LAND REFORM (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Land Reform (Scotland) Bill, introduced in the Scottish Parliament on 13 March 2024.

2. The following other accompanying documents are published separately:

- a Financial Memorandum (SP Bill 44–FM);
- a Policy Memorandum (SP Bill 44–PM);
- a Delegated Powers Memorandum (SP Bill 44–DPM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 44–LC).

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

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

OVERVIEW OF THE BILL AND GENERAL NOTES

Overview

5. The Bill makes changes to the law concerning land management, community engagement and right to buy and transfers of land as well as agricultural holdings and small landholdings.

Interpretation

6. The Bill's freestanding text, that is its sections and schedule, fall to be interpreted in accordance with the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA").

7. Text that the Bill inserts into another enactment falls to be interpreted in accordance with the interpretation legislation that applies to that enactment.

8. The interpretation legislation applicable to Acts of the Scottish Parliament the Bills for which received Royal Assent on or after 4 June 2010 (such as the Land Reform (Scotland) Act 2016) is ILRA.

9. The interpretation legislation applicable to Acts of the Scottish Parliament the Bills for which received Royal Assent before 4 June 2010 (such as the Agricultural Holdings (Scotland) Act 2003 and the Land Reform (Scotland) Act 2003) is the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999.

10. The interpretation legislation applicable to Acts of the UK Parliament (such as the Agricultural Holdings (Scotland) Act 1991) is the Interpretation Act 1978.

Crown application

11. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. The Bill applies to the Crown in the same way as it applies to everyone else. The Bill amends a number of existing enactments, some of which do, and some of which do not, apply to the Crown. The Bill makes no change to the application of those enactments to the Crown.

PART 1 – LARGE LAND HOLDINGS: MANAGEMENT AND TRANSFER OF OWNERSHIP

Overview of Part 1

12. Part 1 makes provision to:

- empower the Scottish Ministers to impose community-engagement obligations on the owners of large land holdings by regulations and makes provision for the enforcement of those obligations (section 1),
- provide a greater opportunity for a community body to register an interest in buying a large land holding or part of one through the community right to buy process (sections 2 and 3),
- prevent, subject to exceptions, ownership of large areas of land from being transferred until Ministers have made a lotting decision (that is a decision about whether the land should be transferable only in lots specified by Ministers) and, where the lotting decision is that the land is to be transferrable only in lots specified by Ministers, further prevents ownership of the land from being transferred except in accordance with that decision (sections 4 and 5),

- establish the new office of the Land and Communities Commissioner (section 6), which is to have functions in relation to the enforcement of the obligations provided for by section 1 and the making of lotting decisions provided for by sections 4 and 5.

Section 1 – Community engagement obligations for owners of large landholdings

Overview of section 1

13. Section 1 of the Bill modifies Part 4 of the Land Reform (Scotland) Act 2016 ("the 2016 Act"). As enacted, Part 4 of the 2016 Act places a duty on the Scottish Ministers to produce guidance about engagement with communities in decisions relating to land that may affect communities. Section 1 of the Bill makes that guidance-producing function Chapter 1 of Part 4 and inserts a new Chapter 2.

14. The new Chapter 2:

- enables Ministers to make regulations imposing obligations about community engagement on the owners of land of a certain scale (inserted sections 44A to 44D), and
- provides for the enforcement of those obligations by the Land and Communities Commissioner (inserted sections 44E to 44L).

Power to make regulations imposing obligations

15. Inserted section 44A confers a regulation-making power on the Scottish Ministers to enable them to impose obligations on the owner of land for the purpose of promoting community engagement in relation to the land. Any regulations made under this power are to be informed by the land rights and responsibilities statement published in accordance with Part 1 of the 2016 Act, and can only be made if the Land and Communities Commissioner has been consulted about them and the Scottish Parliament has approved them in draft (see section 1(5), further explained below).

16. The power conferred by inserted section 44A can only be used to impose obligations in relation to land to which inserted section 44D applies. This means that obligations can be imposed only on the owners of relatively large land holdings, specifically single or composite holdings that:

- exceed 3,000 hectares, or
- exceed 1,000 hectares and constitute more than 25% of an inhabited island (as defined by section 1 of the Islands (Scotland) Act 2018).

17. For the purposes of inserted section 44D, a single holding is the whole of a contiguous area of land owned by one person or a set of persons who own it jointly or in common. A composite holding is where contiguous areas of land are not owned by the same person, but by persons who are connected to one another and so fall, for this purpose, to be treated as though they formed a single area. Persons are "connected" in this context if they are companies in the same group or one person has a controlling interest in the other or a single person has a controlling interest in them both. Whether a person has a controlling interest in another person is to be determined by reference

to the register set up by regulations under section 39 of the 2016 Act, which at the time of writing means the register of persons holding a controlled interest in land established by the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 (S.S.I. 2021/85).

18. For example, if A Ltd and B Ltd are part of the same company group and A Ltd owns 2,000 hectares adjoining B Ltd's 2,000 hectares, the combined single holdings of A Ltd and B Ltd would be treated as forming a 4,000 hectare composite holding. Inserted section 44D would apply to the land comprising that composite holding, and therefore regulations could be made under inserted section 44A imposing obligations on both A Ltd and B Ltd in relation to that land.

19. The power conferred by inserted section 44A cannot be used to impose obligations in relation to land that is not of the requisite scale for inserted section 44D to apply to it. It does not follow, however, that regulations under inserted section 44A must apply in relation to all land to which inserted section 44D applies. Ministers could exercise the power so as to impose obligations in relation to only some of that land.

20. Inserted section 44M gives Ministers a power to modify inserted section 44D by regulations and thereby alter the land in relation to which obligations can be imposed by regulations under inserted section 44A. Regulations modifying inserted section 44D are subject to the affirmative procedure (see section 1(5)).

21. Whatever other community-engagement obligations Ministers might impose in exercise of the power conferred by inserted section 44A, inserted sections 44B and 44C require them to make regulations imposing obligations of the kind they each describe. Inserted section 44B requires an obligation be imposed on land owners to ensure that land management plans are produced. Inserted section 44C requires an obligation be imposed on land owners to consider reasonable requests from community bodies to lease land. In both inserted section 44B and 44C, subsection (2) makes clear that the obligation they require to be imposed does not have to be imposed in relation to all land to which inserted section 44D applies. As mentioned above, inserted section 44D sets a limit on the land in relation to which inserted section 44A can be used to impose obligations, there is no requirement for obligations to be imposed to all cases within that limit.

Enforcement of obligations imposed by regulations under inserted section 44A

22. Obligations imposed by regulations under inserted section 44A are to be enforced by the Land and Communities Commissioner (see the notes on section 6 of the Bill in relation to the Commissioner generally). Inserted sections 44E to 44L make provision about the obligations' enforcement.

23. A closed list of persons may report an alleged breach of an obligation set out in regulations made under inserted section 44A. Those persons are set out in inserted section 44E(2), which is modifiable by regulations under inserted section 44M.

24. After receiving a report of an alleged breach, the Commissioner may investigate the alleged breach provided that the report is from a person specified in inserted section 44E(2), it contains sufficient information to proceed to an investigation and the report is not based on substantially the same facts as a previous report of an alleged breach from the same person.

25. If the report does not contain sufficient information to proceed to an investigation the Commissioner may require the person that submitted the report to provide the necessary additional information within a stipulated timeframe (inserted section 44F(2)).

26. During an investigation the Commissioner is empowered to require information from any person that the Commissioner considers appropriate for the purposes of the investigation (inserted section 44G). A person that fails to comply with a requirement to provide information to the Commissioner may be issued with a fine of up to £1,000. Inserted section 44J makes provision about the notice that the Commissioner is to give in order to impose a fine. Inserted section 44I confers a right to appeal against a fine imposed by the Commissioner. Inserted section 44K provides that fines imposed by the Commissioner are payable to the Scottish Land Commission who are, in turn, required to pay the funds received into the Scottish Consolidated Fund. It further provides for fines to be recoverable in the same way as any other civil debt.

27. Inserted section 44H sets out what steps are open to the Commissioner to take where the Commissioner's finding following an investigation is that there has been a breach of an obligation imposed by regulations under inserted section 44A. The ultimate sanction available to the Commissioner is to impose a fine of up to £5,000. But the Commissioner can only impose a fine if either:

- the Commissioner has first offered the person that has breached the obligation an opportunity to agree a means of remedying the breach and the person has either refused to agree a remedy or has agreed to a remedy but then failed to comply with the agreement, or
- the Commissioner considers it would not be appropriate to give the person that committed the breach an opportunity to remedy it (in considering which the Commissioner is to have regard to any previous failure to comply with an obligation imposed by regulations under inserted section 44A).

28. As with a fine under inserted section 44G, inserted section 44J makes provision about the notice by which the Commissioner is to impose a fine under inserted section 44H, inserted section 44I confers a right to appeal against the fine to the Lands Tribunal for Scotland and inserted section 44K provides for fine monies to be paid to the Scottish Land Commission and by them into the Scottish Consolidated Fund and for payment of fines due to be enforceable in the same way as other civil debts. In an appeal against a fine imposed for breaching an obligation, the Lands Tribunal can (in addition to upholding or simply overturning the fine) overturn the fine and also remit the case back to the Land and Communities Commissioner to try, or indeed try again, to agree a way of remedying the breach. If no agreement can be reached, or the agreement is not abided by, the Commissioner can then again exercise the power under inserted section 44G to impose a fine for the breach.

29. Inserted section 44L provides that it is an offence for a person to disclose confidential information obtained by the Commissioner in the course of an investigation except in the circumstances set out in subsection (2). The offence is punishable with a fine. The amount of the fine will be determined by the criminal courts. In the most serious cases, prosecuted under solemn procedure, there is no limit on the fine the court can impose. In less serious cases, prosecuted under summary procedure, the maximum fine that can be imposed is the statutory maximum (which is defined by schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and is, at the time of writing, £10,000).

Modification of Chapter 2 (of the 2016 Act) by regulations

30. Inserted section 44M confers a regulation-making power on Ministers to modify the land in relation to which obligations may be imposed by regulations under inserted section 44A, and the list of person who may report an alleged breach of those obligations to the Land and Communities Commissioner under inserted section 44E(2). Section 1(5) of the Bill modifies section 126 of the 2016 Act so that regulations under inserted section 44M are subject to the affirmative procedure (see below note on subsection (5)).

Subsection (5)

31. Subsection (5) of section 1 modifies the list of regulation-making powers in section 126(3) of the 2016 Act so as to make regulations under inserted sections 44A and 44M subject to the affirmative procedure. The affirmative procedure is defined by section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 2 – Extended opportunity for community bodies to register an interest in land

Overview of section 2

32. Section 2 of the Bill modifies existing community right to buy legislation so as to provide greater opportunity for a community body to register an interest in buying a large holding of land or, as will more usually be the case, part of one.

33. Part 2 of the Land Reform (Scotland) Act 2003 allows a community body (as defined in section 34 of the 2003 Land Reform Act) to register an interest in land. Once an interest has been registered, (subject to exceptions) the land cannot be sold until notice has been given to the community body with the registered interest in it (see section 40 of the 2003 Land Reform Act for the prohibition on transferring land except in accordance with the Part, and section 48 for the requirement to give notice to the community body). Having received that notice, the community body can activate its right to buy and seek to purchase the land in accordance with a procedure laid down in Chapters 3 and 4 of Part 2 of the 2003 Land Reform Act.

34. If there is no registered community interest in an area of land, it can currently be sold without notice being given to a community that might have wanted to register an interest in buying it had it anticipated the land being sold. The modifications made by section 2 of the Bill will mean that:

- before ownership of a large holding of land or part of one can be transferred, (subject to exceptions) the possibility of registering a community interest in buying it will need to have been publicised at least 30 days earlier, and
- a somewhat modified form of the process for registering a community interest in the land from the one set out in section 37 of the 2003 Land Reform Act will be available to communities that begin the process during that 30 day period.

The detail

The prohibition

35. Section 46B (as inserted by section 2(4) of the Bill) introduces a new, temporary prohibition on the transfer of land of this type by the owner or a creditor in a standard security having a right to sell the land to allow eligible community bodies additional time and opportunity to submit an application to register an interest in the land. The existing late application procedure under section 39 of the 2003 Land Reform Act also remains open to community bodies in relation to land that is or forms part of a large holding of land should they not be invited to submit an application under inserted section 46G or, in certain circumstances, where such an application is unsuccessful.

Land affected by prohibition

36. The prohibition in inserted section 46B applies to relatively large land holdings, specifically single or composite holdings that exceed 1,000 hectares.

37. For the purposes of inserted Chapter 2A a single holding is the whole of a contiguous area of land owned by one person or a set of persons who own it jointly or in common. A composite holding is where contiguous areas of land are not owned by the same person, but by persons who are connected to one another and so fall, for this purpose, to be treated as though they formed a single area. Persons are "connected" in this context if they are companies in the same group or one person has a controlling interest in the other or a single person has a controlling interest in them both. Whether a person has a controlling interest in another person is to be determined by reference to the register set up by regulations under section 39 of the 2016 Act, which at the time of writing means the register of persons holding a controlled interest in land established by the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 (S.S.I. 2021/85).

38. For example, if A Ltd and B Ltd are part of the same company group and A Ltd owns 600 hectares adjoining B Ltd's 700 hectares, the combined single holdings of A Ltd and B Ltd would be treated as forming a 1,300 hectare composite holding.

Lifting the prohibition

39. In order to lift the prohibition on transfer of land that is or forms part of a large holding of land, the owner or creditor must first either serve a notice on Ministers of their intention to transfer all or part of the land under section 46C (inserted by section 2(4) of the Bill) or, where there is

already a registered interest in some or all of that large landholding, serve a notice under section 48 of the 2003 Land Reform Act.

Procedure once a request to lift the prohibition is received by Ministers

40. On receipt of a notice under inserted section 46C or section 48 of the 2003 Land Reform Act in relation to large holding of land, Ministers are to publicise the intention to transfer the land and invite notes of intention to register an interest in the land from eligible persons in the community who are either a community body as defined in the 2003 Land Reform Act or a person affiliated with such a community body (see section 46D as inserted by the Bill). Under inserted section 46A, Ministers are required to keep a list of the contact details of persons who wish to be notified about any possible transfer of land in a particular geographical area. These are the persons referred to in section 46D(2)(b)(i) that Ministers have a specific obligation to notify of potential transfers of land in the relevant area.

41. After an initial sift of notes of intention to register an interest, Ministers are to invite applications to register an interest in the land under section 37 of the 2003 Land Reform Act (from community bodies who are likely to meet the registration criteria) during a 40 day window which runs from the invitation being made. Section 37 sets out the existing process for registering an interest in land at any time before missives are concluded for the transfer of the land or an option agreement is entered into for the acquisition of the land.

42. When Ministers invite applications to register an interest, the temporary prohibition placed on the transfer of the land by virtue of section 46B is lifted and a new prohibition is placed on the land (or parts of it) to which the successful notes of intention to register an interest invited under section 46D related (see section 46F as inserted by the Bill). The owner, or as the case may be the creditor, of any of the land which was the subject of the original notice under section 46C or 48 but which is not to be the subject of an application to register an interest is free, subject to section 4 of the Bill, to transfer that land as they wish.

43. When the 40 days for submitting an application to register an interest in all or part of the land has passed, the prohibition on transfer imposed by inserted section 46B expires but is replaced, where an application on the back of an invitation made under section 46G is received, by the prohibition in section 37(5)(e) of the 2003 Land Reform Act (which applies as it does when any application to register an interest in land is received) but subject to some modifications by virtue of section 39ZA (inserted by the Bill). Under section 37(5)(e), a prohibition on the transfer of land in relation to which an application to register an interest by a community body has been received is imposed to allow Ministers to determine whether or not to register the community body's interest. Ministers would ordinarily have 63 days in which to determine an application to register an interest in land. However, that timescale applies only where the land is not imminently to be transferred.

44. Where section 39ZA (as inserted by section 2(3) of the Bill) applies, therefore, the period of 63 days for determining an application is reduced to 30 days (as is the case under the existing period for late applications provided for by section 39 of the 2003 Land Reform Act) where the

owner of the land or creditor with a right to sell the land has indicated to Ministers by serving notice under section 46C (inserted by the Bill) or 48 (where there is already an interest registered in relation to all or part of the land in question) that they intend to transfer the land.

45. From receipt of an application invited under inserted section 46G, Ministers therefore have 30 days within which to determine whether or not to register the interest in the land which the application is seeking.

46. If an application is successful, the community body's interest in the land is registered in the Register of Community Interests in Land, the community body's right to buy the land under this Part is to be treated as having been activated under section 47 and the community body is to be treated as having confirmed its intention to proceed to buy the land. This means the existing community right to buy process under Part 2 of the 2003 Land Reform Act will operate as usual from that point.

Section 3 – Modifications to other enactments in connection with section 2

47. Section 3 of the Bill makes some minor changes to other enactments in connection with section 2.

48. Section 25 of the Conveyancing and Feudal Reform (Scotland) Act 1970, which relates to a creditor's right to exercise a power of sale in relation to land, is amended to make clear that such a power of sale is subject to all prohibitions on the transfer of land in the 2003 Land Reform Act. Prior to this modification it referred only to the prohibitions in sections 37(5)(e) to 40(1). The modification is made to reflect the Bill's adding further prohibitions, specifically those created by the new sections 46B and 46F which section 2 will insert and sections 67C and 67D which will be inserted by section 4.

49. Section 37(19) of the 2003 Land Reform Act is amended to include reference to section 39ZA (which is being inserted into the 2003 Land Reform Act by the Bill) so that the validity of anything done under section 37 is not affected by any failure to comply with the time limit specified in subsection (17) of section 37 (as modified by section 39(2)(b) or inserted 39ZA).

50. Section 63 of the 2003 Land Reform Act is amended to add loss or expense incurred as a result of the prohibition under section 46B and a prohibition imposed under section 46F to the matters for which the person (other than a community body) who incurred the loss or expense is entitled to compensation from Ministers of an amount to be determined by Ministers.

51. Section 98(5) of the 2003 Land Reform Act is amended so as to make subject to the affirmative procedure:

- regulations made under inserted section 46L(a) (specifying a change to the period in section 46F(2)(b) i.e. the period during which the prohibition under section 46F(1) has effect, and

- inserted section 46L(b) (amending the land affected by the prohibitions under Chapter 2A of the 2003 Land Reform Act).

52. Section 98(5) of the 2003 Land Reform Act does not refer to the affirmative procedure but is relevantly modified by schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010, section 29 of which defines the affirmative procedure.

53. Section 42(1) of the Land Registration etc. (Scotland) Act 2012 ("the 2012 Act") is amended to require the Keeper of the Registers of Scotland to notify Ministers about an application for registration of a deed which the Keeper is not satisfied does not relate to a transfer prohibited under inserted section 46B of the 2003 Land Reform Actor inserted section 46F(1).

54. Subsection (2) of section 42 of the 2012 Act is amended so that notice need not be given under subsection (1) if the only reason for the Keeper not being satisfied as mentioned in subsection (1) is that the application is not accompanied by a declaration required under inserted section 46J of the 2003 Land Reform Act (that is, a declaration that the transfer is an exempt transfer within the meaning of section 40(4) of the 2003 Land Reform Act and that it does not form part of a scheme to avoid the main purpose or effect of the provisions of Part 2 of that Act.

Section 4 – Prohibition on transfer of large holdings of land except in accordance with a lotting decision by Ministers

Overview of section 4

55. Section 4 of the Bill inserts a new Part 2A into the Land Reform (Scotland) Act 2003. The purpose of the new Part is to allow the Scottish Ministers to make a decision about whether land at a certain scale is to be transferable only in lots, with each lot being transferred to a different person.

