The Scottish Parliament
Pàrlamaid na h-Alba

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

AGENDA

4th Meeting, 2016 (Session 4)

Wednesday 3 February 2016

The Committee will meet at 9.30 am in the Mary Fairfax Somerville Room (CR2).

1. **Land Reform (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 3).

2. **Scottish Government's Wildlife Crime in Scotland - 2014 Annual Report (in private):** The Committee will consider a draft letter to the Minister for Environment, Climate Change and Land Reform.

Lynn Tullis
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The papers for this meeting are as follows—

Agenda item 1

Land Reform (Scotland) Bill Stage 2 cover note	RACCE/S4/16/4/1

A Marshalled list of amendments is available here
The Groupings of amendments is available here

Agenda item 2

PRIVATE PAPER	RACCE/S4/16/4/2 (P)

Land Reform (Scotland) Bill – Stage 2

1. The Committee is currently considering amendments at Stage 2 of the Land Reform (Scotland) Bill.[1] The Committee expects to begin consideration of amendments to Part 10 of The Bill (going no further than Chapter 4 of Part 10) on Wednesday 3 February 2016, and then to continue consideration, including of the remainder of Part 10, on Wednesday 10 February 2016. The final day of Stage 2, if required, will be Wednesday 24 February 2016.

2. Following the completion of Stage 1, the Scottish Government provided the Committee with two updates[2] on its plans to bring forward amendments at Stage 2 with regards to section 79 of the Bill (in Part 10) which concerns the conversion of 1991 Act agricultural tenancies.

3. The Committee issued a call for views on the Scottish Government's plans and the responses received are attached at **Annexe A.**[3]

4. On 27 January 2016 the Committee received correspondence from the Scottish Government[4] regarding its plans to amend Part 10 of the Bill to introduce modern repairing tenancies. A copy of the letter can be found at **Annexe B.**

5. The Scottish Government lodged its amendments to Part 10 of the Bill, including amendments relating to both section 79 (conversion of 1991 Act tenancies) and modern repairing leases, on 27 January 2016.[5] The Committee is likely to consider these amendments at its meeting on Wednesday 3 February 2016.

Clerks
Rural Affairs, Climate Change and Environment Committee

[1] Land Reform (Scotland) Bill and all associated documents.
[2] Correspondence from the Scottish Government re plans to amend section 79 of the Land Reform (Scotland) Bill dated 4 December 2015 and 22 December 2015.
[3] Responses to the RACCE Committee's call for views on plans to amend section 79 of the Land Reform (Scotland) Bill.
[4] Correspondence from the Scottish Government dated 27 January 2016 re modern repairing tenancies.
[5] Land Reform (Scotland) Bill, Daily List, 27 January 2016.

Annexe A

Written submission from Robert Gladstone

I understand that you are seeking views on the proposed amendment to section 79 of the Land Reform Bill to allow assignation of 1991 Act Tenancies.

I am totally opposed to this amendment, and I consider that it would be a fundamental breach of my property rights.

I am a small landowner with 2 secure agricultural tenancies. I have very good relations with my farm tenants, and I accept that under present legislation, they have the right to pass on their leases to a family successor. I consider that it would be totally wrong and inequitable to allow them to assign to a third party for value.

If, in the long term, they do not have family successors, I would expect the lease to end and that I would have the freedom to do what I want with my own property.

The proposed amendment is extremely complicated and I am sure will lead to future difficulties and litigation.

I am in the business of letting land long term, and find nothing at all in the Bill that will encourage me to let land. It is totally one sided and discriminatory legislation.

I hope you will take account of my comments.

Written submission from Kinnordy Estate

We are writing to you as members of the family that owns the Kinnordy estate in Angus. Kinnordy is a largely arable farming estate. About half the estate is tenanted by ten 1991 Act tenants and two Limited Duration tenants. The estate has been in the same family since the late eighteenth century and at least one of the 1991 Act tenant families has been in occupation even longer. Most of the tenants have substantial other farming interests in ownership, tenancy or contracting in addition to their tenancy on Kinnordy.

We believe that we have excellent relationships with our tenants and there have certainly been no significant disputes with them. Over the last three years two of them have retired from farming and the Estate agreed substantial retirement packages with the tenants based on s55 of the 2003 Act. A third tenant is in similar negotiation at the moment. In all cases compensation was paid to the the outgoing tenants for Improvements, whether or not they had served Notice on the Landlord prior to carrying out the work. In all these cases we have been able to come to a satisfactory arrangement for both parties which we are confident has made it possible for the tenant to retire with dignity and considerable financial security exactly as the government desires. In most of the current on-going tenancies we expect that the current family will want to continue indefinitely.

Our understanding is that a key objective of Land Reform is to develop a “vibrant” tenant farming community. The problem is that it really requires two willing sets of participants, owners and tenants, to achieve this, yet all the current incentives for owners are to buy in land when available and then farm it in hand. None of the proposals in this or previous draft Land Reform legislation really address the issue of how to encourage owners to consider creating new tenancies. It is generally very

expensive to 'buy-out' tenancies and as a result a Landlord is obliged financially to maximise the income from a bought in holding, such as by faming in-hand, letting out cottages, houses and buildings separately to maximise income in order to fund the transaction.

The proposal to change Section 79 of the Land Reform Bill to make 1991 Act tenancies assignable for value rather than potentially converting them into MLDTs doesn't help this objective. It may strengthen the financial position of the tenant if the very specific proposed rules for financial transactions are implemented but it will not encourage owners to let more land. It may in fact have the perverse effect of encouraging owners to pay more to buy out tenancies to bring the land in hand. This would marginally help the existing tenants to get a higher value for their effective equity participation in the land but hinder the objective of increasing tenanted land to provide opportunities for new would-be farmers.

The proposed prescriptive rules for transactions involving the assignation of 1991 tenancies are similar to the terms that we have seen in such transactions and do not therefore have much impact on the general level of value achieved in such transactions. However, the rules are very specific and likely to get in the way of the details of particular cases. For this reason we think that the more specific rules proposed will hinder an already operating free market approach very similar to that desired by those that have drafted the current proposals.

We do hope that you will consider our views. We are keen that the agricultural sector in Scotland be able to develop in as varied and entrepreneurial way as possible and believe that government should aim to promote that by providing an appropriate framework without being over-prescriptive about these aspects.

Written submission from Diane and George Ross

We are small landowners and rent our land out under the 1991 Act. We bought and paid for our land and receive a small rent in return. We support the farming community in business and in the broader context.

In our area people are very suspicious of letting out land due to the difficulty landowners have had with some tenants and the increasing rights tenants have.

We feel the proposed changes will make this worse. 1991 tenancies are out-dated and the legislation around them is getting more and more complex. It could in some cases be a positive move for farming if landowners have the option to take their land back in hand when the tenant retires however to ask landowners to basically buy their own land again, from the tenant is not going to be affordable for ordinary Scottish citizens. The alternative is the tenant gets paid to assign the 1991 tenancy to someone else. Apart from the fact this is very one sided, I am sure landowners that live on the property would like a say in who is working their farm and on their property.

Tenant farmers often have more than one farm, there are occasions where tenants also own a farm and therefore would have the opportunity to sell, pass on or rent out their own farm at retiral.

Unfortunately we feel we these proposals do not look forward but look backwards, it seems that they will not strengthen the tenanted sector in the long run but weaken it. Landowners will not be encouraged to rent out land under these ever changing conditions.

Written submission from Buccleuch Estate

Response by Buccleuch to the proposed replacement of S.79 of the Land Reform (Scotland) Bill

It is with some concern that we write to you regarding the Scottish Government proposed amendment to S.79 of the Land Reform (Scotland) Bill.

Buccleuch's interest in tenant farming is to have a strong agricultural sector full of talented, progressive farmers who are making the most of the land that they tenant from Buccleuch. Buccleuch achieves this by evaluating the viability of its farms and adjusting them as required and as permitted when farms become vacant or are returned. This is a continuous process and can in some cases require consolidation of holdings.

Many factors affect the viability of farming such as subsidy regimes, commodity prices, climate change and demographics. All farms, including tenanted farms must be capable of adapting in order to evolve. The locking in of farmland into tenancies no longer suited to modern farming in perpetuity is not right for the sector and will not allow it to flourish to its full capability. The proposed change of S.79 to remove the conversion clause and replace with an assignation clause reduces our opportunity to evolve and enable a more vibrant tenanted sector to develop. Buccleuch is a long-term farming business AND agricultural landlord and while conversion to overly long MLDTs (greater than 20 years) is not ideal it is something that would have aided our planning process. The proposed assignation clause effectively gives us no end date to work to as to when a tenancy will end.

We find it unclear as to what the Scottish Government is trying to achieve here. A significant amount of text in the proposed amendment has been taken up with how the valuation will be carried out if the landlord wants to purchase the tenant's interest in the tenancy. No text has been written on how the assignation value will be undertaken. We would ask whether any modelling has been undertaken to identify the likely assignation values that new entrants or those progressing farmers would have to pay to the assigning tenant?

While under an open market system each buyer may attribute a different value to what he/she is purchasing, it is inequitable and legally challengeable that differences in value can be imposed through legislation on a discriminatory basis. It is not fair to the assigning tenant and not fair to the owner of the property.

We would contend that the valuation methodology for the landlord's purchase is incorrect. The tenant has no interest in the capital value of the farm beyond those defined as tenant's improvements, they simply have a right to use the asset and therefore it is wrong for any value to be attributable to the capital value. The amount of money the tenant should be paid should reflect the economic value of the farm's use not its ownership.

We believe that any attempt to discriminate between buyers based on legislation is anti-competitive and would be challengeable under European law. If the Scottish Government wishes to subsidise specific groups of land users then it should do this by way of grant, subsidy or tax incentive, if permitted under European law. The Government cannot, in our view, do this by the confiscation of a property owner's interest.

Buccleuch's opinion is that S.79 should not be replaced, that the existing clause should be retained subject to a compromise of the MLDT term being reduced to a 25 year term. This we believe is in the best interests of the industry.

Written submission from Sandy Lewis

By reason of being involved in committees of both Scottish Land and Estates and National Farmers Union of Scotland, I have been briefed as to the intended replacement Section 79 that the Scottish Government intends to introduce to the Land Reform (Scotland) Bill at Stage 2.

Whereas the original Section 79 may have had adverse consequences to landlords who anticipated a 1991 Act tenancy coming inhand shortly by reason of the tenant having no eligible successors, the conversion process to a Modern Limited Duration Tenancy at least would give certainty of the land coming inhand at the end of the prescribed term. This certainty introduced an element of trade-off and it is accepted as being an attempt to make the clause balanced in regards to the expectations of both landlord and tenant.

The proposed replacement Section 79, by allowing the tenant to assign a 1991 Act tenancy for value, effectively makes, in certain circumstances, 1991 Act tenancies capable of being perpetual - something which their creation in the 1948 Act did not grant. There has always been an expectation that secure tenancies will come back inhand at some time and history has proved this is factual. Although under the proposals the landlord can intervene and buy back the tenancy, the price he will have to pay appears to be higher than the market value of the lease. He pays a premium to obtain back inhand his own land whereas prior to the Act it would have come back with no payment other than waygoing valuations.

The proposed changes, particularly when the Scottish Government paper promoting them suggests that only secure tenancies encourage tenants to invest and therefore existing duration tenancies do not deliver an optimum model; will damage confidence to let on any form of long term tenure in future. It appears that neither the Scottish Government nor RACCE fully understand just how important confidence to let is. We are looking at the possibility of existing term duration lets being made secure in future. That appears to be the direction of travel. Let me give a review of just how important confidence to let is.

I have been involved in the management team of Seafield and Strathspey Estates since 1977 and since 1996 until last year as Chief Executive.

Since 1948, when the Estate's 14 year term tenancies were made secure, until I joined in 1977, a good number tenants gave up smaller holdings presumably because they became uneconomic. During that period the Government understood

the need to have larger viable holdings and it is my understanding that they made Amalgamation Grants available to assist investment in bigger more efficient units and this involved land going back into letting. Because of threats of land nationalisation from time to time, not all land coming inhand was let back out again but the Estate began the process of building up its own inhand farming operation. Confidence to let, which is critical to decision making, was on the wane.

The Estate wanted to let land and tenants wanted to rent it but only secure tenancies were available until the industry came up with the concept of Limited Partnerships. They worked on the basis of a partnership where the general partner was the farmer, the limited partner was the landlord and it was to this partnership that a secure lease was granted. This delivered to the sector effectively the equivalent of a duration tenancy with the duration set by the agreed length of the partnership. No long term letting would have been done on the estate other than through a Limited Partnership vehicle.

With Limited Partnerships established as the standard letting arrangement, political threats appeared also to decrease to the extent that prior to the Land Reform agenda emerging with the prospect of devolution towards the end of the 20th Century, the Estate actually let some holdings on 1991 Act secure leases.

The threat of an Absolute Right to Buy for 1991 Act tenancies, much debated in the years before the 2003 Act, almost killed off long term letting in Scotland to the extent that in using the new Limited Duration Tenancies, the policy was almost always to let on the shortest period possible or not at all. Land Reform influence is now seen as being the predominant driver of change over the needs of the sector and the industry is being abused.

The historical background shows that confidence to let is vital. Landowners want to let land but they do not need to do so. Even although letting may be a core business operation, low yielding expensive assets cannot take the burden of increased investment risk. Risk management underpins all business decisions.

The proposed changes to Section 79 if enacted, will, at a stroke, remove all confidence to let. With no future ability to merge holdings to achieve economies of scale that are beneficial to both tenant and landlord, there will be no appetite for remaining in the sector and land brought inhand either by tenants giving up or by using Section 79 to bring the secure lease to an end, will either be farmed by using contractors or sold on the open market. This will be a tragedy for existing tenants and owner occupiers who wish to be progressive and to the detriment of operational efficiencies in the sector which produces the nation's food.

CONFIDENCE TO LET IS KING – history proves it and I urge the RACCE Committee and the Scottish Government to wake up to the cross roads they stand at and make the correct decision of rejecting the new Section 79 and working on the previous version which was promoted by the AHLRG. AHLRG was chaired by the Cabinet Secretary and took months of evidence to conclude a conversion model designed to be fair to both tenants and landlords.

Written submission from Seafield and Strathspey Estates

Introduction

The generic title 'Seafield and Strathspey Estates', covers the business interests of The Earl of Seafield and his family operating on around 35,000 hectares of Scotland. The land is owned by a number of separate businesses with different owners and ownership types. All owners aim to be responsible land managers and acknowledge they are part of the local community. The family have been engaged for generations in letting agricultural land. This has been seen to date as a core business function.

The family welcome the opportunity to respond to the proposed replacement Section 79 to be introduced into the Land Reform (Scotland) Bill at Stage 2. We believe that this section will now work against the Bill's objectives for the sector as it is not balanced. Together with the RACCE Stage 1 comments on the possibility of an Absolute Right to Buy for 1991 Act tenants in certain circumstances, it will destroy confidence to let agricultural land in Scotland to the detriment of new entrants, existing tenants and the farming sector generally. In the long run, food production will suffer, economic efficiency will deteriorate and the greening opportunities on arable land will be lost.

Absolute Right to Buy (ARTB)

There are a small number of individuals, including some tenants, who promote this idea as a land reform strategy. However, there are a great number of tenants who recognise that this idea is political and damaging to the success and continuation of the tenanted sector. As long as it periodically gets some support it continues as an ambition for some and the uncertainty it generates results in less land being available to let. This is understandable as the risk of letting for low returns in relation to the capital value becomes unacceptable.

The Cabinet Secretary has previously dismissed ARTB as not being in the public interest only to then look to the official Agricultural Holdings Legislation Review Group (AHLRG) to consider the issue. When the AHLRG, chaired by the Cabinet Secretary, reported it also dismissed ARTB as not being appropriate.

Accordingly, your own Stage 1 Report comment crushes hope of confidence to let returning despite that being an objective of the legislation. You cannot eliminate the consequences of collateral damage to the use of the duration tenancies available under the 2003 Act since in 1948 when secure tenancies were brought in, the duration tenancies at that time were made secure. The direction of travel now appears to put existing duration tenancies at risk of becoming secure and then also moving under political pressure to ARTB.

Replacement Section 79 to the Land Reform (Scotland) Bill

We have already responded to Section 79 as reviewed by RACCE, and, notwithstanding our concerns, we accept there was a degree of balance to the proposals. The retiring tenant would have left the farm with waygoing valuations plus an additional sum for the capital value of the new term lease. To some landowners there would have been financial loss without a compensation package,

but to others the opportunity of the conversion from a 1991 Act lease to a fixed duration lease with a guaranteed date when the farm would come back inhand may have been considered an acceptable trade-off. While some landowners could be substantially disadvantaged, those involved in the business of making agricultural land available for let would have an assured date when they could re-organise their land holdings to release maximum productive capacity and engage efficient investment.

The replacement Section 79 is totally unbalanced. It effectively seeks to ring-fence 1991 Act tenancies to remain perpetual despite agreement from all quarters that the arrangements require to be modernised and their continued existence will be used as a base from which to argue for the damaging ARTB.

The Scottish Government's explanation for the change also heavily argues that the security of these 1991 Act tenancies is required for tenants to invest in agriculture. This is not only wrong because there are many tenants investing heavily in term leases but it suggests that existing term leases are inadequate and thus it allows speculation that at a future point it may become a policy of the Scottish Government to make them secure. This damages confidence to let and works against the objectives of the Bill to increase the acreage of agricultural land let in Scotland.

While the proposal would allow the tenant to sell his lease for a value the market would determine on its potential to yield future financial returns, should the landowner take the opportunity to intervene and buy back the lease, that would be according to a prescribed form under the Act which would mean paying possibly around 25% of the capital value of the agricultural holding. The opportunity to bring his own land back inhand is to be at the expense of paying more to the departing tenant than the value of the lease on the market.

The general succession provisions elsewhere in the Bill will have the effect of decreasing the expectation of land let on 1991 Act tenancies coming back inhand. That lowers the let value of holdings where there is currently no obvious successor and, accordingly, with no compensation provisions causes a capital financial loss to the landowner. When coupled to the replacement Section 79 provisions, the tenanted value of the land has decreased and the formula dictates a higher value required from the landowner to intervene and obtain vacant possession of his property.

It is obvious that the proposals are extremely damaging but not possible to accurately predict how landowners will respond. It is certain that if an intervention is taken, the land is very unlikely to be let again – this works against the stated intention of the legislation. Further, considering the already low yield in relation to capital value that let agricultural land gives, some owners may consider they will intervene on the transfer process, buy in the land and sell it on the open market and get out of the sector. Again this works against the objectives of the legislation and will turn Scotland into the same ownership profile as found in Ireland.

