SPICe Briefing
Agricultural Holdings (Amendment) (Scotland) Bill

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Cattle in snow. Photo: remem / istock images
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**PROVISIONS OF THE AGRICULTURAL HOLDINGS (AMENDMENT) (SCOTLAND) BILL**

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EXECUTIVE SUMMARY

Agricultural holdings legislation has undergone a series of changes since the first Agricultural Holdings Act in 1883 giving tenants greater security of tenure and rights to compensation for improvements. However, these changes and other developments may have impacted on landlords’ willingness to let land and one of the main concerns now is the lack of opportunities for new entrants. The Agricultural Holdings (Scotland) Act 2003 (the 2003 Act) established two new types of lease which give greater flexibility of contract than traditional agricultural tenancies. The effects of these changes are still being assessed.

The Tenant Farming Forum (TFF) is an industry-led body made up of the following members: NFU Scotland, RICS Scotland, Scottish Land and Estates, Scottish Tenant Farmers Association, Scottish Association of Young Farmers. It was set up after the 2003 Act to facilitate debate about matters of common interest to landowners and tenants and to improve relationships. The Cabinet Secretary for Rural Affairs and the Environment asked the TFF to look into what further changes were needed to agricultural holdings legislation to encourage the release of land to rent. The TFF came up with a list of proposals, most of which were implemented through secondary legislation (The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011) (the 2011 Order).

The Agricultural Holdings (Amendment) (Scotland) Bill aims to introduce changes which for legal reasons, could not be included in the Order, and a third technical change relating to VAT.

The changes proposed by the Bill are as follows:

**Definition of near relative**

Section 1 of the Bill would amend the definition of “near relative” to include grandchildren of a deceased tenant. The definition of a near relative is important when a “notice to quit” is served on the death of a tenant. Where the successor is a “near relative” of the tenant they can serve a counter notice which means that Land Court consent is required for the Landlord’s notice to be operated. The amendment made by section 1 would apply to tenants who die on or after the day on which section 1 comes into force (it will not be applied retrospectively).

**Provisions relating to rent review**

Section 2 of the Bill would prohibit upward-only and landlord-only initiated rent reviews. While an aim of the 2003 Act was to introduce more flexibility to the rent review provisions for the new tenancy types, an unforeseen consequence has been that some shorter term leases contain rent review clauses that only allow an increase in rent or must be initiated by the landlord. These are clearly advantageous to the landlord and they are considered a result of the imbalance in the bargaining powers between the landlord and the tenant. The prohibition would only apply to new leases and not to those agreed before the Bill comes into force.

Section 3 of the Bill makes clear that a change in VAT should not count as a variation of rent. This is important when a landlord or tenant is seeking to have the rent payable determined by
the Land Court. Landlords and tenants cannot ask the Land Court to determine rent within three years of the last variation of the rent. It is considered that when rent changes due to exercise or revocation of the option to tax land with VAT or a change in the rate of VAT, it should not prevent reference to the Land Court to determine the rent. There have been no cases in Scotland where variations in VAT have prevented reference to the Land Court. However, in a recent English case it was judged that VAT did form a part of the rent and therefore constituted a variation of the rent so preventing another rent review for three years from the date of change in the VAT rate. This section could be applied retrospectively.

The provisions of the Bill have been agreed by the TFF though, with the exception of Scottish Land and Estates (SLaE), members believe section 1 should be applied retrospectively. Other responses to the Scottish Government consultation on the draft Bill were in most cases positive about the provisions, though two private individuals did not support the changes. The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 was scrutinised by the then Rural Affairs and Environment Committee who expressed disappointment that the provisions now making up section 1 and section 2 of the Bill were not included in the Order. Section 3 of the Bill has also been discussed by the TFF following the case in England and they agree it should form a part of the Bill though it was not in the original package of recommendations.
BACKGROUND TO THE BILL

This section describes previous changes to agricultural holdings legislation, outlines the tenanted sector in Scotland and describes the development of the Bill.

AGRICULTURAL HOLDINGS LEGISLATION

The Agricultural Holdings (Scotland) Act 1883 was introduced with the policy aim of trying to enhance the productiveness of agricultural land by encouraging tenants to maintain good husbandry of the land and enabling them to receive returns from improvements (Notley 2009). Since then there have been a number of new pieces of legislation. The Agricultural Holdings (Scotland) 1991 Act (the 1991 Act) and the Agricultural Holdings (Scotland) Act 2003 (the 2003 Act) are of primary relevance.

The 1991 Act

The Agricultural Holdings (Scotland) Act 1991 is a consolidating Act based on the Agricultural Holdings (Scotland) Act 1949 and incorporating amendments from subsequent pieces of legislation. The main policy aims are to maintain security of tenure by restricting the conditions under which notices to quit can be served; to compensate the tenant for improvements; and to provide rules about rent variations including a periodic right to a rent review. Following the 1991 Act, the following leases were available:

- Full agricultural tenancies with security of tenure and succession rights (referred to as secure tenancies or 1991 Act tenancies);
- “Section 2” lets for less than a year, approved by the Scottish Ministers;
- Grazing or mowing lets for less than a year.

