



The Scottish Parliament
Pàrlamaid na h-Alba

Published 2 October 2025
SP Paper 883
71st Report, 2025 (Session 6)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated Powers in the Land Reform (Scotland) Bill (as amended at Stage 2)



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction and overview of the Bill

1. This report considers the delegated powers in the [Land Reform \(Scotland\) Bill](#) (“the Bill”) as amended at Stage 2.
2. The Committee previously considered the delegated powers in this Bill at Stage 1 and published its [report](#) on 17 January 2025. The Committee was content with 36 of the 50 delegated powers contained in the Bill. The Committee made recommendations in respect of the remaining 14 powers. Some of the issues identified and reported on in relation to the powers by the Committee have not been addressed by way of amendment.
3. The Bill completed Stage 2 on 24 June 2025. The Bill was amended to include 6 new delegated powers and to revise 9 delegated powers, all of which are considered in this report.
4. This Bill was introduced by the Scottish Government on 13 March 2024. The lead committee was the Net Zero, Energy and Transport Committee. As this report is after Stage 2, it is addressed to the Parliament.
5. The stated purpose of the Bill is to make provision about the management and transfer of large holdings of land; to require the Scottish Ministers to make publicly available a model lease for environmental purposes; and to modify the law on small landholdings and agricultural holdings. The amended Bill comprises 39 sections in 3 parts together with a schedule in 10 parts to deliver the stated policy intent.

Delegated Powers

6. At Stage 2 the Bill was amended to revise 9 powers and add 6 new powers to make subordinate legislation conferred on the Scottish Ministers. The Scottish Government has prepared a [Supplementary Delegated Powers Memorandum](#) (“SDPM”) which sets out the new and revised powers and provides an explanation of what the powers allows, why they have been taken and why the Parliamentary procedures are considered appropriate.
7. The Committee's views on those are set out below, including a number of issues which the Committee is asking the Scottish Government further questions on. This report will be followed up with a letter to the Scottish Government. That correspondence, and subsequent response from the Scottish Government, will be published on the Committee's web pages in the usual way.

Review of relevant powers

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

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Revised or New Power: Revised

Provision and Revisions

8. Section 1(4) inserts section 44A into the Land Reform (Scotland) Act 2016 (“the 2016 Act”) and gives Scottish Ministers the power to make regulations imposing obligations on the owners of certain types of land to promote community engagement in relation to that land. In the Bill as introduced, section 44A(5) required Scottish Ministers to consult with the Land and Communities Commissioner (“the Commissioner”) before making regulations. Following amendment at Stage 2, the Scottish Ministers must now, before laying a draft of any regulations, also consult such persons they consider appropriate.
9. Inserted section 44B(1) requires regulations to include requiring the owner of land to ensure that there is a publicly available land management plan; that there is engagement with communities on the plan or any significant changes to the plan; and that the plan is reviewed every 5 years from when it was made publicly available. At Stage 2, this section was amended so that regulations must also require the owner of land to ensure that there is engagement with tenants, crofters or small landholders with rights associated with the land when developing or making significant changes to the plan.
10. Section 44B(2) provides that obligations do not need to be imposed in connection with all land to which falls within the description at section 44D. Following amendment at Stage 2, new section 44B(2A) requires Scottish Ministers, when laying the regulations, to publish a statement setting out their reasons for not imposing the obligations on the excepted land.
11. Section 44B(3) requires that the regulations must set out information a land management plan must contain including details of the land to which the plan relates, the long term vision or objectives of managing the land, how the owner is complying with obligations in the regulations, the Scottish Outdoor Access Code, and the code of practice on deer management and how the owner is managing the land in a way that contributes to net zero, is adapting to climate change and increasing or sustaining biodiversity. This section was amended at Stage 2 to include how the owner is having regard to, or intends to have regard to, any local plan in place in relation to the land, the steps taken by the owner to engage with communities in relation to the development of the plan, how engagement with communities influenced the development of the plan, and how engagement with tenants and crofters has informed the development of, or significant changes, to the plan.

12. Section 44B was also amended at Stage 2 (new subsection (4)) to allow regulations to include the way the owner of land may, and the period of time within which the owner of land must, comply with the obligation described in section 44B(1). New subsection (5) requires regulations under 44A to provide, in relation to crofting estates owned by Scottish Ministers, for the appointment of an independent person to fulfil the obligations described.
13. Section 44D, which describes the land on which regulations may impose obligations was also amended at Stage 2. It now includes land that is a single holding or a composite holding that exceeds 1,000 hectares in area. In the Bill as introduced this was a single holding or a composite holding that exceeds 3,000 hectares. The definition of composite holding is also amended to include areas of land within 250 metres of another area of land owned by the same person or set of persons, or by connected persons.

