Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014
22 November 2013

CONSULTATION ON PROPOSED DRAFT AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003 REMEDIAL ORDER 2014

Responding to this consultation paper

We are inviting written responses to this consultation paper by 7 FEBRUARY 2014.

Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:

limitedpartnerships@scotland.gsi.gov.uk
or

Limited Partnerships Team
D Spur
Saughton House
Edinburgh
EH11 3XD

If you have any queries contact Angie Meffan-Main on 0131 244 9603 or by email to angie.meffan-main@scotland.gsi.gov.uk.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations.


This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG
consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly. All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library. (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library 3 weeks after the end of the consultation and on the Scottish Government consultation web pages 25 days after the end of the consultation. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date which is 7 FEBRUARY 2014, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the Agricultural Holdings (Scotland) Act 2003 Remedial Order. We aim to issue a report on this consultation process no later than 3 weeks after the consultation finishes.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to: David Balharry at the contact details above. His email is david.balharry@scotland.gsi.gov.uk.

Further information on the consultation process is included in a brief annex to this letter.

Yours faithfully

DAVID BALHARRY
PROJECT LEADER – ECHR COMPLIANCE ORDER
ANNEX

B. RESPONDENT INFORMATION FORM: AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003 REMEDIAL ORDER

The Respondent Information Form is available as part of the Response Form.

C. THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (e.g., analysis of response reports) can be accessed at: Scottish Government consultations (http://www.scotland.gov.uk/consultations)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may be used to finalise legislation before it is implemented.

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the legislation, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.
Consultation on the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014
THE DRAFT AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003 REMEDIAL ORDER 2014

Purpose

This consultation is public notice of the proposed draft order for the purposes of section 13 (3) (b) of the Convention Rights (Compliance) (Scotland) Act 2001. The document seeks written observations on the proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014, a copy of which can be found at the end of this document.

Introduction

The Agricultural Holdings (Scotland) Act 2003, section 72(10) came into force on 1 July 2003. Its function is to enable a landlord in a limited partnership tenancy, in cases where a tenancy continues to have effect by virtue of section 72(6) notwithstanding the purported termination of the tenancy in the circumstances referred to in section 72(3) to obtain the benefit of section 73. This allows the tenancy to be brought to an end by the landlord by the service of a notice to quit at a time of his or her own choosing. But subsection (10)(b)(i) and (ii) adds a further qualification that must be satisfied if section 73 is to apply. The notice of dissolution or thing mentioned in section 72(3) must have been served or occurred on or after the relevant date which is 1 July 2003.

The effect of this qualification is to deny the benefit of section 73 to all cases where the tenancy was purportedly terminated between 16 September 2002 (the date from which section 72 of the Act was given effect) and 30 June 2003 but which continue to have effect by virtue of section 72(6).

In the case of Salvesen v Riddell [2013] UKSC 22, the Supreme Court of the United Kingdom found that Salvesen’s rights under article 1 of the First Protocol to the European Convention of Human Rights were violated by section 72(10) of the 2003 Act and that said provision, to the extent of that breach, is outwith the legislative competence of the Scottish Parliament. This judgment was suspended for 12 months to allow the defect to be corrected and for that correction to take effect.

This proposed draft Remedial Order makes amendments to the Agricultural Holdings (Scotland) Act 2003 to address the incompatibility of the application of section 72(10) of that Act with article 1 of the First Protocol to the European Convention of Human Rights.

Background to the Order

The Court’s decision relates to the incompatibility of section 72(10) of the 2003 Act to the extent that the breach of ECHR rights was caused by that provision. This turns on the differential treatment given to landlords on the basis of the date of service of dissolution notices, that is, those served between 16 September 2002 and 30 June
2003 and those served on or after 1 July 2003. The Court considered this distinction both arbitrary and unduly harsh to those landlords in the first category. In particular the Court disapproved of outcomes which resulted in landlords in the first category being subjected to a full 1991 Act tenancy if they failed in an appeal to the Scottish Land Court against the tenant’s notice under section 72(6). By contrast landlords in the second category (ie those who served dissolution notices after 1 July 2003) are subjected to the less onerous outcome set out in section 73 of the 2003 Act.