56. Inserted Part 2A is divided into Chapters as follows:

- Chapter 1 imposes two prohibitions on transferring land (both of which are subject to exceptions): first, to prohibit land at a certain scale from being transferred without a lotting decision, and second to prohibit land from being transferred except in the lots specified in a lotting decision where the lotting decision states that the land is only to be transferrable in those lots.
- Chapter 2 sets out the process for Ministers making a lotting decision.
- Chapter 3 sets out the process for asking Ministers to review a lotting decision, and Ministers' options at the end of the review process.
- Chapter 4 allows for an appeal against a lotting decision that land needs to be transferred in lots.
- Chapter 5 provides for compensation to be paid to landowners who suffer loss or expense as a result of the provisions in the Part.

- Chapter 6 deals with relatively technical matters connected to the rest of the Part.

The detail

Chapter 1 of inserted Part 2A: prohibitions on transfer

57. Inserted section 67C prohibits the transfer of land to which inserted section 67G applies unless a lotting decision is in effect in relation to it. This prohibition does not affect exempt transfers. Exempt transfers are defined by inserted section 67J, which makes a transfer exempt from the prohibition created by inserted section 67C if it would be exempt from the prohibition in section 40(1) of the 2003 Land Reform Act, which operates in relation to the community right to buy. Inserted section 67Y gives Ministers a power to modify the definition of exempt transfer by regulations subject to the affirmative procedure (see discussion below of section 5). Whether a lotting decision is in effect in relation to land is addressed by inserted section 67F.

58. As stated, the prohibition created by inserted section 67C affects attempts to transfer land to which inserted section 67G applies. That means it affects transfers of areas of land that:

- exceed 1,000 hectares, or
- 50 hectares if the area in question forms part of a large holding of land (within the meaning of inserted section 67H) and cumulatively more than 1,000 hectares of that holding are, broadly speaking, on the market (which is to be gauged on the basis that notice of intention to transfer the land has been given under the community right to buy provisions and a contract for sale of the land has not concluded).

59. For the purposes of inserted section 67G, inserted section 67H provides that a large holding of land is a single or composite holding that exceeds 1,000 hectares. A single holding is the whole of a contiguous area of land owned by one person or a set of persons who own it jointly or in common. A composite holding is where contiguous areas of land are not owned by the same person, but by persons who are connected to one another and so fall, for this purpose, to be treated as though they formed a single area. Inserted section 67I provides that persons are "connected" in this context if they are companies in the same group or one person has a controlling interest in the other or a single person has a controlling interest in them both. Whether a person has a controlling interest in another person is to be determined by reference to the register set up by regulations under section 39 of the 2016 Act, which at the time of writing means the register of persons holding a controlled interest in land established by the Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Regulations 2021 (S.S.I. 2021/85).

60. Inserted section 67Y gives Ministers a regulation-making power to change the land to which inserted section 67G (and so the prohibition created by inserted section 67C) applies. Any such regulations will be subject to the affirmative procedure (see section 5 of the Bill).

61. In addition to the prohibition on transferring land created by inserted section 67C, inserted section 67D creates a further prohibition on transferring land. This further prohibition operates where a lotting decision is in effect in relation to land that states the land is to be transferred in lots

specified in the decision. Inserted section 67F explains when a lotting decision is in effect in relation to land. Where this prohibition operates, the land in relation to which the lotting decision is in effect can only be transferred in the lots specified in the lotting decision with each lot having to be transferred to unconnected persons (whether persons are "connected" for this purpose is to be determined by reference to inserted section 67I, which is discussed in paragraph 59 above). Like the prohibition created by inserted section 67C, the prohibition created by inserted section 67D does not affect exempt transfers as defined by inserted section 67J.

Chapter 2 of inserted Part 2A: process for making lotting decision

62. When Ministers receive a valid application for a lotting decision (or a previous lotting decision is quashed on appeal under inserted section 67V) they are to make a lotting decision under inserted section 67M or 67N in respect of the land.

63. Under inserted section 67M, Ministers are able to make an expedited lotting decision that the land does not need to be transferred in lots if they are satisfied that the owner of the land (or any part of it) wants to transfer the land to alleviate, or avoid, financial hardship and having to wait for a lotting decision under inserted section 67N is likely to cause, or worsen, financial hardship for the owner. A lotting decision under section 67M is valid for 1 year beginning with the lotting decision coming into effect in accordance with inserted section 67F(3).

64. Under inserted section 67N(1), Ministers may make a lotting decision stating that the land may only be transferred in lots (to unconnected persons) but only if transferring the land in that way would be more likely to lead to its being used (in whole or part) in ways that might make a community more sustainable than would be the case if all of the land were transferred to the same person.

65. A lotting decision under inserted section 67N(1) must specify the lots in which the land is to be transferred. It is valid for 5 years beginning with the lotting decision coming into effect in accordance with inserted section 67F(3).

66. Under inserted section 67N(3), where Ministers decide not to make a lotting decision requiring that the land be transferred in lots they must make a lotting decision confirming that fact.

67. Before making a lotting decision, Ministers are to request, and take into account, a report from the Land and Communities Commissioner under inserted section 67O. Inserted section 67O provides that a copy of the report produced is to be sent to the person who applied for the lotting decision (or, in the case of the report relating to a new lotting decision where the previous decision was quashed on appeal, the person who requested the previous lotting decision).

68. Further, in coming to a lotting decision under inserted section 67N, Ministers are to have regard to the International Covenant on Economic, Social and Cultural Rights (this requirement flows from section 98(5A) of the 2003 Land Reform Act, as amended by section 5 of the Bill).

Chapter 3 of inserted Part 2A: review of lotting decision

69. Inserted section 67P requires Ministers to review a lotting decision that is in effect (see inserted section 67F) where they receive a valid application asking them to do so. Having reviewed a lotting decision Ministers have the following options:

- leave the lotting decision unchanged,
- replace the lotting decision with a new one,
- offer to buy any unsold lots (which is an option open to them whether they have left the lotting decision unchanged or replaced it).

70. An application requesting a review is valid if it complies with the conditions in subsection (3) of inserted section 67P, namely (1) the applicant is the owner of, or a creditor in a standard security having a right to sell, land to which the lotting decision relates, (2) it is made in the manner prescribed by Ministers in regulations, and (3) it is made more than one year after the lotting decision was made (in the case of a first application for a review) or more than one year after Ministers received the last application to review the lotting decision (in any other case). Inserted section 67Y gives Ministers a power to change that one year period by regulations subject to the affirmative procedure (see section 5 of the Bill).

71. Where Ministers are reviewing a lotting decision, their duty to do so under inserted section 67P ceases to apply if they receive a valid request asking them to stop the review under inserted section 67Q.

72. A replacement lotting decision under inserted section 67R (following a review) may state that land is to be transferred in specified lots or that the land need not be transferred in lots. On the day the replacement lotting decision comes into effect the previous lotting decision (which was the subject of the review) is to be treated as withdrawn. The considerations governing the making of a replacement lotting decision under inserted section 67R are the same as those that apply to making a lotting decision under inserted section 67N.

73. Before making a replacement lotting decision, Ministers are to seek appropriate professional advice from a person who appears to Ministers to be suitably qualified, independent and to have knowledge and experience of transfers of land which is similar to the land to which the lotting decision would relate.

74. Following a review of a lotting decision, Ministers may offer to buy any lots that have not sold. Inserted section 67S provides that Ministers can only offer to do so if they are satisfied that it is likely that the fact that the land has not been transferred since the lotting decision was made is attributable to the land being less commercially attractive than it would have been had the lotting decision not prevented its being transferred along with other land.

75. Inserted section 67S further provides that any offer to buy unsold lots may only be at the price determined to be appropriate by the qualified person appointed by Ministers to value the land

(in accordance with inserted section 67S(5)) or by the Lands Tribunal for Scotland on appeal. If the Tribunal sets a higher value on the land in question than the Ministerially appointed person did, inserted section 67S(4) requires Ministers to make another offer for the land at that price.

76. While a review of a lotting decision is underway, inserted section 67T allows a person to specifically request that Ministers consider buying an unsold lot. Ministers, having received such a request, must decide whether the condition in inserted section 67S that must be satisfied if they are to offer to buy an unsold lot is satisfied. If Ministers decide that it is not, the person who requested that they may make an offer to buy may appeal to the Lands Tribunal against that decision. If the Lands Tribunal concludes that Ministers were wrong to decide that the condition is not satisfied, Ministers are to consider again whether to make an offer to buy the unsold lot and this time must proceed on the basis that the condition is satisfied (i.e. that they are entitled to make an offer to buy the land).

Chapter 4 of inserted Part 2A: right of appeal to the Court of Session against a lotting decision

77. Inserted section 67U provides a right of appeal to the Court of Session against a lotting decision that states that land is transferable only in specified lots. An appeal is to be lodged within 28 days, beginning the day after the lotting decision is made. On deciding the appeal the Court may either uphold the original lotting decision or quash the lotting decision (which will result in Ministers being required to make another lotting decision in accordance with inserted section 67K).

Chapter 5 of inserted Part 2A: compensation

78. Inserted section 67V gives a right to compensation from Ministers to an owner of land or a creditor in a standard security having a right to sell land for loss and expense arising from:

- complying with the requirements in inserted Part 2A (for example, costs associated with applying for a lotting decision),
- the prohibition on transfer under section 67C (that is, losses or expenses resulting from not being able to transfer land without waiting for a lotting decision),
- being unable to transfer land except in the lots specified in a lotting decision or being unable to transfer more than one of those lots to the same or connected persons.

79. The amount, if any, of compensation to be awarded is to be determined by Ministers or the Lands Tribunal for Scotland on appeal. Any appeal against Ministers' determination of the amount of compensation due is to be made within 21 days of the person appealing being informed of the Ministerial determination.

80. Ministers are to make further provision about compensation, including how claims are to be made and how the amount payable is to be determined, by regulations. Those regulations will be subject to the negative procedure (this is by virtue of section 98(4) of the 2003 Land Reform Act, as modified by schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Section 5 – Modifications in connection with section 4

81. Section 98(5) of the 2003 Land Reform Act is amended so as to make subject to the affirmative procedure:

- regulations made under inserted section 67S(6) (by which Ministers may make further provision about offers to buy unsold lots), and
- regulations under inserted section 67Y (by which Ministers may change what constitutes an exempt transfer for the purposes of the prohibitions on transfer under inserted sections 67C and 67D, the land affected by the prohibition under inserted section 67C, how long lotting decisions have effect and the period after which a review of a lotting decision can be requested under inserted section 67P(3)(c)).

82. Section 98(5) of the 2003 Land Reform Act does not refer to the affirmative procedure but is relevantly modified by schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010, section 29 of which defines the affirmative procedure.

83. Section 98(5A) of the 2003 Land Reform Act is modified so that lotting decisions made under inserted section 67N and 67R are to be made having regard to the International Covenant on Economic, Social and Cultural Rights.

Section 6 – The Land and Communities Commissioner

84. Section 6 of the Bill amends Part 2 of the 2016 Act (which establishes the Scottish Land Commission and the Tenant Farming Commissioner) to establish the office of a new commissioner called the Land and Communities Commissioner.

85. Section 6(1) to (10) of the Bill make provision for the Commissioner's role to be properly integrated into the Scottish Land Commission but with a remit and functions that are distinct from the Land Commissioners and the Tenant Farming Commissioner.

86. In particular, section 6(6) of the Bill sets out the criteria that a person must meet in order to be considered to be eligible for appointment to the role of the Commissioner. The criteria are that that the person appointed has expertise or experience in land management and community empowerment.

87. Section 6(7) of the Bill sets out that a person is disqualified from being appointed as the Land and Communities Commissioner if that person is or, within the year preceding the date on which the appointment is to take effect, has been the owner of land to which section 67G of the 2003 Land Reform Act (as inserted by the Bill) applies.

88. Section 6(11) of the Bill inserts a new Chapter into Part 2 of the 2016 Act to make detailed provision about the Commissioner's functions. Inserted section 38A provides for the Commissioner's functions.

89. Inserted section 38B provides that the Commissioner's functions may be delegated to any committee or employee of the Scottish Land Commission or any other person.

90. Where the office of the Commissioner is vacant, inserted section 38C provides that a person may be appointed as Acting Land and Communities Commissioner provided the person would not be disqualified from being appointed as the Commissioner under section 12 of the 2016 Act as amended by section 6(7) of the Bill.

PART 2 – LEASING LAND

Chapter 1 – Model lease for environmental purposes

91. Section 7 imposes an obligation on the Scottish Ministers to make publicly available a model lease designed for letting land so that it can be used (wholly or partly) for an environmental purpose. Subsection (4) defines what is meant by using land for an environmental purpose.

92. Ministers are to comply with their duty to publish a model lease within 2 years of the Bill receiving Royal Assent (which marks the point at which it becomes an Act of the Scottish Parliament). But, Ministers may change the date by which they are to fulfil the duty by regulations subject to the negative procedure (see section 29).

Chapter 2 – Small landholdings

93. Chapter 2 of the Bill deals with small landholdings. A small landholding is a tenanted holding which is regulated under the Small Landholdings Acts 1886-1931. These holdings can only exist outwith the crofting counties[1]. As at June 2023, it was estimated that approximately 59 small landholdings remained in existence[2].

Section 8 – Small landholdings

94. Section 8 of the Bill introduces the schedule. This introduces a number of rights in respect of small landholdings for the first time: specifically, in relation to diversification and the right to buy. It also consolidates (i.e. restates in one place) and makes a number of policy changes to the current archaic law on small landholdings in relation to certain topics: specifically, in relation to rent, assignation, succession, and compensation. The law on renunciation is also restated with only minor consequential changes (arising from the removal of provisions about loans which no longer apply). As a result of all of these changes, the current law as it applies to these topics is disapplied. For further details, see the commentary on the schedule (paragraph 277 onwards of these notes).

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[1] Per section 61 of the Crofters (Scotland) Act 1993, the crofting counties are the former counties of Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland, and Zetland.

[2] Introduction - Small landholdings modernisation: consultation analysis - gov.scot (www.gov.scot)

Section 9 – Extension of Tenant Farming Commissioner's functions

95. Section 9 of the Bill makes amendments to the Land Reform (Scotland) Act 2016 in order to extend the functions of the Tenant Farming Commissioner so that the Commissioner's functions encompass small landholdings as well.

96. More specifically, the section provides that—

- Subsection (2): in appointing the Commissioner, the Scottish Ministers must ensure that the person has expertise or experience not just in agriculture but also in rural land tenure,
- Subsection (3): the grounds for disqualification from appointment as Commissioner are expanded so that the type of tenancy of which the Commissioner may not be a landlord or tenant includes a small landholding,
- Subsection (4): the Land Commissioners' functions in respect of which they must have regard to the Commissioner's functions are expanded so as to cover not just functions relating to agriculture and agricultural holdings but also functions relating to small landholdings,
- Subsection (5)(a): the functions of the Commissioner are expanded to include small landholdings (meaning that the Commissioner will have the additional functions of: preparing, promoting and investigating breaches of codes of practice relating to small landholdings; referring to the Land Court questions of law relating to small landholdings; and collaborating with the Land Commissioners where their functions relate to small landholdings),
- Subsection (5)(b): the requirement upon the Commissioner to exercise their functions with a view to encouraging good relations between landlords and tenants of agricultural holdings is expanded so that a comparable duty exists in respect of small landholdings,
- Subsection (5)(c): if regulations are made adjusting the functions of the Commissioner as a result of the review into the Commissioner's functions which was carried out[3], those regulations may make equivalent provision in respect of the Commissioner's new functions relating to small landholdings,
- Subsection (6): the Commissioner's duty to prepare codes of practice for the purpose of providing practical guidance to landlords and tenants of agricultural holdings and their agents is expanded so as to similarly encompass small landholdings, and the non-exhaustive list of examples of codes of practice which the Commissioner may prepare is adjusted accordingly[4],

[3] Tenant Farming Commissioner functions: review - gov.scot (www.gov.scot)

[4] Note that the examples of a code of practice on the right to buy and diversification are added by the agriculture provisions in the Bill (see sections 10(5) and 19(2)), but this will automatically apply to small landholdings too.

- Subsection (7): the Commissioner's duty to promote codes of practice in certain ways is expanded so that the same duties apply in respect of small landholdings as apply in respect of agricultural holdings.

97. The changes made by subsections (8) and (9) simply update section headings so that it is apparent at a glance that the provisions, which are now spent anyway, do not relate to small landholdings.

98. While the list above sets out the express changes made to the Land Reform (Scotland) Act 2016 in order to encompass small landholdings, it should be noted that there are other provisions of the 2016 Act which do not require to be expressly amended but which will now have effect in relation to small landholdings too. That is to say, because the Commissioner's functions are expanded to include small landholdings, this flows through to the rest of the provisions automatically unless those provisions are limited in their terms. For example, the 2016 Act makes provision about the consultation duties which apply where the Commissioner wishes to make a code of practice. This will now apply to codes of practice relating to small landholdings just as it applies to codes of practice relating to agricultural holdings. However, a full analysis of the rules to which the Commissioner is subject, and which will therefore now be relevant to small landholdings, is beyond the scope of these notes.

Chapter 3 – Agricultural Holdings

99. Expressions used in this Part:

- "the 1923 Act" means the Agricultural Holdings (Scotland) Act 1923
- "the 1931 Act" means the Small Landholders and Agricultural Holdings (Scotland) Act 1931
- "the 1948 Act" means the Agriculture (Scotland) Act 1948,
- "the 1949 Act" means the Agricultural Holdings (Scotland) Act 1949
- "the 1991 Act" means the Agricultural Holdings (Scotland) Act 1991
- "the 2003 Act" means the Agricultural Holdings (Scotland) Act 2003
- "the 2016 Act" means the Land Reform (Scotland) Act 2016
- "agricultural holding" or "holding" means the subjects of let (i.e. the farm or agricultural land that is let to the tenant)
- "Commissioner" means the Tenant Farming Commissioner
- "Land Court" means the Scottish Land Court originally established under section 3 of the Small Landholders (Scotland) Act and continued by virtue of the Scottish Land Court Act 1993.

Tenant's right to buy

100. This section makes modifications to the 2003 Act and the 2016 Act in connection with a tenant's right to buy land and the registration of their interest.

Background and existing law

101. Part 2 of the 2003 Act requires a tenant farmer with a 1991 Act tenancy (as defined in section 1(4) of that Act) to apply to the Keeper of the Registers of Scotland to register their interest in purchasing their holding in the Register of Community Interests in Land before the tenant can exercise the pre-emptive right to buy.

102. Section 99 of the 2016 Act made provision to amend Part 2 of the 2003 Act. Amongst other things, section 99 sought to remove the requirement for tenants to register their interest in purchasing the land comprised in their lease with the Keeper. The purpose of section 99 of the 2016 Act was therefore to create an automatic right to buy which was not dependent on registration. However, section 99 of the 2016 Act has not been brought into force, meaning that such modifications made by section 99 of the 2016 Act to Part 2 of the 2003 Act do not currently apply.

Changes made by the Bill

Section 10 – registration of interest and right to buy

103. This section repeals section 99 of the 2016 Act. This means that Part 2 of the 2003 Act is left unmodified by section 99 of the 2016 Act. This has the effect of retaining the original process in the 2003 Act for registering an interest in acquiring the land comprised in the lease and preserves the connected duties of the tenant, the landowner and the Keeper. The statutory right to buy procedure protects the position of those tenants who have registered an interest in acquiring the land comprised in the lease.

104. This section also enables the Scottish Ministers to make provision by regulations for or in connection with the registration by tenants of 1991 Act tenancies of their interests in acquiring the land comprised in their leases. Subsection (2)(a) sets out a non-exhaustive list of examples of things the regulations may make provision about. The regulations may modify sections 24 to 28 of the 2003 Act and, if the Scottish Ministers consider it necessary or expedient, make consequential provision which modifies the other provisions of Part 2 of the 2003 Act.

105. The regulations would be subject to the affirmative procedure. Before laying a draft of such regulations before the Parliament the Scottish Ministers must consult the Keeper and such other persons the Scottish Ministers consider are likely to have an interest in the registration of interests to acquire land.