Committee consideration

14. The Scottish Government explains in the SDPM that while the revisions at Stage 2 add additional requirements to the list of what land management plans must contain and expand the scope of the land in relation to which obligations may be imposed, the reasons for taking this power remain as set out in the [Delegated Powers Memorandum](#) (“DPM”) accompanying the Bill as introduced. The reasons for using the affirmative procedure remain as set out in the DPM.
15. The Scottish Government also explains in the SDPM that the change to the consultation requirement followed recommendations from this Committee at Stage 1 and has been repeated for other revised powers below.
16. Further the change to the threshold from land that exceeds 3,000 hectares to land that exceeds 1,000 hectares stemmed from evidence at Stage 1, including from the lead Committee, that saw some merit in aligning the thresholds operating across the Bill for reasons of policy cohesion and clarity for stakeholders, while noting the power to vary the thresholds in future. (The lotting provisions in the Bill apply to large land holdings that exceed 1,000 hectares.) The revised definition of a composite holding followed a recommendation by the lead Committee in its Stage 1 report that highlighted that land split by a road, railway or similar, should be treated as contiguous.
17. The Committee notes that at Stage 1 this Committee recommended that there should be a statutory requirement to consult stakeholders in addition to the Commissioner before exercising this power and therefore welcomes this amendment in respect of community engagement and land management plans. Other than this, the Committee found the power in the Bill as introduced acceptable in principle and was content that it is subject to the affirmative procedure.
18. The lead Committee’s report not only agreed with the statutory consultation requirement, but also recommended that a pre-laying procedure should be added to this power so that Parliament can consider draft regulations.
19. With regard to the changes to sections 44B and 44D, other than the change to the land threshold, the Committee considers that there is sufficient detail in the amended sections and in the DPM and SDPM as to how this power is likely to be exercised and the provisions to be made in regulations. Further amendments to

engage additional stakeholders and to clarify why land has been excepted from the obligations appear reasonable.

20. The Committee also notes that the proposed change to the land threshold may stem, in part, from a lead Committee recommendation that the Scottish Government should reflect on whether the threshold should be reduced, following the varying evidence provided to the Committee on what this threshold should be.
21. While those reflections have resulted in the proposed change being made, the Committee considers this is a substantial change to the scope of the power, which is not fully addressed in the SDPM. As such, the Committee asks the Scottish Government why it was considered necessary to widen the scope of this power to land that exceeds 1,000 hectares, other than to align the thresholds operating across the Bill, given the varying evidence heard by the lead committee on this point and that this will subject an increased number of landowners to these obligations.

22. **The Committee welcomes that the statutory requirement to consult such persons as Ministers consider appropriate, in addition to the Land and Communities Commissioner, has been included in this revised power.**
23. **The Committee highlights to the Scottish Government the lead Committee’s recommendation that additional scrutiny is attached to the subordinate legislation, whereby the instrument is laid in draft for consultation with Parliament, and asks whether it intends to bring forward amendments at Stage 3 to address this.**
24. **The Committee asks the Scottish Government to set out why it is considered necessary to widen the scope of this power to impose obligations on land that exceeds 1,000 hectares, other than to align the thresholds operating across the Bill, given the varying evidence obtained on what this threshold should be.**

The following three powers were considered together in the Committee’s Stage 1 report as the Committee considered that they are similarly wide powers which can potentially modify significant parts of the Bill and change policy. The Committee raised similar issues with each of these powers and for the purposes of this report they continue to be grouped together.

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 (“44M”)

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 (“46L”)

Section 4(2) inserting section 67Y into the Land Reform (Scotland) Act 2003 – Power to modify various provisions:

– 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. (“67Y”)

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Revised or New Power: Revised

Provisions and Revisions

25. Section 1(4) inserts section 44M into the 2016 Act which confers a power on Scottish Ministers to modify the land in relation to which community engagement obligations may be imposed by regulations under section 44A. It also confers a power to change the list of persons who may report an alleged breach to the Commissioner under new section 44E. At Stage 2, new section 44M(1)(c) has been added to allow Scottish Ministers to modify the maximum amount of a fine which may be imposed under section 44H(1) or new section 44IA(4)(b). Section 44M is also amended to require that the Scottish Ministers must consult such persons as they consider appropriate before laying a draft of any regulations.
26. Section 2 of the Bill introduces a requirement for landowners to give prior notification of their intention to sell large land holdings and gives communities an enhanced opportunity to make a late application under existing community right to buy legislation. Section 2(4) inserts section 46L into the Land Reform (Scotland) Act 2003 (“the 2003 Act”) which confers a power on Scottish Ministers to make regulations amending both the period during which the prohibition on transfer of large land holdings applies to allow for those that have noted an interest to be invited to make an application to register an interest (section 46F inserted into the 2003 Act); and the land to which the prohibition applies (section 46K inserted into the 2003 Act). Section 46L was amended at Stage 2 to require that Scottish Ministers must consult such persons as they consider appropriate before laying a draft of any regulations.
27. Section 4(2) of the Bill inserts new section 67Y into the 2003 Act which confers a power on the Scottish Ministers to make regulations modifying various provisions of the Bill – i.e. to change what constitutes an exempt transfer for the purposes of the prohibition on transfer under inserted sections 67C and 67D; the land affected by prohibition on transfer (section 67G); how long lotting decisions have effect (section 67F); and the period after which a review of a lotting decision can be requested under inserted section 67P. Section 67Y(1)(ca) was added at Stage 2 to also include modifying the new 6 month time period in which the Scottish Ministers must make lotting decisions under 67N(6); and a replacement lotting decision under 67R(8). Section 67Y(2) was also added at Stage 2 to require that the Scottish Ministers must consult such persons as they consider appropriate before laying a draft of any such regulations under this section.

