some tidying-up changes, two amendments to which I draw members' attention. First, a new article 3(4) has been provided to make it clear that any decision made by the Scottish Land Court as a result of the order can be appealed.

Secondly, we have made a technical change to article 4(2) to ensure that, once the order comes into force, landlords who have received a claim by tenants for the tenancy now have 28 days to apply to the Scottish Land Court. The previous version of the article inadvertently provided for 27 days' notice, so we have amended it to ensure that the full 28-day period is provided for in the order.

Although the two changes might appear minor, I am very grateful to those who scrutinised the proposed draft order and helped to identify the need for them. When the Delegated Powers and Law Reform committee considered the order on 11 March 2014, the committee was content with it and our responses to all the issues raised during the consultation.

During the consultation, we also received helpful comments on two key aspects beyond the detail of the legislative fix. The first was the need to provide clear and concise guidance in plain English for everyone affected. I am mindful that it is extremely important that my officials ensure that that is the case, and they are working to produce that guidance, which will as far as possible be in plain English, for publication alongside the final order.

The second key aspect was the offer of mediation, to which I committed on 15 January. I am pleased to report that a mediation process is being developed in consultation with key stakeholders, and I note that it must be agreed by the time the order comes into force.

All members will be well aware that this has been an extremely complex legal case. The super-affirmative procedure that has been used to process the order has provided an ideal opportunity to engage with and understand stakeholders' views while allowing for parliamentary scrutiny and has given us confidence that the order strikes an appropriate balance between the interests of tenants and landlords.

As I have said before, there is now a real opportunity for reconciliation and I sincerely hope that those affected will take advantage of the mediation on offer to find the best possible solutions for everyone involved.

**The Convener:** Thank you, cabinet secretary. If members wish to ask questions, this is the time to do so because the officials will be able to speak. When we move on to the debate, the officials will be excluded from answering any questions.

**Claudia Beamish (South Scotland) (Lab):** Cabinet secretary, you have already mentioned the Scottish Government's support for the mediation process but it would be good if that aspect could be clarified for the record.

**Richard Lochhead:** We are engaging with mediation experts and professionals in the sectors, and the mediation process is being set up as we speak. Once the order comes into play, we will start to make mediation available to all concerned parties during the cooling-off period between now and November, when the order comes into force. The budget is there. I have said before that, if demand for the budget proves so great that we have to provide additional resources, we will be sympathetic towards that.

**Richard Lyle (Central Scotland) (SNP):** At an earlier meeting, you were asked about the numbers that would be affected. The Scottish Government response states that

"we consider that 20 or so farms or tenancies face being directly affected in the current situation. Although we do not have an exact figure ... we feel that the number is in double rather than treble figures."

Do we now know exactly how many people are affected?

**Richard Lochhead:** No. As I have previously indicated to the committee, when we first had the court judgment, we did not know how many people would be affected and were concerned that it could affect hundreds or at least scores of people. The good news is that, thankfully, as a result of all the investigations and our work with key stakeholders, we have been able to whittle down the estimate of people who are affected to a reasonably modest number.

We will not know the exact numbers because, in theory, people could keep coming out of the woodwork during the cooling-off period when the guidance is available and when stakeholders have gone back to their memberships again. However, the signs are that the number is quite modest.

As you know, we think that various groups of people are affected. We have divided them into five groups, the first three of which include the people who are most affected. There are 20 people in group 1, five or six in group 2 and five or

six in group 3. That is a ballpark figure of how many people will be directly affected. We think that there is one person in group 4 and perhaps 15 or so in group 5, but those people may have put in place new arrangements that have taken them beyond the order. It is the first three groups that are the most important.

**Richard Lyle:** After the order is laid and passed, will it be published on the Scottish Government website or in a national newspaper? Will a press release be put out?

**Richard Lochhead:** We will use the media, as we have done before. The specialist farming press, which is read to a great degree by farmers in Scotland, has already given the issue a lot of air time and no doubt will continue to do so when the final order is made available. The order will be made available through the usual parliamentary channels and, because we are working very closely with all the stakeholder groups, we hope that they in turn will make it available to all their members.