106. This section also amends section 27(2) (Tenant Farming Commissioner: codes of practice) of the Land Reform (Scotland) Act 2016 to add material regarding the tenant's right to buy to the

list of indicative issues that the codes of practice, required to be prepared and published by the Commissioner under subsection (1), may make provision about.

Resumption

Sections 11 to 13 – resumption

Introduction

107. Sections 11 to 13 relate to the resumption of possession of land from agricultural tenancies. Resumption is the right of a landlord to take back (resume) some of the land that has been let, typically for a specific purpose or purposes[5].

108. In the case of 1991 Act tenancies, resumption is primarily a contractual matter and will depend on the provisions in the lease, though some statutory provisions apply as respects a tenant's rights to a reduction in rent and compensation etc. and there are common law constraints on the exercise of the right to resume land. Where there is no contractual right of resumption in a 1991 Act tenancy, landlords may be able to give partial notice to quit to achieve a similar outcome. The tenant has a variety of contractual, common law and statutory rights for compensation in addition to an entitlement to a reduced rent.

109. For short limited duration tenancies, limited duration tenancies and modern limited duration tenancies, section 17 of the 2003 Act makes provision about the circumstances in which land may or may not be resumed and specifies a number of requirements as to the notice which is to be given, the corresponding reduction in rent and the compensation payable. Section 17 of the 2003 Act, as read with section 17A of that Act, also governs the resumption of land from repairing tenancies.

Section 11 – resumption in relation to 1991 Act tenancies

110. Section 11 amends the 1991 Act to insert a new Part 3ZA which deals with resumption for 1991 Act tenancies together with a new schedule 2A which deals with determining the amount of compensation payable for the value of the resumed land.

111. New inserted section 32ZA regulates three aspects of resumption under 1991 Act tenancies. It does not create a right of landlords to resume land from a holding where the lease does not otherwise provide for it.

112. Subsections (2) and (3) of section 32ZA impose a minimum requirement in respect of the notice that a landlord must give to resume land[6]. The notice must be in writing, specify the date that the resumption will occur and be given at least one year before that date. This applies even if the lease specifies a shorter period. However, where the lease specifies that a longer period of

[5] Those purposes cannot be agricultural, in those circumstances a notice to quit (or partial notice to quit) would be required to end the tenancy in respect of that part of land.

[6] The changes in section 32ZA bring the position for 1991 Act tenancies in line with those for limited duration tenancies.

notice must be given, that longer period will still be required. A copy of the notice must also be sent to the Commissioner.

113. Subsection (4) entitles a tenant who has received a notice of resumption to give the landlord notice to terminate the tenancy. This notice must be given within 28 days of receiving the landlord's notice or, if later, the date on which any matter arising from the notice is determined. This latter ground relates to the determination of matters relating to the compensation that is to be payable in respect of the resumption. Where the tenant serves such notice, the tenancy will be terminated on the date specified in that landlord's notice of resumption.

114. Subsection (6) sets out that a tenant is entitled to be paid an amount in respect of the value of the land being resumed (calculated in accordance with schedule 2A of the 1991 Act) in addition to the reduction in rent and the other claims for compensation that the tenant has.

115. New inserted section 32ZB enables the landlord to withdraw a notice of resumption, unless the tenant has given notice terminating the tenancy in consequence of the resumption, at any time before the resumption is to take effect. If the landlord does so, the tenant is entitled to recover any loss or expense reasonably incurred in reliance on that notice. The landlord must also notify the Commissioner of the withdrawal of the notice of resumption.

116. New schedule 2A sets out the process for determining the amount of compensation payable for the value of the resumed land. The process begins where the Commission receives a notice under section 32ZA(2)(b). At that point, the Commissioner is to appoint a valuer within the period of 14 days (or such other period as the Scottish Ministers may set out in regulations).

117. The Commissioner may appoint a person as a valuer only if the person appears to the Commissioner to meet the requirements set out in sub-paragraph (4). These are that the person:

- must be independent of both the landlord and the tenant, and
- possess qualifications, knowledge and experience suitable for assessing (i) the value of agricultural land, both with vacant possession and subject to an agriculture holding and (ii) the compensation that may be payable to tenants and landlords of such holdings.

118. The Commissioner has to give notice to the Tenant and the Landlord of who has been appointed valuer as well as the valuer's address.

119. Paragraph 2 of schedule 2A deals with where the landlord or the tenant object to who the Commissioner has appointed valuer. An objection may only be made on the grounds set out in paragraph 2(2) and relate back to the requirements the Commissioner was considering when making the appointment (i.e. independence and relevant qualifications etc.).

120. An objection to the valuer is made by way of an application to the Land Court to appoint a different person as the valuer. The application has to be made within 14 days of receiving the

notice from the Commissioner (under paragraph 1(6)) as to who has been appointed as the valuer and must state the ground of objection. The application may (but does not have to) also propose the name of another person who the applicant would prefer to be appointed as valuer. The Land Court may reject the objection (and confirm the appointment of the person appointed as valuer by the Commissioner) or appoint another person to be valuer. It does not have to appoint a person proposed in the application: another valuer may be identified as suitable as part of the Land Court process. The appointment of a valuer by the Land Court may not be appealed.

121. Paragraph 3 deals with the expenses of the valuer. The expenses of the valuer are to be met by the landlord (as the person who has triggered the valuation process by resuming the land). Where the Commissioner has met any expenses of the valuer, the Commissioner may recover those expenses from the landlord.

122. Paragraphs 4 and 5 deal with how the value of the land being resumed is to be assessed by the valuer. The valuer must assess the value of the land if sold with vacant possession (i.e. with no tenant in occupation) and if sold with the tenant still in occupation. There are various matters to which the valuer must have regard, take account of and not take into account when coming to those values and these are set out in sub-paragraph (2) (as read with sub-paragraph (3)). In making the assessment, the valuer is to invite representations from the landlord and the tenant and must have regard to those representations. The landlord and tenant are to make sure that the valuer can visit and see the land being resumed, provided that the visit is at a reasonable time and reasonable notice is given. So, for example, turning up late at night or without letting the landlord or tenant know beforehand would not be acceptable. The landlord and the tenant must also comply with any reasonable requests of the valuer in respect of information that the valuer may need to make the assessment. If they don't, the valuer may apply to the Land Court for an order requiring them to comply.

123. Once the valuer has the values, the valuer is to calculate the amount of compensation payable in respect of the value of the land being resumed in accordance with paragraph 6. This is half the difference between the value of the land being sold with vacant possession and if the tenant were still in possession.

124. To give a simple example: if a landlord resumed an area of land with a vacant possession value of £10,000 and a value with the tenant in occupation of £6,000 (giving a difference of £4,000), half the difference in those values would be £2,000. This would therefore be the amount of compensation payable in respect of this element of the resumption claim (in addition to the other claims the tenant may have in respect of the resumed land and the corresponding reduction in rent for the loss of the land).

125. Paragraph 7 sets out the process that a valuer must follow for notifying the landlord and tenant of the assessment of the values under paragraph 4 and amount of compensation payable under paragraph 6. It also sets out what information the valuer is to include when doing so. The notice containing this information is called a notice of assessment.

126. The valuer must complete the valuation and give the notice of the assessment within 8 weeks from either (i) the last day on which the landlord or tenant could apply to the Land Court to have a different valuer appointed from the one appointed by the Commissioner (i.e. 14 days after the Commissioner gave notice of the appointment of the valuer) or (ii) where such application was made, 8 weeks after the Land Court's decision on the application (i.e. when the appointment of the valuer is confirmed or a different valuer is appointed). At the same time as sending the notice of assessment to the tenant and the landlord, the valuer must also send a copy to the Commissioner.

127. The notice of assessment must set out the values for the land being resumed if sold with vacant possession and if sold with the tenant in occupation and the amount that has been calculated in accordance with paragraph 6 (being the amount of compensation payable). The notice of assessment must also be dated, include the date or dates of the valuations and how the valuer arrived at the values and amount of compensation.

128. Paragraph 8 provides the tenant and the landlord with the right to appeal to the Lands Tribunal against a matter contained in the notice of assessment (i.e. either of the values assessed, the amount of compensation and the things to which the valuer had regard or that the valuer took into account (or should or shouldn't have taken into account) when coming to those values).

129. The appeal must be made within 21 days of the service of the notice of assessment and must set out the grounds on which the appeal is being made. The Lands Tribunal may then reassess the value or values being appealed and determine a different amount of compensation as being due. The Lands Tribunal may also confirm that the values as assessed (and so the amount of compensation) contained in the notice of assessment are correct. The valuer may be a witness to the proceedings. Where the landlord is a creditor in a standard security, the owner of the land may also be heard and similarly any creditor of a standard security over the land (where the landlord is the owner) is entitled to be heard.

130. The Lands Tribunal is to give written reasons for its decision but that decision is final and may not be appealed. However, where a point of law arises that may be determined by the Land Court by virtue of the 1991 Act or 2003 Act, the Lands Tribunal is to refer the issue to the Court unless it considers it inappropriate to do so.

Section 12 – resumption in respect of limited duration tenancies

131. Section 12 adjusts section 17 of the 2003 Act to confer an entitlement to compensation on a tenant in respect of the value any land being resumed. This is in the same terms as the entitlement of tenants under the 1991 Act described above. Section 12 also inserts a new schedule 2 into the 2003 Act to provide for the same process in respect of valuing the land and determining the valuer of the compensation to be paid as that in schedule 2A of the 1991 Act described above.

Section 13 – compensation for disturbance on resumption

132. Section 13 provides that compensation for disturbance under section 43 of the 1991 Act is to be payable in respect of land that is being resumed. Compensation for disturbance reflects the

costs incurred by a tenant in leaving the holding, such as removing any goods, livestock, machinery or other items as well as the costs of preparing the claim for compensation.

133. In addition, section 13 amends section 43 to add compensation in connection with any costs incurred by the tenant in respect of the development of the land in question to form part of compensation for disturbance. These costs may, in particular, include professional fees (such as those of surveyors and architects).

134. Adjustments are made to subsection (4) of section 43 to cater for the section dealing with resumption of a part only of the holding.

135. Subsections (3) and (4) of section 13 make consequential amendments to section 52 of the 2003 Act.

Compensation for improvements

Section 14 – compensation for improvements

136. This section amends Part IV of the 1991 Act and replaces schedule 5 of that Act. The Part and schedule deal with the compensation to be paid to the tenant at the end of an agricultural tenancy for improvements made by the tenant during the tenancy.

Background and existing law

137. Part IV of the 1991 Act sets out the statutory basis for compensation to be paid to a tenant where the tenant has quit the holding at the termination of the tenancy in respect of "improvements"[7] carried out by the tenant. Section 34 sets out the right to compensation for improvements.

138. A "new improvement" is defined as an improvement specified in Schedule 5 of the 1991 Act which began on or after 1 November 1948[8]. The provisions in the Bill relate to new improvements only and in these explanatory notes reference to "improvements" are therefore to such improvements.

139. The activities which are regarded as improvements are listed in Schedule 5 of the 1991 Act. The Scottish Ministers have the power to amend that list following consultation with persons representing the interests of landlords and tenants in agricultural holdings[9]. Schedule 5 is currently subdivided into three parts: Parts I, II, and III. The rights of the landlord vary according to the Part which applies.

[7] Section 33 of the 1991 Act
[8] See Section 34(1) of the 1991 Act
[9] Section 73(1) of the 1991 Act

140. A tenant is currently entitled to compensation for a Part I improvement if, prior to carrying out the improvement, the landlord consented in writing[10]. The landlord and the tenant may by agreement attach conditions to the consent, however the agreement cannot override the tenant's entitlement to compensation under section 34 of the 1991 Act. An agreement might for example relate to the landlord's contribution to the capital cost of the improvement, or to the rate at which the capital value of the improvement is to be written down.

141. A tenant is currently entitled to compensation for a Part II improvement if, not less than three months prior to the commencement of the work, the tenant has given notice in writing to the landlord[11]. The notice does not have to be made in a specific form but must specify both the general nature of the work and the manner in which it will be carried out.

142. Within one month in the case of a 1991 Act tenancy or, in the case of a short limited duration tenancy, limited duration tenancy or modern limited duration tenancy, within 60 days[12], of receiving notice of the proposed improvement the landlord may give notice to the tenant stating that the landlord objects:

- to the carrying out of the improvement, or
- to the manner in which the tenant proposes to carry it out[13].

143. Section 39 of the 1991 Act provides that if the landlord has served an objection notice, and the tenant is determined to proceed with the improvement, then the tenant must apply to the Land Court for approval to carry out the improvement. The Land Court can withhold its approval, in which case the tenant would not be entitled to compensation if they were to carry out the improvement. Where the Land Court approves the improvement, then its approval may be given unconditionally, or upon such terms relating to the reduction of compensation which would otherwise be payable, or such terms in relation to any other matter as the Land Court deems appropriate. The tenant may carry out the improvement and is entitled to receive compensation as if the landlord had not objected, and as if any terms imposed as part of the Land Court's approval were contained in a written agreement between the landlord and tenant.

144. The test which the Land Court adopts is whether the improvement is reasonable and desirable on agricultural grounds for the efficient management of the holding. In *Whiteford v Cowhill Trustees*[14] the test is described as being an objective one and explains how it is to be applied.

145. If the Land Court has approved the improvement, the landlord may within one month of notification of that decision serve a written notice on the tenant undertaking to carry out the

[10] Section 37(1)(c) of the 1991 Act
[11] Section 38(1) and 38(3)(c) of the 1991 Act
[12] Section 49(2) of the 2003 Act.
[13] Section 39(1) of the 1991 Act.
[14] 2009 SLCR 188

improvement[15]. However, if the landlord does not then carry out the improvement, on application by the tenant, the Land Court may determine that the tenant may carry out the improvement. If the tenant does so, they would be entitled to receive compensation for the improvement as if the Landlord had not objected, and as if any terms imposed as part of the Land Court's approval were contained in an agreement in writing between the landlord and tenant[16].

146. Part III of Schedule 5 of the 1991 Act lists improvements that can be carried out which don't require consent or notice (subject to some limited exceptions). The tenant's right to compensation for a Part III improvement arises from section 34(1) of the 1991 Act.

147. In general terms, the amount of compensation payable to a tenant is "such sum as fairly represents the value of the improvements to an incoming tenant"[17]. The valuer is required to assess the value of the improvement to a hypothetical incoming tenant. The value of any benefit which the landlord has agreed in writing to give the tenant in consideration of the tenant carrying out the improvement is to be taken into account.

Overview of changes made by the section 14

148. Section 14 of the Bill amends sections 33, 33A, 34, 37, 38, 39 and 73 of the 1991 Act and replaces schedule 5 with a new version.

149. The changes made by section 14 are:

- to move from a model where compensation for improvements is payable in respect of fixed lists of particular improvements to one where whether consent or notice is required for a given compensable improvement is judged on the basis of (broadly) how significant the impact of the improvement is on the holding and its management,
- to treat improvements which relate to or facilitate sustainable and regenerative agricultural practices more favourably,
- to adjust the notice requirements for a tenant seeking landlord consent for an improvement,
- to provide for the tenant to be able apply to the Land Court for approval where the consent is withheld,
- to adjust, modernise and rationalise the descriptions of improvements in schedule 5.

Change of model

150. The amendments to section 33, 37(1) 38(1) and 39(1) and the new paragraphs 1 and 3 of the schedule provide for the change of model from fixed lists of improvements to one where whether an improvement needs consent or notice is judged by reference to its impact on the holding

[15] Section 39(3) of the 1991 Act.
[16] Section 39(4)(b) of the 1991 Act
[17] Section 36(1) of the 1991 Act.

and its management. Improvements that don't require consent (but for which a tenant is entitled to be compensated) are listed in Part 3 of schedule 5.

151. The amendment to section 37(1)(c) read with the new paragraph 1 of schedule 5 provides for the new test for improvements which require consent. An improvement will now require the consent of the landlord where it makes a change to land or fixed equipment on the holding that—

- means that the land or fixed equipment affected by the change cannot, or is unlikely to, return to its former agricultural use, or
- otherwise, has a long term or significant impact on the management of holding (as a whole).

152. Paragraph 2 of schedule 5 then provides a list of examples of improvements which are likely to require consent.

153. The amendment to section 38(1)(c) read with the new paragraph 3 of schedule 5 provides for the new test for improvements which require prior notice in order to be compensable. An improvement will now require to be notified if it makes a change to land or fixed equipment on the holding that does not have a long term or significant impact on the management of the holding (as a whole). Paragraph 4 of schedule 5 then provides a list of example improvements that are likely to require notice to be given.

154. Paragraph 5 continues to specify certain improvements for which no notice is required.

155. Taken together, this means that only the most significant improvements, those which take land out of agricultural use or which have a significant impact on the holding or its management will require consent. Most other improvements will require to be notified to the landlord in order to be compensable (unless they fall within paragraph 5).

Improvements which facilitate or enhance sustainable and regenerative production

156. Part 4 of schedule 5, which is referred to in section 39(2B) (discussed below), sets out a list of improvements which are presumed to facilitate or enhance sustainable and regenerative agricultural production. The improvements in this list may require consent or notice (by reference to the examples and depending on the scale of the improvement and its impact on the holding). However, where an improvement facilitates or enhances sustainable or regenerative agricultural production it meets one part of the two-part test that the Land Court is to consider under section 39(2A) when deciding whether or not to approve an improvement. As such, the improvements that are listed in Part 4 are more likely to be approved. Because of the presumption, a landlord who objects to such an improvement will have to either show that the given improvement will not, in fact, facilitate or enhance sustainable or regenerative agricultural production or that it is otherwise unreasonable in all the circumstances of the case for the improvement to be carried out.

Changes to the process for obtaining consent

157. Section 14(5) amends section 37 of the 1991 Act to introduce a process that is to be followed by tenants in seeking the consent of their landlord to an improvement. Subsection (1B) sets out that the request for consent must be in a prescribed form and be accompanied by prescribed information. The prescribed form and information will be set out in regulations made by the Scottish Ministers (and attracts the negative procedure).

158. If a landlord does not respond to a request for consent within the period of 70 days, then the landlord is deemed to consent to the improvement without any conditions (new subsection (1C)).

159. If the landlord refuses consent, then the landlord must provide reasons for the refusal including, in particular, explaining why the improvement does not meet a test in section 39(2A) or is otherwise unreasonable in all the circumstances of the case. Though not stated on the face of the legislation, if the landlord does not provide reasons, then the failure to do so is likely to be a matter that will be taken into account by the Land Court in any subsequent action for approval of the improvement.

160. Subsection (1E) allows a tenant to apply to the Land Court for approval where the landlord has refused consent, or the parties have been unable to agree the terms for consent within the 70-day period from the date the notice requesting consent was given. By virtue of subsection (1F), an application for approval will follow the same process as the one where a tenant is seeking approval under section 39 in respect of an improvement requiring notice.

161. Subsection (1G) confirms that a defect in notice or timings does not affect a tenant's right to claim compensation if the landlord and tenant have otherwise agreed the terms on which compensation is to be paid for an improvement.

Changes to the requirements for notice of improvements

162. Section 14(6) amends section 38 of the 1991 Act to introduce an ability for the Scottish Ministers to prescribe by regulations the form and content of any notice of an intention to carry out an improvement that is to be given by a tenant. The power also allows the Scottish Ministers to specify certain information that must accompany a notice. That second element reflects that the notice may need to be accompanied by plans or other detailed technical information. In common with other powers of this nature under the Act, the regulations are subject to the negative procedure (see section 85(1) of the 1991 Act).

Changes to Land Court approval process

163. Section 14(5) and (7) update the role of the Land Court in relation to obtaining approval for improvements by amending section 37 and 39 of the 1991 Act. The new Part 4 of schedule 5 is also of particular relevance here.

164. As set out above, section 37(1E) now provides for the tenant to be able to apply to the Land Court to obtain consent for an improvement where the landlord has refused or been unable to agree the terms for consent within 70 days.