Committee consideration

28. At Stage 1, the Committee considered that the power to modify the land to which the community land obligations apply (44M) was wide. In its view, the Bill did not define any criteria or limitations upon its exercise and little detail had been provided on why the power is necessary or how it will be exercised other than the Scottish Government considered it important that there should be an ability to alter the threshold following monitoring and feedback. However, in the Committee's view, regulations made under this provision could substantially alter the land to which community responsibility obligations apply with no statutory consultation requirement included at that time, despite the significance of the obligations to be imposed on landowners, who are also subject to penalties for failure to comply with the obligations. Further, modifications made under these regulations could represent a significant policy change and amend primary legislation.
29. At Stage 1, the Committee considered that the power to modify the land to which the prohibition will apply and the length of the prohibition on transfer without defining any criteria or limitations upon its exercise (46L) was wide. Little detail on why the power is necessary or how it will be exercised had been provided other than the Scottish Government considered it appropriate to be able to modify the 40-day period following monitoring and review of the transfer measures; and that it is important for the definition of land affected by the prohibition to be amended in light of monitoring as this is a new area of policy. However, in the Committee's view, 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 section 46K. Further, at that time, there was no statutory consultation requirement on the face of the Bill despite the significance of the prohibition on landowners and creditors. Also, modifications made under these regulations could represent a substantial policy change and amend primary legislation.
30. At Stage 1, the Committee considered that 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 without defining any criteria or limitations to be placed upon its exercise (67Y) was wide. Little detail had been provided on why the power is necessary or how it will be exercised other than to allow for adjustment where monitoring and practical experience demonstrate that this is required. However, in the Committee's view, 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, at this time, there was no statutory consultation requirement despite the significance that any modifications could have on landowners and creditors. Also, modifications made under these regulations could represent a substantial policy change and amend primary legislation.
31. As a result, the Committee drew to the attention of the lead committee that it was concerned by the undefined extent of these powers to modify:

- the land on which community obligations are imposed;
- large landholdings to which the prohibition on sale applies; and
- the land to which the prohibition on transfer without a lotting decision applies.

and, as a result, the potential for these powers to increase the impact on additional landowners/creditors and the land market in Scotland.

32. The Committee also asked the lead committee to consider:
- the necessity for and the scope of these powers; and
 - whether it considers it is appropriate that such potentially significant modifications to fundamental aspects of the Bill be made by subordinate legislation.
33. Further, if the lead committee considered these powers are appropriate, the Committee recommended that:
- additional scrutiny is attached to the subordinate legislation, whereby the instrument is laid in draft for consultation with Parliament; and
 - there should be a statutory requirement to consult before exercising these powers including a requirement to lay consultation documents or reports on any consultation carried out alongside regulations made under this power.
34. In its Stage 1 Report, the lead committee recommended that, in relation to each of these powers, a pre-laying procedure should be added, so that the Parliament can consider draft regulations.
35. At Stage 1, this Committee recommended that there should be a statutory requirement to consult stakeholders before exercising these powers, and therefore welcomes this amendment, which helps to address the Committee's concerns if/when the Scottish Government seeks to modify these provisions as this will now require stakeholder input. However, the amendments at Stage 2 do not address all of the Committee's concerns, as outlined above, and therefore it highlights this to the Scottish Government and asks if it intends to bring forward amendments at Stage 3 to introduce a pre-laying procedure that allows the Parliament to consider and comment on draft regulations, in line with the recommendations from this and the lead Committee at Stage 1 .

36. **The Committee welcomes that the statutory requirement to consult such persons as Ministers consider appropriate has been included in these revised powers.**
37. **The Committee highlights again to the Scottish Government its previous recommendation (which was supported by the lead Committee in its report) that additional scrutiny is attached to the subordinate legislation, whereby the instrument is laid in draft for consultation with Parliament. The Committee asks whether it intends to bring forward amendments at Stage 3 to address this.**

Section 2(4) inserting section 46KA into the into the Land Reform (Scotland) Act 2003 – Power to prescribe an area of land that forms part of a large holding as exempt from the prohibitions on transfer under section 46B or 46F

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Revised or New Power: New

Provision

38. Sections 46B and 46F inserted by section 2(4) of the Bill into the 2003 Act prohibit certain transfers of land, or the taking of action with a view to certain transfers of land, where the land is, or forms part of a, a large holding of land as described in inserted section 46K. New inserted section 46KA allows Scottish Ministers to prescribe a size of an area of land that forms part of a large holding of land as exempt from the prohibitions on transfer. The prohibitions ordinarily apply to a large landholding as defined to allow time for interest to be registered or to invite applications to register an interest in relation to a large landholding under existing community right to buy legislation.
39. It also allows Ministers to prescribe circumstances where, even if the area of land to be transferred is smaller than the prescribed area, the prohibition will still apply. Section 46KA(5) provides that Ministers must consult such persons as they consider appropriate before laying a draft of regulations under this section.