However, in order to avoid establishing secure tenancies, landlords increasingly used “limited partnerships” as permitted under the Limited Partnership Act 1907. This allowed a tenancy to be granted to the Limited Partnership between the landowner (the limited partner) and the farmer (the general partner) which would run for an agreed period. The limited partner contributed a (usually small) sum of capital which was the extent of their liability for the Limited Partnership’s debts. The general partner ran the farm and bore the rest of the costs. Between the mid-1970s and the late-1990s, these became the most popular tenancy arrangements making up 41% of new leases and 47% of the area let (Stockdale et al. 1996). Limited Partnerships had the disadvantage to tenants that they lacked security of tenure and the landlord had access to their business information. In addition, they were mainly set up by those already renting land rather than helping to attract in new entrants (ibid.). However, they were praised for their flexibility e.g. Ravenscroft (1999) recommended them as a model other countries might wish to emulate.

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1 Where a landlord serves a notice to quit, a tenant can serve a counter notice. The landlord must then refer to the Land Court to determine whether the notice to quit is valid. It is likely to be judged so only under specific circumstances e.g. where terminating the tenancy is desirable in the interests of good husbandry or that greater hardship would be caused by not terminating the tenancy.
The 2003 Act

The Agricultural Holdings (Scotland) Act 2003 was developed as a part of the then Scottish Executive’s Land Reform Programme. The Land Reform Policy Group (LRPG) made suggestions for changes to the legislation which were developed by the Landlord and Tenant Consultative Panel (the National Farmers Union of Scotland (NFUS) and the Scottish Landowners Federation (now Scottish Land and Estates (SLaE)) and the Scottish Law Commission. These proposals eventually formed the basis of a Scottish Executive White Paper which itself formed the basis of the draft Agricultural Holdings (Scotland) Bill, published for consultation in April 2002. A SPICe briefing on the Bill as introduced (Edwards 2002) describes the background to this process.

During the passage of the Bill further substantial amendments were introduced and the final 2003 Act is therefore more far-reaching than had been envisaged at the time of the White Paper (TFF 2007) and introduced significant changes to the law around tenancy. More details on the 2003 act are available from Notley (2009) and TFF (2007).

The 2003 Act introduced the following changes:

New Tenancy types

In order to allow more flexible tenancy arrangements, two new fixed-term tenancy types were established— Limited Duration Tenancies (LTDs) (section 5) which had a minimum length of 15 years and no maximum, and Short Limited Duration Tenancies (SLDT) (section 4) with a maximum length of 5 years and no minimum. In addition, changes were made to grazing or mowing lets which must now be done under the provisions of the 2003 Act (section 3) requiring them to be not longer than 364 days with one clear day in between lets. The Act prevents the setting up of new Limited Partnership leases by enabling the General Partner to become the tenant in their own right instead of the Limited Partnership under certain circumstances, for example where a tenant was served a notice to quit over the relevant period. New 1991 tenancies can still be entered into (section 1) though they are likely to be rare.

Diversification

The 2003 Act introduced greater rights for tenants to diversify: an agricultural tenancy may still be described as such even where part of the land or buildings are not put to agricultural use. While the tenant has to seek landlord permission for diversification, the landlord can only object on specific grounds and the Land Court will decide whether these are reasonable. In addition, while traditionally landlords retained the rights over forestry, after 2003, tenants have the right to harvest timber they have planted. The definition of good husbandry has been changed to include conservation activities and diversification.

Right to buy

The most controversial area of the 2003 Act was the introduction of a pre-emptive right to buy for secure tenancies. This means that if a landlord wishes to sell their land, they must offer the tenant first refusal if the tenant has registered an interest in buying the land. If a price cannot be agreed between the landlord and tenant an independent valuation is undertaken. There is a

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2 S. 72(3) allows for tenants to claim sole tenancy where a notice of dissolution of the partnership was served after 16 September 2002. This was upheld by Salvesen v Riddell. In the judgement Lord McGhie expressed his criticism of the retrospective nature of the legislation. The case is currently under appeal.
right of appeal to the Lands Tribunal of Scotland if one of the parties does not agree with the independent valuation. Many tenants are interested in buying their farm. 1,380 successful registrations\(^3\) of interest have been recorded with the Registers of Scotland. While some landlords opposed the right to buy, some tenants believed a pre-emptive right to buy did not go far enough and proposed an absolute right to buy the holding at any time.

**Dispute Resolution**

Prior to the 2003 Act, agricultural holdings legislation disputes had to be resolved by arbitration. The main criticism of this mechanism was that the detailed arbitration rules and procedures meant that it could end up being a lengthy and expensive process. The 2003 Act changed the main dispute resolution mechanism to reference to the Land Court. There is provision for landlords and tenants to agree to have a dispute resolved by “any other method of resolving the matter” which could include arbitration or less formal methods such as mediation if both parties agree.

**Fixed Equipment\(^4\)**

The responsibility on the landlord to provide and thereafter renew and replace fixed equipment and the tenant’s obligation to maintain fixed equipment was followed in LDT’s and SLDT’s, although changes were introduced by the 2011 Order (see below). New post lease agreements, where a tenant agreed to take on the landlord’s responsibility to replace and renew fixed equipment, can no longer be entered into and existing post lease agreements may be set aside if the appropriate notices are served by a tenant prior to a rent review.

**Rent reviews**

There are no statutory provisions for rent reviews for SLDTs and no compulsory statutory provisions for LDTs so the parties have more flexibility to agree the review terms in the lease. If the LDT lease does not mention rent reviews, then the statutory provisions in the 2003 Act will apply. These provisions are similar to those in the 1991 Act so the rent can be reviewed every three years.