With the shadow of the *Salvesen v Riddell* case over us and the opportunity of advancing the cause of letting agricultural land in Scotland before us, we urge the Cabinet Secretary and RACCE to put the interests of Scottish agriculture at the heart

of their decision making and not destroy it for a cause which cannot be supported as being in the public interest.

There is also a question of competence of introducing such a major section at this stage of the parliamentary process. The proposal is radical but has circumvented the AHLRG extensive research study, the general consultation on the Land Reform (Scotland) Bill and the RACCE Stage 1 process. The proposals may prove not to be in the public interest but they certainly cannot claim to have been subject to public consultation.

Written submission from Scottish Land and Estates

Introduction

Scottish Land & Estates received a paper setting out the proposed amendment to section 79 of the Land Reform (Scotland) Bill from Scottish Government policy officials on 4 December. A further paper was released by policy officials on 22 December setting out further detail on the proposal. Our written evidence is based on the information contained in the papers received from policy officials, as well as the letter sent to the RACCE Committee on 4 December with details of the proposal.

Scottish Land & Estates is strongly opposed to the proposed amendment to section 79 of the Bill which would replace the "conversion to MLDT" model with an "assignation for value" model. We have set out our grounds of opposition to the proposal in principle below, both in terms of procedure and content.

Scottish Land & Estates has endeavoured to contribute to the land reform process as constructively as possible and, to that end, notwithstanding our opposition to the principle of the proposal, we have also set out a number of points relating to the technical aspects of the proposal. However, our comments on technical detail are without prejudice to our fundamental objection to the proposal in principle.

Procedure

Insufficient justification or explanation for policy change at this stage of parliamentary process

The measures aimed at allowing 1991 Act tenant farmers to retire have been discussed throughout the land reform process. The "assignation for value" model was specifically considered by the Agricultural Holdings Legislation Review Group and, in its final report, the Review Group stated that the "public interest case for such a change has *not* been made". The final report was published after the Review Group's thorough review of the tenanted sector over a period of many months, gathering evidence and consulting stakeholders across the country. We would question why the Scottish Government has brought forward a proposal which directly contradicts the findings of the Review Group, with no explanation or justification for the policy change.

At the time that the Agricultural Holdings Legislation Review Group's Report was published, it was made clear by the Review Group that the recommendations were considered to be a "package". This is clear from the Report which states that the

"recommendations have been developed as an integrated package, and reflect the interlinked nature of the challenges being addressed". Scottish Land & Estates acknowledges that the Bill as drafted does not implement the "integrated package" in its entirety. However, the introduction of the "assignation for value" model shows further movement away from the "integrated package". The fact that this measure has been introduced separately at stage two of the parliamentary process makes it clear that the Scottish Government does not support the concept of the "integrated package" and instead views each measure as a stand-alone proposal for amendment. Scottish Land & Estates does not support this approach and considers it to be detrimental to the land reform process, and more importantly to achieving the aim of a vibrant tenanted sector.

The RACCE Committee's Stage 1 Report makes it clear that section 79 as currently drafted is not acceptable as it does not contain sufficient detail and leaves substantive policy to secondary legislation. We, like others, hoped that the Scottish Government's response would be to provide details on how the conversion provisions would work in practice. Instead, the Scottish Government proposed a new policy. We would reiterate again that we do not consider that there has been sufficient explanation or justification for the significant change in policy at this stage of the parliamentary process.

Introduction of proposal at this stage sends a negative message to the industry

Scottish Land & Estates has actively and openly engaged with the land reform process on behalf of its members. We accepted that section 79 could deliver the policy objectives and benefit the sector, notwithstanding that it could have negative consequences for those landowners who may have been expecting to re-gain vacant possession in the near future. We spent considerable time canvassing our members on this issue and reaching a position where impact on individuals was viewed as secondary to the sectoral benefit. We feel that this change of policy at this late stage, without sufficient justification, consultation or explanation, shows contempt for the efforts of Scottish Land & Estates and its members.

The policy aims of the Bill include increasing the amount of land let and securing a vibrant tenant sector. A significant change in policy following the publication of a stage 1 report (which does not contain any recommendations relating to the proposal) is unlikely to assist with achieving these aims, given that landowners will understandably have no confidence to let land (other than perhaps on a short term basis) as a result.

Following notification of the proposed amendment to members, Scottish Land & Estates has received correspondence from a number of members setting out their frustration at the proposal and, in some cases, advising that they fail to see why landlords would let land other than under a short limited duration tenancy in the future. This is entirely the opposite of what the industry is seeking to achieve.

Lack of consultation on proposal

We have obtained a formal legal opinion which suggests that there has been insufficient public consultation on the proposal, particularly in the context of the "assignation for value" model having already been ruled out by the Agricultural

Holdings Legislation Review Group. Although we appreciate that we have now been given the opportunity to formally submit evidence on the proposal, we strongly believe that the Scottish Government has not acted in a reasonable manner in relation to the proposed amendment.

Policy

Policy objectives will not be met – landowners will be discouraged from letting land on long term basis

Scottish Land & Estates anticipates that the introduction of the "assignation for value" model will have a significant impact on a landlord's decision as to whether to let land and on what basis. However, there is no evidence to suggest that the Scottish Government has carried out a full assessment on the likely impact of the proposal. Scottish Land & Estates urges the Scottish Government to consider the impact which this measure will have on the decision making process of landowners who are currently letting land or may be letting land in the future in Scotland.

The Scottish Government is seeking to encourage landowners to let land on a long term basis. It is difficult to see why landowners would consider letting land on a long term basis when the Scottish Government has made it clear that they are willing to disregard the interests of landowners who are currently letting land on a long term basis. Significant changes to one type of regulated tenancy will undoubtedly have wide ranging consequences for other types of tenancies and the way in which they are used.

Policy aims can be met by "conversion to MLDT" model which is a less harmful alternative

Scottish Land & Estates has shown support for the "conversion to MLDT" model and accepts that it could create churn in the sector. Provided that the model contained suitable provision for balancing the interests of the landlord, we contend that it could potentially meet the policy objective of allowing tenant farmers to retire where there is not a viable successor. The land would also continue to be let on a long term basis. However, we would highlight that those landowners with a reasonable expectation of vacant possession would be negatively affected by such a measure and this should be acknowledged and accommodated.

The Scottish Government has now rejected the "conversion to MLDT" model in favour of the "assignation for value" model. It is clear that the "assignation for value" model has a significantly larger impact on landlords' rights than the "conversion to MLDT" model. Whereas the landlord's legitimate expectation of recovering vacant possession would be delayed by a fixed period of time by the "conversion to MLDT" model, it could potentially be delayed indefinitely, if not permanently when one considers other proposals for changes to succession by the "assignation for value" model, unless the landlord is in a position to "buy out the tenancy" at the time of assignation. The impact would be even more significant where the current tenant is a partnership and the landlord would, in the majority of cases, therefore expect to gain vacant possession following a change in the partnership (for example on the death of a partner). If the partnership assigns the tenancy to an individual, a lease which previously had a limited duration would become a secure tenancy.

The option to "buy-out" the tenancy has been put forward as a way of protecting the rights of landlords and ensuring that the measure is balanced. The "buy-out" option will be of little benefit to landlords who do not have sufficient financial resources and, in particular, small landowners who may own one or two farms are unlikely to be able to utilise such a provision.

It is both disappointing and perplexing that the Scottish Government is choosing to pursue the "assignation for value" model when the declared objectives could be achieved in a far less harmful, and therefore more proportionate, way through the "conversion to MLDT" model. The existence of a more balanced measure which would deliver the objectives would also be key in a human rights analysis (set out in more detail below).

Perpetuation of 1991 Act tenancies

In our view, the change in policy can only be explained by reference to a wish to perpetuate 1991 Act tenancies. Our view is supported by the language contained in the Scottish Government paper dated 4 December which suggests that the Scottish Government does not consider fixed term tenancies to be conducive to productive farming. In particular, we make reference to paragraphs 20 ("a 25 year MLDT was strongly felt to be too short to enable the land to be farmed as productively as possible…") and paragraph 21 ("We were also concerned that a term of only 25 years could deter farmers from investing as much in their holdings as they might otherwise have done, potentially limiting productivity and hindering modernisation").

This language seems to be at odds with the Scottish Government's proposal to introduce the MLDT with a minimum duration of 10 years. Furthermore, this negative attitude towards fixed term tenancies is not reflected in the Agricultural Holdings Review Group's Final Report which highlights the importance of fixed term vehicles for the sector. Scottish Land & Estates is not aware of evidence gathered by the Scottish Government which supports the view that fixed term tenancies do not provide sufficient security to encourage investment and therefore questions the assertions made by the Scottish Government in the paper.

Scottish Land & Estates strongly supports the concept of fixed term tenancies and is aware of many examples of productive and successful units currently let under limited duration tenancies. We note the current reforms to the process of waygoing which we anticipate will provide tenants with added certainty regarding investment on the holding. We would also highlight that landowners may be more inclined to invest in holdings let under fixed term tenancies due to the certainty involved in the arrangement. The prospect of letting land under fixed term tenancies is also more likely to encourage landowners to let land. However the impact of the language used in this policy proposal and the apparent disregard of the value of fixed term tenancies may well make landowners concerned that future political intervention will arise when a number of them are nearing termination.

The message sent by the "conversion to MLDT" model was one of a sector moving forward to a vibrant and modernised future, a key element of which are fixed term agreements, and this is a message which Scottish Land & Estates endorses. However, the change to the "assignation for value" model sends a message that tenancies with a limited duration, of whatever length, are not conducive to productive

agriculture. Scottish Land & Estates completely disagrees with this and believes that this message will be entirely counter-productive to achieving confidence and trust in the sector.

"Assignation for value" will not necessarily result in higher payment from assignee

Scottish Land & Estates understands that there is a view that the "assignation for value" model would result in a higher payment to the outgoing tenant than the "conversion to MLDT" model, thus providing the outgoing tenant with greater financial security when retiring. This view appears to be based on the belief that a 1991 Act tenancy would always have a higher value in the market than a fixed term tenancy. Scottish Land & Estates believes this to be incorrect.

The process of valuing a 1991 Act tenancy involves calculating income to be generated in the future. A discount would be applied to income to be generated many years in the future and, as a result, the value of the 1991 Act tenancy would not be greater than a long fixed term tenancy. Outgoing tenants would therefore not necessarily be expected to receive a higher figure from an incoming tenant under the "assignation for value" model than they would under the "conversion to MLDT" model.

Broad range of factors affecting tenant's decision to retire – not only lack of successor

We understand that the aim of section 79 is, firstly, to give farmers with 1991 Act tenancies a route that will enable them to exit their tenancies with dignity and security without being dependent on a family member succeeding the tenancy, and secondly, to increase opportunities for newer tenant farmers to establish themselves.

Scottish Land & Estates supports these aims but questions the extent to which the Scottish Government has fully investigated and researched the range of factors which may affect a farming tenant's decision to retire. A "Survey of Agricultural Tenants" was published by the Scottish Government in 2014 which highlighted the broad range of factors which could affect a tenant's decision to retire. In particular, we note that 46% of the respondents said that they would "never want to give up farming". 28 respondents (out of the 3,095 responses which were received in total) stated the lack of successor as a reason. A report published by the Future of Farming Review Group in England in 2013 also suggests that there are many reasons why farmers may continue to work in the industry beyond the age which people in other sectors would choose to retire, including agricultural subsidies and the inheritance tax framework. The likely impact of the proposal on a tenant's decision to retire cannot be determined without considering the other relevant factors and the Scottish Government's own survey indicates that a lack of successor is relevant to a very small minority of tenant farms. It is disappointing that this has not been acknowledged by the Scottish Government.

Human Rights Considerations

Throughout the Stage 1 Report, the RACCE Committee highlights the importance of ensuring that the provisions of the Bill comply with the European Convention on Human Rights. In particular, the Committee makes specific reference to human

rights considerations and Part 10 of the Bill and the disastrous impact of the Salvesen v Riddell case on the Scottish tenanted sector.

As stated above, Scottish Land & Estates has obtained a formal legal opinion on the legality of the proposed amendment, a copy of which has previously been provided to the RACCE Committee, which analysed the proposal in the context of human rights.

It is clear that the "assignation for value" model interferes with the property rights of landlords because it means that the 1991 Act tenancy can be preserved indefinitely (whereas otherwise the lease would have come to an end if there was no viable successor in terms of the legislation). The interference must therefore be justified. We have set out some of the key aspects of analysis seeking to determine whether the interference is justified below.

It is not clear whether there is a legitimate aim

The broad aims of the measure are stated to be (i) giving farmers a route to retire and (ii) increasing opportunities for newer tenant farmers to establish themselves. However, given that these aims could be achieved by the "conversion to MDLT" model, our view is that the aim of the proposed amendment must relate more specifically to the preservation of 1991 Act tenancies (given that this is the main difference between the two models). It is questionable whether the creation of perpetual tenancies pursues a legitimate aim for the purposes of Article 1 Protocol 1.

The rational connection between the measure and the policy objectives is debatable

The fact that a landlord will have the opportunity to "buy-out" the tenancy and many landlords will take advantage of this opportunity if they are financially able to do so means that the policy will not increase the amount of land let in Scotland or increase opportunities for new tenant farmers.

The measure does not strike the balance between the rights of tenants and landlords

Although the "assignation for value" model contains some provisions which are seeking to balance the rights of the landlord (for example, the right to "buy out" the tenancy), these are insufficient and we have raised significant concerns relating to these provisions below. The retrospective nature of the proposal means that many landowners' expectations in respect of their land will be severely affected. The measure does not strike a balance between the rights of landlords and tenants.

We are strongly of the view that the "conversion to MLDT" model could potentially meet the aims of increasing the amount of land let in Scotland and allowing 1991 Act tenants to retire, as well as introducing new blood into the industry (provided that there are suitable safeguards in place to balance the rights of the landlord). This route would be less detrimental to the rights and interests of landlords, and benefit the sector as a whole. There seems to be no justification for pursuing a measure which causes more harm to the interests of landlords without any gain in terms of meeting policy objectives.

Having received Counsel's Opinion, Scottish Land & Estates is of the view that the amendment could be subject to successful legal challenge on the grounds that it breaches the European Convention on Human Rights.

Technical issues

Payment to be made by landlord (nature of payment and valuation)

Nature of payment payable by landlord is not clear

The basis of the payment which would be payable by the landlord to the tenant if the landlord exercised his "right to buy" is not clear from the information provided by the Scottish Government. The wording contained in documentation from policy officials states that the landlord can "buy the tenant's interest in the tenancy". There is also a suggestion that the tenant is being "compensated" beyond any rightful way-go claims. We consider it to be fundamental that the nature of the payment is clearly identified and set out. If the nature of the payment is not clear, it will not be possible to ascertain whether the payment is the correct amount.

Valuation methodology based on capital value is flawed

The methodology put forward by the Scottish Government appears to be based on the concept of capital value. The rationale for this methodology is not clear and Scottish Land & Estates does not consider the capital value of the land to be relevant to the value of the tenancy.

The methodology appears to be loosely based on section 55 of the Agricultural Holdings (Scotland) Act 2003 which makes provision for compensation payable to a tenant where a landlord wishes to sell the holding with vacant possession and enters into an agreement with the tenant. The compensation is half the difference between the estimated value of land if sold with vacant possession and the estimated value of the land if sold with a tenant in occupation. We know of very few instances of these provisions being used in practice since 2003.

We are aware that some believe that the proposed methodology will always result in a 1991 Act tenant receiving a higher payment from the landlord than would be received from an incoming assignee. If that is the case, in effect the landlord would be paying a premium rather than paying the same price as an incoming assignee which breaches the principle of fairness. It is arguable that a challenge could therefore be raised on grounds of discrimination (Article 14 of the European Convention on Human Rights). However, given the lack of modelling carried out in connection with the methodology, it is currently not possible to make a definitive statement on this issue.

Other issues with valuation methodology

Even if the basis of the payment is accepted, we have other significant concerns regarding the valuation methodology.

It requires a value for land with a 1991 Act tenant. However, there is no market for acquiring or buying an individual holding with a 1991 act tenant. There is a commonly held assumption that the value of land with a 1991 Act tenant is 50% of

the value of the land with vacant possession but, following consultations with professional valuers, we understand that some place the value at 30% of the value of the land with vacant possession or lower. The methodology is based on the assertion that a valuation can be obtained for the land with a 1991 Act tenant but we query whether such a value can be fairly obtained, given the differing views in the industry and the lack of evidence.

We note that the deemed value of the land with a 1991 Act tenant will depend upon the likelihood of a successor. It is not clear how the "likelihood" of a successor will be determined. There will be circumstances where there is in theory a successor but, in reality, there is no individual willing to farm the holding. Establishing a valuation on the "likelihood" of a successor will be highly subjective and open to challenge.

Furthermore, assuming that the assignation for value model would be introduced along with the provisions relating to the widening of succession (which we understand is what is proposed), there will be few tenancies where a theoretical successor cannot be identified. The value of the land with a 1991 Act tenant is therefore likely to be low, which means that the sum payable by the landlord to the tenant (based on the difference in the value of the land with a 1991 Act tenant and the value of the land with vacant possession) will be high. Although the valuation may appear at first glance to be attempting to be fair, it prejudices the landlord when viewed in the context of the other provisions of the Bill.

The value of the tenant's improvements should be deducted from the value of the land in the calculation. If the value of the improvements is not deducted, the value will be double-counted as the tenant will also be paid way-go compensation for the improvements.

We note that account is to be taken of way-go compensation in the valuation figure. Any claims which the landlord has against the tenant should also be factored into the calculation.

As currently drafted, the proposal will involve the following valuations: (i) open market valuation of the land with vacant possession, (ii) valuation of the land with a sitting tenant, (iii) valuation of improvements, and (iv) valuation of any dilapidations. We anticipate that the cost of these valuations (to be met by the tenant) could be as much as £10,000 depending on the circumstances, which may prove to be prohibitively expensive from a tenant's perspective.

Given the complexities and difficulties involved in identifying a workable and fair valuation methodology, it would have been prudent for the Scottish Government to have obtained detailed professional advice in connection with the proposal before bringing it forward. This does not appear to have been done and, as a result, the valuation methodology is lacking in sufficient detail and, in some aspects, is entirely flawed.

Time Period for the Valuations

As set out above, the valuer will be required to provide 4 valuations within a 6 week period. This is not realistic. In addition, before valuations can be given, the landlord

and the tenant will need to reach agreement on the dilapidations and this process can be lengthy.