Committee consideration

40. The Scottish Government explains in the SDPM that evidence heard at Stage 1 and subsequently recommended by the lead Committee in its Stage 1 report, highlighted the need to exempt small scale, uncontroversial land transfers from the prohibitions. This new power allows Ministers to identify the threshold below which an area of land is exempted as well as any exceptions to such areas, following consultation. The power can also in future be used to modify the size of the prescribed area of land and any exemptions.
41. The Scottish Government further explains that the affirmative procedure is appropriate given this new regulation making power would allow changes to what land might be within scope of the prohibitions.
42. The Committee considers that this new power is reasonable, reflects the evidence heard and has been recommended by the lead committee. It is also reasonable that this power contains an exception to the exception dependent on circumstances and that there is flexibility to modify the prescribed area. The affirmative procedure also provides for appropriate parliamentary scrutiny.
43. **The Committee welcomes that Scottish Ministers have from the outset of this new power included a statutory obligation to consult such persons as they consider appropriate before laying any regulations.**

- 44. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 4(2) – inserting new section 67OA into Land Reform (Scotland) Act 2003 – Power to issue guidance on lotting decisions

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

Revised or New Power: New

Provision

45. New section 67OA was added to the Bill at Stage 2 to place a duty on Scottish Ministers to issue guidance about the making of lotting decisions under section 67N. The guidance must include information on how the process of making a lotting decision will operate in practice, circumstances when the Commissioner should carry out a review of an application and when a report by the Commissioner should be provided. Scottish Ministers must also consult both the Commissioner and such persons as they consider appropriate before issuing any guidance. Ministers must make guidance (including any revised guidance) publicly available as soon as practicable after issuing it.

Committee consideration

46. The Scottish Government explains in the SDPM that as well as providing greater clarity on the process of a lotting decision and the role of the Commissioner, the new guidance will also help provide greater clarity on how Ministers consider community sustainability and other public interest considerations as part of their decisions.
47. The Scottish Government further explains that the production of the guidance, while requiring consultation, remains largely an administrative matter and in its view does not require any parliamentary oversight. It is therefore not subject to any parliamentary procedure.
48. The Committee considers that a power to issue guidance is not uncommon and can be used to help in the implementation of a Bill's provisions. The guidance to be issued under this new power is to clarify the process of making a lotting decision, how Ministers will consider community sustainability and public interest in the decision making, and the role of the Commissioner in lotting decisions. This will aid understanding of and provide transparency to the decision-making process. Guidance making powers of this type do not generally attract any parliamentary procedure due to the nature of them, which is considered appropriate here.

- 49. The Committee welcomes that Scottish Ministers have from the outset of this new power included a statutory obligation to consult both the**

Commissioner and such persons as they consider appropriate before issuing any guidance; and must make guidance (including any revised guidance) publicly available as soon as practicable after issuing.

50. **The Committee finds the power acceptable in principle and is content that it is not subject to any parliamentary procedure.**

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

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Revised or New Power: Revised

Provision and Revision

51. Section 4(2) of the Bill inserts new section 67P into the 2003 Act which makes provision for Scottish Ministers to offer to buy land subject to a lotting decision in certain limited circumstances. New section 67S makes further provision about this including when such an offer can be made, how land is to be valued, the price to be offered for the land and an appeal process regarding the price to be offered for the land. Section 67S(6) confers a power on Scottish Ministers to make further provision about buying land under section 67P, including how land is to be valued for the purpose of section 67S. New subsection 67P(7) was added at Stage 2 to require that Scottish Ministers must consult such persons as they consider appropriate before laying a draft of any regulations under this section.

Committee consideration

52. The Scottish Government explains in the SDPM that the reasons for taking this power and for using this parliamentary procedure remain as set out in the DPM.
53. The Committee notes that at Stage 1, this Committee recommended that there should be a statutory requirement to consult stakeholders before exercising this power but otherwise found the power acceptable in principle and was content that it is subject to the affirmative procedure. The Committee therefore welcomes this amendment in line with the Committee's recommendations.