**Assignation**

Secure tenants are given the right to assign their leases which means that family members entitled to succeed to the interstate estate\(^5\) (spouse, civil partner, children, grandchildren, siblings, nieces and nephews) can take over before the tenant’s death. The landlord has a right to object. LDT tenants may assign their leases to anyone but the landlord may object and there is provision for the landlord to acquire the tenant’s interest in the lease instead of the proposed assignee. SLDT tenants cannot assign their leases.

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\(^3\) This is the total number of registrations. Some have been removed and others have expired (they expire five years after registration)

\(^4\) Fixed equipment includes permanent buildings, field boundaries, ditches, water and sewerage systems.

\(^5\) Those entitled to succeed in the case that no will is left.
The 2011 Public Services Reform Order

The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 (the 2011 Order) introduced a number of changes to the 2003 Act as recommended by the Tenant Farming Forum (TFF) (see below). The main changes are to the two new types of tenancy introduced by the 2003 Act. Specifically, section 5(1) of the Act is amended to reduce the minimum term of a LDT from 15 years to 10 years and section 5(2), which allowed for the conversion of an SLDT which had run for 5 years to a LTD, has been changed to allow conversion at any time. The other changes seek to remove ambiguity from the legislation to reduce the potential for disputes. They include substitution of the definition of a “two-man unit” to a “viable unit”; annulment of post lease agreements; re-instating some wording inadvertently deleted by the 2003 Act relating to giving notice in writing of intention to seek Land Court determination of rent review; and changes to the rules on recording fixed equipment. A TFF information note describes the changes and the reasons they were introduced in more detail.

THE TENANTED SECTOR

Area of land rented

Graph 1 shows the area of land owned and rented from 1982 to 2011. It is evident that there has been a long term decline in the area of land let through traditional agricultural tenancies. The 2003 Act appears not to have had the desired effect of increasing the area of land rented.

Graph 1. Land rented and owned (million hectares). Source: Scottish Government (2011a)

Types of tenancies available

Overall the total number of tenancy agreements has decreased. Between 2005 and 2011, there was a reduction of 10% (727) in the number of holdings with tenancy agreements. The data
shows the number of SLDTs and LDTs has increased (by 213 and 201) and the number of 1991 tenancies and Limited Partnership tenancies has decreased (by 791 and 333). A large decrease in Limited Partnerships is seen between 2008 and 2009. The increase in 1991 Act Tenancies in that year, suggests some conversion between these tenancy types. The small increase of Limited Partnerships between 2006 and 2007 is likely to be due to the assumptions made when no data is provided – see below.

The Scottish Government states that in 2005 and 2006 a considerable number of respondents to the June Survey (from which this data was gathered) did not confirm their tenancy types. An assumption was made that these were highly likely to be secure 1991 Act Tenancies. Since 2007, the majority of respondents who did not specify their tenancy types have been contacted for confirmation of their tenancy type. The trends before and after 2007 seem fairly consistent, therefore the Scottish Government suggests that the assumptions made for missing data in 2005 and 2006 were fairly reliable.

Table 1. Agricultural Holdings with Tenancy Agreements. Source: Scottish Government (2012)

<table>
<thead>
<tr>
<th>Tenancy Type</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Short Limited Duration Tenancy (SLDT)</td>
<td>285</td>
<td>316</td>
<td>344</td>
<td>431</td>
<td>442</td>
<td>447</td>
<td>499</td>
</tr>
<tr>
<td>Limited Duration Tenancy (LDT)</td>
<td>99</td>
<td>119</td>
<td>166</td>
<td>204</td>
<td>242</td>
<td>262</td>
<td>301</td>
</tr>
<tr>
<td>Small Landholders Act (SLA)</td>
<td>70</td>
<td>91</td>
<td>94</td>
<td>101</td>
<td>96</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total 91 Act Tenancy and Ltd Partnership</td>
<td>7,172</td>
<td>7,049</td>
<td>6,804</td>
<td>6,546</td>
<td>6,399</td>
<td>6,216</td>
<td>6,048</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>91 Act Tenancy</td>
<td>6,348</td>
<td>6,308</td>
<td>6,051</td>
<td>5,795</td>
<td>5,851</td>
<td>5,722</td>
<td>5,557</td>
</tr>
<tr>
<td>91 Act Ltd Partnership</td>
<td>824</td>
<td>740</td>
<td>753</td>
<td>750</td>
<td>548</td>
<td>494</td>
<td>491</td>
</tr>
<tr>
<td>All tenancies</td>
<td>7,557</td>
<td>7,484</td>
<td>7,384</td>
<td>7,272</td>
<td>7,177</td>
<td>7,026</td>
<td>6,943</td>
</tr>
<tr>
<td>Holdings with Tenancy Agreements</td>
<td>7,470</td>
<td>7,385</td>
<td>7,202</td>
<td>7,096</td>
<td>7,010</td>
<td>6,841</td>
<td>6,743</td>
</tr>
<tr>
<td>Total Holdings in Scotland</td>
<td>51,136</td>
<td>51,361</td>
<td>51,365</td>
<td>51,489</td>
<td>52,034</td>
<td>52,314</td>
<td>52,543</td>
</tr>
<tr>
<td>Percentage of Holdings with Tenancy Agreements</td>
<td>14.6%</td>
<td>14.4%</td>
<td>14.0%</td>
<td>13.8%</td>
<td>13.5%</td>
<td>13.1%</td>
<td>12.8%</td>
</tr>
</tbody>
</table>

1. Holdings can have tenancies of different types, which is why the 'All tenancies' total is slightly higher than the number of 'Holdings with Tenancy Agreements'.
2. Crofts and seasonal rents of less than 365 days are excluded from this table.