Objection to the Valuer

The documentation received from policy officials states that the valuer is to be appointed by the Tenant Farming Commissioner and the tenant can object to the valuer if he perceives there to be a conflict of interest. In order to meet the requirements of fairness, both the landlord and the tenant should be able to object to the appointment of the valuer.

Unwritten Lease

The process as set out does not seem to take account of the situation where the landlord and outgoing tenant have an unwritten lease. An assignee will require the certainty of a written lease, which will require to be negotiated between the landlord and outgoing tenant within the process. The timescales will therefore need to take account of this step. Any expenses, including legal expenses, incurred by the landlord in connection with the negotiation of the lease should be met by the outgoing tenant.

Class of Potential Assignees

Difficulties surrounding framing definition

The ability to assign will be restricted to assignees who are “new entrants” or “farmers wishing to progress in the industry”. We assume that the definition of “new entrant” will follow the definition used for the purposes of the Common Agricultural Policy, though clarity on this point is required as soon as possible.

The definition of a “farmer wishing to progress in the industry” is less certain. Anti-avoidance rules will also need to be carefully considered in this area. For example, where the lease is in favour of the father and the son is employed on the holding, could the son qualify as a “farmer wishing to progress” even though both farms will, in practice, be operated together? We anticipate that it would be very difficult to ensure that the provisions are used only by those who the Scottish Government is seeking to assist with this measure.

At this stage, given the level of detail and modelling, it is difficult to comment on the likely value of tenancies in the open market. However, if the values are high, we would question how a “new entrant” or a “farmer wishing to progress” in the industry will be in a position to pay the outgoing tenant, particularly given the other capital inputs which will be required. In the event that the market value payable by potential assignees for tenancies is low (which is likely where the holding is smaller), it seems that the tenant will have little incentive to use the provisions. Instead the tenant may choose to remain on the holding (we refer here to the other reasons why a tenant farmer may choose not to retire, including not wanting to give up farming or their family home) or simply approach the landlord with a view to reaching agreement outwith the legislation.

Definition of "farmer wishing to progress" lacks clarity

Scottish Land & Estates understands that, at this stage, the only criterion which has been identified for the definition of a "farmer wishing to progress in the industry" is that the farmer may not hold a 1991 Act tenancy of another holding. Scottish Land & Estates' view is that this requirement alone would not sufficiently restrict the definition. It means that a farmer could be owner occupier of a large holding but still seek to obtain a 1991 Act tenancy via the "assignation for value" model. The definition of a "farmer wishing to progress in the industry" should exclude farmers who own or lease a viable unit elsewhere. Alternatively, consideration could be given to restricting assignation to those who farm a holding with a Standard Labour Requirement below 1.

Process for determining who is a "new entrant" and a "farmer wishing to progress in the industry" needs to be established

It is not clear at this stage what the process will be for determining whether a farmer meets the criteria of a "new entrant" or a "farmer wishing to progress in the industry". Scottish Land & Estates does not consider that this is something which can be determined by the landlord as the relevant information will not be available to him.

There appears to be a risk that the policy objective will be undermined by both the landlord and the tenant having an interest in the assignee being as established in the farming industry as possible (and therefore not meeting the "new entrant" and "farmer wishing to progress in the industry" tests). From the landlord's perspective, an assignee who is well established means that the farming enterprise is more likely to have access to sufficient resources and, from a tenant's perspective, it means that the assignee will be in a position to pay the highest sum for the tenancy. There would therefore be a need for the identity of assignees to be monitored independently and we suggest that this responsibility should be placed with the relevant Scottish Government department. A procedure would need to be established which requires current or prospective tenant farmers to make a pro-active application to the Scottish Government in order to determine that they meet the criteria. If a tenant farmer meets the criteria, he would then be eligible to be an assignee (subject to the other requirements of the legislation, including the landlord's right to object).

<u>Way-go Process</u>

The papers received from policy officials indicate that way-go under the "assignation for value" model is a 2 stage process – the tenant will obtain an independent valuation of the sum they will be awarded at the end of the tenancy and they can then consider it with no commitment. We understand from the Scottish Government's Response to the RACCE Committee's Stage 1 Report that the Government does not intend to bring forward the two stage way-go process for wider implementation. Scottish Land & Estates queries whether it would be prudent to have consistency across the sector (rather than different way-go processes applying depending on the circumstances).

Concluding comments

Scottish Land & Estates does not consider there to have been sufficient justification, consultation or explanation for the change in policy by the Scottish Government at this late stage of the parliamentary process. The proposed amendment to section 79 directly contradicts the findings of the Agricultural Holdings Legislation Review Group which were set out clearly in their Report following extensive consultation. It also shows that the Scottish Government does not appreciate that the proposals contained in Part 10 should be viewed as a package and cannot be considered alone.

The "assignation for value" model would have significant consequences for many aspects of the tenanted sector and the use of other types of letting vehicles. The lack of any kind of detailed impact assessment by the Scottish Government means that the full extent of the consequences have not been identified but the proposal will act as a strong disincentive to landowners to let land on anything other than on a short term basis. The Scottish Government is seeking to encourage landowners to let land on a long term basis whilst at the same time bringing forward a measure which disregards the rights and interests of landowners who currently let land under secure long term tenancies. Scottish Land & Estates anticipates that the impact of this measure would be the reduction of land let on a long term basis.

In addition, due to the way the section 79 proposal is framed, there is a high probability that the "assignation for value" model will not actually achieve its stated aims of providing opportunities for new entrants and progressing farmers because in most cases (where the landlord can afford it) the tenant is more likely to sell to the landlord at a higher price than would be paid by an assignee.

Scottish Land & Estates firmly believes that the "conversion to MLDT" model could deliver the policy objectives of this section of the Bill far more successfully than the "assignation for value" model. The "conversion to MLDT" model would deliver a more positive message to the industry about the value of fixed term tenancies of a significant duration, thus encouraging landowners to let land (because they would have the certainty of being able to regain possession of the holding at a fixed date if required).

Furthermore, the "conversion to MLDT" model would be less detrimental to the landlord's interests than the "assignation for value" model. The tenant's rights would clearly be improved from their present position as a result of being able to capitalise on their work and retire. However, the landlord would have a reasonable expectation of recovering possession of the holding following the fixed term and the measure would therefore be less likely to be challenged on human rights grounds, thus delivering more stability and certainty for the sector. We firmly believe that the "assignation for value" model is not proportionate or balanced.

In summary, we believe that the proposal as drafted is counterproductive to the Bill's aims and moves further away from compliance with the European Convention on Human Rights.

Written submission from North East Landowners & Tenants Forum

Introduction

The Forum was established in 2014 out of a mutual concern among a group of tenants, owner occupiers and landlords in the North East of Scotland that the review process then being undertaken by the Agricultural Holdings Legislative Review Group (AHLRG) could be heavily influenced by a land reform agenda with the potential to seriously damage the farming industry. The Forum is of the view that while important improvements can be made on a number of levels, fundamentally, the existing let agricultural sector works well. The composition of the Forum ensures that our comments are balanced and they are intended to be positive in supporting the declared objectives of AHLRG and Scottish Government.

Our 2014 Submission to AHLRG

We commented in 2014 on a number of matters but, in particular, we dealt with two issues that have now emerged as huge threats to our industry as we approach Stage 2 of the Land Reform (Scotland) Bill – the prospect of an Absolute Right to Buy (ARTB) for 1991 Act tenants in certain circumstances and the announcement of an alternative Section 79 allowing 1991 Act leases to be sold for value. The text of our previous comments is still pertinent and is given below:

Absolute Right To Buy (ARTB)

The Forum could see no rational reason for the promotion of ARTB but could clearly identify the damage already caused to the sector by the potential threat of it over the past 12 years or so. All Members are strongly opposed to the ARTB. ARTB reduces the Landlord and Owner Occupiers' confidence in letting land. ARTB does not improve relationships and can increase mistrust between the parties. Lack of investment on land and in buildings by each party is compounded by present threat of ARTB.

The Forum is of the view that confidence to let land is a key requirement of the review process encouraging long term tenancy agreements that benefit both landlords and tenants and encourages investment by both.

Assignation of 1991 Act tenancies

The Forum was clear that any general right to assign would be seen by landlords as a significant reduction in property rights and potentially damaging to confidence to let in future through a term tenancy. That being the case, the Forum concluded that the ring fencing of 1991 Act tenancies to preserve them by general assignation rights is something they strongly rejected.

Should AHLRG be minded to grant a system of converting 1991 Act tenancies to LDTs the Forum was concerned of a value being attributed to the lease as this could disadvantage new entrants. Complete freedom to convert, would probably mean larger units would get larger. It would also be important that the landlord confirmed that the new tenant was acceptable.

The Forum also considered that in extreme hardship situations the landlord could appeal the assignation (e.g. if land is surrounding family home etc.). With sensible controls, a scheme allowing 1991 Act tenancies to be converted to 25 year LTD may get general support as it would see a gradual decline of 1991 Act tenancies and prevent pressure for ARTB emerging in future.

Absolute Right To Buy (ARTB)

The AHLRG considered this matter fully and in their report formed the view that ARTB would be very damaging to the industry. It is important to remember that this review group was chaired by the Cabinet Secretary. However RACCE has in its Stage 1 Report to the Parliament suggested that it should be looked at again and should be available in certain circumstances.

The action of RACCE has again brought the issue centre stage and allowed MSPs to voice support in the Stage 1 Debate. We repeat again how this brings a lack of confidence to let land and we trust that the Cabinet Secretary as chair of the AHLRG will ensure that the Scottish Government does not allow this vexed subject to appear anywhere in the Bill as it progresses.

Section 79 reviewed by Stage 1 Process

Based on the guidance provided by AHLRG after extensive regional consultation and long deliberation, the Section 79 in the Draft Bill considered by RACCE during the Stage 1 process may not be ideal for landowners but it has been acknowledged that there is an obvious attempt to balance the rights and expectations of both tenants and landlords. The clause as initially drafted proposed a conversion process from a 1991 Act tenancy to a Modern Limited Duration (MLDT) which could be assigned by the tenant for value as part of his business assets. There would be certainty of a termination date in the future. One of the important points acknowledged by many commentators is that it is the existence of 1991 Act secure tenancies that fuels the ARTB debate and the suggested process could enable that type of lease to 'wither on the vine' and encourage confidence to let in the industry using modern letting vehicles. While both RACCE and the Delegated Powers Law Reform (DPLR) Committee consider that more detail is required in this section, there is the basis of a workable conversion process. Suddenly, without the depth of consultation afforded by the prescribed consultation process, there has been the announcement of a replacement Section 79 of a completely different character.

Proposed Section 79 to be introduced at Stage 2

The new proposals move away from any form of conversion to a process designed to enable 1991 Act tenancies to be assigned for value to a limited class of future tenant – new entrant or progressing farmer. While a tenant to tenant sale is at the value of the lease, there is to be an opportunity for the landlord to buy back the tenancy. This is not a pre-emption right but the value to be based on a formula relating to capital land values not the lease value.

The proposals will seriously impact on the industry for the following reasons:

Conflicts with Scottish Government stated objectives of the legislation

- Hinders new entrants to farming who will find it difficult to purchase a lease at a time when financial stresses are at their highest level.

- Ensures that any landowner who buys a lease back will never let the land again thus land will be taken out of the rental sector.

- Encourages needless increased borrowing by the sector and works against a vibrant tenant sector. The new tenant is burdened with debt servicing costs and exposed to interest rate increases.

Valuation issues

- The value of the lease sold to the new tenant is related to the potential of the holding to produce profits. It is effectively the discounted value of future net revenue streams.

- The suggested formula for agreeing the value the landowner would require to pay to buy out the tenancy is related to the capital value of the holding. These values relate to the heritable asset itself and the tenant has no right or interest in them.

- Notwithstanding the comment made above, the general change to the succession arrangements to widen the potential pool of successors to the tenancy has an impact on the formula in that it keeps the tenanted value of the lease lower than it may have been otherwise depending on the tenant's age and absence of family successors. What the landowner would require to pay to buy the tenancy back is in excess of what the tenant can receive from a direct sale of the lease to an incoming tenant. Why the discrimination?

- The valuation formula also means that the waygoing valuations paid by the landowner are effectively included in the Open Market Value of the holding and so the landowner who decides to buy out the tenancy pays more than once for the value of the waygoing valuations.

- The formula tries to replicate the position of a deal between a willing buyer and a willing seller but this will be a statutory provision where such a balance does not exist. A dangerous precedent would be created.

Detrimental impacts on landowners and tenants

- Reduces the value of the let land portfolio of a landowner where there has always been an expectation that land on 1991 Act leases would come back inhand at some time. This could have a collateral consequence on existing borrowings against the portfolio and an impact on other businesses and employment.

- It signals that long secure tenancies are favoured by the Scottish Government and must be preserved. This suggests that any form of lease other than a secure lease is suboptimal thus implying that existing or future Limited Duration Tenancies could be made secure in a further round of land reform legislation. Confidence to let is therefore seriously compromised.

- Existing tenants and owner occupiers will find it difficult to expand their holdings in future other than through purchasing land. This will in the long term stagnate the sector and restrict opportunities.

Conclusion

The original Section 79 text included principles which could be supported by both tenants and landlords in the main. This is evident as the style was recommended by the AHLRG and supported by the National Farmers Union of Scotland. From the details available to date, the version of Section 79 to be introduced at Stage 2 is not only unbalanced but will inflict serious collateral damage on confidence to let using limited duration tenancies and the long term vibrancy of the tenanted sector generally.

Written submission from Moray Estates

Response to Government Amendment Section 79

Moray Estates wishes to express it's grave concerns about the impact of the proposed amendment to S79 of the Land Reform (Scotland) Bill. In previous submissions we have expressed concern that the inclusion of the agricultural holdings sections of the Bill was premature and likely to be open to political positioning. These concerns are exemplified by the S79 amendment. The purpose of the policy change is unclear, the policy proposal seems very likely to be less effective than the current proposed measure (conversion), has little or inconsistent detail as to it's operation and looks much more like a political response to media calls for greater radicalism than a serious policy measure to reinvigorate the tenanted sector.

It is in no way clear to us why, having been rejected as a policy proposal by the AHRG this measure has reappeared at a relatively late stage of the parliamentary process. This has provided little or no serious opportunity for the sector to consider the impacts and frankly shows a worrying contempt for the entire consultation process. What is the point of setting up groups such as the AHRG and then putting stakeholders through months of engagement and hard work if the intention is to make late, and major, amendments to the Bill to meet political rather than industry objectives? Regrettably this approach will further undermine confidence of property owners in the good faith of the Scottish Government as far as the let sector is concerned and is likely to lead to further disengagement from it. Perhaps that's the intention?

The Bill contained a potentially workable solution to the stated policy objective of encouraging tenants to retire to free up opportunity for others. Setting aside the fact that the Scottish Government has provided no evidence of research into why tenants, in some cases, are slow to retire [one would have thought a pre-requisite to policy development] the policy of allowing conversion of a 1991 Act tenancy to a fixed term MLDT, which could then be assigned for value, had some potential. Although some property owners were likely to be significantly damaged – where there was a reasonable expectation of the tenancy ending shortly anyway – it did look likely that the fact the new tenancy would be for a fixed term would provide some certainty as to future events and likely mitigate against potential legal

challenge to the policy in the courts. Some owners may well have considered the position beneficial with the shift away from secure tenancy to fixed term agreement which allows more opportunity to plan.

The conversion proposal seemed a broadly proportional response to the policy objective and took some consideration of the property rights of the owner.

Regrettably we are now faced with a very different proposition and one previously rejected by the AHRG of which the Cabinet Secretary was Chair.

The policy objective appears to remain providing opportunities for tenants to leave and new entrants to come in. However whilst the policy may well encourage the retirement of tenants it will singularly fail in the objective of creating opportunity. This is because the number of opportunities will fall significantly as property owners respond to the effects of the proposed policy.

The use of conversion and a fixed term tenancy may well have meant that fewer owners decided to intervene and acquire the tenants interest in the lease because they would have the benefit of a fixed term agreement. The conversion route also, importantly, looked like a clear endorsement and recognition of the importance of fixed term agreements and government support for them.

Assignation of 1991 Act tenancies couldn't send a more different message. Property owners are now faced with perpetual secure tenancies – when one considers the interlinked succession changes – and they will respond where they can accordingly. Those that can afford to do so will acquire the tenants interest in the lease. Having done so, at considerable cost, are extremely unlikely to make that property available under an AHA lease of any time. This company would look to acquire and is highly unlikely to offer those farms to let thereafter. The message this amendment sends – the protectionism of 1991 Act tenancies; the disregard for the interests of the owner and the dismissive way fixed term agreements are referred to in the policy justification [too short to establish a business] – will convince those owners not already of the view to have nothing to do with farming arrangements involving a lease.

It also seems likely that the rate of sales to sitting tenants will increase as some owners respond to the prospect of in perpetuity tenancies or seek to recover the cost of acquiring the lease. This and the decrease in confidence in letting will hasten the decline of the let sector not revive it.

It seems remarkable that having presided over the decline we've seen in the last 15 years that the Scottish body politic still fails to understand that you will not succeed in making people do what they do not feel is in their best interests. You cannot bully or force owners to let property. If you fail to provide a workable and fair letting environment and legal framework then the law will be ignored and other avenues pursued.

Given that an apparently workable and broadly proportionate policy had been identified (conversion) it is extremely disappointing that a disproportionate alternative idea (previously rejected) has been introduced. This can only increase the chances of ECHR challenge given the deprivation of any real opportunity to manage the

property and the failure to compensate. Having barely tidied up the mess which Salveson-Riddell produced one might have expected the government to be more circumspect. Even having created such a policy idea the mechanism for implementation contains further discrimination. There is no justification whatsoever for requiring the landlord to pay one sum for the tenant's interest in the lease and the assignee another. The methodology required for the landlord looks very likely to produce a higher sum than that paid by the assignee. Ironically for a policy designed to support continued letting this will incentivise the outgoing tenant to do a deal with the landlord not the assignee.

If implemented it seems highly likely that the policy will either land the sector in legal limbo whilst the first case/s are resolved and/or hasten the decline of the let sector in Scotland. The policy is so misguided that one can only assume that that is the intention.

We urge the parliament to reject this amendment and revert to the AHRG proposal of assignation following conversion to an MLDT.

Written submission from Scottish Tenant Farmers Association

Replacement to Section 79 of the Land Reform Bill at Stage 2

1. Introduction

1.1 The Scottish Tenant Farmers Association welcomes the opportunity to comment on the Scottish Government's amendments to Section 79 of the Land Reform Bill.

