This briefing summarises the historical development and current state of tenant farming in Scotland, highlighting recent reviews and initiatives in the area.

Cattle in snow. Photo: remem / istock images
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EXECUTIVE SUMMARY

In the late 19th Century over 90% of farms in Scotland were tenanted. Since then, there has been a continuous reduction in the number of tenanted holdings and the area of land that is rented, such that 2013 figures show 24% of land and 29% of farms were rented. Three explanations were given by the Land Reform Review Group for this trend: the break-up of large estates post WW1 following recession and the tax regime with tenants converting to owner-occupancy; consolidation of farms into larger units e.g. due to mechanisation; and the introduction of security of tenure in the 1940s, which has made landowners reluctant to create new tenancies since that time. Scotland currently has one of the lowest proportions of rented land anywhere in Europe.

Given the high capital costs of land purchase, tenancy is seen as the route into farming for new entrants. Letting and leasing land also gives flexibility e.g. allows a farmer to retire without selling their farm; or to expand without the capital cost of land purchase. Leasing land offers landlords an opportunity to obtain an income from their land without the capital cost of owning stock and machinery. The Scottish Government’s vision is “a dynamic sector that gets the best from land and the people farming it, provides opportunities for new entrants and forms part of a sustainable future for Scottish farming as a whole”.

Cook et. al (2009) reviewed routes into farming. Their report sees a staged entry into farming for new entrants as they gradually accumulate the necessary capital, experience and skills, with tenancy being a final stage. The report describes five arrangements which are all used to a greater or lesser degree in farming in Scotland: Incentivised employment contract; Share farming; Equity Arrangements and Partnerships; Contract Farming Agreements; and Contract growing.

These arrangements are all distinct from tenancy, where the relationship between landlord and tenant is governed by a specific body of law on “agricultural holdings”. The principle statute is the Agricultural Holdings (Scotland) Act 1991 c.55 (as amended). Under this legislation there are five possible tenancy arrangements:

- Leases of less than a year for grazing or mowing
- Short Limited Duration Tenancies (SLDT) of up to 5 years (508 in 2013)
- Limited Duration Tenancies (LDT) of a minimum of 10 years (an SLDT can be converted to an LDT at any time during the lease) (292 in 2013)
- “1991 Act tenancies” or “secure tenancies” entered into under the 1991 Act or preceding legislation, where the tenant’s security of tenure is protected by the legislation. A 1991 Act tenancy can be converted to an LDT (estimated to be 5,793 in 2013).
- Limited partnership tenancies where the landlord or their agent is the limited partner, and the tenant is the general partner. The limited partnership lasts for a minimum term specified in a partnership agreement. At the end of the term specified in the partnership
agreement, either the landlord or tenant can bring the partnership to an end, which ends the tenancy (418 in 2013).

The Agricultural Holdings (Scotland) Act 2003 (‘the 2003 Act’) was developed as a part of the then Scottish Executive’s Land Reform Programme. The 2003 Act:

- Introduced two new forms of tenancy: LDTs and SLDTs
- Gave tenants greater rights to diversify
- Gave tenants a pre-emptive right to buy their farm. To exercise this right, the tenant must have registered their interest, and they then have first option if the landlord decides to sell. If the landlord and tenant cannot agree the price, an independent valuation is carried out
- Gave the Scottish Land Court the main role in resolving disputes between landlord and tenant

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: NFU Scotland, RICS Scotland, Scottish Land and Estates, Scottish Tenant Farmers Association, and the Scottish Association of Young Farmers.

The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 introduced a number of changes to the 2003 Act as recommended by the Tenant Farming Forum (TFF). The main changes made by the Order were to reduce the minimum term of an LDT from 15 to 10 years and allow an SLDT to be converted to an LDT at any time instead of only at the end. Two of the changes proposed by the TFF could not be made through the Order because of a vires issue. These were a change to the definition of who is a “near relative” of a tenant farmer to include grandchildren and the prohibition of upward only and landlord only initiated rent reviews. These measures were implemented by the Agricultural Holdings (Amendment) (Scotland) Act 2012.

In a judgement given in 2013, the Supreme Court found that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 was incompatible with the ECHR and so was outwith the legislative competence of the Scottish Parliament. The provision was introduced by an anti-avoidance amendment to the 2003 Act which was intended to prevent landlords concerned about the right to buy from dissolving limited partnerships before their term. The Court gave the Scottish Government a year to resolve the situation. The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 was made on the 2 April 2014. The Order provides landlords affected by the defective sections of the Agricultural Holdings (Scotland) Act 2003 a means to recover vacant possession. It allows those affected landlords the “relief “ of section 73, whereby the landlord has a route to termination of the lease and the recovery of vacant possession after a double notice period.

Small landholders are tenants under the Small Landholders Acts 1911-1931. The character of these small landholdings is similar to crofts and the legislation governing them has a shared history with crofting. Once numerous, in 2013 there were 118 small landholders in Scotland, scattered from Strathspey to Stranraer. Small landholders in the areas where crofting tenure was extended in 2010 can apply to convert their holding into a croft. To date no small landholders have succeeded in doing this.