Contract Farming

While traditional agricultural tenancies are declining, it has been suggested that contract farming arrangements are increasing. Graph 2 shows the number of person working days contracted out between 2004-2011.

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6 Where a farmer contracts out some, or possibly all, operations on short term contracts to external contractors who operate on a piece work rate but do not share in any of the residual profit.
While the graph shows no clear trend, anecdotal evidence suggests the contract farming arrangements may cover a larger area of agricultural land. Sleee et al (2008) describe the problems with the data on contract farming and suggest that less formal arrangements such as "you grow the crop and keep the proceeds, I will collect the single farm payment" may not be captured. A survey of a number of estates carried out as part of this work showed a major shift from in-hand farming to contract farming arrangements.

**SITUATION IN ENGLAND AND WALES**

In England and Wales, the Agricultural Holdings Act 1986 entitled anyone who was a tenant for more than two years to stay for life and the tenancy could be passed to the following two generations afterwards. Since then, the law has changed to allow freer contracts with the introduction of Farm Business Tenancies (FBTs) by the Agricultural Tenancies Act 1995. Further reforms were introduced by The Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006 encouraging greater diversification of farm businesses and giving greater flexibility to FBTs to try to encourage more land to be made available for let.

There are four important features to FBTs. First, FBTs were designed specifically to allow diversification into non-agricultural uses. Second, the Act does not specify a minimum term for FBTs. Third, FBTs come to an end at the end of the period prescribed in the original lease. Fourth, subject to some exceptions, new tenancies created after the Act came into force must be FBTs. Graph 3 shows the amount of land rented and owned in England from 1984-2008.

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7 If the landlord serves a notice to quit, if he does not then the tenancy continues for another year, and in subsequent years if a notice is not served
The area of rented land in England has been in long term decline. That decline appears to have halted and even reversed to some extent with increases in new FBTs, as well as increases in annual lets. However, FBTs have not been without their critics: they give little security of tenure and it is argued they are used less by new entrants than by farmers expanding the area they rent. The Tenant Farmers Association’s National Chairman, Greg Bliss stated:

“We are nearly 15 years on from the introduction of Farm Business Tenancies under the 1995 Agricultural Tenancies Act and whilst we have arrested the previous year-on-year decline in the area of let land which was evident before the introduction of the new legislation, there remain painfully few opportunities for new farm tenancies in England and Wales. Last year only 8.5% of lettings were of both land and buildings and less than 8 per cent included houses leaving 84% of lettings as bare land. On top of this, with an
average length of term of only 3½ years on those tenancies which are being offered, there seems to be little if any long-term thinking amongst landlords and their advisers," (TFA News Release).

**ISSUES WITH THE TENANTED SECTOR IN SCOTLAND**

As demonstrated earlier, the area of land rented out through traditional tenancies is decreasing and the number of tenant farmers is also falling. Views on the importance of the issue and how it should be dealt with vary and there are difficulties balancing the rights of landlords, existing tenants and potential new entrants. A literature review and consultation commissioned by the TFF and funded by the Scottish Government looked at the barriers to new entrants (Macaulay et al. 2008). The literature review described the restructuring of agricultural businesses over the past century. With technological improvements and changes in agricultural support payments, farms have increased in size and the number of farmers and farm workers has decreased significantly. However in recent years, they describe a “hollowing out of the middle” i.e. increase in small and large farms while the number of medium sized farms has fallen. Some of the problems highlighted by the research are described below.

**Access to land**

The high cost of land is due to a number of factors. Buying land is seen as a good way to invest capital assets to produce income and qualify for inheritance and capital gain taxation reliefs. Land has an amenity value (for sporting estates, lifestyle purchasers, etc.) and upland areas may have a greater value in terms of sporting management or recreation than they do for farming. The cost of land with development potential, particularly if planning permission has been granted, will be far in excess of land which can only be used for agriculture.

**Agricultural Support**

Some valuers believe the Single Farm Payment (SFP) is effectively capitalised into the cost of the land. In addition, new entrants cannot access the SFP unless they buy it on the open market, meaning they face an effective surcharge when trying to enter into farming. The SFP may also discourage tenant farmers from retiring as they can continue to receive the payment even while engaged in minimal agricultural activity. In addition, uncertainty over the future of the Common Agricultural Policy (CAP) may mean that landlords are waiting to create new tenancies until they know how the area payment will be distributed and what the definition of active farmers will mean.

**Social issues**

While there is evidence that the number of young farmers is under estimated, as young people may work with their parents who are still considered the main farmers, there is no doubt that the sector is aging. Lack of appropriate agricultural career guidance and training may be acting as a barrier. Young people who leave for tertiary education and start another career may be reluctant to return to full-time farming. In addition, the sector is considered risky due to fluctuations in market prices and frequent policy changes. Rural areas may not be considered desirable areas to live due to lack of social opportunities and social services. These problems – which face all young people considering a career in agriculture – are likely to be exacerbated for tenant farmers who face additional uncertainties about security of tenure.
Access to data

The Scottish Government recently updated data on the types of agricultural holdings agreements up until 2011 (previously only available until 2008) and has also put in place more thorough quality assurance of tenancy questions in the Agricultural Census (Scottish Government 2012). This should result in improvements in the reliability of the statistics available.