There have already been various events, and our officials have spoken at several other events. However, despite the high degree of awareness, more people might still come out of the woodwork when they get their head around the legalities and details. When we issue the guidance—which will, as I indicated in my opening remarks, be in plain English—people might understand better the issues and the relevance of the order to their own circumstances.

**Richard Lyle:** When, at a previous meeting, I asked you about compensation, you said that you were open to it. What is the Government's current position on possible compensation claims?

**Richard Lochhead:** Our position is unchanged. We have said on record that we will look sympathetically on particular cases, but our focus is on the opportunities for mediation. A huge amount of effort has gone into considering each individual circumstance, and it is difficult to give a broad-brush answer on what each case might require at this stage. We have said that, where there is clearly a strong case for compensation, we will look on such a claim sympathetically.

**Jim Hume (South Scotland) (LD):** Good morning, cabinet secretary. You state clearly in your paper that the Government will not provide advice on any potential time bars, and I am interested in exploring the implications of that position. After all, in such situations, there is quite often, say, a five-year time bar, which would, of course, now be long past.

**Richard Lochhead:** As we cannot anticipate where some of the cases might end up in the judicial process, any comment that we as a Government give on where we think that time bars

apply in different parts of the legislation might prejudice our position in the courts. The convention is that we do not go into detail on such matters.

In addition, time bars are usually decided by the courts, which will interpret the legislation and come to their own view. Anyone who wanted to pin down a time bar or challenge the legislation would be able to go to the courts and ask them to decide what the time bar was.

**Alex Fergusson (Galloway and West Dumfries) (Con):** Good morning, cabinet secretary. On Jim Hume's point, you have stated—I think that I understand this right but I want to get it on the record—that any period of time that came under consideration in a time bar would not begin until the mediation period was completed. Is that correct for groups 1, 2 and 3?

**Richard Lochhead:** Yes. There is a cooling-off period until November, and from that point landlords will have one year to convert away from 1991 tenancies.

**Alex Fergusson:** So a time-bar clock would not start until the end of that period.

**Richard Lochhead:** That is correct.

**Alex Fergusson:** I thoroughly agree about the plain English aspect, but I am not sure that the expression

"treat any clock to start for the purposes of time bar"

quite falls under that description. There is still room for improvement.

**Richard Lochhead:** We are always learning how to promote plain English. We hope to get there in 50 or 70 years. [*Laughter.*]

**Graeme Dey (Angus South) (SNP):** Good morning, cabinet secretary. During our evidence sessions, pretty much every stakeholder expressed the desire for a swift and appropriate resolution to the situation and wanted to avoid a gravy train leaving the station. What part can stakeholders play in delivering that? Are you looking to the National Farmers Union Scotland and other organisations to encourage their members who are affected by these circumstances to set about the process in the right way and to go for mediation as a means of resolving things quickly?

**Richard Lochhead:** Yes. As I have indicated, we have had productive conversations with and help from all stakeholder groups, including those representing tenants, those representing landlords and those representing both groups.

No one wanted to be where we are at present, but here we are, and we are dealing with the situation as best we can. The committee has been

very supportive of our approach. I hope and expect—indeed, I have no reason not to expect—that all stakeholders will be reasonable and promote the route of mediation in the first instance. Having been working closely with stakeholders, I can say that that is the indication that we are getting so far.

10:15

**The Convener:** I have a question on the order itself. Have you had any discussions with the Supreme Court? We can, of course, pass the order, which we hope can be dealt with and will be acceptable, but are there any lines of communication with the Supreme Court that you can tell us about?

**Richard Lochhead:** I will ask Paul Cackette to talk about our relationship with the Supreme Court.

**Paul Cackette (Scottish Government):** As part of our process to ensure compatibility, we considered whether we should consult the Supreme Court. We took the view that, because the Supreme Court might end up adjudicating on the legality of the order, it would not be appropriate or welcome for it to be asked, or to express an opinion on, whether the fix in question would meet the concerns that it raised. That was something that we thought about.