165. Section 39(2A) sets out a test for the Land Court to apply when considering whether or not to approve the carrying out of an improvement. There are two elements to the test. The first element asks the Land Court to consider if the improvement will have a positive effect on the efficient management of the holding or facilitate or enhance sustainable or regenerative agricultural production on the holding.

166. Subsection (2A)(a)(i) deals with the positive effect on the efficient management of the holding. This caters for general improvements that an agricultural unit may wish to make. That may relate to any number of adjustments which improve the efficient management of a holding (like adjusting stock management systems or putting up a hay shed).

167. Subsection (2A)(a)(ii) is for improvements which are intended to facilitate or enhance sustainable or regenerative practices. This limb is designed to recognise that these practices might not always be more efficient or productive but that they are nonetheless worthwhile improvements on the basis of sustainability or environmental considerations.

168. This limb is to be read alongside Part 4 of schedule 5 which contains specific improvements which are to be presumed to be sustainable and regenerative (unless the contrary is shown). The effect of this is that improvements in Part 4 will automatically satisfy the first element of the Land Court test unless the landlord demonstrates that, in the particular case, the improvement will not facilitate or enhance sustainable or regenerative practices. This does not mean that the tenant does not need to seek consent or, as appropriate, give notice for such improvements (depending on the particular case) but it does mean that it is more likely that the improvement will be approved by the Land Court.

169. The second element is an overarching reasonableness test which is designed to allow the Land Court to look at all the circumstances of the case. There may be cases where a proposed improvement clearly will facilitate sustainable farming practices but is on a scale or is being proposed in a place where it is not appropriate, or would cause the landlord some form of undue hardship.

Other consequential changes

170. The amendment to section 33A of the 1991 Act (made by section 14(3) of the Bill) is a consequential amendment. It confirms that it is not possible to for the landlord and tenant to contract out of compensation for improvements which require notice or which the tenant may make without giving notice.

171. The amendment to section 34(6) (made by section 14(4) of the Bill) is a consequential amendment necessitated by the change to the order of improvements in schedule 5.

Use of agricultural land: diversification

172. Sections 15 to 19 make modifications to the 1991 Act, the 2003 Act and the 2016 Act in connection with the non-agricultural use (or diversification) of agricultural holdings by tenants.

Background and existing law

173. Part 3 of the 2003 Act provides the basis for tenants under a 1991 Act tenancy, a limited duration tenancy, a modern limited duration tenancy, or a repairing tenancy to use the land for non-agricultural purposes. The Act provides that any term of the lease which prohibits the use of the land for a non-agricultural purpose is of no effect.[18]

174. Part 3 of the 2003 Act sets out the procedure for the giving of notice of diversification to the landlord and for the landlord to object to such notice of diversification. Section 40(2) sets out what the notice must specify.

175. The landlord may object to a notice if (and only if) one of the grounds set out in section 40(9) are met, which includes that the intended use of the land would substantially prejudice the use of the land for agricultural purposes in the future, or be detrimental to the sound management of the estate of which the land consists or forms part. The landlord is, within the period specified in section 40(12), to notify the tenant in writing of any objection to the notice of diversification or, where the landlord does not object to the notice of diversification, of any conditions imposed under section 40(10). If no such notification by the landlord is given the landlord is deemed not to have objected to the notice of diversification or imposed any conditions (except where the notice of diversification relates to the planting and cropping of trees).

176. Where the landlord does not object to a notice of diversification (or is deemed not to have objected), the tenant may use the land for the specified non-agricultural purpose on the appointed day (see section 40(5)) subject to any reasonable conditions imposed by the landlord.

177. Where the landlord does object to the notice of diversification, the landlord may (within 60 days of the giving of the notice of objection) apply to the Land Court for a determination that the objection is reasonable. The objection ceases to have effect on the expiry of that period unless the landlord makes such an application to the Land Court, or if the objection is withdrawn before the expiry of that period, no such application having been made. If the objection ceases to have effect the land may be used for the specified non-agricultural purpose.

178. Where an application is made and the Land Court determines that the objection by the landlord is unreasonable, the objection is of no effect and the land can be used for the non-agricultural purpose (from such date fixed by the Court and subject to any conditions imposed). Where on the application of the tenant the Land Court determines that a condition imposed by the

[18] The meaning of "non-agricultural" can be found in section 93 (interpretation) of the 2003 Act. And any reference to the land is a reference to the whole of the land comprised in the lease constituting the tenancy or any part of it.

landlord is unreasonable the Court may remove the condition and in its place impose on the tenant such reasonable conditions it considers appropriate.

179. Section 45A (compensation arising as a result of diversification and cropping of trees) of the 1991 Act provides that where the value of an agricultural holding has increased during the tenancy by the use of the land (or any change to the land) for a non-agricultural purpose, the tenant is entitled on quitting the holding to recover from the landlord such compensation as fairly represents the value of the use, change or carrying out of the activities to an incoming tenant. However, no compensation is payable if the land is unsuitable for use for agriculture by an incoming tenant.

180. Section 27 of the 2016 Act places a duty on the Commissioner to prepare and publish codes of practice for the purpose of providing guidance to landlords and tenants. Subsection (2) of that section provides an indicative list of the issues relating to agricultural holdings that the codes of practice may cover.

Changes made by the Bill

Section 15 – notice of and objection to diversification

181. This section modifies section 40 of the 2003 Act. It provides that the tenant must specify in the notice of diversification any environmental benefit that is intended to be provided in using the land for a non-agricultural purpose. Where an environmental benefit is intended, the notice must also specify how that benefit is to be provided.

182. The landlord is not able to object to a notice of diversification on the grounds that the benefit is not deliverable, but the significance of setting out in a notice if the intended use has any environmental benefit (and how it is to be provided) are realised by the changes made by section 17 (see below for an explanation of those changes).

183. Section 15 does however modify two of the grounds, set out in section 40(9), on which the landlord may object to a notice of diversification. The changes provide that any detriment to the sound management of the estate must be *substantial*. The changes also provide that the intended use of the land must substantially prejudice the use of the whole of the land comprised in the lease for the purpose of sustainable and regenerative agriculture. This means that the effect of the intended use of the land for a non-agricultural purpose has to be considered in the context of any effect the use has on sustainable and regenerative agriculture on the holding as a whole, rather than specifically the piece of land being used for that purpose.

184. The terms “sustainable” and “regenerative” are not defined by the Bill. This is because section 26 of the Agriculture and Rural Communities (Scotland) Bill (SP-33) (the “Agriculture Bill) places a duty on the Scottish Ministers to prepare and publish guidance on sustainable and regenerative agriculture. The guidance is to be known as the Code of Practice on Sustainable and Regenerative Agriculture (“the Code”) and is to contain, among other things—

- an explanation of what the Scottish Ministers are classifying as sustainable and regenerative agriculture,
- the agriculture activities and methods that they consider best practice for sustainable and regenerative agriculture,
- and such other information about sustainable and regenerative agriculture as they consider appropriate.

185. As the Code is to set out what the Scottish Ministers consider to be sustainable and regenerative agriculture, no definitions are contained in this Bill or the Agriculture Bill.

186. While what constitutes sustainable agriculture is reasonably self-explanatory, regenerative farming is broadly any form of farming activity which both generates production and improves the environment. Practitioners try, for example, to disturb the soil as little as possible, following 'no-till' methods which do not disturb the complex network of wormholes and fungal hyphae in the soil. That, in turn, improves the capacity of the soil as a carbon store, and should help reduce reliance on artificial fertilisers.

187. Section 7 of the Agriculture Bill enables the Scottish Ministers to make regulations that set out the consequences of not following guidance (which includes the Code). In particular, regulations will be able to require people to have regard to the guidance, specifying the extent to which compliance with the guidance on a particular topic is relevant in determining whether a person has complied with a statutory duty, and for the guidance to be admissible in certain cases and have particular evidential value in any legal proceedings.

188. This section also modifies section 40 so that the landlord is required to explain, as part of their notice of objection, why the landlord considers the grounds of objection (or any conditions imposed) to be reasonable. The purpose of this is to improve communication between the landlords and tenants, so tenants know why a notice of diversification has been rejected and not just the general basis on which the objection was made.

189. Finally, this section also inserts a power into section 40 enabling the Scottish Ministers to modify subsections (2) and (9) of section 40 of the 2003 Act so as to add or remove a matter which is to be specified in a notice of diversification, or so as to add or remove a ground of objection to the notice of diversification. The regulations would be subject to the affirmative procedure.

Section 16 – tenant extension notice

190. This section inserts a new section into Part 3 of the 2003 Act. This allows a tenant, on one occasion only, to give an extension notice to the landlord at any time prior the landlord making an application notice to the Land Court to determine whether their objection was reasonable. The effect of such a notice would be to extend by 30 days (either or both) the time periods by which the landlord is required to send a notice of objection or to apply to the Land Court for a determination as to the reasonableness of their objection The notice has no other effect on the procedure set out in Part 3 of the 2003 Act. The landlord would still be able to object to a notice

of diversification and make an application to the Land Court to vindicate their position at any time, regardless of whether or not an extension notice has been sent.

Section 17 – determinations by Land Court

191. This section modifies section 41 of the 2003 Act (imposition of conditions by the Land Court). It provides that the Land Court, in deciding whether or not it is reasonable for the landlord to object to a notice of diversification or impose conditions, is to consider if the intended use of the land for the non-agricultural purpose is likely to have a positive effect in facilitating sustainable or regenerative agricultural production on the whole of the land comprised in the lease and on the environment generally. If the Land Court considers such positive effects are likely, it must consider whether those positive effects should outweigh any negative effects including, in particular, any effect which is a ground of objection of the landlord relating to the amenity of the land, the management of the estate or the use of the land for sustainable and regenerative agriculture.

192. The purpose of this new provision is to enable the Land Court to consider favourably the positive effects of the intended use of the land (i.e. on the environment and sustainable and regenerative production on the whole of the land) against any grounds of objection advanced by the landlord and to make a judgement as to whether that the positive effects should outweigh the negative effects in terms of deciding if the landlord's objection is unreasonable.

193. This new test will have the effect of indirectly requiring the landlord to consider a tenant's notice of diversification, which specifies any environmental benefit, in this wider context since environmental benefit will be relevant to the Land Court's determination. It is also in the tenant's interest to explain properly in their notice how that benefit is to be provided, so that the landlord is less likely to object to the notice if they consider that such intended positive effects are likely (as the Land Court would come to the same conclusion and consider their objection to be unreasonable).

Section 18 – compensation arising as a result of diversification

194. This section amends section 45A of the 1991 Act to provide that, where the value of an agricultural holding has increased during the tenancy by the use of the land (or any change to the land) for a non-agricultural purpose the tenant's entitlement to compensation is only invalidated if the use of the whole of the land comprised in the holding for the purposes of sustainable and regenerative agriculture by an incoming tenant has been substantially prejudiced.

195. This means that any lasting effect of using the land for a non-agricultural purpose has to be considered in the context of any effect that has on sustainable and regenerative agriculture on the holding as a whole by an incoming tenant, rather than specifically the piece of land being used for that purpose.

Section 19 – Tenant Farming Commissioner: codes of practice

196. This section amends section 27(2) (Tenant Farming Commissioner: codes of practice) of the Land Reform (Scotland) Act 2016 to add material regarding the use of land for non-agricultural

purposes to the list of indicative issues that the codes of practice, required to be prepared and published under subsection (1), may make provision about.

Game damage etc.

Section 20 – compensation for damage caused by game or game management

197. This section replaces section 52 of the 1991 Act which deals with the compensation to be paid to the tenant of an agricultural holding where the tenant has sustained damage to their crops from game.

Background and existing law

198. At common law, a landowner's game sporting rights over the land (meaning the right to kill or take game) do not pass to a tenant unless express provision is made in the lease.

199. It is common practice for landowners who let agricultural land to retain the game sporting rights. These rights may be exercised by the landowner themselves. A landlord may also confer such rights to a third party by entering into a lease of shootings with a sporting tenant.

200. Section 52 of the 1991 Act provides that if a tenant sustains damage to their crops from game where the right to kill or take game is not vested in the tenant (and the tenant has no permission in writing from the landlord to kill) the tenant is entitled to compensation from the landlord for the damage if it exceeds 12 pence per hectare. Section 52 only allows for damage by game, not for damage or losses or costs arising from all the vermin, pests and animal diseases associated with intensive game shoots. In other words, it does not provide that compensation should be payable for indirect damage to crops (or damage to anything else).

201. Game is defined as meaning deer, pheasants, partridges, grouse, and black game. 'Black game' is not defined in the 1991 Act, but is a reference to black grouse.

202. The tenant is only entitled to claim compensation from the landlord if—

- the tenant has served a notice in writing to the landlord as soon as is practicable after the damage was first observed by the tenant (the "first notice"),
- the landlord is given a reasonable opportunity to inspect the damage,[19] and
- the tenant has served a further notice in writing on the landlord setting out their claim within six months of giving their first notice after observing the damage to the crop.

[19] Where the damage has been caused to a growing crop, the landlord has to be given that opportunity to inspect before the crop is reaped, raised, or consumed. If the damage has been caused to the crop after it was reaped or raised then the landlord has to be given the opportunity to inspect before the crop is removed from the land

203. If the tenant has not followed these steps then they will not be entitled to claim compensation from the landlord.

204. Compensation, if not agreed between the landlord and tenant, falls to be determined by the Land Court. The landlord is entitled to be indemnified by the sporting tenant of the land (or the person in whom the right to kill the game has been vested) against all claims by the agricultural tenant for the compensation for damage by game. Section 53(3) of the 2003 Act provides that section 52 of the 1991 Act also applies for short limited duration tenancies, limited duration tenancies, and modern limited duration tenancies.

Changes made by this provision

205. This section replaces section 52 of the 1991 Act with a new version. It provides that compensation is payable where game or game management have caused the tenant to sustain damage to agricultural (or permitted non-agricultural[20]) trees, fixed equipment[21], livestock and habitats; in addition to damage to crops. This section provides that "game management" includes the killing and taking of game and steps taken or not taken by a person in the exercise of a right to kill and take game.

206. This section also provides that compensation is payable for both direct and indirect damage. Direct damage, for example eating or crushing of crops by the game itself, is already covered by the existing section 52. However, this new section provides that compensation is also payable for costs arising due to indirect damage. This may include costs arising as a result from vermin, pests and animal diseases associated with intensive game shoots (for example, eating of crops by rats and the spread of disease from such animals to livestock), or due to inadequate or lack of game management causing disease to spread from game to livestock.

207. The preconditions in respect of a tenant's entitlement to recover compensation are similar to the existing section, except that provision is also made in terms of giving the landlord a reasonable opportunity to inspect the damage to trees, fixed equipment, livestock or habitats. These provisions generally require the landlord be given a reasonable opportunity to inspect the damage before action or work is taken to rectify it. In terms of livestock, damage is defined by this section as including suffering, injury or disease. If the tenant has reasonable cause to believe that delaying action (including, for example, the destruction of the livestock) is likely to cause the affected livestock further suffering or injury, or the further spread of disease then the landlord does not need to be given a reasonable opportunity to inspect the livestock prior to action being taken by the tenant. Similarly, if any action is required by virtue of any statutory obligation (see, for example, section 24 of the Animal Welfare (Scotland) Act 2006) then such an obligation defeats the right of the landlord to inspect and in such circumstances, the entitlement to compensation remains despite that missed step.

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[20] The reference to "permitted non-agricultural" is a reference to diversification activity permitted under Part 3 of the Agricultural Holdings (Scotland) Act 2003 (Use of Agricultural Land: Diversification)

[21] "Fixed equipment" is defined by section 85 of the 1991 Act.

208. This section also makes other minor changes to the existing section, including to remove the *de minimis* threshold of 12 pence per hectare. It also removes "black game" from the definition of "game".

Standard claim procedure for compensation

209. Section 21 inserts new sections 59B and a new schedule 3 into the 2003 Act. Section 22 inserts a new section 59C.

210. Section 59B and schedule 3 set out a new claims process which may be applied to any form of compensation that might arise under the 1991 Act, 2003 Act or at common law. For the procedure to be applied to a type of compensation claim, the Scottish Ministers must first make regulations. The regulations will take account of the particular type (or types[22]) of compensation (such as the matters to be taken into account) but the overall process will be substantively the same for all claims to which the procedure is applied. The regulations may also make adjustment to any existing statutory provisions dealing with the process for how to claim compensation of a particular type so as to, for example, remove any potential conflicting timeframes for notices being given or information that may be required.

211. Section 59C provides that interest should be payable on all outstanding compensation at a rate equivalent to 1.5% above the Bank of England base rate. The interest starts to run at the point that the compensation becomes payable. Where the Lands Tribunal determine the amount of compensation, the interest runs from the date of that determination. It is worth noting that the rate of interest does not become the judicial rate just because the amount of compensation has been determined by the Lands Tribunal.

212. The new schedule 3 describes a standard process and is split into Parts which reflect the different phases of the process. Part 1 provides for definitions that are used in the schedule. Part 2 deals with how notice of claims is to be given and the appointment of a valuer. Part 3 looks at the assessment of the value of the claim and Part 4 looks at the payment of the compensation and the appeal rights available to a party to the process.

Part 2 – notice of claim and appointment of valuer

213. Paragraph 2 provides for a notice of claim being made which specifies the type of compensation being sought together with details of the tenancy and other relevant information. It also starts the process of appointing a valuer to determine the amount of compensation as the notice must include a person who the claimant believes meet the requirements for appointment that are set out in paragraph 5 of the schedule.

214. The notice has to be given not less than 9 months before the relevant date which is (either) the date on which the event giving rise to the entitlement to compensation occurs (in many cases this will be the date on which the tenancy is to come to an end) or another date specified by the

[22] The regulations could apply the standard claim procedure to several types of compensation at the same time.

regulations which apply the procedure to a particular type of compensation claim (for example, it may be more appropriate to specify a date which is after the tenancy comes to an end in some cases). However, if there is a reasonable excuse for not giving the notice on time and the person making the claim has remedied the failure as soon as practicable, the claim for compensation is not extinguished by the failure to give timeous notice. This might be relevant in a variety of cases (for example, a telecommunications issue or ill health).

215. Paragraph 3 provides that the respondent to a claim may object to who the claimant has nominated as a valuer. To do so, they must give notice of that objection to the claimant within 14 days, send a copy of the objection to the Commissioner and request the Commissioner appoint a valuer instead. In many cases, however, it is expected that the parties may be able to agree who should be a valuer and the definition of a valuer in paragraph 1 includes a person appointed by agreement. Depending on the point at which that agreement is reached, the notice of claim may therefore nominate the agreed person or, where agreement is reached after a notice of objection has been given, the agreement can supersede the entitlement of the claimant to appoint the person nominated in the notice of claim (see paragraph 3(3)). Alternatively, if agreement is reached once the Commissioner has been requested to appoint a person, the Commissioner can be asked to appoint the agreed person (provided that the person meets the requirements for appointment).

216. Paragraph 4 provides for the Commissioner to appoint a person as valuer. The Commissioner must do so within 14 days of the notice requesting a valuer is copied to the Commissioner (or such other period as may be specified in regulations). Once the Commissioner appoints a valuer, the Commissioner must notify the parties. Paragraph 5 sets out the requirements for a person to be appointed as a valuer.

217. A party may object to who the Commissioner appoints if the party does not agree that the person meets the requirements set out in paragraph 5. The objection is made by way of application to the Land Court and must be made within 14 days of the notice of the person's appointment being given under paragraph 4(4). The Land Court has discretion over who is to be appointed as valuer and may confirm the appointment or appoint someone else. Parties may also still agree to appoint a valuer at this stage, though it may have a bearing on the expenses of the Land Court action. The decision of the Land Court may not be appealed.

218. The expenses of the valuer are to be shared equally between the claimant and the respondent unless the Land Court makes an order otherwise. Such an order may be appropriate where the Land Court believes that one party should bear a greater cost. The valuer's expenses are separate matter from the costs of the application to the Land Court to determine who should be valuer. Such costs are to be determined in the usual manner for a Land Court application.