Nonetheless, there is still a lack of information on tenancy agreements which makes a thorough assessment of the effects of policy changes more difficult. There is no information on the area of the different types of tenancies. The Scottish Government states that plans are in place to develop and publish these statistics in the future. Data on the area of land managed through formal and informal contract agreements is also lacking, although it is often claimed that these less formal arrangements are taking over from long term tenancies.

An additional problem is accessing clear information on the costs of disputes to landlords and tenants. This may be due to an unwillingness to disclose potentially sensitive commercial information but it means that policy makers rely to a large extent on hearsay and individual cases.
CURRENT DEBATE ON AGRICULTURAL HOLDINGS LEGISLATION

The Tenant Farming Forum

The Tenant Farming Forum (TFF) was set up after the 2003 Act was passed to facilitate debate between landlords and tenants and discuss how relationships could be improved. The TFF is an industry-led body made up of the following members: NFU Scotland, RICS Scotland, Scottish Land and Estates, Scottish Tenant Farmers Association, Scottish Association of Young Farmers.

According to its statement of purpose, the TFF should help to promote a healthy farm tenanted sector in Scotland by providing a discussion forum; contributing to understanding of legislation in force and under development; raising awareness of problems in the sector; formulating views on how good relations can be developed; liaising with Government and other interest groups; and having a vision on the future of the sector. There is a strong focus on education on agricultural holdings legislation and the website provides guidance on best practice, for example maintaining good relations between tenants and landlords.

In June 2007, the Scottish Government asked the TFF to consider why the changes introduced in the 2003 Act had not increased the availability of agricultural land for let.

The remit of the Forum's task was as follows:

- to investigate barriers to new entrants to farming, identify practical solutions and make recommendations, including how these might be implemented in practice;
- to invite and consider the views of people with an interest in the industry; and
- to deliver recommendations to Scottish Ministers by the end of 2007 with a view to them being published.

The TFF came up with a package of recommendations for the Scottish Government. The Scottish Government agreed to take most of these forward (Scottish Government 2008b) under the powers contained within the Public Services Reform (Scotland) Act 2010 which allows amendments to primary legislation where those amendments reduce the burden of legislation. The two outstanding recommendations were the change to the definition of near relative and the prohibition of upward-only and landlord-only initiated rent reviews which are included in the draft Bill (see below). The third change (VAT provisions) was discussed and agreed by the TFF though it was not included in the original package of measures.

The Scottish Parliament Rural Affairs and Environment Committee questioned TFF representatives as part of their scrutiny of the 2011 Order. Following this, the Committee wrote to the Cabinet Secretary, Richard Lochhead to express their support of the Order and disappointment that the two additional measures put forward by the TFF were not included.

The TFF has agreed on a limited scope to the current Bill to ensure the agreed changes come into force rapidly. However, some TFF members and other interested parties would like to see additional changes to legislation in the future. Areas which are being considered by the TFF or have featured in recent press coverage are listed below.
Succession and assignation

In the statement in which he ruled out the right to buy, the Cabinet Secretary described other areas which the Scottish Government wanted the forum to examine in more detail:

“The Scottish Government ... recognise[s] the concerns of families looking to pass secure leases to the next generation. The succession and assignation conditions in the 1991 Act are increasingly seen to be out of date, and I am aware the Forum has been discussing this. The Scottish Government considers that the provisions should be modernised, in keeping with the Succession (Scotland) Act 1964 and with the different circumstances in which the variety of agricultural businesses have now to operate. I look to the Forum to work out details and come back to me on this.”

Only a limited number of “near relatives” (children, spouses and civil partners) have a reasonable level of certainty that they can succeed to a secure tenancy. In addition, succession only occurs on the death of the tenant meaning that children can often be late in life themselves before they officially succeed to the tenancy.

A Scottish Law Commission report on succession (SLC 2009) is being considered by the Scottish Government, so there is potential that there may be changes to succession law more broadly which could potentially impact agricultural holdings.

The 2003 Act gave tenants the option to assign tenancies to a wider range of relatives. Landlords can only object under very specific circumstances tested by a recent case Fleming v. Ladykirk Estates Ltd. However, tenants can only assign their leases while they live rather than leaving notice of who they want to assign a tenancy to on their death.

The TFF has discussed proposals to align the provisions on assignation and succession, and the grounds of objection. The views on whether the categories of those who can be assigned or succeed to tenancies should be broader or narrower however, vary. In the paper prepared by the then TFF legal advisor, it was suggested that the pendulum had swung too far in favour of the tenant (Sturrock 2011). However, many tenants would like to be able to choose more broadly who to leave a tenancy to. Some would like to go still further so that they could effectively sell a secure tenancy.

Dispute resolution

An area on which landlords and tenants agree is that arrangements for rent review established by the 2003 Act require further consideration. The primary forum for dispute resolution is the Land Court unless both parties agree in terms of the 2003 Act to go to arbitration or mediation instead, at, or after the dispute has arisen. Having a dispute referred to the Land Court can be an expensive and lengthy process.

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8 RN SLC/62/08. The case showed that leases cannot specifically prohibit assignation; the onus is on the landlord for showing his grounds for withholding consent are reasonable and where they are not, the tenant can assume consent has been granted; the tenant must only provide information on the assignees relationship and identity.

9 The Court currently charges a fee of £120 per day for a hearing in an agricultural holdings case, but by far the greatest element of the cost of a case will be the fees charged by the parties’ legal advisers. These can be in the region of £200 to £250 per hour for a solicitor with specialist knowledge of agricultural law, while counsel’s fees for appearing in court can be in the range of £1500 to £3500 per day depending on the experience and seniority of the advocate involved (Land Court, pers. comm.).