The objective of the policy proposal is to correct the defect in the law and to bring the legal relationship between the landlords and the tenants into an ECHR compliant position.

Initial investigations have taken place into numbers affected. It is estimated, on the basis of data available to date, that around 20 persons may be within groups 1, 2 and 3.

**Scope of the Order**

The proposed draft Order serves to remedy any unlawful outcomes which have or may arise from the section 72(10) defect identified by the Supreme Court. The unlawful outcomes that require legislative correction are where:

- the landlord was served with notice under section 72(6) notice and now has a tenant with a 1991 Act tenancy or

- where the dissolution notice was served between 16 September 2002 and 01 July 2003 but where the purported termination date is still in the future and so notice under section 72(6) may still be served.

Included within the design of the proposed draft Order is a „cooling off‟ period. The basis for this „cooling off‟ period is to respect the long term nature and complexity of farming business and provide time for both landlords and tenants to discuss options and prepare for change in their personal circumstances.

It may well be that one or both of the parties have taken action which moves them beyond the defect by, for example, selling their property or entering into a bilateral agreement other than a 1991 Act tenancy. These individuals may or may not be content. This will depend entirely on the individual facts and circumstances of each case and it is possible or even likely that these will vary widely. A group response is not therefore possible.

Consequently the effect of the proposed draft Order is constrained to groups 1, 2 and 3 in Figure 1 and does not apply to groups 4 and 5. Groups 4 and 5 are deemed to have moved beyond the defect by either the sale of the farm or bilateral agreement between the parties.
Effect of the Order

The proposals aim to provide landlords who served dissolution notices to end limited partnerships during the period 16 September 2002 and 30 June 2003 with a means to recover vacant possession where they have not reached separate bilateral agreements (and also where the bilateral agreement was to maintain the 1991 tenancies) or moved beyond the scope of the changes through a sale of the farm or an agreement to maintain a 1991 tenancy on a basis other than section 72(6) continuing to have effect (i.e. they have entered into a new tenancy). Moreover, the proposals aim to provide, insofar as possible and also in a compliant manner, an appropriate period of notice for affected landlords and tenants to adjust their businesses and relationships.

Initial analysis has identified 3 distinct groups of tenants and landlords for which solutions are required to bring them into an ECHR compliant position. The groups are

1. Those where the landlord served on the tenant a dissolution notice under section 72(3) for a date in the future. The tenant has the option, within 28 days, of the purported termination, to serve a notice claiming the tenancy in their own right under section 72(6). The date at which the tenant can serve the claim notice is still to arrive (group 1).
2. Those where the tenant is in receipt of a full 1991 tenancy as a result of the landlord either electing not to apply for Land Court for an order under section 72(8) or withdrawing from the Land Court process (group 2).
3. Those where the tenant’s claim to a full tenancy was challenged by the landlord under section 72(7) and the cases were sisted pending the outcome of the above Case (group 3).

The proposals are as follows:-

Landlords in Groups 1, 2 and 3 are provided with different routes for getting into section 73 as the means for recovering vacant possession. The only exception is for group 3 cases where there is an option of allowing the Scottish Land Court to make a decision on a time period that they would regard as reasonable.

- For group 1 the order provides for the section 73 process.
- For group 2 the order provides that the landlord has an option (though not an obligation) of converting these tenancies into the section 73 process. The opportunity for conversion is provided during a 12 month period which starts on the 28 Nov 2014. The delay for the start of the conversion period allows for a “cooling off” period during which the Scottish Government is offering to assist with mediation if required.
- For group 3 the order provides that if the case is removed from the Land Court, it is processed through section 73. If it remains at the Court the order provides more discretion to take account of the circumstances and for the Court to make a decision as to when it would be reasonable for landlords to recover vacant possession.
The consultation process will be complete on around 7 February 2014 with a view to then laying a draft remedial Order under section 13 (2) of the Convention Rights (Compliance) (Scotland) Act 2001.

A copy of the 2003 Act can be found at:

Figure 1. Groups affected by the “defect”

Dissolution Notices Served by Limited Partnerships
16 Sept 2002 - 30 June 2003

1. Cases yet to reach termination date

2. T has full ‘91 tenancy. Initially because the LL acquiesced/capitulated. Includes cases where the T subsequently assigned or succeeded. Other than legal fees the Ts in this group have not made any payment to the LL. This group would include both the original LL and LLs who succeeded to the ownership rather than purchased the land.