1.2 The new amendment to S79 to be introduced at Stage 2 will create a process under which 1991 Act tenants can assign their tenancy to a new entrant or to a progressing farmer, with the landlord having the option to purchase the tenant's interest during the process, as an alternative to the tenancy being assigned. The Bill will still enable 1991 Act tenancies to be converted to MLDTs, with the agreement of the tenant and landlord.

1.3 STFA fully supports this amendment and agrees with the Scottish Government's policy objectives to:

a) Provide 1991 tenants with a route which would enable them to exit their tenancies with dignity and security, particularly if they did not have an eligible successor, through a process that is transparent and fair to both landlord and tenant.

b) Increase opportunities for new and progressing tenant farmers to establish their business under a secure tenancy.

STFA would add a third objective:

c) Maintain the area of land let under secure 1991 tenancies which provides greater incentive for tenants to grow their businesses, modernise and invest.

2. The Process

2.1 **Valuation**: It is understood that the cost of the valuation will be borne by the tenant, and the tenant will be entitled to object to the valuer appointed by the TFC, particularly if a conflict of interest arises which the TFC may not be aware of. The valuer is to have 8 weeks to carry out the valuation, followed by a 21 day window to appeal the valuation by either party.

2.2 **Exercise of buyout by landlord**: It has been proposed that the landlord should have a period of 6 months to exercise his right to buy out the tenant and settle the acquisition. STFA would suggest that if the landlord elects to exercise his right to resume, the actual end of tenancy and waygo should take place at the next "ish" date following the decision to acquire the tenancy being made.

2.3 **Assignation of the lease by the tenant**: It has been proposed that the tenant may only assign to a new entrant or a tenant farmer progressing in the industry (in practice, not someone who has already held a 1991 Act tenancy). However, one of the most deserving and suitable classes of tenant farmer to receive an assignation will be the General partners in Limited Partnership (1991) tenancies whose leases have either come to an end or have been terminated. STFA considers that these tenants should be eligible as assignees to the tenancy of a retiring tenant. In addition, secure tenants of smaller units who wish to progress to a larger unit and are prepared to relinquish their current holding should be considered as a progressing farmer.

2.4 Although it is probable that a potential assignee will have been identified before the tenant initiated the process, consideration should be given to the consequences of an eligible assignee not being found. STFA would recommend that the valuations carried out at the expense of the tenant by an independent valuer should still be considered as eligible for the usual waygo process which may take place at a later date.

2.5 **Notification to landlord detailing proposed assignee**: In the case that the landlord decides not to exercise his right to buy out the tenant, he should notify the tenant of his decision, from which point the tenant should have at least a 6 month period in which to notify the landlord with the details of the proposed assignee. In practice a potential assignee may already have been identified, but if not, then 6 months would be a reasonable time period in which to identify a suitable assignee. In the event of a successful landlord objection, a new 6 month period should be permitted in order to find a new potential assignee. Assuming no successful landlord objection to the proposed assignee, the assignee should be permitted a 6 month period to arrange any necessary finance with the assignation taking place at the following 'ish' date.

2.6 **Landlord's objection**: Landlord's objections should be open to appeal particularly in the event of vexatious objections. There should be a limit to the number of objections.

Policy Objectives

3. Retirement:

3.1 The proposed new measure should provide an attractive exit route to encourage older farmers nearing retirement age to make way for the next generation. Agriculture suffers from an aging population of farmers, many of whom have no natural successors, who would benefit from an opportunity to exit their tenanted farm having received proper compensation for the investment they and their families have made over the course of the tenancy.

3.2 The current subsidy regime acts as a disincentive for an elderly tenant farmer to retire. Providing the farmer can demonstrate sufficient activity on the farm to satisfy the regulations, he can draw down an income from the BPS and continue to occupy the farmhouse and enjoy the benefits of a farming business. The assignation proposal will help break what is now being seen as a logjam which is denying the next generation of farmers access to tenanted land.

3.3 STFA is aware of a number of tenants who have identified a suitable non-family successor and are hoping to take advantage of the new provision once the new act commences. Typically, these potential successors are employees or distant relatives who have been involved in the business or neighbouring young farmers looking for a start in farming.

3.4 Waygo compensation: STFA has proposed a two stage waygo procedure to ensure that a retiring tenant is not required to serve an irreversible notice to quit the holding without knowing the value of his end of tenancy compensation, as is the case at present. We believe that a two stage notice process should be available to all tenants in 1991 or LDT leases, but the Scottish Government have indicated that there will not be time to amend the bill accordingly. As a consequence, the proposed assignation/retirement process becomes a vital ingredient in the package of tenancy reforms providing the tenants with a range of end of tenancy options.

4. New farmers:

4.1 Under the current situation it is likely that the area of land and numbers of tenants in secure tenure will continue to decline. However, instead of creating opportunities for the next generation of farmers land becoming vacant is generally either: a) re-let to a neighbour, with the consequent loss of houses and steadings; b) taken back in hand to be subject to contact farming, seasonal grazings; or c) amalgamated with the in-hand farming operation. Vacant land is seldom released to be relet on the open market and any land that is, will attract a rent from an established farmer far in excess of what would be sensible of affordable to a new farmer. In effect this closes the door on new entrants or developing faming businesses seeking to move up the farming ladder. This current trend will inevitably lead to ever increasing size of farms and fewer opportunities for small to medium sized farming operations and this problem will only become exacerbated in the future.

4.2 A farming ladder exists in most farming systems allowing new farmers to progress through the industry from farm worker to small rented farms and eventually

to larger viable units. In New Zealand, for instance, a farmer will often move farms several times in the course of his career. In contrast, the typical Scottish farmer will remain in the same unit throughout his working life and new entrants to the industry will invariably come from established farming families. The high capital value of land and the capital intensive nature of agriculture has proved to be a major barrier to new entrants. Rented land is scarce and existing farmers will invariably outbid new entrants on farms let on the open market.

4.3 Although some landlords will opt to buyout a tenant prepared to relinquish his tenancy, many prefer to allow the assignation to take place creating an opportunity for a new farmer. Statistics show that about 120 secure 1991 tenancies are lost to the rented sector annually, if only a quarter are assigned, that will create an opening for 30 new tenants.

4.4 There are a number of Forestry Commission and a few private starter farms on SLDTs or LDTs. These young farmers will be looking for the next step in farming in a few short years. There are an estimated 700 or so LDT tenancies on 10 or 15 year leases, many of these tenants will be looking for another tenancy at the end of the present lease. Most of these farmers will be well capitalised, experienced and ready to take on a sizeable tenanted unit. Many will also have sons to carry on the farming business.

4.5 The Land Reform Bill provides little comfort to Limited Partnership tenants who will either be coming to the end of their tenancies or will be farming on tacit relocation (year to year). This proposed assignation measure will provide them with opportunities to move to secure tenancies where they will be able to invest in and grow their businesses to the benefit of the local economy and Scottish agriculture. Scores of such farming businesses have been lost to the sector over the last few years and the assignation proposal opens the prospect of halting this decline and retaining much needed talent in the farming industry.

4.6 The potential to assign a 1991 tenancy will also create scope for share farming arrangements where a retiring farmer can take a new entrant into the business with a view to assigning the lease at a later stage once he/she has accumulated sufficient capital. Share farming is a common route into agriculture in many countries but rarely used in Scotland. The ability to assign tenancies has the potential to open up a new avenue into agriculture.

5. Preservation of the secure tenanted sector:

5.1 It is widely recognised that farming is a long-term business requiring continual capital investment in the land, fixed equipment, machinery and livestock. The long-term nature of farming and the need for security underpinned the thinking of the 1948 Act which granted tenants the security of tenure which stimulated the massive post-war improvements to agriculture in Britain.

5.2 Today's picture is very different with land being increasingly let on a short-term basis, driven by the maximisation of publicly funded subsidies rather than by agricultural production, the needs of rural communities and environmental management. As a consequence, the infrastructure of many farms on short-term lets or contract farming arrangements is suffering from chronic lack of investment.

An investment impasse has developed where the tenant will not invest in a farm which he may only have for a short period and the landlord has little incentive to invest when he knows there is a buoyant market where demand outstrips supply. The consequences of this investment impasse is evident in England where short-term lets predominate and there is widespread evidence of soil depletion on the land, drainage and fencing neglected and farm buildings in decline or sold for development and farmhouses sold.

5.3 STFA considers that it must be in the interest of Scottish agriculture and rural communities to maintain the area of land let under secure long-term tenure and to provide an entry route for new farmers into fully secure holdings in which they can have the confidence to invest and grow their businesses.

6. Property Rights:

6.1 STFA believes that the steps proposed by the government to implement the new end of tenancy package are practical, considered and will balance the interests of both parties. We also agree with the government's rationale in choosing this approach.

6.2 STFA believes that within the industry there is considerable misunderstanding around the proposed S79 replacement, in that the valuation of the tenant's interest in his lease will not disadvantage those landlords who have the expectation of gaining vacant possession of a tenanted holding where the tenant has no eligible successors. The proposed valuation method takes into account when the landlord would otherwise have been likely to recover vacant possession from the tenant. If the tenant is nearing retirement without any successors, the value of the land with the sitting tenant will be close to the vacant value, and the cost to the landlord in addition to the normal waygo compensation will be minimal.

6.3 This method of valuation allows both the landlord's and the tenant's property interests to be recognised, and ensures fairness to both parties.

7. Conclusion:

STFA has long advocated the introduction of assignation of 1991 tenancies to non-family members and welcomes the government's decision to include it in the bill. We believe that this new provision carefully balances the rights of landlords and tenants and in many ways provides the missing piece in the tenancy jigsaw and makes the bill a more complete package. Not only will this measure open up opportunities for tenants to retire with a realistic waygo valuation but it will also provide new entrants and progressing or developing farmers access to secure tenancies and help to re-instate the missing rungs in the farming ladder.

Written submission from Neil King

Land Reform Bill, Part 10

Stage 2 evidence on Scottish Government's proposed amendments to clause 79 (conversion of 1991 Act tenancies)

I write to comment on the Scottish Government's letter of 4 December 2015 to the RACCE Committee clerk.

1. Paragraph 413 of the Policy Memorandum says:-

The AHLRG [Agricultural Holdings Law Review Group] considered a wide range of options to try and meet these aims [i.e. enabling elderly 1991 Act tenants to be able to retire from their tenancies with confidence, dignity, and a fair return on their investment], from open assignation of 1991 Act tenancies, through to conversion to shorter term MLDTs, both with and without a pre-emptive right for the landlord to buy out the tenant's interests and take the holdings back "in hand". These options were discussed at length with the industry, before the AHLRG recommended the approach intended to be taken forward by the regulation making power in this Bill on conversion and assignation [...]. [Emphasis added.]

The Scottish Government should be invited to explain what has happened since the bill was introduced into parliament to cause it to depart from the AHLRG recommendations. For example, has a new and different consensus emerged amongst the industry stakeholders?

2. Para. 414 of the Policy Memo, under the heading of Human Rights, says:-

Scottish Ministers consider the proposal to allow for the conversion of 1991 Act tenancies into a minimum duration MLDT to be the most practical, proportionate and least intrusive option of achieving the aim sought.

Standing the RACCE Committee's anxiety that the bill be ECHR watertight (see for e.g., paras. 521 & 524 of the Stage 1 Report) to avoid repeating the mistakes made in the 2003 Act and the Salvesen v Riddell fallout which is still going on nearly 13 years later, the ScotGov should be asked to justify now putting forward a proposal which must by definition NOT be "the most practical, proportionate and least intrusive option of achieving the aim sought".

3. The passage in the first bullet point of paragraph 18 of the note attached to the letter:-

Under the terms of such leases [i.e. 1991 Act tenancies] the landlord is not currently guaranteed to regain control of the land at a fixed point in time: even in instances where a landlord might expect to regain control shortly (for example, because the tenant is nearing retirement age, single and without successors), the tenant's circumstances could change: he could (re)marry; have children later in life; or an eligible successor who has not previously shown an interest in taking on the tenancy could change his or her mind. By allowing the incoming tenant to take on the lease as a 1991 Act tenancy, the new policy therefore preserves the position the landlord was already in.

is naive at best and disingenuous at worst.

It's a short step from that sort of logic to arguing that a proposal to legislate for suspected drug dealers to be shot on sight does not breach Article 2 of ECHR (right to life) because the suspects could be killed in a road accident at any time! I don't pretend any expertise in Human Rights law but I'd hazard the guess that it exists to protect people's reasonable expectations as well as certainties (are there any certainties in life?) Perhaps the Committee should take evidence from an expert HR lawyer on this.

4. The following passage, in the third bullet of para. 18 of the note:-

In circumstances where landlords may feel they are most disadvantaged – in other words, where they may have expected to regain control of the land in the near future – the cost to the landlord of recovering possession will be relatively low. This is because the independent valuation of the land will take into account when the landlord would otherwise have been likely to recover vacant possession of the land from the tenant. If the tenant is nearing retirement and has no successor, the value of the land with the sitting tenant and the value of the land if vacant will be closer to each other, and the cost the landlord pays (50% of the difference) in addition to waygo compensation will be lower. Conversely, in circumstances where the landlord would not have been likely to recover possession of the land in any event, the impact on him of this new process is more limited. The difference in value between the land with the sitting tenant and the land if vacant would be higher, and therefore the 50% of the difference paid by the landlord would be a larger sum. [emphasis added]

gives the lie to the claim in the first bullet quoted previously that a landlord's position is not affected by the situation of the tenant - the ScotGov may believe that but the market apparently doesn't! And note how the third bullet accepts that the new process does have an impact on the landlord whereas the first point says it preserves the landlord's existing position - the note contradicts itself!

That aside, this aspect will only be of any comfort to landlords and a mitigation of ECHR risks if the subject to tenancy value is directed to be made assuming the possibility of allowing assignation to new entrants and "progressing farmers" did not exist. I would suggest the Committee takes evidence from the RICS on that point.

5. The claim in para. 22:-

However, there would nonetheless be drawbacks to enabling all tenants to unilaterally convert their 1991 Act tenancies to MLDTs, potentially imposing new lease terms on their landlords against their will. We are therefore of the view that continuing the tenancy as a 1991 Act tenancy is a better approach, as it retains the terms of the lease the landlord is already subject to.

is a total non-point and clutching at straws as a justification for retaining the tenancy as a 1991 Act after the assignation rather than an MLDT as the AHLRG recommended.

The only difference of any substance between an MLDT and a 1991 is that the former does not involve security of tenure. As such, there is not a landlord in

Scotland who would not welcome a 1991 being converted to an MLDT, unilaterally or otherwise. However, if imposing new terms on the landlord is still thought to be a concern, it can be got round by providing that, after the assignation, the tenancy will continue as a 1991 Act except with no security of tenure after 35 years (in other words the assignee would be vulnerable to an incontestable notice to quit after 35 years rather as a non-near relative successor is under the present law).

Written submission from SAAVA/CAAV

PROPOSED REVISION OF SECTION 79

JANUARY 2016

CONTENTS

1. Introduction

1.1 This note is submitted in response to the call by the RACCE Committee for specific evidence on the paper issued in December 2015 outlining an alternative to the Land Reform Bill's section 79 with its proposals for the conversion and assignation of tenancies under the Agricultural Holdings (Scotland) Act 1991. A second updated version of the proposal paper was then issued by the Scottish Government on 22nd December.

1.2 Evidence more generally on Part 10 of the Bill was submitted to RACCE on 14th August 2015.

1.3 Recommendations - As well as the general review of the proposals for a new s.79, we make two specific recommendations:

- This procedure should only apply where there is a written lease. A tenant with an unwritten lease wanting to trigger this procedure should first use the statutory provisions of s.4 of the 1991 Act to have the lease recorded in writing, giving certainty as to the extent, parties and terms of the lease. The compensatable tenant's improvements and any relevant record of condition should also be submitted for valuation, if necessary using the procedures of s.8 of the Act. (*Section 5 of this evidence*)

- Specific practical and technical consideration should be given to the questions of what is to be valued and the basis for those valuations to ensure that the new mechanism is robust in achieving its ends. We are happy to devote work to this. (*Section 7 of this evidence*)

2. The Scottish Agricultural Arbiters and Valuers Association (SAAVA) and the Central Association of Agricultural Valuers (CAAV)

2.1 SAAVA is the specialist Scottish body for those advising and acting for tenant farmers, farming owners, landlords and other agricultural and rural businesses as well as other interests including government, environmental bodies and lenders. It is affiliated to the CAAV which has a longstanding UK-wide expertise in agricultural and rural property and business issues, allowing SAAVA to draw on that broader range and long experience of tenancy and other issues across the UK and further afield.

2.2 As professional bodies with members acting for such varied interests, our concern is not to promote particular causes but look at matters and proposals practically, considering what will work and what will not. In this, we are conscious that our members will be advising tenants, landlords and potential assignees in the years following the outcome of any changes and will need the position to be clear so that advice can be certain and effective for clients to be able to make decisions and spend money on that basis. Equally, in engaging with public policy we would prefer to see measures that are sensibly implementable and successfully promote the health of the industry.

2.3 Members as individuals will act for tenants, landlords and others with interests in agricultural property. Our professional interest is in a system that functions well to achieve the aims of the parties and for which the law is drafted so that good and secure advice can be given to parties making decisions about their lives, businesses and assets.

2.4 As an arbitral appointments referee, SAAVA is also concerned that, where disputes happen between parties, the mechanisms for resolving those disputes are practical and proportionate, enabling the best answers for the least rancour and at least cost.

3. Policy and Implementation

3.1 As a professional body, we are not commenting on the merits of the objectives of the draft legislation but on their practical implementation. In that, we observe that the proposals allow a tenant without heirs and nearing planned retirement or death to require his landlord either:

- to buy him out on the statutory basis (on a formula which is intended to reflect those circumstances), or

- to accept a qualifying assignee (if one can be found on agreed terms suitable to the tenant) with the tenancy now capable of continuing as a 1991 Act tenancy in near-perpetuity (the proposal in the Bill was for a new MLDT for 35 years which gave a finite, if relatively distant, horizon)

so changing the framework for estate planning affecting both the landlord and other tenants.

3.2 With a view to its effective implementation, it is right to test what is the predominant policy purpose of the proposal. Is the proposed mechanism primarily intended:

- to help a number of existing tenants leave the sector by offering a mechanism for them to be bought out, in general by the landlord but with a fall back to assignation. The availability of the mechanism could prompt this outcome as might its basis, more generous than might be seen in practice in the market where such deals are only struck in particular circumstances and so more often at 20 or 30 per cent of the vacant possession premium. The outcome would probably accelerate the reduction in the size of the let sector.

or

- to transfer 1991 Act tenancies to new entrants or "progressing farmers" (albeit with an initial power of pre-emption by the landlord) with the implication that the land may be perpetually subject to a tenancy?