10 The time from when a case is registered with the Court, to when it is concluded, has ranged from one month to three years. In the Moonzie case, the application was lodged in December 2008 and the first order made by the Court on 8 December 2008. The period where the respective solicitors adjusted their pleadings, lasted until...
Since the 2003 Act came into force, the following rent review applications have been received by the Land Court.

Table 3. Applications for rent reviews received by the land court since the 2003 Act came into force.
Source: Scottish Land Court (pers. comm.)

<table>
<thead>
<tr>
<th>Year</th>
<th>Applications received</th>
<th>Applications where rent fixed by Court</th>
<th>Applications withdrawn or settled by agreement between parties</th>
<th>Applications still in process</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>10</td>
<td>1</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>2005</td>
<td>7</td>
<td>1</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>2006</td>
<td>7</td>
<td>0</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>2007</td>
<td>9</td>
<td>0</td>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>30</td>
<td>1</td>
<td>22</td>
<td>7</td>
</tr>
<tr>
<td>2009</td>
<td>42</td>
<td>0</td>
<td>24</td>
<td>18</td>
</tr>
<tr>
<td>2010</td>
<td>25</td>
<td>0</td>
<td>7</td>
<td>18</td>
</tr>
<tr>
<td>2011</td>
<td>19</td>
<td>0</td>
<td>1</td>
<td>18</td>
</tr>
</tbody>
</table>

It can be seen from table 3 that the majority of cases are settled by negotiation. Frequently an application is made to the Court and parties then immediately agree to have it sisted (put on hold) so that they can continue to try and reach a settlement. Where a case is sisted, either party can come back at any time and ask the Court to make an order for further procedure, if negotiations are not successful. Of the applications still in process, almost all are sisted for negotiation or awaiting the outcomes of the Moonzie case (see below).

There have only been three applications where the Court has made an order fixing the rent. In two of these, however, the Court did not go through the process of assessing the appropriate level of rent. The 2004 case was unopposed and in the 2005 case the Court made an order fixing the rent at the amount agreed between the landlord and tenant. The case of Morrison-Low v Paterson’s Executors (known as the Moonzie case) is the only one so far in which there has been a full hearing and the Court has determined the appropriate level of rent.

In the Moonzie case, the difference in estimation of the rent (there was a difference of over £20,000 between the landlord’s and the tenant’s calculations) related to how the Single Farm Payment SFP should be treated. The Land Court decided that the SFP was not properly to be regarded as part of the earnings of the farm and should not therefore be considered in fixing rent and the rent was fixed somewhere between the two estimates, slightly below its original level. Mr. Morrison-Low (the landlord) has now lodged an appeal with the Inner House of the Court of Session.

In its response to the Scottish Government consultation on the current Bill, the Central Association of Agricultural Valuers argued that the Arbitration (Scotland) Act 2010 had removed the arguments against arbitration and it should be relied on to a greater extent (Scottish Government 2011d). Currently parties to a disagreement over rent have the option to go to arbitration (or mediation) voluntarily but there is a lack of trust in the process due to the problems experienced prior to the 2003 Act and, given that firms involved in arbitration may also be involved in other land related businesses, some tenants have expressed uncertainty about whether an arbitrator would be truly neutral.

January 2010. The case was heard in the court in March 2010 and the Court issued its decision in 2 June 2010. The case has now been appealed which means that other cases continue to await its final outcomes.
The TFF are discussing whether establishing a simple model for submitting a case to an arbitrator could encourage parties to use the process more often. They are examining whether a limit can be put on costs and if the Land Court could be asked to take consideration of parties’ choices to use arbitration as a first resort to resolve disputes. These issues need further exploration and it may be that a process can be set in place for reducing the burden of a rent review dispute without any changes to legislation.

*Other issues with rent review*

Rents are set according to section 13 (3) of the 1991 Act:

> “the rent properly payable in respect of a holding shall normally be the rent at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing landlord to a willing tenant, there being disregarded (in addition to the matters referred to in subsection (5) below) any effect on rent of the fact that the tenant is in occupation of the holding.”

The Moonzie case demonstrates the uncertainties surrounding what factors can be taken into account when determining rent. Concern has been expressed by the STFA that the process of setting rents may be unfair since landlords tend to look at existing tenancies which are influenced by the lack of available land. STFA would like to see greater emphasis put on the potential earning capacity of the farm having regard to prevailing economic conditions and the level of settled rents. However, Scottish Land and Estates (SLaE) insist that rents must be economically sustainable for both parties if changes are made to the way they are calculated.

*Investment in holdings and compensation for investment*

It is thought that a better process of arbitration could also help resolve other disputes e.g. problems around fixed equipment, who is responsible for maintaining it, and the compensation tenants receive for improvements at the end of a lease (“compensation at waygo”).

The responsibility for fixed equipment is laid out in the lease but for a secure tenancy, it will normally be the landlord’s responsibility to renew and replace fixed equipment while the tenant will generally be responsible for everyday repairs and maintenance. If a landlord is required to maintain fixed equipment and fails to do so, the tenant can withhold rent (section 15A of the 1991 Act introduced by section 64 of the 2003 Act). However, these provisions are enforced through the Land Court and there may be some reluctance to resort to a potentially costly legal process.