Part 3 – assessment of value of claim

219. Paragraph 8 sets out a framework for how the value of a claim for compensation is to be assessed. In most cases it will need to be read alongside substantive provisions about the entitlement to compensation (which will specify the basis for the compensation and the matters (however described) which determine how much compensation is due). The regulations applying

the procedure may also specify matters which are to be considered. In every case, the valuer is to seek written representations from the claimant and respondent and have regard to those representations. Paragraph 11 sets out the powers that valuer has to inspect the land and seek relevant information. It also confirms that a valuer is not to be considered in breach of their duties under the schedule (particularly in relation to timings) if the delay is caused by the actions of a party.

220. The valuer is required to produce a preliminary and a final report. Both reports are to assess the value of the claim and set out the matters taken into account.

221. The preliminary report is to be sent to the parties not less than 5 months before the relevant date and will include details of any part of the assessment that may change between the date of the preliminary assessment and the relevant date – for example, that may take account of ongoing work or wider events that have a bearing on values. It is expected that the preliminary report will provide a basis for parties to discuss the appropriate amount of compensation and engage with the valuer in respect of any aspects that they do not consider are correct.

222. The final report is issued 3 months before the relevant date. Unless appealed, the assessment of the value of the claim forms the basis of the amount of compensation due (see paragraph 12).

223. Both types of report may include, or be accompanied by, any other relevant information that the valuer considers appropriate. This is to ensure that the valuer has flexibility to include more information if it has a bearing on the value. It may also include extra information about the methodology or, if a party did not co-operate, information about anything that the valuer was unable to properly assess that may be relevant should a matter within the report be appealed.

Part 4 – payment and rights of appeal

224. Paragraph 12 provides for how the amount payable by way of compensation is to be arrived at and also when it falls due to be paid. The amount payable is the value in the final report or, if appealed, as determined by the Lands Tribunal. In addition, interest is payable from the due date until payment is made.

225. The payment is to be made two months after the relevant date or at a date specified by the Lands Tribunal. In many cases that will therefore fall to be two months after the date that the tenancy comes to an end. Of course, if parties agree a settlement, they may agree a different date.

226. Paragraph 13 provides parties with a right to appeal to the Lands Tribunal against a matter contained the final report. The reference to a ‘matter’ here is to be construed widely and may relate to anything that affected the assessment of the value of the claim in the final report.

227. The valuer may be called as a witness to such proceedings. Further, paragraph 13(5) allows for certain creditors and other persons to be heard where appropriate. The decision of the Lands Tribunal is final.

228. Paragraph 14 enables the Lands Tribunal to refer any matter of law arising under the 1991 Act or the 2003 Act which may competently be determined by the Land Court to that court unless the Lands Tribunal considers it inappropriate to do so.

Rent review

Sections 23, 24, 25 – rent review

229. These sections relate to how the rent of agricultural tenancies is to be reviewed. Section 23 amends schedule 1A of the 1991 Act for 1991 Act tenancies. Section 24 substitutes new sections 9B and 9BA for section 9B of the 2016 Act for limited duration tenancies and modern limited duration tenancies and section 25 amends section 9 of the 2016 Act in respect of repairing tenancies. The parties to a short limited duration tenancy are free to make their own agreement with regard to rent.

230. A number of changes to the manner in which rent is to be reviewed were made in the 2016 Act but have not been brought into force. The description of the current legal position below therefore sets out the law as it currently stands and does not take account of the 2016 Act changes. However, the provisions in the Bill amend and repeal the provisions of the 1991 Act *as they are amended by the 2016 Act* (even though they not in force) and the provisions of the 1991 Act, as so amended, will be commenced in a manner that takes account of the changes made by the 2016 Act to the extent necessary to give effect to the changes being made in the Bill.

231. The majority of the 2016 Act changes to the process for the review of rent are not affected and are fully described in the Explanatory Notes accompanying that Act[23]. For present purposes it is sufficient to note that section 101 of the 2016 Act replaced section 13 and added a schedule 1A into to the 1991 Act for 1991 Act tenancies. This modernised the rent review process by making provision in respect of:

- service of the rent review notice,
- the form and content of the notice,
- the timing of service of the notice,
- withdrawal and termination of a notice
- referral of rent to the Land Court,
- the powers of the Court, and
- a power to phase in the new rent.

[23] https://www.legislation.gov.uk/asp/2016/18/notes/contents

232. The basis of the determination of the rent, that is the things that must be taken into account by the Land Court when determining the rent, is what is being replaced for all relevant types of tenancy by the Bill. These Notes therefore focus on the changes being made to that particular aspect of the rent review process. This includes dropping some of the requirements that were included in the 2016 Act (notably in relation to surplus accommodation) and removing the power to phase in the new rent.

Current legal position: 1991 Act tenancies

233. Section 13(1) of the 1991 Act entitles either party to serve written notice on the other to have the Land Court determine the rent that is to be payable as from the next day after the date of the notice on which the tenancy could have been terminated by notice to quit (served by the landlord) or by notice of intention to quit (served by the tenant) on that date.

234. The service of a notice entitles the party serving it to have the Land Court determine (under section 13(3) to (7A) of the 1991 Act) the rent properly payable in respect of the holding from the relevant date. Despite the various modifications, the basis of the review remains that of "open market" value.

235. The rent to be fixed under section 13 is "normally" the rent at which, regard being had to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing landlord to a willing tenant.

236. It is subject to certain disregards[24], in particular:

- any effect on the rent of the fact that the tenant is in occupation of the holding, and
- any distortion in the rent that is due to a scarcity of lets.

237. It was pointed out in *Morrison-Low v Patterson's Executors*[25] that section 13(3)(b) appears to state that it is the distortion should be disregarded. The Court held that in order to avoid an absurd result it was necessary to read that provision in such a way that it is the increase in rent caused by the distortion that should be disregarded.

238. Section 13 of the 1991 Act also provides that the Land Court must disregard any increase in the rental value attributable to the tenant's improvements carried out wholly or partly at their expense, and without equivalent benefit having been given by the landlord. However, an improvement under an obligation imposed on the tenant by the lease should be taken into account.

239. In this context, improvements include those for which the tenant is not entitled to compensation under Part IV of the 1991 Act. For example, if the tenant failed to give notice of or

[24] Section 13(3) of the 1991 Act
[25] (2012 CSIH 10)

obtain consent for the improvement, or the improvement is written off under a compensation agreement.

240. The adoption of higher farming standards, for which the tenant would in due course be entitled to compensation in terms of section 44 of the 1991 Act, will be treated for the purposes of section 13(5) as an improvement at the tenant's expense. It is accordingly not taken into account.

241. An improvement by the landlord that increases rental value is not to be taken into account to the extent that the landlord receives or will receive a grant out of monies provided by Parliament for the improvement. The tenant in effect has rent free use of a publicly funded improvement.

242. The tenant has a qualified right to use the holding for a non-agricultural purpose[26], and section 13 provides for cases where the rental value is affected by such a use. The Land Court may not fix the rent at a lower amount by reason of any reduction in the rental value that results from the use of the land, or changes to the land, for a non-agricultural purpose. It must however take into account any increase in the rental value of the whole holding that results from such a use or change.

243. Similarly, the Land Court may not fix the rent at a lower amount by reason of any reduction in the rental value that results from the carrying out of conservation activities on the land.[27]

244. Section 13 also provides for two matters to which the Court must have regard.

- First, regard must be had to information about rents of other agricultural holdings, including the dates at which they were fixed and any other factors affecting those rents (other than any distortion due to the scarcity). Information about rents is not confined to open market rents.
- Second, regard is to be had to the current economic conditions in the relevant sector of agriculture.

Current legal position: limited duration tenancies and repairing tenancies

245. The rent under a limited duration tenancy may be varied:

- *by agreement* – a rent review clause will generally displace section 9. However, certain restrictions (such as upwards only reviews) are void (see section 9(1A)),
- *under section 9* – where the lease makes no provision for rent review,
- *after improvement by the landlord* – a landlord who has carried out an improvement for the purposes of section 10 of the 2003 Act is entitled to an increase if the improvement has rental significance,

[26] See sections 39 to 42 of the 2003 Act

[27] See section 13(7)(b) of the 1991 Act. See also section 85(2A) of the 1991 Act.

- *by the Land Court* – under the general discretion afforded by section 11 of the 2003 Act[28], or
- *by the Land Court* – where it makes a decision on a question remitted under section 13, 16, or, as the case may be, 16A of the 2003 Act.

246. The rent under a repairing tenancy may be varied:

- under section 9 of the 2003 Act where the lease makes no provision for the review of rent (as above),
- in consequence of landlord's improvements – where a landlord has carried out improvements under section 10 of the 2003 Act (as above), or
- by order of the Land Court under section 11 of the 2003 Act.

247. The test adopted in section 9 of the 2003 Act for limited duration tenancies and repairing tenancies, although expressed differently, is substantially the same as the open market test in section 13 of the 1991 Act. The general principle in section 9 is that on a review the rent payable is: "the rent which the tenancy would reasonably be expected to fetch in the open market where there is a willing landlord and a willing tenant". As with a 1991 Act tenancy, there are factors which must either be disregarded or taken into account.

Changes made by the Bill

248. Section 23 amends the changes that are made by the 2016 Act to the extent that it replaces the matters to which the Land Court must have regard when determining the fair rent for a holding in respect of a 1991 Act tenancy. Section 24 replaces section 9B of the 2003 Act to the same end (though the wording is slightly different in places, the effect is the same).

249. The matters to be taken into account now are:

- the productive capacity of the holding,
- the open market rent of any fixed equipment provided by the landlord for a non-agricultural purpose,
- the open market rent of any land forming part of the holding that is used for a purpose that is not an agricultural purpose (e.g. a commercial purpose)
- the rent payable on similar holdings,
- the prevailing economic conditions in the sectors of agriculture that are relevant to the holding.

[28] Section 11 provides "Where it appears to the Land Court, in determining any matter in relation to a limited duration tenancy, a modern limited duration tenancy or a repairing tenancy by virtue of section 13, 16, 16A or 16B, that it is equitable that the rent payable under the lease should be varied, it may vary the rent accordingly".

250. The following paragraphs consider each of those matters in turn.

251. The Bill does not define productive capacity. Instead it is intended that the new regulation making powers provided in respectively paragraph 9 of the 1991 Act and section 9BA of the 2003 Act will provide further detail about what is to be taken into account in the assessment of productive capacity after further consultation with stakeholders. There are a variety of possible models and the regulation making power will enable the preferred model to be set out and adjusted in light of experience.

252. However, it is expected that an assessment of the productive capacity of a holding will necessarily require the Court to take account of a wide range of factors, including the relationship between the gross output of the holding and the affordability of the proposed rent. It will be assumed that the holding is farmed by a hypothetical tenant who is competent, efficient and experienced.

253. It may also require the parties to agree on the applicable farming system, and they can be expected to have regard to various types of system in that regard (likely subject to advice from their individual valuers, or a joint one).

254. Further, the regulations are likely to provide for the purpose of this assessment that the hypothetical tenant has, so far as is practicable, adopted the farming methods and other practices recommended in the Code of Sustainable and Regenerative Agriculture.

255. The requirement to consider the open market rent of any fixed equipment that is provided, or land used, for a purpose that is not an agricultural purpose is to be read with paragraph 9(5) of schedule 1A the 1991 Act or section 9(4) of the 2003 Act which clarify what is meant by an open market rent in this context. This requirement clarifies that non-agricultural purposes are to be taken account of in the rent for the lease in line with the prevailing market conditions for such uses. For example, if part of the farm is used for holiday lets or solar panels, the rent should reflect the going market rate for such commercial lets.

256. The limb relating to the rent payable on similar holdings is to be read with paragraph 9(6) of the 1991 Act or section 9(5) of the 2003 Act. In considering this limb the Land Court must look at a range of information about similar holdings (and amounts offered or agreed in respect of the holding itself) and is to take account of any distortion in the market caused by the scarcity of lets with a view to discounting any premium that the scarcity of lets has caused over and above what might be considered fair. It is expected that previous case law on section 13(4) of the 1991 Act will be relevant to this limb. To that end, the court is able to allow for economic changes in the period between the date of the comparable and the valuation date. In assessing this the valuer has to avoid double counting since the effect of current economic conditions may be built into comparable rents struck at or near the valuation date[29].

[29] See *Shand v Christie's Trustees* 1987 SLCR 29 at paragraph 35

257. The requirement to have regard to the prevailing economic conditions in the sectors of agriculture that are relevant to the holding is similar to what is currently required under section 13(4)(b) of the 1991 Act. The Land Court has held (albeit on an earlier version of section 13 of the 1991 Act) that these conditions had to be considered as at the valuation date, and so conditions that arise after that cannot be taken into account[30].

258. As noted earlier, the new paragraph 9 of schedule 1A of the 1991 Act and new section 9BA of the 2003 Act enable the Scottish Ministers to make further provision in relation to the matters that are to be taken into account by the Land Court when determining the rent for a holding. This is primarily aimed at providing further detail in respect of ascertaining the productive capacity of the holding, but may also be relevant for the other limbs. Before making these regulations the Scottish Ministers must consult such persons as they consider appropriate, which is likely to include representatives of landlords and tenants and others with an interest in the topic (e.g. the Tenant Farming Commissioner). Regulations under this paragraph are subject to the affirmative procedure[31].

Rules of good husbandry and estate management

259. These sections amend schedule 5 (rules of good estate management) and schedule 6 (rules of good husbandry) of the 1948 Act and section 85 of the 1991 Act.

Background and existing law

260. The 1948 Act imposed on owners of agricultural land (landlords) responsibilities to manage the land in accordance with the rules of good estate management. That Act similarly imposed on occupiers responsibilities in accordance with the rule of good husbandry. These responsibilities were abolished by the Agriculture (Scotland) Act 1958, but the rules in those schedules remain and are still relevant in variously determining whether the tenants and landlords are fulfilling their respective obligations. The rules are decisive of certain specific questions that arise under the 1991 Act and the 2003 Act in relation to 1991 Act tenancies, short limited duration tenancies, limited duration tenancies and modern duration tenancies.

261. In general terms, a tenant will be fulfilling their responsibilities if they maintain a reasonable standard of efficient production, as respects both the quality and quantity of the produce, while keeping the unit in a condition to enable such a standard to be maintained in the future. A landlord will be fulfilling their responsibility to manage the land in accordance with the rules of good estate management if the management of the land is reasonably adequate to enable the tenant to maintain efficient production as respects both the quantity and quality of the produce.

[30] See, for example *Buccleuch Estates Limited and Kennedy* (1986 SLCR 1)
[31] See section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010

262. The schedules each provide a non-exhaustive list of examples of things which regard is to be had to in determining whether the manner in which the unit is farmed or maintained is consistent with the rules of good husbandry and estate management.

Changes made by the Bill

Section 26 – rules of good estate management

263. This section amends schedule 5 of the 1948 Act (rules of good estate management) so that the landlord will be fulfilling their responsibility if they manage the land in a way that enables the tenant to maintain a reasonable standard of "efficient, sustainable and regenerative production". This means that the need for production to be "efficient" has to be balanced against the need for the production to also be sustainable and regenerative.[32]

264. This section also makes other minor changes to schedule 5 of 1948 Act in relation to the matters which regard must be had to in determining whether the manner in which the unit is maintained is consistent with the rules of good estate management. These changes provide that the making of muirburn in the interests of sheep stock does not need to be "regular" and that bracken, whins and broom need to be "controlled" (rather than eradicated).

Section 27 – rules of good husbandry

265. This section amends schedule 6 of the 1948 Act (rules of good husbandry) so that the tenant will be fulfilling their responsibility if they maintain a reasonable standard of "efficient, sustainable and regenerative" production. This means that the need for production to be "efficient" has to be balanced against the need for the production to be sustainable and regenerative.

266. This section also makes other minor changes to schedule 6 of 1948 Act in relation to the matters which regard must be had to in determining whether the manner in which the unit is being farmed is consistent with the rules of good husbandry. These changes provide that the following are considered: the health and welfare of livestock, the means of identifying animals generally (instead of specific means only as it concerns sheep), and that the making of muirburn in the interests of sheep stock does not need to be "regular".

267. This section also amends section 85 (interpretation) of the 1991 Act. Subsection (2B) of section 85 of the 1991 Act requires conservation activities to be treated as being in accordance with the rules of good husbandry if carried out in accordance with the criteria set out in that subsection. What constitutes a "conservation activity" is not defined. This Bill amends section 85 so that the Scottish Ministers may by regulations prescribe activities or descriptions of activities which are to be treated as conservation activities for the purposes of subsection (2A).

[32] See commentary in paragraphs 183 to 186 for further information regarding the terms "sustainable" and "regenerative" and the Code of Practice on Sustainable and Regenerative Agriculture.

PART 3 – FINAL PROVISIONS

Section 28 – Ancillary provision

268. Section 28 confers a power on the Scottish Ministers to make ancillary provision by regulations.

269. Subsection (2) provides that the power to make ancillary provision can be used to modify enactments. The word enactment is defined for this purpose by schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010, it includes Acts of the Scottish Parliament and Acts of the UK Parliament. There is a general presumption that a regulation-making power cannot be used to modify Acts. Subsection (2) overcomes that presumption.

270. Section 29 provides for ancillary regulations to be subject to the affirmative procedure if they textually amend an Act of the Scottish Parliament or the UK Parliament, but otherwise they are subject to the negative procedure.

Section 29 – Regulation-making powers

271. Section 29 makes further provision about the regulation-making powers that the Bill confers on the Scottish Ministers.

272. Subsection (1) makes clear that the powers can be used to make different provision for different purposes and areas. For example, the power to make commencement regulations under section 30 can be used to appoint different days for the coming into force of different provisions.

273. The remaining subsections set out the parliamentary scrutiny procedure that is to apply to regulations made under the powers that the Bill confers. Those subsections refer to:

- the negative procedure, which is defined by section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010, and
- the affirmative procedure, which is defined by section 29 of that Act.

Section 30 – Commencement

274. Section 30 deals with the coming into force of the Bill's provisions. The formal provisions of Part 3 itself, and the Scottish Ministers' duty to publish a model lease under section 7 will come into force on the day after the Bill receives Royal Assent. All of the other provisions fall to be commenced by the Scottish Ministers by regulations.

275. Regulations that do nothing beyond commencing the provisions of the Bill will have to be laid before the Scottish Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 31 – Short title

276. Section 31 assigns the short title of the Act that the Bill will become (if it is passed and receives Royal Assent).

THE SCHEDULE – SMALL LANDHOLDINGS

Part 1 – Rent

277. This Part of the schedule makes provision about the rent that is payable in respect of a small landholding. Much of this is consolidation of the existing law, but changes are also made to tie in with the new provision which is made in Part 2 allowing diversification of a small landholding (with authorisation).

Paragraph 1 – Rent

278. The existing law which is restated at paragraph 1 provides for what the rent of a small landholding is – i.e. the rent is the amount agreed by the parties or fixed by the Land Court (under either this Part or the previous law).

279. This provision is a simplification of section 13 of the Small Landholders (Scotland) Act 1911, based on what continues to be relevant.

Paragraph 2 – Alteration of rent by agreement

280. Paragraph 2(1) provides for the parties to be able to alter the rent by written agreement. The rent being altered may be the rent which was previously mutually agreed or the rent which was previously fixed by the Land Court.

281. If the parties wish to agree the rent then they must, under sub-paragraph (2), also specify a period for which the rent is to remain at the new level. The relevance of this period is as follows—

- During this period, the parties can still vary the rent by agreement (sub-paragraph (4)) but the Land Court cannot normally intervene to apply a new rent (see paragraph 3(2)(b)). The exception to this is where there is diversification (see paragraph 3(3)).
- After this period elapses, the rent still continues at the level set in the agreement until either a new agreement takes effect or a new rent fixed by the Land Court takes effect (sub-paragraph (3)).