**The Convener:** As there are no further questions, we move on to agenda item 3, which is consideration of motion S4M-09333, which asks the committee to recommend approval of the order.

The cabinet secretary will move the motion, after which there will be an opportunity for a formal debate on the order, which can last for up to 90 minutes, if required. In practice, most of the issues have been covered, but I remind members that the officials cannot be asked questions during the debate. I invite the cabinet secretary to speak to and move the motion.

**Richard Lochhead:** I have laid out the background for the committee, and I thank members for all their input. One reason why we have what is, I hope, a robust fix before us is the additional parliamentary scrutiny of the issue as a result of the circumstances in which we find ourselves. I hope that the fix will be effective, proportionate and reasonable, and that it will allow us to move on as quickly as possible once the mediation and the window of opportunity to convert have passed.

I repeat that I did not want to be here having to address such an issue, and I have focused on minimising disruption to tenants who would, of course, be shocked to find out that the

circumstances that they believed that they were in were perhaps not as they thought. At the same time, we have tried to be fair to landlords as well as tenants.

I do not have anything else to add to my additional comments, other than to thank the committee. My officials have been doing painstaking work with all stakeholders to find a way through this complex legal issue, and I thank them for their support, because they have used imaginative and consensual ways, working with all stakeholders, to move things forward.

I move,

That the Rural Affairs, Climate Change and Environment Committee recommends that the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 [draft] be approved.

**The Convener:** Does any member have anything to say?

**Nigel Don (Angus North and Mearns) (SNP):** I do—I am not quite sure which committee hat I am wearing, but I will not worry too much about that.

From my perspective, the fix is as good a solution as is possible. I am grateful to the Government and the cabinet secretary for having a good look at the possible good-faith agreements in group 2 that have raised their heads, albeit hypothetically. I have had a good look at the very long paragraph at the top of page 21 of my copy of paper 1, which begins with the words:

“On balance, we do not accept the suggestion”.

It is exemplary; I mention it only because it lays down clearly what has had to be looked at and how the issues have been addressed. I think that it sums up the committee's thinking on the subject, so I thank the Government for that.

If, ultimately, the Supreme Court feels that we have got this wrong, that will be despite the very best endeavours of everyone in the room. We can reflect on a process that has been well done and thoroughly and energetically addressed.

I also thank our parliamentary legal advisers, who have done a huge amount of work. The cabinet secretary has acknowledged that the solution has been a team effort, and it is important to register that. I am very content with what we have finished up with.

**The Convener:** If no other members have comments, I will make some myself.

Notwithstanding the circumstances of the collaboration to find our way from the problem to a solution that is acceptable to all, I want to reflect on the circumstances of the ministerial decision in 2003. The context for that was a widespread conversation among landowners and tenants about the possibility of the absolute right to buy



that was being discussed at length by the then Rural Affairs Committee. The pre-emptive serving of notices on limited partnership tenants stemmed from a feeling that they might be included with the 1991 secure tenants in any absolute right to buy. The irony is that the then Scottish Executive decided not to back an absolute right to buy for secure tenants, never mind for limited duration tenants.

The landlords' actions nevertheless heightened tensions in the debate and prompted the inclusion in the Agricultural Holdings (Scotland) Bill of sections that precluded the ending of limited partnership tenancies. It should not be forgotten that there was also debate about the reform of the common agricultural policy during 2002-03 and that the terms of the historic payment rights had yet to be agreed. However, subsequent experience of the issue shows that the focus has always been on the wish to maximise the single farm payment, either by outright ownership or by buying and selling entitlements.

In his farming column in yesterday's *Herald*, Rog Wood commented on the sudden decision by Scottish Land & Estates to offer a year's amnesty period for "farm tenancy improvements". He pointed out that an impasse had arisen because both landlords and tenants are "reluctant to invest" in the absence of any clear security for the future, and that tenants fear that any improvements made would be contested at the point of waygo, which is a matter that is still being debated. Wood described Scottish Land & Estates' amnesty offer as

"a desperate bid to ward off"

the absolute right to buy. Therefore, it seems that the heightened tensions of 2002-03 have not yet been resolved.