54. **The Committee welcomes that the statutory requirement to consult such persons as Ministers consider appropriate has been included in this revised power.**

55. **The Committee finds the revised power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 4(2) inserting section 67V(4) into Land Reform (Scotland) Act 2003 – Power

to make further provision about compensation**Power conferred on: Scottish Ministers****Power exercisable by: Regulations****Parliamentary procedure: Affirmative****Revised or New Power: Revised****Provision and Revision**

56. An owner of land or a creditor in a standard security having a right to sell land is entitled to compensation from the Scottish Ministers if incurred in complying with the procedural requirements of Part 2A of the 2003 Act – Lotting of Large Land Holdings - in connection with the land; if attributable to a potential transfer of the land being prevented without a lotting decision being made; or if attributable to a lotting decision stating that the land may only be transferred in lots (new section 67V inserted into the 2003 Act by section 4(2) of the Bill). The amount of compensation to be awarded is to be determined by Scottish Ministers or the Lands Tribunal on appeal by the person seeking compensation against the Scottish Ministers' determination of the amount payable. Subsection 67V(4) confers a power on Scottish Ministers to make further provision about compensation including how claims are to be made and how the amount payable is to be determined. New subsection 67V(5) was added at Stage 2 to require that Scottish Ministers must consult such persons as they consider appropriate before laying a draft of regulations under section 67V. An amendment to section 5(2)(a) of the Bill also provided that regulations under this section would now be subject to the affirmative procedure.

Committee consideration

57. The Scottish Government explains in the SDPM that the reasons for taking this power remain as set out in the DPM. Further, following recommendations from this Committee at Stage 1, the power was amended to the affirmative procedure and also to include a statutory requirement to consult.
58. At Stage 1, this Committee recommended that there should be a statutory requirement to consult stakeholders before exercising this power and that the affirmative procedure was more appropriate; but otherwise found the power acceptable in principle. The Committee therefore welcomes these amendments in line with its recommendations.

59. **The Committee welcomes that the statutory requirement to consult such persons as the Ministers consider appropriate has been included in this revised power.**
60. **The Committee welcomes that this power is now subject to the affirmative procedure.**
61. **The Committee finds the revised power acceptable in principle and is content that it is subject to the affirmative procedure.**

Schedule, paragraph A4: Size of small landholding

Power conferred on: **Scottish Ministers**

Power exercisable by: **Regulations made by Scottish statutory instrument**

Parliamentary procedure: **Affirmative**

Revised or new power: **New**

Provision

62. The schedule was amended at Stage 2 to insert a new part A1 in relation to small landholdings. Newly inserted paragraph A4(1) provides that a small landholding must not exceed 20 hectares, subject to sub-paragraph (2).
63. Sub-paragraph (3) confers power on the Scottish Ministers to modify paragraph A1 by regulations to substitute a different area for the area for the time being mentioned in sub-paragraph (1), and to provide for land which is to be left out of account in calculating the size of a holding for the purposes of paragraph A4.
64. Regulations made under this section are subject to the affirmative procedure.

Committee consideration

65. The Scottish Government explains in the SDPM that the schedule enables the creation of new small landholdings in the future. It considers it is important to be able to review the size limit of the new small landholdings so it can meet the needs of individual businesses and of land tenure policy.
66. The Scottish Government further explains that it considers the affirmative procedure is appropriate as regulations made under this provision determine whether land is eligible for inclusion or exclusion from being a small landholding which will have economic impacts for both the small landholder and their landlord. It is also considered appropriate as the powers permit the amendment of primary legislation.
67. This part of the Bill has been subject to significant amendment at Stage 2. The Committee considers that the provisions in the Bill create a number of obligations for a small landholder and the landlord including relating to rent, conditions of let, rights of access, compensation and diversification amongst other matters. Identification of what land will constitute, or be exempt from, a small landholding is fundamental to this part of the Bill, and it is beneficial that the size is specified on the face of the Bill.
68. This delegated power is similar to that in section 1(4) inserting section 44M into the Land Reform (Scotland) Act 2016 and section 4(2) inserting section 67Y into the 2003 Act. Inserted section 44M confers power to be able to modify the land to which the community land obligations apply and inserted section 67Y confers power to be able to make regulations modifying various provisions of the Bill.
69. This Committee asked a number of questions of the Scottish Government on those powers when considering the Bill at Stage 1. The Committee drew both of them to the attention of the lead committee to consider their necessity, scope and whether such potentially significant modifications to fundamental aspects of the Bill should

be capable of being made by subordinate legislation.

70. The Committee also recommended that if the lead committee considered those powers appropriate, additional scrutiny should be attached to the subordinate legislation, whereby any instruments should be laid in draft for consultation with Parliament, and there should be a statutory requirement to consult before exercising the powers.
71. This power is more limited in scope than the powers in 44M and 67Y, however, just like these powers there is a potentially significant impact with regulations made under this provision being able to alter the land that would be a small landholding, without any requirement to consult. Little detail has been provided in the SDPM on why the power is necessary or how it will be exercised other than the Scottish Government considers it important that there should be an ability to review the size limit to ensure it meets the needs of individual businesses and land tenure policy.
72. The powers in sections 44M and 67Y have been amended to include a statutory requirement to consult, however, there is no corresponding requirement to consult when exercising this new power, despite its potential significance. The Committee asks the following questions in order to fully consider the necessity of the power. It also sees no reason why, as a minimum, a statutory requirement to consult stakeholders should not be added to this power.