282. Paragraph 2 is largely consolidation of section 5 of the Crofters Holdings (Scotland) Act 1886. However, some minor clarifications have been made. In addition, paragraph 3 has an impact on this provision and it includes new rules (as the concept of permitting diversification is new).

Paragraph 3 – Application to Land Court to fix the rent

283. Paragraphs 3 and 4 deal with an application to the Land Court to fix the rent. The starting point is a restatement of the law found in sections 6(1) to (3) and 20 of the Crofters Holdings (Scotland) Act 1886 and section 7(6) of the Small Landholders (Scotland) Act 1911, but changes are made to what was provided for there.

284. Paragraph 3(1) provides that there are two scenarios in which the Land Court can step in and fix the rent payable for a small landholding.

285. Under paragraph 3(2), the first scenario where the Land Court may fix the rent is based on the passage of time. It applies where all of the following criteria are met—

- any previous Land Court order fixing the rent in respect of the same small landholder and same small landholding took effect at least 7 years prior to the date on which the new order would take effect,
- the Land Court would not be interfering with an agreement by the parties that the rent will be remain at a certain level for a particular period, and
- where the landholder is new holder, the first 7 years of the lease will have elapsed by the time the new order would take effect.

286. It should be noted that what is crucial in all of the above timeframes is when an order takes effect, not when it is applied for or made. It is recognised that a party may want to apply to the Land Court slightly in advance. For example, if the Land Court set a rent which took effect on 28 November 2023, the landlord is not forced to wait until 28 November 2030 to apply for a new order (as if they did then it would not take effect before May 2031, which would mean that the 7 year period was always 7½ years). Instead, the landlord can apply in the run-up to the 7 year period elapsing, so that a new rent can be fixed which will take effect from 28 November 2030.

287. Under paragraph 3(3) and (4), the second scenario where the Land Court may fix the rent is based on diversification activity (i.e. the use of the land for a non-cultivation purpose). This can arise in one of two ways—

(a) it can arise in advance of diversification taking place – specifically, where the small landholder now has the landlord's consent to diversify but an agreement as to how to adjust the rent accordingly has not been reached, or

(b) it can arise where diversification has taken place already, but where the rent has not been reviewed to reflect that activity and nor did the landlord waive their right to such a review (for example, by indicating when consenting to the diversification that no change in rent would be required).

288. In relation to paragraph (a), it should be noted that the situation where the small landholder has authorisation from the Court, rather than the landlord, to proceed with diversification is covered separately by paragraph 4.

289. There is nothing to prevent repeated applications being made on the basis of new diversification activity within any particular period. For example, a small landholder might obtain consent to carry out one particular diversification activity and the rent is reviewed accordingly. A year later, the small landholder might obtain consent to carry out a different diversification activity too, and the rent could again be reviewed accordingly. However, diversification can only be a basis for a review where it has not already been considered. As such, if there was only one diversification activity and it had already been the subject of a review (including a review which decides that the rent is not to increase) then a second bite at the cherry is not permitted.

290. Sub-paragraphs (5) and (6) deal with how the level of rent is to be determined. It is to be the fair rent for the holding, taking account of all the circumstances. Two particular aspects of this are specified—

- The rent may not be *increased* as a result of any permanent or unexhausted improvements for which the small landholder is responsible (as to do so would effectively penalise the small landholder for improving the holding). An "unexhausted improvement" could include things such as unused manure/fertiliser being left in the soil after a crop has been harvested.
- The rent may not be *reduced* on account of diversification activity, even if that activity reduces the value of the land. This protects the landlord by avoiding the rent being reduced due to changes brought about by the small landholder. However, it is at least theoretically possible that the rent may reduce if that reduction is attributable to other factors, such as a market downturn.

291. As this demonstrates, even where an assessment of the fair rent is prompted by a diversification ground, the assessment will take account of all matters – not just any increase in value arising due to the diversification. As such, the carrying out of a review based on diversification will restart the clock for the carrying out of a purely time-based review. To give an example—

> The rent is set by the Court in 2030. In the absence of diversification, it could next be set by the Court in 2037. However, if there is diversification in 2035, a new rent can be set at that point instead. If the Court's order in respect of that diversification review takes effect in 2035 then the next time that the Court could set the rent (in the absence of any further diversification) would be 2042.

292. Sub-paragraph (7) deals with the process to be followed by the Land Court: it may visit the holding and take advice from assessors or valuers, and must invite representations from the small landholder and the landlord.

293. Under sub-paragraph (8), any order fixing the rent takes effect as from the first term date (i.e. Whitsunday or Martinmas) falling after the date on which the order is made. Whitsunday and Martinmas are defined for these purposes in section 1 of the Term and Quarter Days (Scotland) Act 1990 to mean 28 May and 28 November respectively.

Paragraph 4 – Land Court's power to fix the rent in connection with a ruling on diversification

294. Paragraph 4 deals with the situation where diversification activity, or diversification conditions, have been authorised by the Court. Either of these things may give rise to a desire to have the rent reviewed.

295. The parties may be able to agree the rent themselves, but under this paragraph they will have the option of asking the Land Court to set it for them instead. This paragraph provides for this to always be done as part of the court proceedings under which the diversification is authorised or the conditions are removed, so as to streamline the process. The time at which this must be done in the proceedings is not prescribed though, and there is the possibility of the parties doing things like asking the Court to sist proceedings while they attempt to negotiate the rent themselves. This means that there will still be flexibility for the parties to negotiate despite the fact that if they want the Court to rule on the rent then it will need to be dealt with within the same proceedings.

296. The rules which apply are the same as those which apply under paragraph 3—

- The rent is to be set at a fair rent, with specific rules about how improvements and diversification are to be dealt with (see paragraph 290 of these notes),
- An order fixing the rent under this paragraph would have the effect of restarting the clock for any future rent review application (see paragraph 291 of these notes),
- The process to be followed by the Court is the same (see paragraph 292 of these notes),
- The order takes effect on the same date (see paragraph 293 of these notes).

Paragraph 5 – Land Court's powers in respect of rent arrears

297. In paragraph 5, the existing law on the Land Court's powers in respect of rent arrears is restated (and extended to rent reviews which are brought on the basis of diversification). This provision—

- allows proceedings seeking removal of a small landholder for non-payment of rent to be sisted (i.e. paused) until an application to determine the rent has been processed (and it will be for the Court to decide if this is appropriate – e.g. in a diversification case, they may decide it is preferable to ascertain first whether the small landholder will be continuing on in the holding),
- allows the order which sists the proceedings to include conditions which must be met,
- obliges the Court, when determining the rent in a case where an application to sist the removal proceedings was brought, to consider whether to reduce the rent arrears and/or impose a payment plan in respect of them (having regard to the level of the rent arrears and why they arose),
- allows such an order reducing rent arrears to proceed regardless of whether or not some or all of those arrears have already been paid off (meaning that the landlord could be required to reimburse sums that have been paid).

298. This provision is a consolidation of section 6(4) and (5) of the Crofters Holdings (Scotland) Act 1886 and section 2 of the Crofters Holdings (Scotland) Act 1887 insofar as it remains relevant (that is, insofar as it provides for a relief mechanism where repayments have already been made).

Part 2 – Diversification

299. Section 10 of the Small Landholders (Scotland) Act 1911 requires small landholders to cultivate their holdings. Cultivating the holding means using it for horticulture or husbandry (including the keeping or breeding of livestock, poultry or bees, and growing fruit and vegetables). Section 10 does permit the use of the land for certain subsidiary or auxiliary purposes, but these are limited to things that are not inconsistent with the cultivation of the holding.

300. Part 2 of the schedule makes provision enabling small landholders to diversify their use of their holdings, that is to use them for non-cultivation purposes. This brings small landholders into line with tenants of agricultural holdings who are already able to use their land for non-agricultural purposes (principally under Part 3 of the Agricultural Holdings (Scotland) Act 2003).

301. There are two ways in which the use of a holding for a diverse purpose can be authorised by virtue of Part 2. The first is for the landholder and landlord to enter into a diversification agreement. The second is for the landholder to give the landlord a notice of diversification, setting out a diversification proposal which is either agreed to by the landlord or approved by the Land Court.

302. Paragraph 6 of Part 2 makes provision for diversification agreements. The small landholder and the landlord can enter into a diversification agreement at any time (sub-paragraph (1)). The agreement allows the landholder to use the landholding, or part of it, for a purpose other than cultivation (sub-paragraph (2)).

303. The effect of the agreement is to override any term of the lease of the landholding preventing the use of the holding for that purpose (paragraph 16(2)). Paragraph 16(1) also provides that the landholding does not cease to be a small landholding (and therefore does not fall outwith the small landholdings legislation) only because it is used for a diverse purpose in accordance with a diversification agreement, rather than for cultivation.

304. The agreement must be in writing and set out what the diverse purpose is, the land that may be used for that purpose, any changes that the landholder can make to the land for that purpose, any conditions relating to the use of the land for the diverse purpose or to any changes that may be made to the land, and the date on which the landholder may begin using the land for that diverse purpose (sub-paragraph (3)).

305. Paragraphs 7 to 15 of Part 2 make provision for the other route which a landholder can use to obtain approval to use the landholding for a diverse purpose. This involves the landholder giving the landlord notice of the proposed diversification. The landlord may object to the notice but only

on limited grounds, and any objection has effect only if the Land Court agrees that the objection is reasonable.

306. Paragraph 7(1) allows the small landholder to give the landlord a notice of diversification, notifying the landlord that the landholder intends to use the landholding, or part of it, for a diverse purpose.

307. The notice must set out what the diverse purpose is, the land that would be used for that purpose, any changes that the landholder proposes to make to the land for that purpose, and the date on which the landholder proposes to begin using the land for the diverse purpose (sub-paragraph (2)). It must also specify any environmental benefits that the landholder intends to flow from using the land for the diverse purpose, and how those benefits would be provided (sub-paragraph (3)(a) and (b)(i)). Where the landholder proposes to make changes to the land, the notice must set out how they are to be financed and managed. Where the proposed diversification is related to a business, the notice must set out how the part of the business relating to the land is to be financed and managed (sub-paragraph (3)(b)(ii) and (iii)).

308. The notice must also address some of the grounds under paragraph 9(3) on which the landlord might object to the notice (sub-paragraph (3)(c)). Those grounds are that the landlord reasonably considers that implementation of the proposal would lessen significantly the amenity of the land or the surrounding area, substantially prejudice the use of the landholding for cultivation in the future, or be substantially detrimental to the sound management of the estate of which the landholding is part.

309. Sub-paragraph (4) requires the notice to be given in writing and in any form that is prescribed by the Scottish Ministers by regulations. It must be given at least 70 days before the date on which the landholder proposes beginning to use the land for the diverse purpose.

310. The Scottish Ministers are given the power, by regulations, to modify paragraph 7 to add or remove information that must be included in the notice (sub-paragraph (5)).

311. Paragraph 8(1) allows a landlord who receives a notice of diversification to request more information about the diversification proposal from the landholder. The landlord can make one request for such information, and it must be made within 30 days of the notice being given to the landlord.

312. The information that can be requested is information relating to the diversification proposal, or to the finance or management of a business that is connected with the proposal (sub-paragraph (2)(a)). The landlord can also request information that is necessary for the landlord's consideration of whether the landlord has grounds to object to the proposal under paragraph 9(3)(a)(i) to (iii) or (b) (sub-paragraph (2)(b)). Those grounds are the ones mentioned in paragraph 308, as well as that the landlord reasonably considers that the notice fails to demonstrate that any change that the landholder proposes to make to the land, or any business associated with the proposal, is viable.

313. The landholder must provide any information which is reasonably requested by the landlord within 30 days of the request (sub-paragraph (3)). Failure of the landholder to provide such information within that period is a ground on which the landlord can object to the diversification proposal (see paragraph 9(3)(c)).

314. Paragraph 9 sets out how the landlord is to respond to a notice of diversification given under paragraph 7.

315. The landlord must notify the landholder in writing of whether the landlord agrees or objects to the diversification proposal (sub-paragraph (1)). That notification must be given within 60 days of the landlord making a request for more information under paragraph 8 (sub-paragraph (2)(a)). If the landlord does not make such a request, then the notification of the landlord's decision must be given within 60 days of the landlord being given the notice of diversification under paragraph 7 (sub-paragraph (2)(b)).

316. If the landlord does not respond to the notice within the required period, the landlord is to be treated as having agreed to the proposal (without conditions) (sub-paragraph (6)).

317. Where the landlord does agree to the proposal within the required period, the landlord may impose reasonable conditions on the implementation of the proposal (sub-paragraph (4)). Where such conditions are imposed, the landlord must, when notifying the landholder of the landlord's agreement, also set out what the conditions are, why they are being imposed and why the landlord considers them to be reasonable (sub-paragraph (5)(b) and (c)).

318. Paragraph 9(3) sets out the grounds on which the landlord may object to the proposal. These are the only grounds of objection (and so the landlord must agree to the proposal if none of these grounds exist).

319. The landlord may object under paragraph 9(3)(a) if the landlord reasonably considers that, if the proposed diversification proceeded—

- the amenity of the land or the surrounding area would be significantly lessened,
- the use of the whole of the landholding for cultivation in the future would be significantly prejudiced,
- there would be substantial detriment to the sound management of the estate of which the landholding is part, or
- the landlord would suffer undue hardship.

320. The landlord may object under paragraph 9(3)(b) if the landlord reasonably considers that the notice fails to demonstrate that any change that is proposed to the land, or any business associated with the proposal, is viable.

321. Finally, the landlord may object under paragraph 9(3)(c) if the landholder fails to provide the landlord with information in accordance with paragraph 8(3).

322. Where the landlord objects to the proposal, the notification of that objection must also set out the grounds for the objection (sub-paragraph (5)(a)).

323. Sub-paragraph (7) makes provision for the date from which a proposal which has been agreed to under this paragraph may be implemented. Paragraph (a) provides that that date is the earlier of the date set out in the notice of diversification as the date on which the landholder proposes to begin implementing the proposal, or, if the landlord had requested additional information under paragraph 8, the date which is 70 days after that request was made. However, sub-paragraph (7)(b) allows the landholder and the landlord to agree that the implementation may begin on an earlier date.

324. Sub-paragraph (8) allows the Scottish Ministers, by regulations, to modify the grounds for objection in sub-paragraph (3), and to make provision about the information to be included in notification of the grounds of objection in relation to each ground, and the manner in which the information is to be given to the landholder.

325. Paragraph 10 makes provision for the landlord and landholder to negotiate a diversification agreement (under paragraph 6) where the landlord has objected to a notice of diversification under paragraph 9.

326. Where the landlord objects to such a notice, the landholder may notify the landlord that the landholder wishes to negotiate such an agreement (sub-paragraph (2)). That wish must be notified to the landlord within 30 days of the landlord notifying the landholder of the objection to the notice of diversification.

327. If the landlord and the landholder enter into a diversification agreement before either the landlord has applied to the Land Court for a determination that the objection is reasonable, or the period for making such an application has run out, the notice of diversification is to be treated as if it had not been made (sub-paragraph (3)). This means that the landlord does not have to apply to the Land Court for a determination that the landlord's objection to the notice was reasonable, and the landholder cannot proceed to implement the diversification proposal as set out in that notice (except insofar as it is the same as the diverse purpose agreed to in the diversification agreement).

328. If the landholder notifies the landlord of a wish to negotiate a diversification agreement under sub-paragraph (2), the period within which the landlord may apply to the Land Court to determine that the landlord's objection is reasonable, or withdraw the objection, is extended by 30 days (sub-paragraphs (4) and (5)).

329. Paragraph 11 allows the landlord to withdraw an objection to a notice of diversification within 60 days of notifying that objection (or 90 days if the landholder has notified the landlord of

a wish to negotiate a diversification agreement) (sub-paragraph (1) as read with paragraph 10(5)(a)).

330. Where the objection is withdrawn, the landlord must notify the landholder that it is withdrawn (and that the landlord now agrees to the diversification proposal), and the landlord may impose reasonable conditions on the implementation of the proposal (sub-paragraph (2)). If conditions are imposed, the landlord's notification must also set out what the conditions are, why they are being imposed and why the landlord considers them to be reasonable (sub-paragraph (3)).

331. Where the landlord withdraws the objection, the landlord may not apply to the Land Court for a determination that the objection is reasonable (sub-paragraph (4)(b)).

332. If the objection is withdrawn, the landholder may implement the proposal from the later of the date set out in the notice of diversification as the date on which the landholder intends to begin implementing it, and the date on which the objection is withdrawn (sub-paragraph (4)(a)).

333. Paragraph 12 allows the landlord to withdraw or modify conditions which have been imposed by the landlord on the implementation of a diversification proposal under paragraph 9 or 11. The conditions can be withdrawn or modified by the landlord, in writing, within 60 days of being notified to the landholder (sub-paragraphs (2) and (3)).

334. Where the landlord modifies the conditions, the landlord must notify the landholder of the modifications, the reason for making them and why the landlord considers them to be reasonable (sub-paragraph (4)).

335. Paragraph 13 provides that, where the landlord has objected to a notice of diversification, the landlord may apply to the Land Court for a determination that the objection is reasonable (sub-paragraph (2)). Any such application must be made within 60 days of the notification of the objection to the landholder (or 90 days if the landholder notifies the landlord of a wish to negotiate a diversification agreement) (sub-paragraph (3) as read with paragraph 10(5)(b)).

336. If the landlord does not make such an application within that period (and has not withdrawn the objection), or withdraws or abandons an application, the diversification proposal is to be treated as if the landlord had agreed to it (without conditions) (sub-paragraphs (8) and (9)). The landholder can therefore implement the proposal from the later of the date specified in the notice of diversification as the date on which the landholder proposed to begin implementing it, and the date on which the period for making the application expired (if no application was made) or the application was withdrawn or abandoned.

337. Where an application is made, the Land Court must determine whether the objection is reasonable or unreasonable (sub-paragraph (4)). In deciding whether it is reasonable, the Court must consider whether there are likely to be any positive environmental effects arising from the proposal, and, if so, whether they outweigh any negative effects (sub-paragraph (7)).

338. If the Land Court decides that the objection is unreasonable, the diversification proposal is approved and may be implemented by the landholder. The Land Court can attach conditions to its implementation, and determine when implementation of the proposal can begin (sub-paragraph (6)).

339. If the Land Court decides that the objection is reasonable, the diversification proposal may not be implemented by the landholder (sub-paragraph (5)).

340. Sub-paragraph (10) prevents any late applications being made under sub-paragraph (1). The Land Court therefore does not have discretion to accept applications made outwith the period allowed for by sub-paragraph (3) (as read with paragraph 10(5)(b)).

341. Paragraph 14 provides that, if the landlord and landholder enter into a diversification agreement after the landlord has applied to the Land Court for a determination that the landlord's objection to a notice of diversification is reasonable, the Land Court may determine that application by determining that the notice is not approved, and that the diversification proposal set out in the notice is not to be implemented (sub-paragraphs (1) and (2)). This allows the Court to give effect to the agreement of the parties without having to determine whether the landlord's objection was reasonable or not.

342. Sub-paragraph (3) makes it clear that this does not prevent the landholder from proceeding with any aspect of the diversification proposal which is allowed under the diversification agreement.

343. Paragraph 15 enables a landholder to apply to the Land Court for a determination that a condition imposed on the landlord's agreement to a notice of diversification under paragraph 9 or 11 is unreasonable (sub-paragraphs (1) and (3)). The application must be made within 60 days of the landholder being notified of the condition (sub-paragraphs (2) and (4)).

344. In deciding whether or not the condition is reasonable, the Court must consider whether the diversification proposal will have any positive environmental effects and, if so, whether those effects outweigh any negative effects to which the condition relates (sub-paragraph (5)).

345. The Land Court must determine whether the condition is reasonable or unreasonable. Where it determines that the condition is unreasonable, it may remove the condition, and it may impose another condition in its place (sub-paragraph (7)).

346. Paragraph 16(1) makes clear that (despite the statutory requirement to cultivate the small landholding) a small landholding does not cease to be a small landholding only because it is used for a non-cultivation purpose, so long as that purpose is agreed to by the landlord or approved by the Land Court under this Part.