While the two may in practice not be very dissimilar, the message of each is different.

3.3 The name currently given to the initial notice could appear to crystallise the core concept as an opportunity to "relinquish" (as opposed to a notice of intention to assign), so pointing to the former option. That may be realistic but is it the intention?

3.4 In considering the practical development of this, the current issues with the implementation of the complex suite of options selected by the Scottish Government for the new CAP prompt a caution for introducing undue complexity here, however attractive the arguments might seem for each individual element. It would be best to focus on the effective achievement of one simple policy objective than to fail to deliver a more sophisticated package.

3.5 In practice, this measure, considered on its own, could further reduce the already small and declining area of the Scottish let sector but could achieve some restructuring, whether by aiding either landlord's in-hand farming or that of assignees. Where land is brought back in-hand, the landlord may usually be very cautious about letting it again, save perhaps as part of a mutually beneficial arrangement with another existing tenant.

3.6 There are sufficient differences between this potential disposal of a tenancy and the tenant's power of pre-emption under Part 2 of the 203 Act for that model not to be followed slavishly.

4. Its Practical Effectiveness Will Vary with the Size of the Holding

4.1 Typically, it is likely to require a significant sum of money for a tenant to consider positively leaving a holding on which he has security, the ability to claim

income from the CAP's Basic Payment and Greening and quite possibly has his home. However much he may consider his present position to be unsatisfactory, finding a new home (whether to buy or to rent) and a replacement income or pension will come at a cost. How much money might a tenant reasonably consider necessary to be able to establish a new life away from the holding?

4.2 This mechanism is a means of making that sum available to some tenants, whether by the landlord paying on the statutory basis or the assignee paying for the right to the tenancy (potentially a different figure). With such a property-based calculation, in either case the sum required is more likely to be fundable from a larger unit than from a smaller one which may never be able to deliver the kind of finance that would ordinarily be needed to support this move. There is concern that some tenants of smaller holdings may have unrealistic hopes of this mechanism and might anyway be reluctant to afford the initial costs of the process.

4.3 In the great majority of cases, it is expected that the value in this procedure will lie in the land (the half share of the vacant possession premium) rather than the balance of waygo claims. The combined value of land and net claims will be supplemented by the subsequent farm dispersal sale. The sum achieved will be subject to taxation.

4.4 In summary, on the whole this mechanism is naturally more likely to attract effective interest from tenants of larger holdings. It may also have more appeal to tenants who already have housing away from the holding.

4.5 It is then likely that a major effect of s.79 might often be as a backstop for prior discussions between tenants (probably with some prior advice as to likely values) and landlords that may deliver the policy without directly using the statutory mechanism. That outcome is seen as pragmatic sense, not as a problem.

5. The Importance of Certainty for the Process

5.1 General

5.1.1 The initial procedure turns on the statutory valuation of the land (with and without the tenancy) and the potential end of tenancy claims between the parties. It is not set out as a dispute resolution procedure for issues that are uncertain or in contention between the parties.

5.1.2 If the task of the valuer, appointed by the Commissioner, is to value the prescribed items, they should be identified for him: the valuer has to know what it is he is to value. If the valuer has to go on a process of discovery to crystallise and identify those items, whether the lease itself or the compensatable items of improvements or dilapidations, before valuing them that will have consequences as to time, cost and liabilities of the procedure.

5.1.3 Valuation becomes very difficult if it is uncertain that the subject to be valued actually exists. This is an issue for both the land and the claims. In an extreme case, might the valuer have simply to advise that the items have not been defined and so cannot be valued?

5.2 The Land and the Lease

5.2.1 Where there is (or claimed to be) an unwritten lease, there may be issues over:

- the identification of the lease
- the relevant statute (is it actually under the 1991 Act?)
- the area covered by it
- its terms
- who may really be the tenant.

It is not a satisfactory basis for the proposed process if someone can simply assert that they have an unwritten lease under the 1991 Act while offering no clarity on these details and leaving open issues as to whether the landlord accepts the position or whether there are other claimants. It may not even be practically possible to undertake a professional valuation in some such cases.

5.2.2 What is the position if the tenant says that the tenancy covers a larger area than the landlord accepts (or indeed vice versa)? Is the valuer to rule as to the nature of the tenancy that is the subject of the notice to relinquish and so for the landlord or an assignee to purchase? If not, what is the route to be taken?

5.2.3 The tenant's remedy in the event of an unwritten lease is to move under s.4 of the 1991 Act for the terms of the lease to be recorded in writing.

5.2.4 In turn, that written lease then prospectively assists the tenant with an assignation so that the assignee (who may be borrowing money for this or moving home) can be certain that he is actually buying something and what it is. The less certain he is on this, the less he will pay, if he takes it at all.

5.3 The End of Tenancy Claims

5.3.1 If the valuer is to identify the compensatable improvements and dilapidations that will, at the very least, add substantially to the exercise and so its cost. As the valuer, who should have no conflict of interest in this work, is unlikely to know the farm, this may become impossible if no adequate evidence is given to him or the issues are clearly too contested for him to proceed.

5.3.2 Again, the valuer's role is not to hear and settle differences or disputes between the parties but to provide a valuation of what is before him. If there are outstanding issues that may not be easy or even possible. There may be cases where he could be asked to provide valuations in the alternative according to what the facts might later prove to be – but that appears to be outside the remit of the Commissioner's appointment and so would have to arise under be a separate instruction by one or both parties.

5.3.3 One specific point is there may, at that point, usually be no tenant's notice in respect of fixtures, let alone any landlord's response as to whether he would take to

and pay for them or let the tenant remove them. It will not be known what these items are or if they would be compensated.

5.3.4 The remedy for the tenant as the instigator of the s.79 process is to have moved under s.8(2) of the 1991 Act for the relevant improvements to be settled. It may usually be a matter of fact as to whether there is a record of condition that can be the prerequisite for a dilapidations claim though assessing the resulting dilapidations can be time consuming and contentious.

5.3.5 It is recognised that this will require prior work and cost by at least the tenant on these matters before he embarks on the main procedure but both are practical things that were better done anyway.

5.3.6 It is accepted that the valuer's role will always, as a matter of practice, include some element of appraisal of what is before him but few may wish to accept an appointment where the facts of what is to be valued are not evident, making his determinations very vulnerable to challenge. What is to be the position if, for example the legal validity of an available record of condition (the prerequisite for a dilapidations) is challenged?

Recommendation: This procedure should only apply where there is a written lease. A tenant with an unwritten lease wanting to trigger this procedure should first use the statutory provisions of s.4 of the 1991 Act to have the lease recorded in writing, giving certainty as to the extent, parties and terms of the lease. The compensatable tenant's improvements and any relevant record of condition should also be submitted for valuation, if necessary using the procedures of s.8 of the Act.

6. Initial Procedure – Appointment of a Valuer by the Commissioner

6.1 Following his receipt of a copy of the tenant's notice, the Commissioner is appoint a valuer. While the skills required of the valuer are better expressed in the second version of the paper, our questions about this are:

- as this process carries an administrative cost, is there to be a charge for the appointment to accompany the copy of the notice to the Commissioner?

- is it intended that this process could be triggered after a tenant's death (but before a notice to quit) by his personal representatives?

- what is the position if only one of joint tenants serves the notice?

- what is the position if the notice is served by someone who proves not be the tenant at all?

- given the potential issues raised by managing conflicts of interest it would be more practical for the Commissioner not to be bound by a time limit for making the appointment but to be subject instead to a requirement to proceed with despatch. What would be the position if he failed to meet the time limit?

- would the Commissioner have enough knowledge of the relevant valuers to make the appointment or might he delegate the task to existing appointment systems, such as those of professional bodies? SAAVA and the RICS are

both arbitral appointment referees and the Central Association of Agricultural Valuers makes appointments.

- is the tenant (or indeed the landlord) able to object to an appointed valuer? – as, say, if there is a perceived undisclosed conflict of interest? If so, would that be to the Commissioner as the appointing person?

- might it assist tenants' confidence and sense of participation if they were offered a choice of valuer from which to make the appointment for which they are to pay?

- is the Commissioner to have any duty or place in this process beyond the initial appointment?

6.2 We have understood from the Scottish Government that for valuers to be appointed by the Commissioner they must have been approved through the Government's procurement process but are not clear what this might mean. There is natural concern, drawn from experience with utilities work, that competitive bidding over fees could result in inappropriate people being to the fore, excluding those with genuine skills in competition over cost rather than competence and so risking the repute of the exercise. The requirements as to the valuer's skills are quite properly very specific.

6.3 There may be circumstances where the landlord has no desire or realistic interest in buying the tenant out. In such a case, requiring the valuation stage seems to impose needless effort and cost on the tenant. Might there be a means to allow the tenant to move directly to the assignation stage where the landlord has certified in writing that he does not wish to buy?

6.4 Similarly, might it be possible for a tenant, unsure if his landlord is actually a likely buyer and anxious as to upfront costs, to choose to defer (or even waive) the end of tenancy claims part of this task? If deferred, then the compensation and dilapidations claims could then be triggered as normal on the end of the tenancy if the landlord does purchase. They are not necessarily so relevant to the assignation value.

7. The Valuation

7.1 General

7.1.1 The proposals are for the valuer to provide four valuations which, in general terms are to be:

- the vacant value of the land in the holding

- the value of the holding as let under the terms of the present tenancy to the actual tenant

- the value of the tenant's waygo claims for improvements

- the value of the landlord's claim for dilapidations on waygo.

While the proposals paper makes some further points on these, there are significant issues of definitions and of the basis and assumptions for the valuations that need to be clarified for each of these and considered in this section of our response. We urge that specific care and further discussion be taken on the approach to valuation so that there is a robust framework for this mechanism. We are very happy to participate in those discussions.

7.1.2 We have commented above on the extent to which the valuer might be expected not only to undertake the statutory valuations but also to discover the facts and potentially make judgments as to the nature and extent of the tenancy and the subjects of waygoing claims, with the associated legal issues and the liabilities that may flow from that.

7.1.3 The proposals imply that the valuer would most naturally be acting here as an expert, appointed under the aegis of the Commissioner to provide the required figures. He is not resolving a dispute or difference between the parties and so would not have the quasi-judicial role of an arbitrator under the Arbitration (Scotland) Act 2010 with its judicial immunity. While appointed on the tenant's prompting and paid for by the tenant, the valuer's duty should be to the process and so implicitly to both parties.

7.1.4 It becomes more difficult if either of the parties seek to rely on the valuation more widely. What is the position if, in the absence of a record of condition, the valuer says there are no dilapidations and then a record of condition is subsequently found? Has the potential for an end of tenancy claim founded on that record then been lost? What is the valuer's liability?

7.1.5 Is the valuer required to release his report before he is paid – as is the practice for arbitrators? A separate contention may arise if the tenant does not like the figures provided.

Recommendation – Specific practical and technical consideration should be given to the questions of what is to be valued and the basis for those valuations to ensure that the new mechanism is robust in achieving its ends. We are happy to devote work to this.

7.2 Part 2 of the 2003 Act May Not Offer a Useful Precedent

7.2.1 The first draft of the proposals paper drew express attention to the provisions of s.34 of the 2003 Act for the valuations for the tenant's right to pre-empt a sale of the landlord's interest to a third party. While that specific reference has now been withdrawn (save at paragraph 4) that raises both general and specific points.

7.2.2 Inquiries suggest that there may have been very few cases where even the initial stages of Part 2 have been invoked. We have heard of one that reached the valuation stage but none that proceeded further. While there is a larger experience of actual but negotiated sales of holdings to sitting tenants (with the statutory provisions possibly in the background), that means there is neither experience nor any decided case on the statutory provisions. Part 2 is, for practical purposes, untested and so is an uncertain basis on which to proceed.

7.2.3 The proposal here differs from the purpose of Part 2 in that Part 2 concerns the purchase by the tenant of the reversion while these proposals are for the purchase of the tenancy by the landlord and so potentially raising waygo issues.

7.2.4 More specifically and reviewing s.34(2)-(7) of the 2003 Act (as prompted by the first draft of the paper), we note that:

- s.34(2)(c) takes account of special purchasers, so not just market value

- s.34(2)(d) specifically mentions the effect of any sporting lease affecting the land but any right affecting the land could be relevant

- s.34(2)(e)'s recognition of moveable property that might be sold with the land is relevant to Part 2 of the 2003 Act does not seem relevant to this procedure as the tenant has those anyway

- s.34(2)(f)(i) disregarding there being no time for marketing may not be needed as it is captured by existing valuation definitions – unless its purpose has been missed here

- s.34(2(g) to (j) effectively apply a "black patch" to both tenant's fixed equipment/improvements (so broader than compensatable improvements) and dilapidations. We discuss this question below but at this point simply mention the potential risk of both double counting and omission warranting careful thought.

- S.34(4) to (7) asks, in the context of its purpose, for a valuation of the landlord's estate which includes the holding, with and without the holding, not just of his interest in the holding. This may not be relevant in the context of these proposals which seem properly expressed solely in terms of the holding and need not look more widely since the physical extent of the landlord's estate remains unaltered.

These and other issues need careful review in the light of policy intentions and the practicalities of valuation.

7.3 Basis for the Land Valuations

While it might be natural for the vacant and let values of the holding to be assessed on a market value basis, we note that, for Part 2 of the 2003 Act, s.34(2)(b) goes further in also recognising the value that may be available from a special purchaser (usually for marriage value with another property). Which is to be the basis for the valuation? It would require specific evidence for an independent valuer to be confident in identifying a real special purchaser.

7.4 Other Issues for the Vacant Land Valuation

Is the value of the vacant land to be limited to the uses of the land available under the tenancy agreement or take account of any non-agricultural development value? What is intended to be the position if the land is a prospect for, say, housing development?

7.5 The Holding as Let – The Investment Valuation

7.5.1 Among other things, the paper firmly proposes that the valuation must take into account when the landlord would otherwise have been likely to recover vacant possession of the land from the actual tenant. This is very important in practice. The tenant might have a long life expectancy and farming heirs or be aged, infirm and have no heirs. Equally, there may in the circumstances and under the lease be a prospect of some or all of the land going for non-agricultural development. The terms of lease would be relevant to that for the valuation of the holding as let. Those points should, in principle, affect the investment value if the market has confidence that the legal position is stable.

7.5.2 However and even with assumptions resolved, the evidence base for identifying the investment value of a let holding in Scotland is very thin. A swift trawl has found two instances of the landlord's interest in a Scottish holding being offered on the market since 2010 – by contrast the same trawl has found 11 for England in 2015 alone. While it might ordinarily be possible to work from potentially relevant English evidence across, here that could require very substantial adjustment for Scottish circumstances in which the Agricultural Holdings Law Review Group noted that:

"A secure 1991 Act tenancy that had previously been seen as a low-return/low-risk investment is now regarded as a low-return/high-risk investment." (Paragraph 195, Interim Report)

Scottish let land values are thought to be much further below vacant possession values than English ones. That lack of evidence consequently weakens the valuation process and gives much room for reasonable disagreement with obvious consequences for the tenant and the landlord as the parties involved.

7.5.3 Even if it is true that, as is often loosely said that Scottish let land values are generally half of vacant land values that figure will be neither precise not true of every holding. Purely for illustration, there would be a £300,000 difference in the landlord's payment for a reasonable 500 acre arable farm turning on whether the let value is either 40 per cent or 60 per cent of vacant value.

7.5.4 The alternative to working from comparable sales is to use an investment approach applying an investment yield to the rent. That is again problematic not only for want of relevant contemporary evidence but also because very slight changes in the very low levels of yields usually seen for let farmland have large effects on value. The most recent public offer of let land sought a 1.4 per cent yield and modelling that points to a landlord's s.79 payment for the holding of £1,570/acre. At a 1 per cent yield that payment would be £1,000/acre; at 1.8 per cent yield it would be £1,890/acre. The current sense of low long term interest rates across the world could point to the argument being at the lower end of the yields used with the higher sensitivities illustrated. The consequences of those small differences in yield rates would be very significant for the parties and the outcomes could easily be contentious. That could suggest the need for at least one Lands Tribunal case (and possibly several) before there is a sense of the values for let land that can be sustained under challenge.

7.5.5 Not only may the necessary evidence for the valuation be very limited but it may be most limited for situations where vacant possession is seen as in prospect, whether because of the circumstances of the tenant or the prospect of development. Investment interests might rarely be sold in such cases when a much larger value could be obtained by waiting. That compounds the problems of meeting the paper's expectations that the investment valuation should reflect those circumstances. That does suggest the importance of an express provision in the statute equivalent to or clearer than s.34(2)(c) which says:

"taking account of when the seller would in the normal course of events have been likely to recover vacant possession of the land from the tenant"

so that the valuer's attention is drawn to an approach that assesses this prospect in its own right.

7.6 Issues Over Waygo Claims

7.6.1 The valuer is also asked to value the compensatable improvements and dilapidations with those figures then used to adjust the payment by the landlord. It may often be that in most instances the waygo claims aspect will be of less significance in this than the land values.

7.6.2 The issue here is that the holding as it stands already has the benefit of the tenant's improvements and the burden of the tenant's dilapidations. They would therefore ordinarily be reflected in the two land valuations, perhaps with more effect on the vacant value than the let land value. With the understandable view that the tenant should have benefit of his improvements but face the consequences of his dilapidations, making the problem one of ensuring that there is an equitable approach that sees neither double counting nor omission.

7.6.3 Part 2 of the 2003 Act handled this issue by requiring its land valuations to disregard ("black patch") all the tenant's fixed equipment (s.34(2)(j)) and improvements (s.34(2)(g)) and the dilapidations (s.34(2)(i)(i)). Waygo is, though not relevant to the Part 2 procedure.

7.6.4 Perhaps the root of the issue here is the parties can only enforce claims for payment (the basis of valuation) so far as there is a legal basis for payment. That may not usually cover all items disregarded by s.34 as:

- only those tenant's improvements that lie within Schedule 5 and, where required, have consent will be compensatable

- dilapidations can only be claimed where there is a valid record of condition.

A possibly lesser issue is that the statutory basis for assessing improvements (value to an incoming tenant) may produce a value that is different from the effect that an improvement may have on the land value (market value as a whole).

7.6.5 It may be that one answer is to ensure that the land valuations are only to disregard those items for which compensation is due but that requires them to be clearly defined beforehand.