3. No challenge from landlord. Tenancy under 72(6) continues this outcome declared unlawful by Supreme Court.

4. LL sold to T exercising pre-emptive right to buy

5. Bilateral agreement
- Landlord prepares to apply under s72(7) for SLC order
- SLC consider whether to issue order under s72(8) that s72(6) does not apply

Sisted Cases

Bilateral agreement that tenancy under 72(6) no longer applies. The Salvesen v Riddell case is in this group.

LL sold to new LL

Extension period to LP withdrawn of DN vacant possession recovered SLDT/LDT Other
List of consultees

Mandatory consultees

COSLA
Local authorities
Clerk of the RACCE Committee
Departmental Committee Liaison Officer
Scottish MEPs,
Equality and Human Rights Commission
SE Library
SPiCe Library
6 Legal Deposit Libraries

Stakeholder groups

Tenant Farmers Forum
Scottish Tenant Farmers Association
National Farmers Union of Scotland
Scottish Agriculture and Valuers Association
Scottish Land and Estates
Royal Institute of Chartered Surveyors

Courts etc

Chief Executive, Scottish Court Service
Crown Agent, COPFS
COPFS
Lord President
Lord Justice General
Law Society of Scotland
Journal of the Law Society of Scotland
Faculty of Advocates
Society of Solicitor Advocates
District Courts Magistrates
Sheriffs Principal
Sheriffs Association
Part time Sheriffs Association
Scottish Law Commission
Scottish Legal Aid Board
Scottish Land Court
Judicial Office For Scotland
Judicial Institute
Scottish Law Gazette
Scots Law Times
Scottish Justices Association
Citizens Advice Bureau
General

MSPs, MPs
Clerk Delegated Powers and Law Reform Committee
Clerk Finance Committee
SPICE Researchers

A number of individuals including those affected who have identified themselves to us
The Scottish Ministers make the following remedial Order in exercise of the powers conferred by section 12(1) and (3) of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”) and all other powers enabling them to do so.

The Scottish Ministers consider the provision made by this Order to be necessary or expedient in consequence of section 72(10) of the Agricultural Holdings (Scotland) Act 2003 being incompatible with a Convention right(a).

In accordance with section 12(2) of the 2001 Act the Scottish Ministers are of the opinion that there are compelling reasons for making a remedial order as distinct from taking any other action.

In accordance with section 13(3) of the 2001 Act the Scottish Ministers laid before Parliament a copy of the proposed draft Order, together with a statement of their reasons for proposing to make the Order, gave such public notice of the proposed draft Order as they considered appropriate, invited observations on it and had regard to observations submitted.

In accordance with section 13(4) of the 2001 Act the Scottish Ministers laid before Parliament a statement summarising all the observations to which they had regard under section 13(3)(c) and specifying the changes which they made in the draft Order and the reasons for them.

In accordance with section 13(2) of the 2001 Act a draft of this Order has been laid before and approved by resolution of the Scottish Parliament.

(a) The “Convention rights” has the meaning given by section 1 of the Human Rights Act 1998 (c.42). In the case of Salvesen v Riddell [2013] UKSC 22, judgement 24th April 2013, the Supreme Court found that section 72(10) was outside the legislative competence of the Scottish Parliament and made an order under section 102(2)(b) of the Scotland Act 1998 suspending the effect of the finding for 12 months or such shorter period as may be required for the defect to be corrected and for that correction to take effect.
Citation and commencement

1.—(1) This Order may be cited as the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014.

(2) This Order comes into force on [ ] 2014.

Amendment of the 2003 Act

Amendment of the Agricultural Holdings (Scotland) Act 2003

2.—(1) The Agricultural Holdings (Scotland) Act 2003 (asp 11) (“the 2003 Act”) is amended as follows.

(2) In section 72 (rights of certain persons where tenant is a limited partnership)—

(a) in subsection (2), the words “unless the conditions mentioned in subsection (5) are met” are repealed;

(b) in subsection (3), in the closing words, the words “subject to subsection (4)” are repealed;

(c) subsections (4), (5) and (7) to (11) are repealed.