73. **The Committee highlights that it considers the SDPM does not provide sufficient detail on the necessity of this power, and without this it is not clear to the Committee that this power is necessary.**
74. **The Committee asks the Scottish Government: -**
- **for a detailed justification on the necessity of the power.**
 - **what consideration it has given to whether there should be a requirement to consult with affected stakeholders before making regulations under these powers given the impact they may have on those involved in the process.**
 - **whether it intends to bring forward amendments to these powers at Stage 3.**

Schedule, paragraph 5E: Compensation for damage caused by game or game management

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

Revised or new power: New

Provision

75. The schedule to the Bill has been amended at Stage 2 to add in Part 1A in respect

of the use of small landholdings. Part 1A introduces new paragraph 5E of the schedule. Compensation for game damage is not payable unless the requirements specified in paragraph 5E(3) are met.

76. Newly inserted paragraph 5E(3)(a) provides that those requirements include that notice by the small landholder of their claim should be in such form and manner as may be prescribed by the Scottish Ministers in regulations.
77. Newly inserted paragraph 5E(3)(c) provides that notice in writing of the claim is given to the landlord by the small landholder of their claim should be in such form and manner as the Scottish Ministers may prescribe by regulations within 6 months of the giving of notice.
78. Regulations made under paragraphs 5E(3)(a) and 5E(3)(c) are subject to the negative procedure.

Committee consideration

79. These powers have been added in at Stage 2. The Scottish Government explains in the SDPM that these powers are necessary to ensure that a landlord is given fair notice of a claim and to ensure that the form of the notices can be adapted to take account of any change of circumstances. This is described as mirroring the approach to compensating for game damage provided for agricultural holdings.
80. Powers to prescribe certain notices, the form and manner of notice, or other matters that must be specified in various documents and notices is a common feature in modern primary legislation. It is not generally expected that such detail would be on the face of the Bill and so it is standard to see this type of power to be outlined in subsequent subordinate legislation.
81. The provisions listed above are in the same terms as already provided for in section 20 (in respect of agricultural holdings) of the Bill which this Committee was content with at Stage 1. The powers are narrow and limited in their exercise, they allow the form and manner of giving notice to be prescribed and does not permit changes to primary legislation. These powers are specifying administrative matters relating to notices and the negative procedure is considered appropriate given the scope and nature of the powers.

82. **The Committee is content with the powers in principle and that they are subject to the negative procedure.**

The following are new powers for both small landholders and agricultural holdings. The next two powers do the same thing for both types of land and as such both powers will be dealt with together below for the purposes of this report.

Schedule, paragraph 51(9) & (10): Exercise of right to buy

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

83. Paragraph 51 of the schedule provides that where a landholder has a right to buy, they may proceed to buy the land from the owner or any eligible creditor provided that the landholder gives notice to the owner or the creditor that they intend to buy the land.
84. The schedule was amended at Stage 2 inserting paragraphs 51(9) and (10), conferring new powers on the Scottish Ministers to make regulations providing for the period in which notice under 51(3) must be given and providing for any such regulations to be able to modify paragraph 51.
85. Regulations under paragraph 51 are subject to the affirmative procedure.

Section 10: Registration of interest and right to buy

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

86. Section 10 inserts a new section providing that where a landholder has a right to buy, they may proceed to buy the land from the owner or any eligible creditor provided that the landholder gives notice to the owner or the creditor that they intend to buy the land.
87. Section 10 was amended at Stage 2 inserting new subsections (8) and (9) into section 29 of the Agricultural Holdings (Scotland) Act 2003, conferring new powers on the Scottish Ministers to make regulations providing for the period in which notice under 29(2A) must be given and providing for any such regulations to be able to modify section 29.
88. Regulations under section 10 are subject to the affirmative procedure.

Committee consideration

89. The Scottish Government explains in the SDPM that these powers are to provide clarity for all parties, by enabling the Scottish Ministers to ensure that notice is given at a time that is fair to both the landholder and the owner or creditor.
90. The Scottish Government further explains that it considers the affirmative procedure is appropriate as the exercise of a right to buy will have a direct effect on the rights and interests of landowners and anyone who has acquired the land.
91. The powers provide for the period of notice to be prescribed and for the whole of paragraph 51 and section 29 to be able to be modified. It is not clear why the powers require to be so wide. The Committee considers the SDPM justification for this to be insufficient.