7.7 Time Allowed for the Valuation

The differences in this process from that of Part 2 of the 2003 Act do warrant a longer period for the valuer's work than six weeks. It may sometimes be that the work of assessing waygoing claims and dilapidations will require more work than the land valuations. We appreciate that the second paper proposes a period of eight weeks, rather than six. The right period will depend on the extent of the work expected of the valuer.

7.8 Assistance from the Parties

7.8.1 The issues underlying the paper's mention of the need for the parties' co-operation with the valuer suggests the need for an equivalent of s.36 of the 2003 Act (after review). The tenant triggering the process should certainly be expected to provide all the information relevant to his position, including improvements asserted to be compensatable.

7.8.2 The tenant will usually have an active interest in demonstrating as many compensatable improvements as possible but even here there may be issues as if the tenant regards them as self-evident and so does not organise himself to demonstrate their status. He may simply overlook an old but still important land improvement or assert that a slurry store is an improvement when it lies outside Schedule 5. Is the valuer to have an investigatory role in such cases?

8. Appeal Against the Valuation

8.1 The paper does not specify the mechanism to make the appeal. We think there is no experience of the operation of the appeal provisions of s.37 of the 2003 Act to assist.

8.2 Any appeal will be against the valuation and not be a dispute between the parties. That interacts with the issue of the approach to the costs of the appeal. In practice, the appeal is asking the Tribunal for an opinion and it so would be at the cost of the party concerned. Perhaps the most ready comparison is with an application to the Lands Tribunal to modify or remove a burden on title (a restrictive covenant) which also may only be between the applicant and the Tribunal. While it would have the valuation before it, the valuer is not a party to the issue.

8.3 That raises a question for the Tribunal as to how the valuation and the appellant's evidence is tested if the other party does not join the issue. There might be some issue here where the appeal concerns something on which the party might reasonably have provided the information directly to the valuer.

8.4 As the Lands Tribunal's role is to resolve the valuation, any issues and action over any alleged misconduct by the valuer (perhaps most often perceived undisclosed conflict of interest) are assumed to lie directly against him and not be part of the Tribunal's remit.

8.5 More generally, that might suggest an emphasis here (as we suggest more generally for Part 10) on providing for more effective and lower cost dispute

resolution procedures, whether as alternatives or under the aegis of the Land Court or Lands Tribunal.

9. The Tenant's Opportunity to Withdraw

9.1 The tenant, now having the statutory figures and with time to reflect, may prefer to remain where he is, rather than continue with the process. The second paper combines the two previously proposed periods into a 35 day window for this option. The tenancy then remains as though no initial notice had been served.

9.2 Should that notice of withdrawal be copied to the Commissioner?

10. The Landlord's Chance to Buy the Tenant Out

10.1 The end of that 35 day period is when the landlord acquires an active role in the process. He could simply have been a bystander up to this point, aware but with no obligation to act (save for any duty to co-operate that may be imposed). Indeed, he need not act at this point.

10.2 The paper proposes that the landlord is pay "at least" the statutory figures. What does "at least" mean here? The proposed statute would identify the measure of payment which is what would then be due under the statute and anything else, more or less or involving other assets, would be a matter of private contract between the parties.

10.3 The second paper gives the landlord six months to buy out the tenant. It is taken that this is to see the transaction completed with the settlement of any other terms, the raising of finance and the conveyancing processes. The developing regulation of bank lending for property, commonly slowing processes, is a factor here.

10.4 The resulting timetable if all goes without a hitch appears to be:

Tenant serves notice on landlord/Commissioner	
TFC appoints valuer	2 weeks (say)
Valuation to be done within	8 weeks
Period before landlord can enforce buy out	5 weeks

so the landlord's opportunity to buy the tenant out on the statutory basis arises some 15 weeks after notice and closes 41 weeks after the notice, when the tenant can move to assign the tenancy.

11. Assignation

11.1 General

11.1.1 If the landlord does not complete the purchase in that six month period, then the tenant can assign. He may have reasons for doing that to a family member but

can equally offer it for sale in the open market where the value may most often be driven either by:

- the perpetual benefit of the profit rent (the excess of the market rent over the proposed fair rent)
- the residential opportunities of the tenancy.

The assignee would potentially be buying the near-perpetual right to:

- the use of the land for agricultural purposes
- the use of the existing dwellings
- any diversification and sub-letting feasible under the 1991 Act and the lease

subject to:

- the obligation to pay the rent
- any exposure to repossession for non-agricultural development
- having a landlord
- any other exposure to notice to quit

and with the same right to attempt to realise an exit value through the same proposed assignation route.

11.1.2 There is no reason for the value that could be paid to become the tenant to be similar to the payment that the landlord might make to extinguish the tenancy under the statutory process suggested.

11.1.3 If there is not a written lease by this point, one will almost certainly be essential for a third party assignee to want to commit his life and money to the purchase of the holding, especially if he is to rely on borrowed money for that. While potential further use of the assignation route could allow a tenancy to be used a security, it seems likely that lenders will be reluctant to do so (with issues over taking possession and re-marketing), preferring other collateral (owned land or a house) and guarantors while taking comfort in the tenancy and its profit rent.

11.1.4 It is clearly for a tenant with potentially eligible successors to resolve any family issues on moving to consider assignation to a third party for value.

11.1.5 Assuming the tenancy is to be bought as a farming project and not simply for its access to a possibly desirable house, the value is more likely to be based on the profit rent. That would be the difference between what would be paid as a market rent for the holding and the “fair rent” that would in future be determined at a rent review. The capital value that some would pay to benefit from that annual profit rent might then be adjusted for potential end of tenancy claims/liabilities.

11.1.6 As an assignation, the tenancy does not end but is transferred as a continuing asset to new hands. Thus, the rent review cycle should not be disturbed. There is thus no occasion for end of tenancy claims (as there would be if the tenancy were handed back to the landlord). The assignee takes the tenancy with its improvements and dilapidations at the date of the handover.

11.1.7 The second paper clarifies that the assignment may only be to a natural person, and so not to company or partnership. It does however propose that the assignation may only be to those qualifying as either new entrants or "a tenant farmer who is progressing in the industry" (also "progressing farmer").

11.1.8 Aside from issues of definition that also poses an issue if those people are less able to provide the sum of money that would encourage the tenant to leave the holding. That returns to the question of whether the paper's proposals are intended to help tenants out or assist progressive farmers in. If the latter is a significant part of the policy, the class of potential assignees needs to be broader rather than narrower since enabling larger payments will assist more to exit. If an assignee cannot offer enough money to enable a tenant to move, he will not do so.

11.1.9 Is there a case for allowing assignation to a farmer who is releasing an entry or progression opportunity elsewhere?

11.1.10 The proposed assignee is then to be put with a justification to the landlord who has 30 days to object on specified grounds.

11.2 New Entrant

11.2.1 We have a working and, to an extent, tested definition from the CAP regime as to who qualifies as a new entrant. It is clearly not intended to have an age limit and some of the more interesting new entrants are those with experience and capital from others areas of business and so need not be "young".

11.2.2 That EU definition looks back over five years for testing "head of holding" – is that to be kept? Keeping it would appear a useful safeguard for some applicants who might be thought desirable who could be prejudiced by circumstances no longer relevant disqualifying them. As "holding" here is a CAP term, it would be preferable to test the issue directly in terms of the control of a farming business, partly also to avoid confusion with the tenancy use of "holding".

11.2.3 As elsewhere in the agricultural holdings provisions of Part 10 of the Land Reform Bill, we doubt that simply a proposed entry to a farming course is sufficient to satisfy any reasonable requirement for training and experience, especially of the larger holdings that may be released by this mechanism. We fear that this is more likely to store up problems for the future where an assignee fails to complete the course and more generally weaken the credibility of the system. Meanwhile, the acceptability of interim arrangements might be seen merely to affirm the legitimacy of the essentially non-farming assignee using contractors, and so bypassing the supposed point of restricting who can be assignees.

11.3 "A tenant farmer who is progressing in the industry"/"Progressing farmer"

11.3.1 This concept raises more issues of definition. Progression is at least as important to the future of the sector as entry into it. While the words used imply that the assignee must hold a tenancy of some sort, progressing farmers may be involved in all sorts of structures of business – and may own some land whether by inheriting a field or having an involvement in another business. Limiting this definition too tightly is more likely to encourage creativity as to "new entrants".

11.3.2 The second paper has properly moved away from expressly excluding anyone with a 1991 Act tenancy, however small.

11.3.3 By definition, such people are already "head of a business" or they would be new entrants. The implication is that the business is not so substantial a holding that the Scottish Government thinks they should not be able to be an assignee. That might be tested on the basis of securely held land by:

- reviewing land that is not occupied:
    - on a grazing or mowing lease under s.3 of the 2003 Act
    - on an SLDT
    - on an LDT with less than […] years until the expiry of its term – that period to be a matter for policy
    - as an executor, receiver, etc
- then applying the succession two man unit test of Case 7 of Schedule 2 of the 1991 Act to the remaining owned and long term land.

A view would have to be taken as to how to treat the assignee's share in jointly owned land and land held by partnership.

11.3.4 If the issues of defining progressing farmers prove too difficult, the preferred solution would be to have no such restriction and allow assignation to everybody and so maximise the benefit of the s.79 mechanism as a means for exit, facilitating re-structuring.

11.4 Landlord's Grounds of Objection

11.4.1 We see these to be modelled on those for assignation and family succession. Where the assignee is unknown to the landlord and the information submitted by the tenant may not appear complete, there may need to be a process for the landlord to seek further details before the 30 day period for objection starts.

11.4.2 We do not believe that a landlord's objection to a new entrant on the grounds of inadequate training and experience can be properly answered by a simple commitment to attend and complete a course at a college. It would be very unlikely for a holding save perhaps for a small area of bare land or a single building to be let

voluntarily on such basis and then only to someone known to the landowner for a defined term, not a whole equipped farm let on a secure tenancy.

11.5 Cut-Off Date for Assignation

11.5.1 A cut-off for assignation under the authority of the initial notice is in the interests of certainty for all involved, rather than leaving the issue open indefinitely.

11.5.2 The tenant may feel he is not in a position to market his tenancy to potential assignees until the landlord is no longer able to insist on buying the tenancy although discussions with the landlord may equally continue after the statutory period has expired. The nine months or so from the initial notice to the expiry of the landlord's right to buy may mean that it is impractical for the tenant to have an arms' length assignee in mind from the start.

11.5.3 An unwritten lease may need to be recorded in writing or other issues resolved for it to be marketed. Once on the market, there may be no adequate interest in the way the tenancy is offered. An agreed assignee may fail to find the finance and so a fresh marketing exercise may have to be undertaken. There are times when the land market is slow and lenders' attitudes may be significant. Even when an assignee has been found the procedure with the landlord must be followed and the conveyancing then done. A three year period is suggested as reasonably covering the process with all its possible slips.

12. Possible Consequential Issues

12.1 General

If a 1991 Act tenancy in principle becomes capable of being transferred for money, that has taxation and other consequences.

12.2 Taxation

12.2.1 The tenant is disposing of an asset, whether the tenancy is transferred to the landlord or the assignee. That is liable to CGT as on the disposal of any other asset. That will be due, typically at 28 per cent, on the taxable gain after reliefs. Where lease is assigned within the family, HMRC will impute a market value for it (though it may be possible for the acquirer to claim Holdover Relief where the tenancy has been given to him).

12.2.2 The gain would be assessed by deducting from the disposal value:

- the transactions costs
- any acquisition cost (probably nil at this stage but relevant to an assignee's future assignation)
- the value of the lease in March 1982 if it was held by the tenant then
- any costs in defending title and enhancement expenditure.

12.2.3 It is possible that if the tenant is indeed retiring completely from farming (rather than just one rented part of his business) the disposal may be taxed instead at the 10 per cent rate offered by Entrepreneurs' Relief, available where someone disposes of all or part of business or of the business assets after ceasing business. However, the simple disposal of an asset such as a tenancy of farmland does not, of itself, qualify – as demonstrated by the Tribunal's decision in the Scottish farming case, *Russell*. If the tenant has other farming interests that may require careful planning over the timing of the disposal of the tenancy which may not always be feasible since:

- any disposal before cessation of the business will not qualify.

- any farming after the disposal (exchange of contracts) will exclude that asset from the relief

12.2.4 If the tenant has not given up farming or is moving into another business, he may use Rollover Relief to defer the tax liability.

12.2.5 The acquirer of the lease (landlord or assignee) may have a liability under LBTT.

12.3 Future Issues – Inheritance and Divorce

12.3.1 While it has been clear for many years that an unassignable tenancy has a value (a point a tenant will assert on compulsory purchase), this has been less significant for Inheritance Tax since the rate of Agricultural and Business Property Reliefs (APR and BPR) were increased to 100 per cent in 1992. Any relevant qualification of those reliefs or reduction in that rate could expose a tenant to some tax liability.

12.3.2 The value achieved by the tenant for the tenancy would, as cash, not benefit from any relief from Inheritance Tax beyond the normal nil rate band for all assets, unless it was redeployed into other relievable assets.

12.3.3 Having a clear mechanism by which value can be achieved for a 1991 Act tenancy will open up a range of issues, whether or not the tenant actually assigns.

12.3.4 Interaction with Inheritance - The proposed removal of the distinction between heritable and moveable property for Scottish inheritance law is understood (from a conversation with officials) to lead to the potential division of continuing un-assigned tenancies between heirs where this is necessary to effect the principles of succession – the mechanism for doing that is not clear in writing this. The proposed access to value by the new mechanism would strengthen the pressures for that to happen in seeking equity between the farming heir and other siblings. In some cases, a tenant might prefer to use the s.79 mechanism in the hope of a payment that allows the distribution of money than retain the tenancy as perhaps where there are few other assets.

12.3.5 Divorce - It may also bear on divorce proceedings. Valuers may currently be asked to advise on the value a tenancy in this context but need also to comment that it is a value that cannot be realised. This change would now make that value

available for division should the court wish to do that rather see the tenancy as the source of the business income to fund its award.

Written submission from NFUS

To specifically address the Committee's request for evidence on the proposed Scottish Government amendment on Section 79 (assignation of secure tenancies), NFU Scotland wishes to make the following clarifications.

Firstly, NFU Scotland feels it is vital to highlight that this amendment is a substantial alteration from what was in the initial Bill. Due to the importance of the tenanted sector, the Union has consulted widely with its membership through the consultation stages leading up to the Bill in order that our members are informed about proposals and that our views reflect the views of our membership.

Given the substantive changes proposed to assignation via this amendment it was deemed necessary to undertake an additional period of consulting with our members. This consultation is currently underway via NFU Scotland's network of branches, working groups, Board of Directors, and at our nine Regional AGMs that are taking place throughout the month of January. At NFU Scotland's national AGM on 11/12 February, a panel session with members of the Agricultural Holdings Legislation Review Group will also be held. This activity will assist NFU Scotland in formulating a position that is in the best interest of farmers in Scotland and takes into account all our members views.

Therefore, I wish to confirm that once the Union has gathered the views of the membership, NFU Scotland will be in a position to give a firm view on Section 79 shortly before the Committee's scheduled discussion of Section 10 of the Bill which we understand is probably likely to take place on Wednesday 11 February.

Initial discussions indicate that a consensus amongst farmers on the amendment on Section 79 (assignation of secure tenancies) is unlikely to be achieved. Not all secure tenants who may see a benefit from the suggested change think the same. Not all farmers hold the same view on whether this change will benefit or be to the disadvantage of the tenanted sector. Where there is a consensus is that all farmers want to see a Bill that delivers more land available for rent on a more secure basis. It is important for Scottish farming that this Bill, once made law, is fit for purpose. This Bill is too important to get wrong and we will explain to our members what is being proposed so that they may come to an informed decision.

Written submission from Roxburghe Estates

PROPOSED AMENDMENT TO INTRODUCE RIGHT OF ASSIGNATION FOR 1991 ACT TENANTS

1. INTRODUCTION

1.1 The Roxburghe Estates has significant interests in the agricultural let sector in Scotland. The Estate hosted a visit by the RACCE Committee on 28th September 2015 and this provided an opportunity for the Committee to understand the nature and extent of the different occupational arrangements

in place, the opportunities provided for new entrants and others progressing up the farming ladder and the investment being made on let farms and houses. The visit also allowed an opportunity to discuss the Land Reform Bill and the particular concerns in relation to some of the proposals on agricultural holdings.

1.2 The Committee is inviting further responses on the Scottish Government's proposal to introduce a new assignation process to replace Section 79 of the Land Reform (Scotland) Bill. Accordingly, the Roxburghe Estates is submitting its response to the proposed amendment.

2. OBJECTIVES

2.1 The stated objectives are to allow existing 1991 Act tenants to exit the industry with dignity and security and to increase opportunities for new tenants.

2.2 The Roxburghe Estates supports initiatives aimed at encouraging retirement and creating new opportunities for farm tenants. It has created a large number of opportunities for new entrants to get a foothold in farming and for existing farmers to expand or progress. It has actively encouraged the next generation of farmers to become tenants themselves through joint tenancies in 1991 Act leases, during the retiring tenants lifetime, so enabling smooth transition and security. The Committee were able to meet five new farm tenants on the Estate during the visit on 28th September.

2.3 It is regrettable that, in considering how to increase opportunities for new tenants, the Scottish Government has focused on the preservation of 1991 Act tenancies. Far from increasing the supply of let land, and therefore the opportunities for new tenants, the Roxburghe Estates believes that assignation will reduce the supply significantly.

3. EFFECT OF ASSIGNATION FOR VALUE

3.1 The measures as proposed provide a right for a 1991 Act tenant to assign a lease for value after first giving the landlord the opportunity to acquire the tenant's interest at a value representing 50% of the difference between the value subject to the tenancy and the value with vacant possession. The Roxburghe Estates considers that the majority of landlords will exercise the option to acquire the tenant's interest.

3.2 The cost of acquiring the tenant's interest may be more or less than the value the retiring tenant would derive by assigning the lease, but it would introduce an additional cost nonetheless. Returns from letting land are already low so a further cost would drive investment returns lower still. The prospect of lower returns from letting land, the heightened risk of political intervention to contractual arrangements, loss of confidence and loss of control would lead to the Roxburghe Estates, and most other landlords, choosing to farm land in-hand, to sell with vacant possession, to seek to change the use (particularly forestry in upland areas) or to enter into very short-term occupational arrangements. The availability of land to let on any long term basis would be

reduced significantly. Those opportunities which historically the Roxburghe Estates has provided for new entrants, and for those farmers wishing to expand their farming business, would be denied to the detriment of the farming industry and the agricultural community. The Scottish Government would fail in its objective of increasing opportunities for new tenants.