(3) After section 72, insert—

“72A Application of section 73

(1) Section 73 applies to a tenancy continuing to have effect by virtue of section 72(6) unless the tenancy is a relevant tenancy.

(2) If—

(a) the tenancy is a relevant tenancy,

(b) the circumstances described in subsection (3) do not apply, and

(c) the landlord gives an application notice to the tenant within the intimation period,

section 73 applies to the tenancy from the date on which the application notice is given.

(3) The circumstances are that—

(a) the landlord purchased the landlord’s interest in the tenancy at a time when it was no longer possible for an order under section 72(8) to be made in respect of the tenancy, or

(b) the landlord acquired (by any means) the landlord’s interest in the tenancy from—

(i) the landlord who purchased that interest in the circumstances described in paragraph (a), or

(ii) a successor of such a landlord.

(4) In this section—

“application notice” means a notice, in writing, intimating that the landlord may bring the tenancy to an end in accordance with section 73,

“the intimation period” means the period of 12 months beginning on 28th November 2014,

“relevant tenancy” means a tenancy continuing to have effect by virtue of section 72(6) where—

(a) the action taken by a limited partner in consequence of which the tenancy was purportedly terminated (being an action described in section 72(3)(a) to (c)) occurred before 1st July 2003,

(b) notice was given to the landlord under section 72(6) before the coming into force of this section, and

(c) there is no ongoing application for an order under section 72(8) in respect of the tenancy;
“successor” includes the executor, assignee, legatee, disponee, guardian, legal representative (within the meaning of Part I of the Children (Scotland) Act 1995) or (in relation to a sequestration) trustee or interim trustee, of a landlord.

(5) For the purposes of this section, a reference to an ongoing application for an order under section 72(8) is a reference to an application made to the Land Court under section 72(7) before the coming into force of this section and which, at that time—

(a) has not been finally determined by the Land Court, or

(b) is subject to an appeal from that Court which has not been finally determined.”.

**Ongoing cases**

**Effect of amendments on ongoing cases**

3.—(1) The repeals in article 2(2)(c) are to apply in relation to any ongoing application for an order under section 72(8) of the 2003 Act.

(2) In consequence, the Scottish Land Court (or any other court considering the application on appeal) must make an order disposing of the application in such manner as it considers reasonable.

(3) An order under subsection (2) may, in particular—

(a) specify shorter periods for the purposes of section 73(4) and (5) of the 2003 Act,

(b) specify that the tenancy to which the application relates is to terminate on such date as may be specified in the order,

(c) deal with such other matters relating to the tenancy or its termination as the Court considers appropriate.

(4) In this article, a reference to an ongoing application for an order under section 72(8) of the 2003 Act is a reference to an application made to the Scottish Land Court under section 72(7) of that Act before the coming into force of this Order and which, at that time—

(a) has not been finally determined by the Scottish Land Court, or

(b) is subject to an appeal from that Court which has not been finally determined.

**Transitional and saving provision**

**Preservation of landlord’s right to make an application**

4.—(1) This article applies where—

(a) a landlord is given a notice under section 72(6) of the 2003 Act within the period of 28 days ending with the coming into force of this Order, and

(b) no application has been made by the landlord under section 72(7) of that Act before the coming into force of this Order.

(2) The landlord may, before the end of the period of 28 days beginning with the date on which the notice was given under section 72(6) of the 2003 Act, apply to the Scottish Land Court for an order under article 3 of this Order.

(3) For the purposes of that article and section 72A of the 2003 Act, such an application is to be treated as being an ongoing application for an order under section 72(8).
Continuing application of section 73 of the 2003 Act

5. Despite the repeal of section 72(10) of the 2003 Act, section 73 of that Act continues to apply in respect of any tenancy to which it applied immediately prior to that repeal.

A member of the Scottish Government

St Andrew’s House,
Edinburgh
2013
EXPLANATORY NOTE
(This note is not part of the Order)

This Order makes amendments to the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”) to remove the incompatibility, arising from section 72(10) of that Act, with a Convention right.