92. It is not clear how these powers provide clarity given they permit regulations to be made later providing for the period of notice and permitting modification of the sections as a whole when other notice periods are provided for in the primary legislation. The Parliament is therefore unable to anticipate what changes may be made by the regulations in the future.
93. The context of these powers is, in the view of the Committee, of importance. The Committee considered wide powers the Bill introduced in respect of the registration of interest and right to buy for small landholdings and agricultural holdings at Stage 1. These new powers are in addition to those wide powers already provided for in the Bill as introduced which the Committee were concerned about.
94. The other powers (paragraph 59 of the schedule and section 10) in the Bill confer powers on the Scottish Ministers to make provision for or in connection with the registration of interests in buying the land comprised in their small landholdings and agricultural holdings. The powers provide for various matters to be able to be set out in subsequent regulations and they also permit modification of several sections and paragraphs in those parts of the Bill.
95. The Committee asked the Scottish Government several questions regarding those powers at Stage 1 and subsequently drew them to the attention of the lead committee, on the basis that it was concerned about their scope and recommended that that they should be more narrowly drafted. The lead Committee made the following recommendation:
- ” *“The Committee recommends, in line with the DPLR Committee’s view, that the power in paragraph 59 of the schedule should be more narrowly drafted to give a clearer sense of what this power will be used for rather than granting a catch-all power for any provision related to the registration of a small landholder’s interest in land.”*
96. The lead committee also stated about a tenant’s right to buy:
- ” *“The Committee is concerned about the reliance on secondary legislation in respect of provision about a tenant’s registration of interest. This was the approach in the 2016 Act and is the approach again now. This does not give any certainty to tenants or landlords about how registration will work in practice. We consider the power as drafted to be broad and recommend that this should be framed more narrowly, with more detail on the face of the Bill about its parameters.”*
97. Given the already wide regulation making powers in the Bill in this area the Committee asks for a detailed justification on the need for these additional powers, why they are drafted so as to permit modification of the paragraph and section as a whole and whether there should be a requirement to consult before exercising them to allow a proper assessment of the necessity and scope of the powers.

- 98. The Committee highlights that it considers the SDPM does not provide sufficient detail on the necessity and scope of these powers, and without this it is not clear to the Committee that they are necessary and it is not clear that the scope of the power is doing no more than necessary to meet the policy intent.**

It is not obvious from the SDPM why the notice period cannot be stated on the face of the Bill or how such regulations would provide further clarity as they permit notice periods to be fixed via subordinate legislation and to modify the paragraph and section as a whole. As such it is not clear to the Parliament the type of provision that may be made.

99. The Committee asks the Scottish Government: -

- for a detailed justification of the necessity of the powers given the wide powers that already are already contained in the Bill in respect of the registration of interest and right to buy.
- for a detailed justification why the powers require to be so wide, permitting the modification of the paragraph and section as a whole.
- why the notice period cannot be specified on the face of the Bill.
- what consideration it has given to whether there should be a requirement to consult with affected stakeholders before making regulations under these powers given the impact they may have on those involved in the process.
- whether it intends to bring forward amendments to these powers at Stage 3.

Section 14: Compensation for improvements

Section 73(A1) of the 1991 Act

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new power: Revised

Provision

100. Section 14(7) inserts new subsection (2B) into section 39 of the 1991 Act which lists improvements that are presumed to facilitate or enhance sustainable or regenerative agricultural production. Section 14(8) amends the existing power in section 73 of the 1991 Act dealing with improvements for which compensation may be payable. Section 14(9) substitutes a new schedule 5 into the 1991 Act.
101. Paragraph 1 of the substituted schedule has the effect that an improvement that makes a change to the land or fixed equipment will require the consent of the landlord if it means that the land or equipment affected by the change either cannot or is unlikely to return to its former agricultural use, or the improvement has a long term or significant impact on the management of the holding as a whole. Paragraph 2 is an illustrative list of improvements of that type. Paragraph 3 of the substituted schedule has the effect that notice is required for an improvement that does not

have a long term or significant impact on the management of the holding. Paragraph 4 is an illustrative list of improvements of that type. Paragraph 5 is a fixed list of improvements for which no consent or notice is required.

102. Inserted section 73(A1) confers power on the Scottish Ministers by regulations to modify section 39(2B) and paragraphs 2, 4, and 5 of schedule 5 to add, amend or remove an improvement.
103. Regulations made under this power are subject to the negative procedure.