There may be issues identifying where the cut off between the landlord and tenant responsibilities lie, which could mean that the investment in tenanted farms may be lower than in owner-occupied farms. In addition, calculating the value of investment as opposed to maintenance may be complicated. If a landlord improves fixed equipment, he or she is entitled to ask for an increased rent. Tenants should also be able to claim for improvements at the end of the tenancy based on their value to the incoming tenant, however, there is some uncertainty about the kind of improvements that qualify. Section 55 of the 2003 Act introduced a requirement for the landlord to compensate an outgoing tenant by sharing in the uplift value that occurs when vacant possession is obtained by agreement between the parties. However, as with rents, there can be disagreement about how exactly the uplift is calculated.
The right to buy

The most heavily debated issue during the progress of the 2003 Act through Parliament was whether tenants should have any right to buy and if so, whether it should be a pre-emptive right to buy (i.e. apply only to land which was being put up for sale) or an absolute right to buy (i.e. the tenant would be able to buy the land at any time). There has been renewed interest in a right to buy in the farming press in recent months (Scottish Farmer 2011).

From the Scottish Government’s point of view the cost of an absolute right to buy is a practical concern. In debate around the issue during the 2003 Act, Ross Finnie, the Minister for Environment and Rural Development at the time, wrote in answer to a parliamentary question:

“The Executive believes that the creation of an absolute right to buy could result in landowners incurring loss in the value of their assets. We also believe that a court of law might view provisions introducing an absolute right to buy as amounting to an interference of the enjoyment of the landlord’s possessions. As such, the provisions would be unlikely to comply with the provisions of Article 1 of the First Protocol to the European Convention of Human Rights if the Executive did not also ensure that landlords were reasonably compensated for their losses” Scottish Parliament (2002).

In their recommendations to the Scottish Government, all the members of the TFF except the STFA agreed that there should be no extension of the right to buy. Richard Lochhead, the Cabinet Secretary for Agriculture and Rural Affairs has stated that the Scottish Government does not intend to extend the right to buy:

“Accordingly, I confirm that we will not take forward any extension of right to buy provisions for 2003 Act or 1991 Act tenancies. Absolute right to buy is not on our agenda, and thus owners should now have the confidence to get on and let land to new tenants. Indeed, we will monitor the uptake of new tenancies in the future and consider further action in the future if more land is not let.”

While the right to buy has attracted a lot of media attention, some have suggested that it is drawing attention away from other issues faced by the tenanted sector which if they are dealt with properly could solve the problems which lead tenants to call for a right to buy in the first place. The National Farmers Union of Scotland (NFUS) President Nigel Miller wrote in the Scottish Farmer:

“The recent comments about the ‘right to buy’ have unfortunately opened up the wounds for some on both sides of the land reform debate and risk cutting away the opportunity of securing the changes badly needed to revitalise the tenanted sector.”

He described the two main measures of success as being “based on new entrants to our industry, and availability of land” (Miller 2011).
PROVISIONS OF THE AGRICULTURAL HOLDINGS (AMENDMENT) (SCOTLAND) BILL

THE BILL

The explanatory notes accompanying the Agricultural Holdings (Amendment) (Scotland) Bill [as introduced] state that it aims to “amend legislative provisions relating to succession and rent review in order to create a better environment for the letting of farmland to the tenant farming sector of the agricultural industry and to encourage new entrants into tenant farming.”

The Bill has six sections, the first three of which cover the main provisions (sections 4-6 are transition provisions, commencement and short title).

Definition of near relative

Section 1

Section 1 of the Bill would extend the definition of “near relative” which currently includes a surviving spouse, civil partner11 or child, to include grandchildren of a deceased tenant. The reference to adopted children has been removed, rendered unnecessary by a change in law12.

The definition of a near relative is important in the context of section 25 of the 1991 Act. A “notice to quit” can be served on the death of a tenant. However, where the successor is a “near relative” of the tenant they can serve a counter notice. This would mean that the landlord’s notice to quit cannot be operated unless the Land Court consents it and consent would only be granted under very specific circumstances13. If a successor is not a “near relative”, the landlord can serve an incontestable notice to quit.

There have been two cases taken through the courts where landlords have served notices to quit on grandchildren where the middle generation died before the grandfather. The Outer House of the Court of Session (Lord Clarke) in Stephen v Trustees of Cawdor Marriage Settlement Trust, 3 May 2006, and the Divisional Court of the Scottish Land Court in Salvesen v Graham, 25 July 2006, both reached similar conclusions, finding in favour of the tenants in light of the specific and particular circumstances relating to those tenancies. However, the decisions by the Court in favour of the tenants were not because they were near relatives as they clearly did not fall within the definition but because in effect they already had an interest in the lease as joint tenants.

The Scottish Government considers it desirable that where there are three generations of a farming family and the parent dies before succeeding to the tenancy, the grandchild should not be prevented from succeeding to the tenancy.

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11 The definition was extended in 2004 to include a surviving civil partner of a deceased tenant by article 2 of the Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2006 (SSI 2006/379).
12 The Adoption and Children (Scotland) Act 2007 provides that an adopted child is treated in law as if born as a child of the adopter.
13 Reasons are set out in Schedule 2 of the 1991 Act. e.g. where the tenant has insufficient experience or the unit is not considered viable.
The amendment made by section 1 will apply to tenants who die on or after the day on which section 1 comes into force (i.e. it will not be applied retrospectively).