Section 72(6) of the 2003 Act provides that if a landlord sought to bring an agricultural tenancy to an end by dissolving a limited partnership on or after 16th September 2002, then the tenancy continues in existence with the non-landlord partner, known as the general partner, as tenant in his or her own right (if the general partner gives notice that this is intended to happen). Section 73 of the 2003 Act is a counterpart to section 72(6). It entitles the landlord to bring the tenancy to an end by service of a notice to quit at a time of the landlord’s own choosing. However section 72(10) qualifies this position and provides that section 73 does not apply to landlords who served the dissolution notice between 16th September 2002 and 30th June 2003.

The Supreme Court in a judgement dated 24th April 2013, Salvesen v Riddell [2013] UKSC 22, held that the difference in treatment between those landlords who served a dissolution notice between 16th September 2002 and 30th June 2003 and those landlords who served notices on or after 1st July 2003 was unfair and disproportionate and did not pursue an aim that was reasonably related to the aim of the legislation as a whole. It therefore made a finding that section 72 (10) of the 2003 Act violated art. 1 of the First Protocol to the European Convention on Human Rights and that the provision was outside the legislative competence of the Scottish Parliament. The Supreme Court made an order under section 102(2)(b) that the effect of the finding should be suspended for 12 months or such shorter period as may be necessary to correct the defect. The 12 month period expires on 23rd April 2014.

In order to remove the incompatible effect of section 72(10) this Order inserts a new section (section 72A) into the 2003 Act. This applies section 73 unless the tenancy is a relevant tenancy (section 72A(1)). Where the tenancy is a relevant tenancy, section 73 only applies, other than in prescribed circumstances, where the landlord has given an application notice within 12 months from 28th November 2014 (section 72A(2)).

The prescribed circumstances (section 72A(3)) are where the landlord’s interest has been purchased after the section 72(6) notice was given and at a time when it was no longer possible to make an order under section 72(8) that section 72(6) does not apply and has never applied.

Section 72A(1) applies section 73 to those cases where there is an ongoing application to the Scottish Land Court under section 72(8) but, by virtue of article 3, in these cases the Land Court has a discretion on disposal of these ongoing applications including, but not limited to, specifying shorter periods of notice than in section 73(4) and (5) of the 2003 Act and specifying the date on which the tenancy is to be terminated. A landlord who has been given notice under section 72(6) in the 28 days prior to the coming into force of this Order will have 28 days from the date of notice to apply to the Land Court and have his or her case treated in the same way as ongoing applications.

Articles 4 and 5 make transitional and savings provisions.

Section 72 (4) and (5) are repealed as spent and section 72(7)-(11) are repealed with the effect that a tenancy operating by virtue of section 72(6) can no longer be effectively annulled under section 72(8) on application to the Land Court.
POLICY NOTE

THE AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003 REMEDIAL ORDER
2014

Background

1. On 24 April 2013 the Supreme Court issued its judgment in the case of Salvesen v Riddell [2013] UKSC 22, which involved a dispute between a landowner and a tenant over the dissolution of a Limited Liability Partnership (LLP). The judgement identified a defect in section 72 of the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”), holding that the effect of the operation of section 72(10) contravened landlords’ rights in certain circumstances under Article 1 of the First Protocol of the European Convention on Human Rights. The Court held that those rights had been breached (a) since the consequence of certain actings of landlords in dissolving an LLP (ie the establishing of a full tenancy under the Agricultural Holdings (Scotland) Act 1991) before 1 July 2003 was disproportionate and (b) because an arbitrary and unfair outcome arose compared to the dissolving an LLP after that date.

2. The Supreme Court suspended their judgement until 23 April 2014 to allow the Scottish Government time to consult with the industry and address how best to provide “just satisfaction” to persons whose rights have been breached.

3. The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 is made under section 12 of the Convention Rights (Compliance) (Scotland) Act 2001 and makes provision which is necessary or expedient for the purposes of that section by amending the 2003 Act to remove the incompatibility arising from the operation of section 72(10) by repealing provisions of section 72 and inserting a new section (section 72A). Section 72A provides for the application of section 73 of the 2003 Act to affected groups, being a consistent and proportionate outcome, by way of response to the circumstances that gave rise to the enacting of section 72. The Order makes provision in respect of ongoing cases and makes transitional and savings provision.