3.3 In the very limited cases in which assignation were to proceed where a landlord chose not to exercise the pre-emptive right, the process can be expected to create considerable problems and tensions. A fundamental principle of any landlord/tenant relationship is "willing landlord/willing tenant". This principle would be destroyed. The retiring tenant would have no enduring interest and clearly would seek only to secure the highest value possible for their tenancy in the marketplace. By contrast the landlord would be interested in the long term future of the holding not the sum of money being tendered for the lease. It would also impose an additional cost on new entrants trying to get a start in farming and existing farmers seeking to expand. Such a divisive and ill-judged process is completely contrary to the Government's objective of creating a vibrant tenanted sector.

3.4 In light of the foregoing concerns, the Roxburghe Estates would urge the RACCE Committee to challenge the Scottish Government on the assignation for value proposal and to reject it comprehensively. The AHRG concluded that assignation would be self-defeating and not in the public interest and, rightly in the Roxburghe Estates view, rejected it.

Written submission from Dunecht Estates

Submission to the Rural Affairs, Climate Change and Environment Committee (RACCE) on the Government's Proposed Stage 2 Amendment relating to S79 of the Land Reform (Scotland) Bill

Introduction

Dunecht Estates (owned by the Pearson family) is a diverse rural property business based in Aberdeenshire and Kincardineshire. The business is committed to Scottish agriculture and letting farms plays a significant role with 50 units let on 1991 Act secure tenancies and 20 units let on a mixture of Limited Duration and Short Limited Duration tenancies. In addition the Pearson family have their own farming business operating on a large low ground unit at Dunecht (arable, beef and low ground sheep) and extensively in Strathdon (upland sheep).

Dunecht is fundamentally opposed to the Scottish Government's proposed amendment. It seeks to replace S79 of the Bill with a wholly new provision and the proposal will do little to deliver a vibrant tenanted sector. In fact it has every prospect of achieving the exact opposite. Current and prospective landlords will view the proposal as a damaging piece of retrospective legislation that does not balance the interests of the parties. As such it will deliver a crushing blow to confidence to let land going forward and therefore sabotage other proposals in the Bill that are aimed at encouraging letting.

It is especially frustrating that this new proposal is being introduced at Stage 2 without any Stage 1 scrutiny and as a replacement for a recommendation from the Agricultural Holdings Legislation Review Group (AHLRG). As a consequence not only will the proposal be severely detrimental to the health of the sector but there is every prospect that if hurried through the outcome will be bad law that is exposed to successful legal challenge.

Below are Dunecht's comments on the principle of the new proposal and also comments on the detail.

The Principle - AHLRG

The AHLRG (chaired by the Cabinet Secretary) spent many months touring the country, gathering evidence and engaging with stakeholders before presenting its report and recommendations. S79 of the Bill as scrutinised during Stage 1 effectively incorporated the AHLRG's recommendation which it presented in its package of measures for the sector. It is very difficult to see what has changed in the short time since the AHLRG reported and why the 'conversion' proposal has been replaced with an 'assignation' proposal that will see the perpetuation of 1991 Act tenancies. Also the RACCE committee after completing its Stage 1 process did not recommend in its report that 'conversion' as proposed should be replaced with 'assignation'. As such there appears no sound justification for the significant change in direction.

The AHLRG's conversion proposal was designed as a mechanism that would facilitate retirement of 1991 Act tenants thereby creating more turnover in the sector and therefore opportunities for new entrants, expanding businesses etc. Importantly as part of its work the AHLRG looked at the assignation for value model and concluded that the public interest case for it had not been made. Not only did the AHLRG arrive at that conclusion but they also noted that they were not persuaded that any marginal additional incentive in relation to retirement would be significant over that arising from conversion.

It is also relevant to highlight that the AHLRG concluded that the merits of the case for ring fencing 1991 Act tenancies was unclear. Dunecht agrees with that view. Public policy since 2003 has accepted that farms will be let on fixed duration tenancies. If there is a school of thought that secure tenancies are required if production is to be maximised then this calls into question current policy on letting vehicles. There is no-one in the industry seeking the replacement of fixed term tenancies with secure tenancies

Many (including the AHLRG) have recognised that confidence is essential if existing landlords and potential new landlords are to embrace letting. The Scottish Government's readiness to first accept (conversion) and then ignore (assignation) the recommendations of the AHLRG serves to deliver a message that very significantly damages that confidence. As such there is the real prospect that existing landlords will favour short term arrangements and potential new landlords will shy away from the sector altogether. Certainly before progressing with such a change in approach detailed evidence should be taken from the industry on the impact the proposed new measure is going to have.

Conversion vs Assignation

Although the original S79 proposal lacked detail (as identified by the RACCE committee in its Stage 1 report) it imported a principle from the AHLRG's recommendations that has received considerable support across the industry. There is no doubt that it too represented retrospective legislation and a concept that was not in the best interests of landlords but it did deliver on turnover (providing financial incentive to 1991 Act tenants to retire) and thus the creation of opportunity while at the same converting secure tenancies to fixed term vehicles. Essentially S79 as originally introduced had a measure of balance and that was recognised by landlords. That balance has been ignored in the Scottish Government's new proposal.

Dunecht Estates is of the view that conversion is much more likely to achieve the objective of a vibrant tenanted sector. Turnover in tenancies is part of what is required to deliver vibrancy and arguably that turnover will be driven by the price paid by an incoming tenant for the lease. There is no evidence to suggest that a higher price will be paid if acquiring an 'assigned' lease rather than a 'converted' lease. There is a strong argument using financial mathematics principles that the price someone will pay for a long MLDT will be no more than the price someone will pay for a 1991 Act tenancy. The price will be a function of future income streams discounted back to the present day with the discount factor reflecting the risk associated with achieving that forecast income.

As already stressed vibrancy in the sector will also be achieved if there is confidence to let land. Confidence will see existing landlords remaining committed and willing to let using long fixed term vehicles. It will also encourage potential new landlords into the sector. Some have argued that the new S79 proposal will have no effect on the future use of LDTs/MLDTs on the basis that it only applies to 1991 Act tenancies. There is no evidence to support that position and it does not reflect the sentiment that is being expressed in many quarters.

Balance

The new S79 proposal removes the element of balance contained in the original provision. That loss of balance exposes the legislation to a successful challenge under the European Convention on Human Rights (ECHR). While there is an argument that the original proposal is also exposed it is evident that the new provision is much more susceptible to successful challenge. Dunecht is aware that this view has been drawn to the RACCE committee's attention by Scottish Land & Estates and that they have exhibited an Opinion from Counsel to this effect. The RACCE committee raised its own fears in this direction in its Stage 1 Report and the Delegated Powers and Law Reform Committee had similar concerns too.

It will not be in the interests of the let sector and therefore farming generally if poor legislation is enacted and then successfully challenged. Everyone is well aware of the damage (Salvesen v Riddell) that arose as a result of ill thought through provisions introduced in 2003. Every effort should be made to avoid a repeat but the new S79 proposal being rushed through at Stage 2 heightens that real prospect.

Some have accused those who have emphasised the need to comply with ECHR of making threats. That accusation is simply unfair. To do anything other than highlight the matter would be irresponsible. What is key is that property rights are correctly balanced.

It is understood that the option to 'buy out' the tenancy has been included in the proposal to provide a degree of balance and therefore a means to protect the rights of the landlord. However that will be of no benefit to a landlord who does not have the financial means to do so.

Also it must not be emphasised that the proposal is not a right of pre emption. The landlord is not being given the opportunity to match the price being offered by the proposed acquirer of the lease. Instead the proposal is requiring the landlord to pay a price based on a function of the capital value of the farm – a farm that he/she already owns.

The Detail – Valuation Methodology

No sound justification has been given as to why the landlord if exercising the proposed right to buy has to pay a price that is different to that of any acquirer of the tenancy. Also there is no sound basis provided for the price to be a function of the capital value of the farm. If the Scottish Government remains determined to proceed with its proposal then the buy out must be at the same price as that paid by the proposed acquirer ie a true pre emption. This does not prejudice the 1991 Act tenant seeking to assign his/her lease as that is all that he/she is expecting to receive from the proposed incoming tenant. As such it will have no impact on the objective of encouraging turnover.

It is not apparent whether the Scottish Government has conducted any testing of their proposed valuation methodology. If that is not the case then it again highlights the dangers of rushing through complex legislation at Stage 2. For example does the Scottish Government know whether there is any robust evidence to support the valuation of farms that are subject to a 1991 Act tenancy. Dunecht's understanding is that there is very little is any market evidence to support any valuation. Without knowing whether it will be possible to provide the valuations required it makes no sense to be introducing the provision.

If this proposal had been contained in the Bill as originally presented then the RACCE committee could have taken evidence from professional valuers on the methodology. If there is no opportunity to do so to properly consider the Stage 2 amendment then it should be rejected.

Potential Acquirers (Assignees)

The proposal highlights that the potential acquirers will be limited to new entrants or farmers wishing to progress in the industry. The definition of both class of acquirer is unclear and needs to be given considerable detailed thought.

There has been suggestion that the definition of a farmer wishing to progress in the industry will exclude anyone who already has a 1991 Act tenancy. However what if any restriction will be placed on owner occupiers who seek to buy the tenancy. They

could be of any size (and potentially considerable size) and able to demonstrate that they wish to progress in the industry. The same could be said for tenants already farming on a long term LDT. Will they be eligible to acquire a 1991 Act tenancy?

This concern also raises the question of who will determine whether a proposed acquirer meets either definition and whether the landlord will have a right of objection if he/she considers that the proposed acquirer does not fall into either category.

Conclusions

The Scottish Government's proposal to introduce this significant new proposal at Stage 2 should be rebutted by the RACCE committee. Considerable time and effort was expended by the AHLRG on coming up with proposals and the new S79 dismisses their conversion recommendation in favour of something that will be to the prejudice of landlords with the resulting consequence set out in this submission. What is very strange is that the stated objectives of the Bill can be achieved in a far less damaging way by developing an appropriate conversion model – something that all in the industry expected to see as Stage 2 developed. The primary questions for the Scottish Government are what has changed and why proceed with an approach that will not achieve the Bill's objectives? To add the proposal with its lack of balance will expose the Scottish Government to a successful legal challenge.

It is a rushed and cavalier approach with no evidence demonstrating that the Scottish Government has done a full assessment of the likely impact.

Written submission from Cawdor Estate

Written Evidence to the Rural Affairs, Climate Change and Environment Committee (RACCE) on the Government's Proposed Stage 2 Amendment relating to Section 79 of the Land Reform (Scotland) Bill

Introduction

Cawdor Estate provided oral evidence to the RACCE on 7th September 2015. Although this evidence session predominantly concentrated on land ownership in Scotland, questions were asked about some aspects of Agricultural Holdings legislation.

Additionally, Cawdor Estate had previously submitted written evidence in relation to the Land Reform Bill, which included comments on proposed changes to Section 79 of the Land Reform (Scotland) Bill.

We have now taken the opportunity to read and consider the RACCE Stage 1 Report on the Land Reform (Scotland) Bill.

Our written evidence is based on the information available in the public domain.

Cawdor Estate is strongly opposed to the proposed amendment to section 79 of the Bill which would replace the "conversion to MLDT" model with an "assignation for value" model. We have set out our grounds of opposition to the proposal in principle below, both in terms of procedure and content.

Cawdor Estate has endeavoured to contribute to the land reform process. However, as currently drafted, we believe Land Reform (Scotland) Bill, and in particular recommendations from the RACCE on s79 will benefit neither landlords nor tenants.

Procedure

There is insufficient justification or explanation for policy change at this stage of parliamentary process. The measures aimed at allowing 1991 Act tenant farmers to retire have been discussed throughout the land reform process. The "assignation for value" model was specifically considered by the Agricultural Holdings Legislation Review Group and, in its final report, the Review Group stated that the "public interest case for such a change has not been made". The final report was published after the Review Group's thorough review of the tenanted sector over a period of many months, gathering evidence and consulting stakeholders across the country. We would question why the Scottish Government has brought forward a proposal which directly contradicts the findings of the Review Group, with no explanation or justification for the policy change.

At the time that the Agricultural Holdings Legislation Review Group's Report was published, it was made clear by the Review Group that the recommendations were considered to be a "package". This is clear from the Report which states that the "recommendations have been developed as an integrated package, and reflect the interlinked nature of the challenges being addressed". It is acknowledged that the Bill as drafted does not implement the "integrated package" in its entirety. However, the introduction of the "assignation for value" model shows further movement away from the "integrated package". The fact that this measure has been introduced separately at stage two of the parliamentary process makes it clear that the Scottish Government does not support the concept of the "integrated package" and instead views each measure as a stand-alone proposal for amendment. Cawdor Estate does not support this approach and considers it to be detrimental to the land reform process, and more importantly to achieving the aim of a vibrant tenanted sector.

The RACCE Committee's Stage 1 Report makes it clear that section 79 as currently drafted is not acceptable as it does not contain sufficient detail and leaves substantive policy to secondary legislation. We, like others, hoped that the Scottish Government's response would be to provide details on how the conversion provisions would work in practice. Instead, the Scottish Government proposed a new policy. We would reiterate again that we do not consider that there has been sufficient explanation or justification for the significant change in policy at this stage of the parliamentary process. Introduction of proposal at this stage sends a negative message to the industry.

The policy aims of the Bill include increasing the amount of land let and securing a vibrant tenant sector. A significant change in policy following the publication of a stage 1 report (which does not contain any recommendations relating to the proposal) is unlikely to assist with achieving these aims, given that landowners will understandably have no confidence to let land (other than perhaps on a short term basis) as a result. This is entirely the opposite of what our industry is seeking to achieve.

Policy objectives will not be met

Cawdor Estate believes that landowners will be discouraged from letting land on a long term basis with the introduction of the "assignation for value" model. However, there is no evidence to suggest that the Scottish Government has carried out a full assessment on the likely impact of the proposal.

The Scottish Government is seeking to encourage landowners to let land on a long term basis. It is difficult to see why landowners would consider letting land on a long term basis when the Scottish Government has made it clear that they are willing to disregard the interests of landowners who are currently letting land on a long term basis. Significant changes to one type of regulated tenancy will undoubtedly have wide ranging consequences for other types of tenancies and the way in which they are used.

Policy aims can be met by "conversion to MLDT" model which is a less harmful alternative as there is provision for balancing the interests of the landlord and tenant. It could potentially meet the policy objective of allowing tenant farmers to retire where there is not a viable successor. The land would also continue to be let on a long term basis.

The Scottish Government has now rejected the "conversion to MLDT" model in favour of the "assignation for value" model. It is clear that the "assignation for value" model has a significantly larger impact on landlords' rights than the "conversion to MLDT" model. Whereas the landlord's legitimate expectation of recovering vacant possession would be delayed by a fixed period of time by the "conversion to MLDT" model, it could potentially be delayed indefinitely, if not permanently when one considers other proposals for changes to succession by the "assignation for value" model, unless the landlord is in a position to "buy out the tenancy" at the time of assignation. Alternatively, the provisions under the existing legislation to tackle tenants not in complete compliance with their tenancy agreement, specifically in relation to good husbandry are strengthened.

The impact would be even more significant where the current tenant is a partnership and the landlord would, in the majority of cases, therefore expect to gain vacant possession following a change in the partnership (for example on the death of a partner). If the partnership assigns the tenancy to an individual, a lease which previously had a limited duration would become a secure tenancy. The option to "buy-out" the tenancy has been put forward as a way of protecting the rights of landlords and ensuring that the measure is balanced. The "buy-out" option will be of little benefit to landlords who do not have sufficient financial resources, in turn preventing them from "progressing in the industry" themselves, in particular, small landowners who may own one or two and use the partnership vehicle to farm viably.

It is both disappointing and perplexing that the Scottish Government is choosing to pursue the "assignation for value" model when the declared objectives could be achieved in a far less harmful, and therefore more proportionate, way through the "conversion to MLDT" model.

If the Scottish Government does not consider 25 year fixed term tenancies to be conducive to productive farming, then allow freedom of contract for fixed term

tenancies rather than forcing tenants to continue farming into 'perpetuity' which may be the case if a 1991 Act tenancy is of a nature such that it lacks sufficient value to be assigned.

Cawdor Estate strongly supports the concept of fixed term tenancies and is aware of many examples of productive and successful units currently let under limited duration tenancies. This will meet the purported aim of a dynamic tenanted farming sector; something far less likely to be achieved under "assignation for value". Landowners will be more inclined to invest in holdings let under fixed term tenancies due to the certainty involved in the arrangement and the generally more business-like nature of such arrangements.

It is disappointing that this has not been acknowledged by the Scottish Government.

Human Rights Considerations

Throughout the Stage 1 Report, the RACCE Committee highlights the importance of ensuring that the provisions of the Bill comply with the European Convention on Human Rights. In particular, the Committee makes specific reference to human rights considerations and Part 10 of the Bill and the disastrous impact of the Salvesen v Riddell case on the Scottish tenanted sector.

In this matter we defer to submissions made by industry consultants and legal experts. However, we wish to comment that as proposed, there may be a very valid case for claims by landowners in accordance with the European Convention of Human Rights.

Valuation Methodology

<u>Payment to be made by landlord (nature of payment and valuation)</u>

The basis of the payment which would be payable by the landlord to the tenant if the landlord exercised his "right to buy" is not clear from the information provided by the Scottish Government. The current wording states that the landlord can "buy the tenant's interest in the tenancy". There is also a suggestion that the tenant is being "compensated" beyond any rightful way-go claims. We consider it to be fundamental that the nature of the payment is clearly identified and set out. If the nature of the payment is not clear, it will not be possible to ascertain whether the payment is the correct amount.

Valuation methodology based on capital value is flawed. The rationale for this methodology is not clear and we do not consider the capital value of the land to be relevant to the value of the tenancy. The methodology appears to be loosely based on section 55 of the Agricultural Holdings (Scotland) Act 2003 which makes provision for compensation payable to a tenant where a landlord wishes to sell the holding with vacant possession and enters into an agreement with the tenant. The compensation is half the difference between the estimated value of land if sold with vacant possession and the estimated value of the land if sold with a tenant in occupation. We are aware that some believe that the proposed methodology will always result in a 1991 Act tenant receiving a higher payment from the landlord than would be received from an incoming assignee. If that is the case, in effect the landlord would

be paying a premium rather than paying the same price as an incoming assignee which breaches the principle of fairness. However, given the lack of modelling carried out in connection with the methodology, it is currently not possible to make a definitive statement on this issue.