347. Sub-paragraph (2) has the effect of overriding any term of a small landholder's lease which would prevent the use of the landholding for a diverse purpose in accordance with this Part.

348. Paragraph 17 defines certain terms used in this Part of the schedule.

Part 3 - Disposal of holding by small landholder

349. This Part of the schedule deals with three ways by which the small landholding can be disposed of: by being renounced by the small landholder; by being assigned by the small landholder; or by the small landholder dying.

Chapter 1: Renunciation

350. This Chapter is a consolidation of the small landholder's right to renounce the holding, subject to giving suitable notice. It is a restatement of section 7 of the Crofters Holdings (Scotland) Act 1886 as read with section 22 of the Small Landholders and Agricultural Holdings (Scotland) Act 1931. However, it is adjusted slightly to take account of the fact that there will no longer be any loans under section 7 of the Small Landholders (Scotland) Act 1911 and, as such, no provision requires to be made in relation to renunciation in cases where there is outstanding liability under those loans.

351. The general rule is that one year's written notice of renunciation must be given, and renunciation can only take effect as from Whitsunday or Martinmas. Whitsunday and Martinmas are defined for these purposes in section 1 of the Term and Quarter Days (Scotland) Act 1990 to mean 28 May and 28 November respectively.

352. However, slightly more detailed rules apply to a particular subset of small landholdings – i.e. those created after 1 April 1912 under a scheme prepared under section 7 of the Small Landholders (Scotland) Act 1911. In such cases, unless the landlord agrees otherwise then a tenancy can only be renounced with effect from the same term date of Whitsunday or Martinmas at which it commenced.

Chapter 2: Assignation

353. This Chapter provides an enhanced statutory right for a small landholder to assign their tenancy. It takes the place of section 21 of the Small Landholders (Scotland) Act 1911.

354. At present—

- the ability to assign is provided for only where the small landholder is unable to work the holding through illness, old age, or infirmity,
- this statutory right to assign requires a successful application being made to the Land Court for permission to assign the holding,
- an assignation can only be authorised by the Court in favour of a very limited category of people (the small landholder's son-in-law or someone who could inherit the small landholder's estate under the laws of intestacy).

355. In contrast, under the right to assign which is provided for in this Chapter—

- no element of necessity will require to be established before the assignation can be authorised: the starting point is simply that the small landholder gives 70 days' written notice of the proposed assignation setting out details of the proposed assignee, the terms of the proposed assignation and the date on which it is proposed to take effect (see paragraph 19(4)),
- either the landlord's consent or court authorisation is required, but where the proposed assignation is to a close family member as defined in paragraph 20(9) then the landlord may object only on specific grounds (see paragraph 20(1) and (2)); where the assignation is to a more distant relative then the landlord has a broader right of objection but must still have reasonable grounds for objecting (and paragraph 20(4) clarifies that the assignee being unable to pay the rent or cultivate the holding would be reasonable grounds),
- while the right to assign under these provisions is still limited to specified relationships, the list is much expanded from the present law and, for example, now includes various step-relations and the spouse or civil partner of various relatives as well as including widows and widowers in the same way as spouses and civil partners (see paragraph 19(2) and (3)).

356. In terms of the detail, a landlord has only 28 days to object to an assignation proposal, and their silence is to be treated as consent (paragraph 19(5)). Where the landlord does object, the small landholder then has a 28 day period within which they may apply to the Land Court for an order authorising the proposed assignation (paragraph 20(5)).

357. If the Land Court is satisfied that none of the grounds for withholding consent are reasonable, it must authorise the proposed assignation (paragraph 20(6)). Where the proposed assignation is to a close relative of the small landholder, this requirement for the ground to be reasonable is subject to the additional constraint that the landlord is only offered certain specified grounds upon which an objection may be made. The decision of the Land Court as to whether it is reasonable for the landlord to withhold consent is not subject to appeal (paragraph 20(8)).

358. Any term of a lease which purports to prevent assignation in accordance with this Chapter is void (paragraph 19(6)).

359. It should also be noted that the new system provides for a regime whereby assignations can proceed in certain circumstances regardless of the landlord's preference. However, there is nothing to stop a landlord from agreeing to something more generous, outwith the statutory regime – for example, permitting an assignation to a wholly unrelated person or agreeing to an assignation with less notice. It is not the case that a small landholder has to follow the process set out in these provisions in order for there to be an assignation – rather, it is that if the small landholder wants to benefit from the deemed consent of a landlord or the restrictions on the landlord's ability to refuse consent which apply under this Chapter, they need to follow the process set out here.

Chapter 3: Succession

360. This Chapter provides for the succession of the small landholder's interest in their tenancy following their death. It takes the place of section 16 of the Crofters Holdings (Scotland) Act 1886.

Testate succession

361. At present, the landholder may bequeath their interest in the holding to their son-in-law or to any person who could succeed to the landholder's estate on intestacy. The legatee has to notify the landlord of the bequest within 2 months of the death unless unavoidably prevented from doing so (in which case, it must be done as soon as possible). This also serves as a means of signifying the legatee's acceptance of the bequest. The landlord then has 1 month to notify the legatee that the landlord wishes to object; otherwise, the legatee becomes the small landholder under the holding. If there is an objection then the legatee can apply to the Land Court to be declared the landholder. If any reasonable ground of objection is established to the satisfaction of the Land Court, the bequest is declared null and void. Otherwise, the Land Court is to grant the petition and declare the legatee to be the small landholder. The decision of the Land Court is final.

362. Under the new system, there are a number of changes where a bequest is made—

- The class of persons to whom a tenant may bequeath their interest in their tenancy is expanded (see paragraph 21(2) and (3)). As with the rules on assignation, this will now include, for example, various step-relations and the spouse or civil partner of various relatives as well as including widows and widowers in the same way as spouses and civil partners.
- Where the legatee wishes to accept the bequest, they will now have a slightly shorter period of 21 days to notify the landlord in writing. However, there will continue to be the ability for late notification where legatee is unavoidably unable to give notice timeously (see paragraph 21(5)).
- As before, where the landlord does not object then the legatee will become the small landholder of the holding (see paragraph 21(7)). However, the period the landlord will have for objecting in writing (known as issuing a "counter-notice") will now be fractionally shorter than at present and will be set at 28 days.
- There will for the first time be rules about the grounds on which a landlord may issue a counter-notice. Where the legatee is a close family member as defined in paragraph 23(10) then the landlord may object only on specific grounds (see paragraph 23(3) and (4)); where the legatee is a more distant relative then the landlord is not limited in their grounds of objection but the legatee may be able to defeat any objection by demonstrating that there are reasonable grounds for allowing the bequest to stand (see paragraph 24(4)).
- There is also a change in relation to who has to apply to the Court in the event of a dispute. Whereas previously the onus always fell on the legatee, now it will depend on the deceased's relationship to the legatee. In the case of a close family member, the bequest will stand unless the landlord successfully applies to the Court for it to be overturned (see paragraph 23(5) to (7)). In the case of a more distant relative, the onus

of applying to the Court will rest with the legatee (see paragraph 24(3)) and in the absence of a successful application the landlord's counter-notice will render the bequest null and void.

- In each case, there will be a period of 28 days for the application to be made following the issuing of the landlord's counter-notice. The Land Court will then consider whether the applicant has made their case and make an order accordingly (see paragraphs 23(6) and (7) and 24(4) and (5)). The Land Court's decision may not be appealed.

363. As is the case under the current law, there will as default be a right for the legatee to occupy the small landholding on a temporary basis pending the outcome of court proceedings regarding a counter-notice (see paragraph 25). However, this right can be overturned by the Land Court if the landlord demonstrates why this should not be permitted. It can also be overturned by the executor of the deceased small landholder's estate objecting.

Intestate succession

364. This Chapter also deals with the interest in the tenancy of a small landholding falling into intestacy.

365. At present, paragraph (h) of section 16 of the Crofters Holdings (Scotland) Act 1886 provides that if the legatee does not accept the bequest of an interest in a small landholding, or if the bequest is declared to be null and void, the interest in the holding is to be treated as intestate estate. Under the general law, the interest in a holding will also be intestate estate if there is no bequest of it. In all of these circumstances, the interest in the holding currently becomes available for transfer by the executors under section 16(2) of the Succession (Scotland) Act 1964. This section allows the executors to transfer the interest, though this ability is subject to a requirement to obtain the landlord's consent under section 16(2A) of that Act (unless the transfer is to a close enough relative for consent not to be required).

366. Paragraph 22(1) makes equivalent provision to the current law in terms of when an interest in a small landholding is to fall into intestacy. It provides for the rules of intestacy to apply where there is no bequest, or the bequest is not accepted or it is declared to be null and void – the only difference is that the different ways in which the bequest can become null and void are adjusted to match the new testate succession rules. As under the current law, the interest in the holding will then become available for transfer by the executors under section 16(2) of the Succession (Scotland) Act 1964. However, the rules about landlord consent which are found in section 16(2A) of that Act are now switched off in respect of small landholdings (see paragraph 64 of the schedule) and instead the process of landlord consent or objection is dealt with in the same way as the new rules which apply to a bequest to a legatee.

367. As such, paragraph 22(2) provides that the person who acquires the lease of the small landholding under the rules applying to intestacy must give the landlord notice (just as a legatee who wishes to accept a bequest must do). As with testate succession, where the landlord does not object then the acquirer under intestacy will become the small landholder of the holding (see paragraph 22(4)).

368. Where the landlord objects to the person's acquisition of the tenancy, the landlord may issue a counter-notice under paragraph 23 or 24 as applicable (depending upon who has inherited the lease). The timescales for doing so and the grounds on which the landlord may do so are the same as in relation to testate succession (meaning that the grounds differ depending on how close a relative the person is to the deceased).

369. The effect of the counter-notice is also equivalent to its effect in relation to testate succession. As such, a counter-notice issued to a close relative only serves to allow the landlord to apply to the Land Court, and the tenancy continues in place unless and until the Land Court is persuaded that there one of the permitted grounds of objection is made out. In contrast, a counter-notice issued to a more distant relative will terminate the tenancy unless the acquirer applies successfully to the Land Court for the counter-notice to be overturned.

370. An acquirer under intestacy has the same rights as a legatee to temporary possession of the small landholding pending the outcome of court proceedings regarding a counter-notice.

Part 4 – Compensation

371. This Part of the schedule deals with the compensation rights which arise in certain circumstances when the tenancy of a small landholding is terminated in a particular way. It should be noted that compensation can also, separately, be payable for other reasons – for example, in respect of resumption of the small landholding by the landlord (see section 2 of the Crofters (Scotland) Act 1886).

Chapter 1: Right to compensation

Overview

372. This Chapter provides for rights to compensation for both the landlord and the small landholder. Some of these are a restatement of, or expansion of, existing law but others are new. The rights to compensation provided for in this Chapter are, in brief:

- paragraph 27: a slightly expanded restatement of the existing right of the small landholder to compensation for improvements they have made or paid for (which is based on sections 8 and 10 of, and the schedule to, the Crofters Holdings (Scotland) Act 1886, together with section 12 of the Small Landholders and Agricultural Holdings (Scotland) Act 1931),
- paragraph 28: a new right of the small landholder to compensation where they have increased the value of the land through permitted diversification activity,
- paragraph 30: an expansion of the existing right of the landlord to compensation for deterioration etc. caused to the holding by the small landholder (previously this right was limited to deterioration in the last 4 years and could only be claimed where it was being offset against a small landholder's claim to compensation for improvements – see section 10 of the Crofters Holdings (Scotland) Act 1886),

- paragraph 31: a new right of the landlord to compensation where the small landholder has reduced the value of the land through diversification activity (whether permitted diversification activity or not).

When the compensation rules apply

373. Under paragraphs 26 and 29, these rights to compensation can arise where the small landholder is removed from the holding, renounces the holding, takes on a new tenancy of the land outwith the statutory small landholding regime, or in certain situations which can arise where the tenancy is terminated following the small landholder's death. In addition, the landlord's rights to compensation under paragraph 29 can also arise where the small landholder has abandoned the holding. This ensures that a small landholder is not able to defeat the landlord's right to compensation by failing to give notice to terminate the tenancy of the holding.

374. However, in all cases, in the event that the process of removal or renunciation is followed and then the parties decide to enter into a new small landholding, within the protection of the small landholdings legislation, the right to compensation is instead deferred until the end of that new tenancy (when it will arise in respect of the entire period of occupation). This is achieved by a combination of paragraph 26(4) or 29(4) (as applicable) and paragraph 32(2).

375. The inclusion of the right to compensation where a small landholder stays on under a tenancy outwith the statutory small landholding regime is new, and recognises the fact that there is otherwise no appropriate point at which the rights which applied to the small landholding would be crystallised.

376. There are other ways in which the small landholding can be terminated which are not covered by these provisions. There can be resumption of the small landholding. However, as noted at paragraph 371, compensation is payable separately in that instance. The tenancy can also be terminated by the small landholder purchasing the holding, which takes it outwith the Landholders Acts. However, if doing so, a purchase price can be negotiated which factors in the small landholder's impact appropriately. Indeed if the holding is purchased under the right to buy provisions in Part 5 of the schedule, that is statutorily provided for. The purchase price is calculated without factoring in any increase/decrease in value caused by the small landholder, meaning, for example, that where a small landholder does not receive compensation for an improvement they have made, they are not missing out because they will instead benefit from the reduced purchase price payable by them which is based on the pre-improvement value of the holding.

377. Where the compensation rights arise because the tenancy of the small landholding has been terminated following the death of the small landholder and the tenancy has simply been terminated by the executor of the estate, paragraphs 26(3) and 29(3) provide for any right or liability to compensation to fall on the executry. However, where the lease of the small landholding is transferred to an acquirer (i.e. in a case where there is no valid bequest, or the bequest is not accepted or is struck down under Part 3) there is a short window in which the inheritance of the lease may subsequently be challenged under Part 3. If it is challenged successfully and the tenancy therefore comes to an end, it is the acquirer – i.e. the person who accepted the transfer of the lease

– who takes on the right to or, as the case may be, responsibility for any compensation that is due. The executor of the estate or, as the case may be, the acquirer is given the same right to apply for valuation of the compensation rights as the deceased small landholder would have had.

Previous tenancies

378. In all cases, the compensation rights allow the small landholder to receive credit, or blame, for anything done by their predecessors under the tenancy. Paragraphs 27(1) and 30(1) expressly talk about the small landholder or a predecessor under the same tenancy, while paragraphs 28(1) and 31(1) are simply concerned with what happened during the tenancy – and where someone is assigned or inherits the tenancy, that is a continuation of a single tenancy. However, it should be noted that a sub-tenant is not treated as being part of the same tenancy.

379. Similarly, if the landlord of the holding has changed during the period of the tenancy then anything done by their predecessor would be taken into account, and references to the landlord having done a particular thing are stated to include the landlord's predecessor in title having done so.

380. Provision is also made at paragraph 32(2) to cover the case where there is more than one tenancy – for example, the small landholder renounces the tenancy but then agrees with the landlord to stay on after all. Although there are technically two (or more) consecutive tenancies rather than just one, neither side is deprived of the compensation which would otherwise have arisen in respect of the period of occupation.

381. The other case in which previous tenancies can be relevant is that provided for by paragraph 34, where an incoming holder has stepped into the outgoing holder's shoes. See the commentary at paragraphs 389 and 390 of these notes for further details.

The substantive compensation rights

382. The compensation rights themselves (i.e. paragraphs 27, 28, 30 and 31) are largely self-explanatory, and are summarised at paragraph 372 above.

383. The rights are likely to be familiar to those accustomed to dealing with rural land tenure. This is because—

- The right to compensation for permanent improvements provided for at paragraph 27 is very close to the existing right for small landholdings (although when it is payable is expanded – see paragraph 375 above). As such, it is expected that any existing case law on what does or does not constitute a permanent improvement will continue to apply.
- The expanded right to compensation for deterioration etc. provided for at paragraph 30 is similar to the comparable provision made at section 45 of the Agricultural Holdings (Scotland) Act 1991.

- Similarly, the new rights to compensation for diversification at paragraphs 28 and 31 are not dissimilar to the rights which exist in respect of agricultural holdings (see section 45A of the 1991 Act). It should be noted that the rights to compensation for diversification apply only to diversification which occurs after the Bill comes into force.

384. In terms of how the compensation is valued, the compensation to the small landholder is based on the value of the thing (whether that thing is a permanent improvement or diversification) to an incoming tenant of the holding. The reference to "an" incoming tenant confirms that what is to be considered here is a hypothetical incoming tenant rather than "the" specific incoming tenant who might happen to be taking over. In both cases there is then a deduction made from that amount – primarily to take account of the extent to which the landlord has contributed to the increase in the value. For example, if a landlord had paid for materials for a permanent improvement but the small landholder provided free labour, that would be an improvement in respect of which the small landholder was eligible for compensation. However, the value of the landlord's contribution would be deducted from the compensation payable to the small landholder. In respect of the new right of the small landholder to compensation where there is successful diversification, there is also a further rule which applies. If an incoming tenant's ability to use the holding for cultivation is substantially prejudiced by the diversification, no compensation is payable in respect of the diversification unless it has an environmental benefit.

385. The value of the compensation payable to the landlord is based on the decrease in the value caused by the small landholder (whether that is through allowing deterioration etc. or through diversification) as compared to what the value would have been without that factor. I.e. if the value of the holding has increased over the period of the tenancy due to general market conditions, that does not mean that there is no relevant decrease as the comparison is with what the value would have been without the small landholder's actions. In the case of deterioration etc. though, the compensation payable to the landlord is whichever is greater of the decrease in value or the cost of rectifying it.

Notice to the small landholder

386. Paragraph 32(1) imposes a requirement for the landlord to give three months' written notice of their intention to seek compensation under this Chapter. However, that is subject to an exception where the small landholder has abandoned the holding (as the giving of notice is likely to be impracticable or even impossible). The Land Court is also given the ability to dispense with the requirement for notice in other cases – which might be relevant, for example, where the compensation arises following a small landholder's death and so there is not a long lead-in period to the right to compensation arising.

Chapter 2: Compensation: ancillary matters

387. This Chapter deals with a number of miscellaneous matters relating to compensation. Specifically, it deals with the following—

- It confirms that outstanding rent can be offset against compensation payable to the landlord.
- It allows an outgoing small landholder to agree with an incoming one for any compensation payable to the former for improvements to be payable in due course to the latter instead.
- It makes provision for the creation of a record of condition.

Paragraph 33 – Offsetting rent

388. While the ability to offset debts is a general principle of law, this was provided for expressly by section 23 of the Small Landholders (Scotland) Act 1911. This principle is restated in paragraph 33 and applies to any compensation payable by the landlord under this Chapter.

Paragraph 34 – Compensation to outgoing holder by incoming holder

389. Paragraph 34 essentially allows an incoming small landholder to step into the shoes of the outgoing holder, taking on their rights and responsibilities in relation to compensation under this Part. While this would happen automatically upon the holding being assigned, this provision also allows that result to be reached in a case where one tenancy has been terminated and a new one begun. This means that the compensation payable can be deferred to the end of the incoming holder's tenancy. This requires the agreement of the incoming holder, the outgoing holder and the landlord.

390. This paragraph is the modern equivalent of section 1(1) of the Small Landholders and Agricultural Holdings (Scotland) Act 1931. However, it is simplified as there are currently no outstanding loans under section 7 of the Small Landholders (Scotland) Act 1911 and no such liability will arise in future as the provision for making these loans is turned off by Part 6 of the schedule. As such, there is no need to deal with the taking over of liability for those loans as part of this provision.

Paragraph 35 – Record of condition

391. Paragraph 35 provides for the making of a record of condition. It is an expanded and amended provision which takes the place of both section 10 of the Small Landholders and Agricultural Holdings (Scotland) Act 1931 and section 8(4) of the Small Landholders (Scotland) Act 1911.