4. The Order in particular provides 3 avenues into section 73 of the 2003 Act, in the existing circumstances set out below (other than where the Land Court makes an order relating to termination date under article 3(2)(b)). The Order provides for the same outcome if a dissolution notice is served under section 72(3) of the 2003 Act in future. This ensures consistency both for circumstances in which the outcome has in the past and will in the future be a tenancy under section 73 of the 2003 Act.

5. The Court in its judgement recognised the right of the Parliament in principle to make measures such as that at section 73(8), to reduce notice periods ahead of a given expiry date, provided that the consequences, where the landlord does not meet the test, are proportionate. In such a case, the terms...
of the Order respect the other existing contractual terms agreed between the parties, while providing for termination by the landlord under section 73(3) & (4).

6. Moreover, the Scottish Government recognises - as the Court did in its judgement, at paragraph 57 – that the transition to a fair solution, balancing competing interests in a constructive way, will take time. This remains important even after the Order takes effect and accordingly, after that date, the Scottish Government will offer mediation services to facilitate that smooth transition as far as possible. The Order provides for a limited “cooling off” period designed to support that transition. This “cooling off” period is designed to respect the long term nature and complexity of farming business and provide time for both landlords and tenants to discuss options and prepare for change in their personal circumstances.

Groups affected by section 72

7. The Order makes amendments to the 2003 Act which are needed or expedient in order to remove the incompatible effects arising in consequence of the necessary operation of section 72, as concluded by the Court. It does not seek to address outcomes which may have arisen by virtue of agreements between parties which have avoided the consequence of the potential operation of section 72 (which are entirely dependent on the individual facts and circumstances of each case) and as a result of which agreements there is no incompatibility in consequence of the necessary operation of that section.

8. The Scottish Government has identified three groups of persons and circumstances in respect of whom amendments to the 2003 Act are needed or expedient to that end.

9. These are-

9.1 Where an LLP notice was served between 16 September 2002 and 1 July 2003; the tenant served a notice under section 72(6) of the 2003 Act; but the landlord did not apply to or continue with an application to the Land Court under section 72(7) (referred to in the Consultation Paper as Group 2). The effect of section 72 on such circumstances is that a full tenancy under the Agricultural Holdings (Scotland) Act 1991 (“a full 1991 Act tenancy”), which is a consequence disapproved of by virtue of the judgement of the Court will have arisen. This includes cases (if any) where an application was made but not pursued to a substantive decision (where giving rise to that same outcome).

Although it might be considered that a landlord in those circumstances has – by virtue of not applying or pursuing an application under section 72(7) – acquiesced in the giving rise to a full 1991 Act tenancy, the legal effect of these circumstances (by operation of the Act) is an outcome considered by the Court to be disproportionate.
The Order provides for a landlord, if desired, to bring the tenancy to an end so that rather than the tenant continuing to have a full 1991 Act tenancy, the landlord can use section 73 of the 2003 Act after a "cooling" off period which runs from the date that the order comes into force until the 28 November 2014. Scottish Government will provide mediation during this period.

9.2 Where an LLP notice was served between 16 September 2002 and 1 July 2003; the tenant served a notice under section 72(6) of the 2003 Act; the landlord applied to the Land Court under section 72(7); but the Land Court has not yet determined the application (referred to in the Consultation Paper as Group 3). The main persons so affected are in proceedings where the landlords raised court cases and the cases were and remain sisted pending the outcome of the Supreme Court judgement and this Order. That situation could still arise where there is an ongoing application under section 72(7) made before the intended coming into force date of the Order.

In this case, it is no longer open to the Land Court to make a finding under section 72(9) that it is not satisfied thereunder (since such a finding would cause section 72(6) to apply).

In consequence, Article 3(3) of the Remedial Order applies and allows the Scottish Land Court to make any such order it considers reasonable, with express provision (since these are proceedings which are ongoing before the Court) to make clear that an order of the Court can cover any matter related to the tenancy. Alternatively, if the landlord wishes he or she could abandon his or her application and section 73 would apply.

Accordingly, whether or not a landlord seeks to satisfy the Land Court as to the tests at section 73(8) and whether or not they are successful, the outcome is a section 73 tenancy with the right of termination under section 73(4) & (5), which is a proportionate outcome for that circumstance.