Committee consideration

104. The Scottish Government explains in the SDPM that it is necessary to modify the illustrative lists in paragraphs 2 and 4 and the fixed list in paragraph 5 of substituted schedule 5, and the list of improvements in newly inserted section 39(2B), in order to ensure that they properly reflect changes in understanding and in agricultural practice over time. The power is said to be used after engagement with stakeholders if evidence suggests it is helpful to include an activity in the lists to enable efficient management of the holding and facilitate appropriate on-farm investments aimed at mitigating the effects of climate change.
105. The Scottish Government further explains that it considers the negative procedure is appropriate because the lists that can be modified are illustrative or have a modest effect, and the exercise of the power does not raise any issues of particular importance.
106. The Committee considers that the amendments made at Stage 2 do not significantly alter the power, they are in similar terms, with the exception of the addition of being able to modify inserted section 39(2B) and further detail being added to some of the lists in the schedule. It should be highlighted that one of the lists this power permits amendment to is a fixed list of improvements (paragraph 5 of the schedule) and the current fixed list of improvements is amended by regulations subject to the affirmative procedure.
107. When the Committee considered this power at Stage 1 it considered that whilst the lists are generally illustrative, they will be referred to by the Land Court when determining any matters referred to them in respect of consent to improvements. The Committee also noted the power itself is permitting the amendment of primary legislation, albeit to a somewhat limited extent and the power is more than minor or administrative and as such the level of parliamentary scrutiny being applied should reflect that. The Committee was content with the power in principle but recommended that the power be subject to the affirmative procedure. The lead committee agreed and reported

” *“The Committee also supports the recommendation of the Delegated Powers and Law Reform Committee that the power to modify the lists of improvements in schedule 5 should be subject to the higher level of parliamentary scrutiny that would be afforded by the affirmative procedure.”*

108. The power is narrow in that it can only be used to add, amend or remove items from the lists in section 39(2B) and paragraphs 2, 4, and 5 of schedule 5, however, this Committee’s previous comments remain relevant and the Committee reiterates its view that the exercise of the power should be subject to a higher level of parliamentary scrutiny.

109. **The Committee reiterates its view that it is content with the power in principle but recommends that the power be subject to the affirmative procedure, and asks the Scottish Government whether it plans on bringing forward an amendment to this effect.**

The following are newly inserted powers for both tenancies under the Agricultural Holdings (Scotland) Act 1991 and the Agricultural Holdings (Scotland) Act 2003. The next two powers do the same thing for both types of tenancies and as such both powers will be dealt with together below for the purposes of this report.

Section 23: Rent review: 1991 Act tenancies

Paragraph 9 of schedule 1A to the 1991 Act

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: Revised

Provision

110. Section 23 of the Bill amends schedule 1A to the 1991 Act which makes provision for rent reviews. This section of the Bill was further amended during Stage 2 with the amendments to the schedule now making provision for what the Land Court is, and is not, to have regard to when determining the fair rent of the holding. The provisions include the Land Court must have regard to the rent of comparable holdings (rather than similar ones), and in determining fair rent to take no account of improvements to the holding amongst other matters.

111. New paragraph 9 of the schedule confers power on the Scottish Ministers to be able, by regulations, to make further provision for the purposes of paragraphs 7(4) and (4A) which lists certain matters to which regard must be had, or to which no account is to be taken by the Land Court.

112. Regulations made under this provision are subject to the affirmative procedure.

Section 24: Rent review: limited duration tenancies

Section 9BA of the 2003 Act

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: Revised

Provision

113. Section 24 of the Bill amends section 9B of the 2003 Act which makes provision for rent reviews. This section of the Bill was further amended during Stage 2 with this section now making provision for what the Land Court is, and is not, to have regard to when determining the fair rent of the holding. The provisions include the Land Court must have regard to the rent of comparable holdings (rather than similar ones), and in determining fair rent to take no account of improvements to the holding amongst other matters.
114. New section 9BA of the 2003 Act confers power on the Scottish Ministers to be able, by regulations, to make further provision for the purposes of paragraphs 9B(2) and 9B(2A) which lists certain matters to which regard must be had, or to which no account is to be taken by the Land Court.
115. Regulations made under this provision are subject to the affirmative procedure.

Committee consideration

116. The Scottish Government explains in the SDPM that the amendments made at Stage 2 have been developed in close consultation with the industry and the Scottish Ministers intend to continue this work around factors that should be considered when determining the prevailing economic conditions in the sector. This is to ensure that any rent determined by the Land Court is the fair rent for the holding.
117. The Scottish Government further states that the powers are necessary to make further provision in respect of the rent 'factors' considered appropriate for the purpose of establishing a particular baseline in respect of a matter, or to give legal effect to a consensus that has been established in the industry.
118. The Scottish Government considers the affirmative procedure is appropriate as the provision made by these powers could have significance in resolving disagreements on fair rent and a corresponding effect on the interests of landlords and tenants.
119. The Committee was content with the powers in the Bill as introduced at Stage 1. The amendments made to the Bill at Stage 2 provide further detail on the face of the Bill about the matters the Land Court is to take account of, and not to have regard to which provides additional clarity to those involved in the process. The amended powers are narrowly drafted to be able to make further provision in respect of the specified matters only and the Scottish Ministers must consult with such persons they consider appropriate before making such regulations. Additionally, the regulations are subject to the affirmative procedure affording a high level of Parliamentary scrutiny given the impact they may have on those involved in the process. Therefore, the Committee is content with the revised powers.

120. **The Committee is content with the powers in principle and that they are subject to the affirmative procedure.**