392. This provision allows either party to the lease to require that a record of condition be made at the joint expense of both parties. For example, a party may wish to have a formal statement as to who paid for an improvement so that there is no dispute about this at the end of the tenancy when compensation comes to be assessed. A party may also wish the state of condition to be assessed at the commencement of the tenancy so that there is a benchmark for assessing at the end of the tenancy whether there has been deterioration for which compensation is payable. There are no prescribed requirements as to the form a record of condition is to take so this would be for the parties to agree or, in the absence of such agreement, for the person making the record to determine.

393. Where the parties can agree then they can appoint someone themselves to prepare the record of condition but where there is no agreement then the Scottish Ministers can be asked to make an appointment. Specific rules apply in terms of the costs in cases where Ministers are asked to intervene. Where a dispute arises in relation to the making of a record of condition, the Land Court is to determine the dispute.

Chapter 3: Process for determination of compensation amount

394. This Chapter sets out the process for determining the amount of compensation payable in a case where this cannot be agreed by the parties concerned. This is dealt with by way of application to the Tenant Farming Commissioner, and the process will be a familiar one for the Commissioner as it broadly mirrors the process for valuing the compensation payable upon relinquishing an agricultural holding set out in sections 32G to 32O of the Agricultural Holdings (Scotland) Act 1991.

395. This new process takes the place of the provision made in respect of the valuation of the existing right to compensation for improvements upon renunciation found in section 11 of the Small Landholders and Agricultural Holdings (Scotland) Act 1931. It also supersedes section 31 of the Crofters Holdings (Scotland) Act 1886 which provided for compensation for improvements to be determined by the Crofting Commission.

396. The process as set out in this Chapter is broadly self-explanatory. However, in short—

- either party may apply to the Tenant Farming Commissioner for the appointment of an independent and suitably qualified valuer who will, after having regard to any written representations made by the parties, determine the compensation and issue a notice of assessment (see paragraphs 36, 37, 40 and 41),
- there are various appeal rights—
    - there is a right for either party to lodge an objection with the Land Court to the person appointed as the valuer, and the Land Court's decision on that matter is final (see paragraph 38),
    - both parties have the right to appeal to the Lands Tribunal against the valuer's assessment (see paragraph 42),
    - there is a route for any issues of law which are raised on such an appeal to be referred by the Lands Tribunal to the Land Court (see paragraph 43),
- the valuer's costs are payable by the person by whom compensation is payable, and where there is no award (whether because the compensation each is due to the other is equal or because the application for an assessment is withdrawn) it is payable by the applicant (see paragraph 39). For the purposes of determining who is to meet these costs, the fact that the compensation payable to a small landholder may be reduced by offsetting rent is to be disregarded.

Part 5 – Right to buy

397. At present, there is no mechanism for small landholders to register their interests in buying their holdings or for acquiring the right to buy as there is for tenants of agricultural holdings under Part 2 of the Agricultural Holdings (Scotland) Act 2003. Part 5 of the schedule establishes a scheme for small landholders which is similar to that provided for in Part 2 of the 2003 Act. Under this scheme, a small landholder may register an interest in buying the land comprising the holding, and, where such an interest is registered, is given the right to buy the land in certain circumstances where the land owner, or a secured creditor, proposes to transfer the land to a third party.

398. Paragraph 44(2) requires the Keeper of the Registers of Scotland (the "Keeper") to keep the Register of Community Interests in Land (the "Register"), established by section 36 of the Land Reform (Scotland) Act 2003, so that there is a part in that Register for registering small landholders' interests in buying the land comprising their landholdings. There is already a part of that Register for registering the interests of tenants of agricultural holdings in buying their holdings (section 24 of the 2003 Act).

399. Sub-paragraph (3) requires the Keeper to record in that part of the Register any notice or notification given to the Keeper under this Part (including a notice of interest in buying land under paragraph 45), and the date on which any registration of an interest in buying land is removed from the Register.

400. Sub-paragraph (4) provides that references in this Part to a small landholder do not include a reference to a sub-tenant of a small landholding. A sub-tenant therefore does not acquire any rights under this Part.

401. Paragraph 45 allows a small landholder to apply to the Keeper to register the landholder's interest in buying the land comprising the landholder. An application is made to the Keeper by the small landholder giving the Keeper a notice of interest under sub-paragraph (1).

402. A notice of interest must specify the particulars of the landholder and the land owner, the location and boundaries of the land and any interests or rights comprised in the land (such as sporting or mineral rights) (sub-paragraph (2)(b)). The Scottish Ministers may prescribe other information to be included in the notice in regulations under sub-paragraph (2)(b)(iv), and may prescribe the form of the notice in regulations under sub-paragraph (2)(a).

403. The landholder must give the land owner a copy of the notice, and let the Keeper know that has been done (sub-paragraph (3)).

404. The Keeper must register the landholder's interest in buying the land on receiving a notice of interest (sub-paragraph (4)). The registration must include the information included in the notice, and the date of registration. The Keeper is to give an extract of the registration to the landholder and the land owner.

405. If there is a standard security over the land, the land owner must let the landholder know that is the case (sub-paragraph (5)). The land owner must also give the creditor in the standard security a copy of the extract of the registration within 28 days of receiving the extract. If the creditor has the right to sell the land, the creditor will be required to comply with this Part where the landholder has registered an interest in buying the land (see paragraph 48 of the schedule).

406. The Scottish Ministers can, in regulations under sub-paragraph (6), specify reasonable fees that the Keeper may charge for registering interests under this paragraph, and for providing extracts and copy extracts of registrations.

407. Paragraph 46 allows the land owner to challenge the registration of a small landholder's interest in buying land on the ground that there is an inaccuracy in the registration (sub-paragraph (2)). The land owner is to make the challenge by giving the Keeper notice in writing.

408. If the Keeper receives a notice challenging a registration, the Keeper must make any enquiries that the Keeper considers appropriate (sub-paragraph (3)). Where the Keeper considers that there is a material inaccuracy in the registration, the Keeper must rescind it (sub-paragraph (4)(a)), and let the landholder and the land owner know that it has been rescinded (sub-paragraph (5)(a)). Where the Keeper considers that there is an inaccuracy which is not material, the Keeper may amend the registration (sub-paragraph (4)(b)), and must give the landholder and the land owner an extract of the registration if it is amended (sub-paragraph (5)(b)).

409. The landholder or the land owner may appeal to the Land Court against any decision of the Keeper in respect of a challenge to a registration (sub-paragraph (6)). This includes a decision that the registration is not inaccurate, as well as a decision that there is an inaccuracy, and whether an inaccuracy is material or not material.

410. Paragraph 47 makes provision about how long the registration of a small landholder's interest in buying land has effect.

411. The registration ceases to have effect if the registration is rescinded following a challenge under paragraph 46, if the landholder's tenancy of the land is terminated, or (where neither of those things has happened) after 5 years (sub-paragraph (1)(b)). If any of the land which is the subject of the registration stops being part of the holding, the registration ceases to have effect in relation to that land (sub-paragraph (1)(a)).

412. The land owner must notify the Keeper in writing if the tenancy is terminated during that 5 year period, or if any land stops being part of the holding during that period (sub-paragraph (2)). This notification will be entered in the Register by virtue of paragraph 44(3)(a). Someone checking the Register will therefore be able to see any notification of a reduction in the land affected by the registration.

413. The Keeper must remove any registration which has ceased to have effect from the Register (sub-paragraph (5)). Paragraph 44(3)(b) also requires the Keeper to enter the date of the removal in the Register.

414. Where a landholder's interest in buying the land comprised in the holding is registered, and the registration has not ceased to have effect, paragraph 48 requires the owner of the land to notify the landholder notice of any proposal to transfer the land (sub-paragraph (2)). A secured creditor who has the right to sell the land must also notify the landholder of any proposal by the creditor to transfer the land.

415. Some proposed transfers are exempt from this notice requirement (sub-paragraph (3)). They are set out in paragraph 49. The Scottish Ministers have the power to modify the list of exempt transfers in regulations made under paragraph 49(5).

416. Paragraph 49(2) provides that transfers which are not for value, which are between companies in the same group or which are made in consequence of the assumption, resignation or death of a partner in a partnership, or a trustee of a trust, which are ordinarily exempt by virtue of paragraph 49(1)(a), (d) and (g), are not exempt from the notice requirement in paragraph 48 if the transfer is part of a scheme or arrangement, or a series of transfers, the main purpose or effect of which is to avoid the land being subject to the landholder's right to buy.

417. Where notice of an intention to transfer land is required to be given to the landholder under paragraph 48, the notice must be given in writing and in accordance with any provision prescribed by the Scottish Ministers in regulations (paragraph 48(4)), and a copy must be given to the Keeper (paragraph 48(5)).

418. Paragraph 50 sets out the circumstances in which a small landholder, whose interest in buying land is registered under paragraph 45, acquires the right to buy the land.

419. The landholder acquires that right if the owner of the land, or a secured creditor with a right to sell the land, gives the landholder a notice of a proposal to transfer the land under paragraph 48 (sub-paragraph (1)(a) and (2)).

420. Where the land owner or the creditor takes any of the steps set out in sub-paragraph (3) with a view to transferring the land, and has not given the landholder notice under paragraph 48 then, unless the transfer is an exempt transfer, the landholder acquires the right to buy the land (sub-paragraph (1)(b) and (2)). The land owner or creditor therefore cannot avoid the landholder acquiring the right to buy by not complying with the notice requirements in paragraph 48.

421. The steps mentioned in sub-paragraph (3) include advertising or exposing the land for sale, entering into negotiations with a view to transferring the land to another person, and continuing with a proposed transfer that was initiated before the landholder's interest in buying the land was registered. (However, paragraph 49(1)(f)(iv) exempts a transfer if missives were concluded before the landholder's interest was registered.) These steps may be taken by the land owner or creditor

themselves, or by someone acting on their behalf, or by someone in whom the land has vested in relation with a sequestration, bankruptcy, winding up, incapacity, or purpose for which a judicial factor may be appointed (sub-paragraph (4)).

422. The Scottish Ministers are able to modify sub-paragraphs (3) and (4) by regulations under sub-paragraph (7). They are thus able to modify what steps taken by or on behalf of the land owner or a secured creditor will trigger the landholder's right to buy the land where no notice has been given to the landholder under paragraph 48.

423. If the land owner or the creditor transfers the land to a third party despite the landholder having the right to buy the land (and that right not having been extinguished by a failure of the landholder to exercise the right), the landholder has the right to buy the land from the third party (sub-paragraphs (5) and (6)).

424. Where a landholder has the right to buy land under paragraph 50, the landholder can proceed to buy the land only if the landholder gives the land owner or the secured creditor (the "seller") notice that the landholder intends to buy the land under paragraph 51.

425. Where the seller gave the landholder notice of the proposal to transfer the land under paragraph 48, the landholder must give the seller notice of their intention to buy the land within 28 days (sub-paragraph (2)). Failure to give notice of intention to buy within that period means that the landholder's right to buy is extinguished (sub-paragraph (7)(a)).

426. Where the seller did not give the landholder notice of the proposal to transfer the land (and the landholder's right to buy was triggered by the seller taking any of the steps set out in paragraph 48(3)), the landholder must give the seller notice of their intention to buy the land under sub-paragraph (3). There is no time period within which that notice must be given as the landholder may not be aware of those steps being taken until sometime afterwards (and accordingly may not be aware of their right to buy the land until sometime afterwards).

427. Where the landholder has the right to buy from a third party to whom the seller transferred the land, the landholder may give that person notice of the landholder's intention to buy the land within three years of the transfer taking place, provided that the landholder's tenancy of the landholding is still in force when the notice is given (sub-paragraphs (4) and (5)). If no such notice is given within that period, the right to buy is extinguished (sub-paragraph (7)(b)).

428. If the landholder does not intend to exercise their right to buy, the landholder can give the seller or any third party to whom the land has been transferred notice under sub-paragraph (6) that they do not intend to buy the land. Such notice has the effect of extinguishing the right to buy (sub-paragraph (7)(c)).

429. The landholder must give the Keeper a copy of any notice of intention to buy the land given by the landholder under paragraph 51 (sub-paragraph (8)).

430. Paragraph 52 provides that, where a landholder's right to buy is extinguished the landholder can acquire a new right to buy the land under paragraph 50(2). However, the landholder cannot acquire a new right to buy within 12 months of the first right to buy being extinguished unless the land has been transferred to a third party, and the third party proposes to transfer the land to someone else.

431. Paragraphs 53 to 58 set out the process by which the landholder may buy the land from the seller.

432. Paragraph 53(1) requires the landholder to make the offer to buy the land. The price offered is either to be agreed by the landholder and the seller, or the price assessed by a valuer under paragraph 55, or by the Land Court in an appeal under paragraph 57.

433. The date of entry, and of payment of the price, in the offer is to be either a date within 6 months of the landholder giving notice of their intention to buy the land (sub-paragraph (4)(a)). But if there is an appeal to the Land Court in relation to the price payable for the land, and that appeal has not been determined within 4 months of the notice of intention to buy being given, the date must be not later than 2 months after the appeal is determined or abandoned (sub-paragraph (4)(b)). In either case, the landholder and the seller can agree to a date which is later (sub-paragraph (4)(c)).

434. As well as including the price and the date of entry, the offer may include other reasonable conditions which are necessary or expedient to secure the efficient progress and completion of the transfer (sub-paragraph (5)).

435. If the landholder does not conclude missives with the seller, or take all reasonable steps towards doing so, before the date of entry specified in the offer, the seller can apply to the Land Court for an order directing the landholder to conclude the missives within a specified period and take any specified remedial action for that purpose, and directing the landholder and the seller to include any terms or condition specified by the Court in the missives (sub-paragraphs (6) to (8)).

436. The landholder's right to buy is extinguished if the landholder fails to comply with an order of the Land Court under sub-paragraph (8), or, if the seller has not applied for such an order, fails to conclude missives within a reasonable period (sub-paragraph (9)).

437. Paragraph 54 provides that if the seller and the landholder do not agree a price for the land, it is to be valued by a valuer appointed by agreement between them, or by a person nominated by them (sub-paragraph (1)).

438. If the holding is part of an estate, and any other landholder has given notice of their intention to buy their holding, the valuation is to be carried out by a valuer appointed by agreement between the seller and at least half of the landholders who have given such notice, or by a person nominated by a seller and at least half of those landholders (sub-paragraphs (2) and (3)).

439. If there is no agreement between the seller and the landholder (or landholders), the Land Court is to appoint the valuer, or nominate a person to appoint the valuer (sub-paragraph (4)).

440. The valuation of land for the purposes of this Part of the schedule can be carried out by one valuer, or by two valuers with an overseer (sub-paragraph (5)).

441. Paragraph 55 sets out how the land is to be valued by the valuer. This includes the date at which the land is to be valued (sub-paragraph (1)), matters which the valuer must take into account (sub-paragraph (3)), and matters which the valuer must not take into account (sub-paragraph (4)). The valuer must have regard to the value that would likely be agreed by a reasonable seller and buyer who were both willing participants in the transaction, where the buyer was a sitting landholder (sub-paragraph (2)).

442. Where the land is part of an estate, the valuer is also to assess the difference between the value of the whole estate if it were being sold to someone other than the landholder, and the value of the estate excluding the holding if it were being sold to such a person (sub-paragraph (5)).

443. The price payable for the land under paragraph 53 is, where the land is not part of an estate, the value of the land assessed under sub-paragraph (2) (sub-paragraph (9)(a)). If the land is part of an estate, the price payable is whichever is the greater of the value of the land assessed under that sub-paragraph, and the difference between the value of the whole estate, including that land, and the value of the whole estate excluding that land, as assessed under sub-paragraph (5) (sub-paragraph (9)(b)).

444. If the land forms part of an estate, and any other landholder is also exercising a right to buy their holding, the valuations under sub-paragraphs (2) and (5) are to be carried out in respect of each of those holdings as at the same date, and the valuer may apportion the difference in values assessed under sub-paragraph (5) between the holdings (sub-paragraph (6)).

445. The Scottish Ministers may issue guidance for the purposes of valuation under paragraph 55 (sub-paragraph (7)).

446. Paragraph 56 makes further provision about valuation for the purposes of the exercise of a landholder's right to buy.

447. The valuer is to invite written representations about the valuation under paragraph 55 from the seller and the landholder, and, where the holding is part of an estate, any other person who the valuer considers to have an interest in the estate (sub-paragraphs (1), (2) and (3)).

448. The valuer is allowed to enter onto land and make reasonable requests of the seller and the landholder for the purposes of a valuation under paragraph 55 (sub-paragraph (4)).

449. The valuer is to give the seller and the landholder notice of the price payable by the landholder, and how that price was calculated, within 6 weeks of being appointed (sub-paragraph (5)).

450. The valuer's expenses are to be met by the landholder or landholders of the holding or holdings which the valuer has assessed under paragraph 55 (sub-paragraph (6)).

451. However, if the Land Court makes an order under paragraph 53(8) requiring the landholder to conclude missives (or anything else mentioned in that paragraph) and the landholder complies with the order, the seller is liable for the valuer's expenses if the seller does not proceed with the sale of the land (sub-paragraph (7)).

452. Sub-paragraph (8) allows the Scottish Ministers to make further provision in regulations for or in connection with the appointment of valuers and the valuation of land under this Part.

453. A seller or landholder can appeal to the Lands Tribunal against the valuation of a holding, under paragraph 57(1).

454. The appeal must be made within 21 days of the valuer notifying the seller and the landholder of the price payable for the land, and must state the grounds of appeal (sub-paragraph (2)).

455. The Tribunal may reassess the value of the land, and make its own determination of the price payable for the land (sub-paragraph (3)).

456. The valuer may be a witness in the appeal proceedings (sub-paragraph (4)), and the seller, landholder and (if not the seller) the land owner and a secured creditor in relation to the land may be heard in the proceedings (sub-paragraph (5)). If the land is part of an estate, a secured creditor in relation to any other part of the estate, and a landholder or other tenant of any other part of the estate, may also be heard.

457. The Tribunal must give a written statement of the reasons for its decision on an appeal (sub-paragraph (6)) and its decision is final (sub-paragraph (7)).

458. Paragraph 58 requires the Tribunal to refer any issue of law that arises in the appeal to the Land Court, if that issue is one which it is within the competence of the Land Court to determine.

459. Paragraph 59 gives the Scottish Ministers the power, by regulations, to make provision for or in connection with the registration of small landholders' interests in buying land under this Part. Sub-paragraph (2) lists particular matters related to such registration that may be dealt with in the regulations (without excluding other matters also related to such registration).

460. The regulations are subject to the affirmative procedure (section 29(2)), and the Scottish Ministers must consult the Keeper and such other persons as they consider are likely to have an interest in registration under this Part before laying a draft of the regulations before the Scottish Parliament (sub-paragraph (3)).

461. Paragraph 60 contains definitions for the purposes of this Part.

Part 6 – Consequential modifications

462. This Part of the schedule disapplies the current law on small landholdings insofar as it would conflict with or is otherwise superseded by the provisions in the rest of the schedule.

463. This Part also makes some modifications to the current law on small landholdings in areas which are not superseded by this Bill but which cross-refer to topics which are now contained in this Bill. For example, no provision is made in the schedule about how a small landholder can be removed from their holding so the existing law on removal continues to apply. However, that law refers to compensation for improvements and there is now updated provision about compensation which requires to be referred to instead.

Part 7 – General and interpretation

464. This Part of the schedule applies section 25 of the Small Landholders and Agricultural Holdings (Scotland) Act 1931 to the new provision about small landholdings made by the schedule. This means that a landlord and small landholder cannot contractually deprive the small landholder of any right given to the small landholder by this schedule unless the Land Court authorises the contract.

465. This Part also contains some definitions which are used across the whole schedule.

This document relates to the Land Reform (Scotland) Bill (SP Bill 44) as introduced in the Scottish Parliament on 13 March 2024

LAND REFORM (SCOTLAND) BILL

EXPLANATORY NOTES

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