This places the landlord into a consistent position with all other landlords where the notice of dissolution was served after 1 July 2003 and ensures that landlords will have an outcome which is proportionate. In addition, the Court is able (by virtue of article 3), in a more transparent way than under section 72(9) to balance the potentially competing ECHR rights where for example the occupancy by the tenant of the holding is the family home of the tenant and so where immediate vacant possession may run the risk of contravening the ECHR rights of that tenant.

9.3 Where an LLP notice was served between 16 September 2002 and 1 July 2003, but with a termination date falling after the intended coming into force date of the Order; the tenant serves a notice under section 72(6) of the 2003 Act within 28 days of the purported termination; and
accordingly the right of the landlord to apply to the Land Court under section 72(7) has not yet arisen (referred to in the Consultation Paper as Group 1).

In this circumstance too, it is no longer possible to allow a case to go to the Land Court in a way that allows it to make a finding under section 72(9) that it is not satisfied thereunder (since such a finding would cause section 72(6) to apply).

The Order therefore provides (for the same reasons of consistency and proportionality) for section 73 to apply. A landlord may terminate the tenancy based on periods of notice as provided for under section 73(4) & (5) without needing to go to the Land Court but may make an application under section 73(6) to reduce the notice period if able to satisfy the Land Court as to the tests at section 73(8) (being the same test as at section 72(9)).

The Remedial Order

10. In order to give effect to the outcomes set out above, the Remedial Order provides as follows.

11. Article 2(2) repeals section 72(4) and (5) which are spent provisions in consequence of it no longer being possible (after the date of the coming into force of the Order) to meet the conditions at section 72(5), with consequential repeals of wording in section 72(2) & (3).

12. Section 72(7) to (11) are repealed in consequence of the application of section 73 by virtue of new section 72A, subject to provision for ongoing cases and transitional and savings provisions.

13. Article 2(3) inserts a new section in the 2003 Act (section 72A).

14. Provided that there is still a tenancy in existence at the relevant time for these provisions to apply to, section 72A(1) applies section 73 in the second and third sets of circumstances above and section 72A(2) applies section 73 in the first set of circumstances above (by virtue of the definition of “relevant tenancy”), other than-

14.1 where there has been a sale of the landlord’s interest since 2003 but there remains a tenancy in existence (comprising the circumstances as set out at section 72A(3)) or
14.2 where the landlord elects not to seek a conversion to a section 73 tenancy.

15. The right of the landlord to convert is unlimited provided that an intimation notice is given within the set time period, but exists as a landlord may decide at his or her own hand not to seek a conversion and so conversion is not imposed if not desired.
16. To allow landlords and tenants to move through a transition that is as orderly as possible (once the Order has become law), the Order specifies an intimation period tied in with the Martinmas term date, a traditional starting point for agricultural tenancies, giving landlords 12 months from 28 November 2014 to intimate an intention to convert the tenancy into a section 73 tenancy. In the period between the Order coming into force and the start of the intimation period (and throughout the intimation period) the Scottish Government will offer mediation services to facilitate as far as possible that smooth transition, in balancing respective interests, in accordance with best industry practice.

17. That period does not prejudice the right of Landlords after conversion to seek an order from the Land Court under section 73(6) for shorter periods of notice, if the tests at section 73(8) are met.

18. Article 3 deals with the effect of the repeals on ongoing cases (ie in set 2 above) by requiring the Land Court to continue to determination of such cases, but makes provision for disposal by the application of the section 72(9) test repeated at section 73(8).

19. Article 4 preserves the right of a landlord to apply to the Land Court where part of the 28 day period allowed by section 72(7) falls after the coming into force date of the Order, to ensure that he or she has the full 28 day period provided by the current law to seek a remedy. The 28 day period is the “relevant period” as prescribed for the purposes of section 72(7) by the Agricultural Holdings (Relevant Date and Relevant Period) (Scotland) Order 2003 (SSI 2003/294).

20. Article 5 preserves rights of landlords and tenants who are already in circumstances where section 73 applies to their tenancy (where the acts referred to in section 72(3) occurred after 1 July 2003), notwithstanding the repeal of section 72(10) by article 2(2)(c).

Consultation

21. [To be completed at the laying of the draft remedial order]

Impact Assessment

22. [To be completed at the laying of the draft remedial order]