**Provisions relating to rent review**

*Section 2*

Section 2 of the Bill will prohibit upward-only and landlord-only initiated rent reviews by amending section 9 of the 2003 Act. While an aim of the 2003 Act was to introduce more flexibility into the provisions around rent review for the new tenancy types, an unforeseen consequence has been that some Limited Duration Tenancies (LDTs) contain rent review clauses that allow for upward only or landlord only initiated reviews. These are clearly advantageous to the landlord. The Scottish Government considers that these provisions are the result of an imbalance in the bargaining powers of the landlord and the tenant and that they threaten to undermine a tenant’s security of tenure. They therefore consider that there are strong public policy grounds for banning them. The prohibition would only apply to clauses in new leases and not to those agreed before the Act comes into force. Where such provisions appear, the rent shall instead be determined according to the statutory formula set down in the remainder of section 9.

*Section 3*

Section 3 of the Bill amends section 13(9) of the 1991 Act which sets out the circumstances under which a variation of rent can be disregarded when a landlord or tenant is seeking to have the rent payable determined by the Land Court. Reference to the Land Court cannot be demanded within three years of the commencement of the tenancy, the last variation of the rent or the last time it was determined that the rent must remain unchanged. It is considered that when rent changes due to exercise or revocation of the option to tax under Schedule 10 to the Value Added Tax Act 1994 or a change in the rate of VAT, it should not prevent reference to the Land Court to determine the rent. There have been no cases in Scotland where variations in VAT have prevented reference to the Land Court. However, in a recent English case (*Mason v Boscawen*) it was judged that VAT did form a part of the rent and therefore a change in VAT was considered to constitute a variation in rent. Since the legislation in Scotland and England is in this regard similar, it is possible that under current law, a change in VAT could be considered a variation in rent.

The change proposed in the Bill would clarify the situation. This section could be applied retrospectively so that for example the changes in VAT in 2010 and 2011 would not prevent reference to the Land Court if the last rent review was over three years earlier.

**FINANCAL CONSIDERATIONS**

The financial memorandum accompanying the Bill concludes that there are no costs to the Scottish Administration.

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14 Supplies of land and buildings (including leasing and renting) are normally exempt from VAT. This means that no VAT is payable, but the person making the supply cannot generally recover any of the VAT incurred on their own expenses. For this reason the person making the supply may choose to tax land which means they could normally recover any VAT incurred in making those supplies. It is likely that this would affect a limited number of tenancies.
The prohibition of upward only or landlord initiated only rent reviews could have a financial impact on those landlords who intended to include such clauses in their leases. It is possible that this could include local authorities where they act as landlords (see Falkirk Council, Scottish Government 2011d). However, the provisions should benefit tenants by making the process fairer.

There is the possibility that the final clause could allow rent review cases to reach the Land Court earlier but it is unlikely that it would mean a greater number of cases went to the Land Court. In any cases, there are relatively few leases where VAT is payable on the rent.

**SCOTTISH GOVERNMENT CONSULTATION**

The Scottish Government consulted on the proposed changes (Scottish Government 2011b). Since the changes had previously been agreed by the TFF, there was, unsurprisingly, general support from members (Scottish Government 2011c). The transitional arrangement for section 1 was the one area identified as needing further work as it was not included in the consultation. A majority of members of the TFF suggested that section 1 should apply where the tenant had died before the provisions came into force but the grandchild who has succeeded to the lease (the acquirer) had not yet given notice to the landlord15. The STFA has highlighted one case where an individual will be affected if the legislation is not retrospective. SLaE, however, is strongly opposed to retrospective legislation which could lead to interference with a previous legal position. It believes that this provision could create further uncertainty for landlords and refers to problems with section 72 of the 2003 Act16. This view was largely supported by the Law Society of Scotland (Scottish Government 2011d).

There was very little criticism of the provisions of the draft Bill. Falkirk Council considered that they might be affected by section 2 and two individual respondents were not supportive of the Bill. One anonymous respondent was concerned that tenants could avoid rent reviews and the other respondent considered that that the basic legislation was so flawed that there was little point in trying to amend it.

While most respondents were supportive of the draft Bill, some expressed nervousness about its scope and the potential that it could be used as vehicle to introduce further changes which had not been consulted upon or were not supported by the range of stakeholders. Others identified additional areas of agricultural holdings legislation that merit further investigation, particularly rent reviews and the possibility of reintroducing a greater role for arbitration in the process. However, it is also thought that this might be an issue the TFF could address without recourse to changes of legislation (e.g. STFA response, Scottish Government 2011d). It was also suggested that a further consolidation of the law would be beneficial (Scottish Government 2011c).

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15 This is explained in the NFUS response: In the case of intestate succession there is a two stage process. Firstly the executors have to confirm to the lease and transfer it to a near relative... within one year of the tenant's death. Secondly the near relative then has 21 days from date of transfer to notify the landlord that they have acquired the lease... A tenant would in normal circumstances... have died a maximum of one year prior to Section 1 coming into force and his or her executors would be able to transfer the lease to a grandchild of the deceased (Scottish Government 2011c).

16 This introduced retrospective legislation on limited partnership agreements, criticised in the Salvesen v Riddell judgement.
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RELATED BRIEFINGS

SB 11-82 CAP Reform – Legislative Proposals
SB 11-06 CAP Reform: Proposals for 2014-20
SB 10-01 Crofting Reform (Scotland) Bill
SB 10-29 Hill Farming
SB 02-113 Agricultural Holdings (Scotland) Bill (contact SPICe)

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