Even if the basis of the payment is accepted, there are other significant concerns regarding the valuation methodology. It requires a value for land with a 1991 Act tenant. However, there is virtually no market for acquiring or buying an individual holding with a 1991 Act tenant. There is a commonly held assumption that the value of land with a 1991 Act tenant is 50% of the value of the land with vacant possession. However, we believe this is closer to 30% of the value of the land with vacant possession or lower. The methodology is based on the assertion that a valuation can be obtained for the land with a 1991 Act tenant but we query whether such a value can be fairly obtained, given the differing views in the industry and the lack of evidence.

We note that the deemed value of the land with a 1991 Act tenant will depend upon the likelihood of a successor. It is not clear how the "likelihood" of a successor will be determined. There will be circumstances where there is in theory a successor but, in reality, there is no individual willing to farm the holding. Establishing a valuation on the "likelihood" of a successor will be highly subjective and open to challenge.

Furthermore, assuming that the "assignation for value" model would be introduced along with the provisions relating to the widening of succession (which we understand is what is proposed), there will be few tenancies where a theoretical successor cannot be identified. The value of the land with a 1991 Act tenant is therefore likely to be low, which means that the sum payable by the landlord to the tenant (based on the difference in the value of the land with a 1991 Act tenant and the value of the land with vacant possession) will be high.

If the value of the tenant's improvements is not deducted as part of the calculation, the value will be double-counted as the tenant will also be paid way-go compensation for the improvements. We note that account is to be taken of way-go compensation in the valuation figure. Any claims which the landlord has against the tenant should also be factored into the calculation.

Class of Potential Assignees

The ability to assign will be restricted to assignees who are "new entrants" or "farmers wishing to progress in the industry".

We assume that the definition of "new entrant" will follow the definition used for the purposes of the Common Agricultural Policy, though clarity on this point is required as soon as possible.

The definition of a "farmer wishing to progress in the industry" is less certain. Anti-avoidance rules will also need to be carefully considered in this area. For example, where the lease is in favour of the father and the son is employed on the holding, could the son qualify as a "farmer wishing to progress" even though both farms will, in practice, be operated together? We anticipate that it would be very difficult to

ensure that the provisions are used only by those who the Scottish Government is seeking to assist with this measure.

At this stage, given the level of detail and modelling, it is difficult to comment on the likely value of tenancies in the open market. However, if the values are high, we would question how a "new entrant" or a "farmer wishing to progress" in the industry will be in a position to pay the outgoing tenant, particularly given the other capital inputs which will be required. In the event that the market value payable by potential assignees for tenancies is low (which is likely where the holding is smaller), it seems that the tenant will have little incentive to use the provisions. Instead the tenant may choose to remain on the holding (we refer here to the other reasons why a tenant farmer may choose not to retire, including not wanting to give up farming or their family home) or simply approach the landlord with a view to reaching agreement outwith the legislation.

The definition of "farmer wishing to progress" lacks clarity and at this stage the only criterion which has been identified for the definition of a "farmer wishing to progress in the industry" is that the farmer may not hold a 1991 Act tenancy of another holding. Our view is that this requirement alone would not sufficiently restrict the definition.

Additionally, it does not aid the furtherance of the Scottish Government's aims as a farmer could be owner occupier of a large holding but still seek to obtain a 1991 Act tenancy via the "assignation for value" model. Also, there are many 1991 Act Tenancies already in existence which can no longer be regarded as viable units, albeit being so when issued at the turn of the last century. The definition as drafted would prevent these tenants from "wishing to progress" and extend their holding by virtue of their existing lease.

The definition of a "farmer wishing to progress in the industry" should exclude farmers who own or lease a viable unit elsewhere, regardless of tenure. Alternatively, consideration could be given to restricting assignation to those who farm a holding with a Standard Labour Requirement below 1.

Process for determining who is a "new entrant" and a "farmer wishing to progress in the industry" needs to be established. It is not clear at this stage what the process will be for determining whether a farmer meets the criteria of a "new entrant" or a "farmer wishing to progress in the industry". There appears to be a risk that the policy objective will be undermined by both the landlord and the tenant having an interest in the assignee being as established in the farming industry. From the landlord's perspective, an assignee who is well established means that the farming enterprise is more likely to have access to sufficient resources and, from a tenant's perspective, it means that the assignee will be in a position to pay the highest sum for the tenancy. There would therefore be a need for the identity of assignees to be monitored independently and we suggest that this responsibility should be placed with the relevant Scottish Government department. A procedure would need to be established which requires current or prospective tenant farmers to make a pro-active application to the Scottish Government in order to determine that they meet the criteria. If a tenant farmer meets the criteria, he would then be eligible to be an assignee (subject to the other requirements of the legislation, including the landlord's right to object).

Way-go Process

Cawdor Estate understands that way-go under the "assignation for value" model is a 2 stage process – the tenant will obtain an independent valuation of the sum they will be awarded at the end of the tenancy and they can then consider it with no commitment. We understand from the Scottish Government's Response to the RACCE Committee's Stage 1 Report that the Government does not intend to bring forward the two stage way-go process for wider implementation. We believe it imperative to have consistency across the sector to aid clarity for all parties rather than different way-go processes applying depending on the circumstances.

Concluding comments

Cawdor Estate does not consider there to have been sufficient justification, consultation or explanation for the change in policy by the Scottish Government at this late stage of the parliamentary process. The proposed amendment to section 79 directly contradicts the findings of the Agricultural Holdings Legislation Review Group which were set out clearly in their Report following extensive consultation. It also shows that the Scottish Government does not appreciate that the proposals contained in Part 10 should be viewed as a package and cannot be considered alone.

The "assignation for value" model would have significant consequences for many aspects of the tenanted sector and the use of other types of letting vehicles. The lack of any kind of detailed impact assessment by the Scottish Government means that the full extent of the consequences have not been identified but the proposal will act as a strong disincentive to landowners to let land on anything other than on a short term basis.

The Scottish Government is seeking to encourage landowners to let land on a long term basis and wishes to see a vibrant tenanted sector which actively encourages new entrants. In order to achieve both objectives, there requires a need to protect the rights and interests of landowners who currently let land under secure agricultural tenancies. We anticipate that the impact of this measure would be the reduction of land let on a long term basis.

In addition, we believe there is a high probability that the "assignation for value" model will not actually achieve its stated aims of providing opportunities for new entrants and progressing farmers because in most cases tenancies will be sold 'off-market' and to the highest bidder rather than the most capable. There is no mechanism which prevents tenants already operating quasi sub-letting arrangements through stubble-to-stubble mechanisms from assigning their tenancy for value or acquiring additional land through this method. Additionally, it does not address those tenants not complying with codes of good husbandry. There would be no opportunity for the landowner or indeed the incoming tenant to claim dilapidations, leaving all parties aside from the outgoing tenant in a poorer position.

Additionally, the landlord has no relationship with the incoming tenant, does not know whether they are capable of managing a successful farming business, or indeed whether they have the financial capacity to run a business and pay a rent.

The Cawdor Estate firmly believes that the "conversion to MLDT" model or a tenancy allowing complete freedom of contract could deliver the policy objectives of this section of the Bill far more successfully than the "assignation for value" model. The "conversion to MLDT" model would deliver a more positive message to the industry about the value of fixed term tenancies of a significant duration, thus encouraging landowners to let land because they would have the certainty of being able to regain possession of the holding at a fixed date if required. Furthermore, the "conversion to MLDT" model would be less detrimental to the landlord's interests than the "assignation for value" model. The tenant's rights would clearly be improved from their present position as a result of being able to capitalise on their work and retire. However, the landlord would have a reasonable expectation of recovering possession of the holding following the fixed term and is more likely to wish to invest in the holding with the tenant, and the measure would therefore be less likely to be challenged on human rights grounds, thus delivering more stability and certainty for the sector. We firmly believe that the "assignation for value" model is not proportionate or balanced.

In summary, we believe that the proposal as drafted is counterproductive to the Bill's aims, will not assist new entrants or expansion of successful units, and moves further away from compliance with the European Convention on Human Rights.

Planning applicants looking to take advantage of legislation for building development linked to forestry/agricultural land management should demonstrate the need and sustainability to the Planning Departments and local community, showing that the application is not solely based on a desire to increase land value or for personal gain.

The appointment of an independent party in order to carry out a feasibility study could achieve this objectivity.

Sporting rates

Any landowner deriving any income from shooting on their land should have an obligation to pay sporting rates.

Deer Management

The current deadline of 2016 for the formulation and presentation of Deer Management Plans should be brought forward in order to ensure the proper balance of culling and conserving biodiversity of any given area. The current voluntary Deer Management Code of Practice (2012) has not encouraged enough land managers to present their plans.

Engagement of Deer Panels with local communities, and a legal requirement to produce plans, would be an essential component in Management transparency.

Landowners who choose not to deploy deer fencing because they intend to raise revenue from stalking should be considered as running a sporting estate whether or not they maintain a herd and provide supplementary winter feed.

Core Path and open access

Core paths should satisfy the basic needs of local people. These needs encompass a wide range of outdoor activities, including horse riding mountaineering and walking with or without dogs.

Clarification of access points and a formation of core path networks and clear signage should form part of the Reform Bill.

Written submission from Kincardine Estates

ASSIGNATION FOR VALUE

This measure will be disastrous for the supply of rented land. No landlord will ever trust that a future Scottish Government will not change the rules with retrospective legislation on other types of agricultural tenancy.

If you translate this arrangement from farming to a simple property lease and were to give tenants the right to assign for value you would kill off the supply of rented housing very swiftly.

The stated aim of the Scottish Government is to have a vibrant agricultural tenancy sector. The proposal will completely undermine that aim.

Written submission from Somerled Notley

Development of Agricultural Tenants' Rights Since 1948

As a solicitor with many years' involvement in agricultural law and the author of the most recent book on the subject, I have been watching closely the progress of the Land Reform Bill and in particular Part 10 of the Bill. I read with great interest Rob Gibson's recent article in Common Space on the subject of the Bill in which he maintains that there has been a shrinking of agricultural tenants' rights since 1948; this is an interesting contention which follows upon similar comments by Mike Russell and which I think is worthy of some detailed analysis. In this regard, I have been fortunate in having practical experience of working with all the legislation to which I refer below.

1948 was indeed a year of great note for agricultural tenants as it saw the passing into law of the Agriculture (Scotland) Act which introduced full security of tenure for agricultural tenants and offered the prospect of potentially perpetual tenancies passing down the generations. This Act was a reaction by the Labour Government of the time to concerns over the shortcomings in food production exposed by the Second World War and the Act was a central element of the strategy to address this through encouraging investment in more efficient and productive farming at a time when the industry was also a major rural employer. It is fair to say that until 2003, the 1948 Act represented a high point for protection of the interests of agricultural tenants.

Between 1948 and 2003, there were various amending measures passed into law which were generally aimed at achieving a sustainable balance between the interests of agricultural landlords and tenants. The Agricultural Holdings (Scotland) Act 1949 re-enacted the 1948 Act along with surviving provisions from earlier agricultural holdings legislation and was therefore no more than a consolidating Act. The main amending legislation was:

1. The Agriculture Act 1958 which (a) enabled a landlord to give a successor to a deceased tenant an incontestable notice to quit, (b) transferred some quasi-judicial functions from the Secretary of State to the Scottish Land Court (most notably the granting of consent to operation of notices to quit where consent was required) and (c) made clear that rent reviews were to be on an open market basis;

2. The Succession (Scotland) Act 1964 which enabled a deceased tenant's executor to transfer the tenancy to a next of kin acquirer where the tenant died without making a Will or an effectual bequest of the lease;

3. The Agriculture (Miscellaneous Provisions) (Scotland) Act 1968 which (a) made provision for one of the near relatives of a deceased tenant (i.e. at that time, the tenant's spouse and children) to succeed to the tenancy provided the landlord did not within a specified period, establish one of certain strictly limited grounds for consent to operation of a notice to quit, (b) introduced reorganisation compensation, an additional payment payable to the tenant on quitting the holding where the landlord recovered possession for a non-agricultural purpose without being able to establish personal hardship and (c) provided for compensation for loss of profits where a tenant had land resumed at short notice;

4. The Agriculture (Miscellaneous Provisions) Act 1976 which included provisions introducing certain safeguards for tenants in respect of demands on tenants to remedy defects in fixed equipment and notices to quit following upon these; and

5. The Agricultural Holdings (Amendment) (Scotland) Act 1983 which (a) provided, for tenancies entered into on or after 1 January 1984, extended and amended grounds for a landlord obtaining consent to operation of a notice to quit given to a near relative successor, (b) qualified the open market basis for review of rent by allowing certain external factors to be taken account of where the open market had become distorted or difficult to apply e.g. due to a scarcity of lets or of comparables, (c) gave the Land Court an appellate jurisdiction in the case of rent reviews determined by arbiters and (d) reduced the minimum period between rent reviews from 5 to 3 years.

The Agricultural Holdings (Scotland) Act 1991 consolidated the provisions of the 1949 Act with the amending legislation without making any further material amendments. As can be seen from the above, the various provisions amending the 1949 Act in some cases tended to favour landlords, in other cases tended to favour tenants and some changes were largely neutral in effect. Overall, it can reasonably be stated that the 1991 Act did not represent material shrinkage in tenants' rights from the tenants' rights set out in the 1949 Act.

Of course the 2003 Act and subsequent amending provisions have strengthened further the tenants' position. Specifically, provisions:

(a) Giving tenants the prospect of purchasing their holdings by providing for a tenants' pre-emptive right to buy,

(b) enabling diversification to give tenants more control over the use of their holdings and to enhance profitability,

(c) preventing the avoiding of security of tenure by not allowing creation of new partnership (including limited partnership) tenancies,

(d) preventing future reduction of landlords' fixed equipment obligations and compensation liabilities by removing the availability of new post lease agreements and new compensation write-down agreements,

(e) removing landlords' veto on lease assignation by providing for assignation to any suitable next of kin,

(f) strengthening rights of succession by widening the definition of near relatives who could succeed to the tenancy and amending grounds on which the landlord could recover possession,

(g) restricting landlords' irritancy (lease forfeiture) rights and

(h) providing tenants with a right to withhold rent in certain circumstances,

have resulted in agricultural tenants now having more rights than ever before and Part 10 of the Land Reform (Scotland) Bill offers the prospect of further significant measures extending tenants' rights; and this somewhat ironically at a time when mechanisation and changes in farming methods have resulted in far fewer people being employed in the industry now than on introduction of security of tenure in 1948 and when the drive now is towards reduction of production rather than increase. Furthermore, there seems now to be an impetus to go beyond and even to depart from, the recommendations of the Agricultural Holdings Legislation Review Group set up in 2014 under the Chairmanship of Richard Lochhead. This Group tried very hard to produce a Report last year which recommended a package of measures to address issues within the industry while striking a balance between tenants' and landlords' interests with a view to helping to secure a better and sustainable future for the tenant farming sector, so its recommendations should attract considerable respect.

I would conclude that the agricultural tenants' rights contained in the 1991 Act taken along with those introduced by the 2003 Act result not in a shrinkage of tenants' rights since 1948 as Rob Gibson and Mike Russell maintain, but rather in a significant increase, with the prospect of Part 10 of the Land Reform Bill strengthening the tenants' position yet further.

Annexe B

CORRESPONDENCE FROM THE SCOTTISH GOVERNMENT TO THE RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE DATED 27 JANUARY 2016

Land Reform (Scotland) Bill: Stage 2 amendments: introduction of repairing tenancies

As we stated in the Scottish Government's response to the RACCE Committee's Stage 1 report, we are bringing forward Stage 2 amendments to introduce a modern repairing tenancy. This was a recommendation of the Agricultural Holdings Legislation Review Group (AHLRG), and was supported both by the Committee and by our key stakeholders.

These amendments are being lodged today and the Committee will be able to see the full detail of the provisions, but I thought it might also be helpful to briefly set out the main features of the repairing tenancy:

- As recommended by the AHLRG, a repairing lease will have a duration of at least 35 years. It will begin with a 'repairing period', which is the period of at least 5 years from the commencement of the tenancy. (The length of the repairing period is agreed between the parties.) The intention is that the tenant use the repairing period to bring the holding up to a standard that enables it to be farmed effectively.

- During the repairing period the tenant is not liable to maintain the land in accordance with the rules of good husbandry. This reflects the fact the holding may not be capable of being farmed in accordance with them. They are however, expected to improve the holding so that it can be maintained *after* the repairing period in accordance with the rules of good husbandry.

- During the repairing period the tenant is (unless the tenant and the landlord agree otherwise) responsible for providing and maintaining all the fixed equipment the tenant will need to be able to farm the holding efficiently.

- After the repairing period the tenant is still responsible for maintenance of fixed equipment, but the landlord is responsible for any renewal or replacement. The tenant and landlord can agree to apportion responsibility differently if they prefer. This is consistent with the provisions for MLDTs.

- The lease may include a break clause, which allows the tenant to terminate the lease at any time up to the end of the repairing period. This is to provide the tenant with a way out if they decide that continuing with the full lease length would not be manageable (for example, if the condition of the holding turns out to be worse than the tenant feels is feasible for them to bring up to standard). The landlord, by contrast, may only terminate the lease under a break clause at the end of the repairing period. The grounds on which the landlord can terminate under the break clause are the same as those for an MLDT break clause, except that they will not be able to terminate on the grounds that the tenant has not been farming in accordance with the rules of

good husbandry (because good husbandry requirements are disapplied during the repairing period).

- The rent for a repairing tenancy must be set using the rent review process in Chapter 4 of the Bill, in line with the AHLRG's recommendation that repairing leases be required to apply the new rent provisions.

- The tenant may assign the lease during the repairing period, if the landlord consents. The landlord may withhold consent if there are reasonable grounds for doing so. These grounds are comparable to those for MLDTs (adjusted slightly to reflect the specific nature of repairing leases), with an exception: the landlord may not object on the ground that the proposed new tenant lacks the necessary skills or experience if the tenant is undertaking (or about to start) relevant training, and has made arrangements to make sure the land is farmed appropriately in the meantime. This exception is made in recognition of the fact that repairing leases may present a particularly good opportunity for newer farmers to establish themselves in the sector. After the repairing period, the same assignation rules apply to repairing leases as to MLDTs.

- When a repairing lease expires, unless the parties terminate the lease it will continue on tacit relocation for a period of 7 years. This is in line with the proposed continuation term for MLDTs. (As the Bill currently stands, the continuation period for MLDTs is 10 years. However, following calls from stakeholders for it to be reduced we are bringing forward an amendment to change it to 7 years.)