The Supreme Court upheld the landlords' human rights in the case of Mr Salvesen. That is the wider context in which the corrections in the order are being proposed. However, as the cabinet secretary has been at pains to explain, the current reviews on tenancy relations and the absolute right to buy are not material to the order's proposed legal corrections. We should acknowledge that that debate continues in a different form.

We should hope that the painful experience of the past 10 years on this matter can lead to a calm and respectful debate, that decisions in the interests of maintaining and improving efficient production on our farmlands should be central to the outcome of the discussion, that contractual arrangements between landlords and tenants can be regularised, and that lessons can be learned from what has been an important but expensive episode.

**Alex Fergusson:** May I make a brief comment? I agree with almost everything that has been said today, but I think that there is a lesson to which we must give cognisance.

Whenever something like a right to buy is discussed, mentioned or brought into the debate, it is surely inevitable that those who might be affected by such a move, even if it is being discussed only theoretically, will take steps to protect what they already have. I feel that one of the lessons that we should have learned over the past 10 years is that we cannot float such ideas or bring them into the debate without there being consequences. I think that that is what has brought us to where we are today.

I agree with what the cabinet secretary said, because none of us—including, I think, the stakeholders—wants to be where we are. I share the cabinet secretary's aspirations and hope that the order will help us to find a way through the problems. I think that we need to bear that in mind as the debate moves forward. I agree with the convener that it needs to move forward in a balanced and reasonable manner, but I repeat that we cannot float certain ideas or theories without there being consequences.

**The Convener:** That is good to have on the record. Are there any other comments from members?

**Jim Hume:** I have just a brief one. I appreciate all the work that the cabinet secretary and his team have done on the remedial order. I was an NFU activist at one time, and I remember many tenants having some very disturbing times. That has left a scar. There are different views on all sides, but we should bear in mind that trust has been lost. From what I can see, it seems that a lot of land is being held back because of that lack of trust. If we can bear that in mind as we go forward and get the trust back between tenants and landlords, I hope that we can have a market for letting land, which is obviously the best way for new entrants to access agriculture and the wider rural economy.

**Claudia Beamish:** I acknowledge the remarks of the convener and Alex Fergusson, and I understand Alex's point that people will protect what they already have. However, if we want to have balance in the debate, we must acknowledge that some tenants and those who want to get into agriculture are in a different position. I would not want people to shy away from looking at the future because of the issue of protecting what is already there. Having said that, I respect those who already work well on the land.

**The Convener:** If there are no further comments, I invite the cabinet secretary to wind up.

**Richard Lochhead:** I have listened very closely to all the comments that members have made. Many good points have been made, and I certainly agree with much of what has been said. I might put a slightly different emphasis on some of the issues, but we are talking about difficult issues.

We must balance the interests of various sectors in Scotland while trying to achieve the ultimate outcome of ensuring that our land is used productively for the public interest and that there is an opportunity for new entrants into agriculture. We need new generations to work the land, otherwise we will not be able to produce food as a country or to look after our landscapes. That is an on-going challenge that I have struggled with since day 1 in my post.

Of course there are many other reviews that are under way that will influence the debate going forward. However, we all have to learn lessons from the episode that we have been discussing. I hope that we now have a way of putting it behind us and moving forward.

**The Convener:** The question is, that motion S4M-09333 be agreed to.

*Motion agreed to,*

That the Rural Affairs, Climate Change and Environment Committee recommends that the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 [draft] be approved.

**The Convener:** The committee's report will confirm the outcome of the debate.

I thank the cabinet secretary and his officials for coming along, and I hope that we can move on because of the order.

The committee's next meeting is on 26 March, when we will take evidence on the CAP and the Scotland rural development programme from the cabinet secretary.

10:28

*Meeting continued in private until 11:09.*

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

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