The Land Reform Review Group was established by the Scottish Government in 2012. It produced its final report in June 2014 and two of the Group’s 62 recommendations relate to tenant farming:

1 The Small Landholders (Scotland) Act 1911 (c 49), Land Settlement (Scotland) Act 1919 (c 97) and the Landholders and Agricultural Holdings (Scotland) Act 1931 (c 44)
• The Group recommended that the requirement for prior registration for the agricultural right to buy should be removed and all these tenants should have first option on buying any part of their tenanted holding which their landlord decides to sell.

• The Group recommended that the Government should take full account of social and local community factors in determining whether the introduction of a conditional right to buy for tenants with secure tenancies under the Agricultural Holdings (Scotland) Act 1991, would be warranted in the public interest.

The Group also recommended that small landholders should have a right to buy their holding.

In November 2013 the Scottish Government initiated a review of agricultural holdings legislation. The interim report of the review was published in June 2014. The interim report discusses an absolute right to buy for secure tenants i.e. a right to buy even if the landlord/owner is not willing to sell the land. It argues that the policy rationale for any proposed right to buy must be clearly expressed, supported by evidence and must clearly explain how it supports the vision for the sector. The report states that further consideration will be given to the following issues: the impact of a potential right to buy on sustaining agricultural productivity; achieving diversity of ownership; and resolving disputes. The interim report concludes by setting our three broad areas that the Group will focus attention on ahead of the final report. These are:

• Establishing a stable and effective framework for secure 1991 Act tenancies.

• Creating a new and flexible framework to stimulate diverse other arrangements

• Ensuring a supportive wider cross cutting context e.g. taxation and CAP.

A final report will be submitted to Scottish Ministers by December 2014.
INTRODUCTION

HISTORY OF TENANT FARMING IN SCOTLAND

An overview of tenant farming in Scotland since the late Nineteenth Century is provided in the report of the Land Reform Review Group (Scottish Government 2014a, p 195):

The original legislative framework for agricultural holdings was the Agricultural Holdings (Scotland) Act 1883, introduced over 130 years ago. At that time, over 90% of Scotland’s land was owned by 1,750 owners with over 405 ha (1,000 acres) each and over 90% of the agricultural holdings or ‘farms’ in Scotland were tenanted. Since then, there has been a continuing reduction in the number of tenanted holdings.

By the 1880s, there had already been a long history of land owners reducing the number of smaller tenant holdings on their land, to create larger units to maintain or improve rents. While this continued, another trend which started in the early 20th century was tenant farmers becoming owner occupiers of their holdings. The most concentrated period of this was in the 1920s when following the impact of the First World War, taxation and economic recession also contributed to the break up of some estates. In lowland areas, with better agricultural land, these sales often resulted in the tenant farms being sold to their occupiers. In the 1920s, while there was little change in the total number of agricultural holdings in Scotland, the proportion that were owner occupied increased from 8% to over 21%.

This conversion of tenants to owner-occupiers in lowland areas continued to a limited extent during the 1930s and 1940s. By the time the Agricultural Holdings (Scotland) Act 1949 was enacted, 27% of Scotland’s agricultural holdings were owner occupied. There were a further significant number of estate farm sales to tenants in the new post war context of the 1950s and by the 1960s, 38% of agricultural holdings and 51% agricultural land was farmed by owners rather than tenants.

The continued decline, since the 1950s, in the number of tenant farms and the extent of Scotland’s agricultural land that they farm, can be attributed to a range of factors. There continues to be some farm sales by land owners to tenants, but this has been limited. However, a major factor in reducing the number of both owned and rented holdings, has been farm amalgamations. Post war public policy for agriculture was focused on increasing output and promoted the amalgamation of holdings to create larger and more mechanised farms. This essentially remains the case today with an ongoing pressure on many farmers to be able to farm more land, to achieve ‘economies of scale’ and improve viability.

Another likely influence on the falling number of tenanted holdings have been public subsidies to agriculture. Traditionally, when a tenanted farm became vacant, land owners tended to add the land to existing tenancies as part of ongoing amalgamations. However, from the 1970s, the levels of farm grants compared to the rents from tenants encouraged an increasing number of land owners to further develop their own farming operations and to absorb tenanted land which became vacant into their ‘in-hand’ land. This could mean remaining tenants were increasingly constrained by their limited acreage, which could in turn result in further tenant land becoming vacant and added to the owner’s farm.

A third key factor in the continuing reduction of the number of tenanted holdings has been the increasing reluctance more generally of land owners to create new farm tenancies. This has been due to the greater security of tenure and other improvements for agricultural
tenants in the Agriculture (Scotland) Act 1948 and Agricultural Holdings (Scotland) Act 1949 and continued since by the 1991 Act, as the successor consolidating legislation. The security of tenure significantly reduces the capital value of the land in sales to sitting tenants and in open market sales of land with an existing secure 1991 tenancy. In addition, since 2003, these secure 1991 tenants have also been able to register a pre-emptive right to buy their holding if it is being sold.

By the 1980s, the supply of land available to rent as a secure tenancy had virtually dried up and despite various initiatives, this has remained the case. Very few new secure tenancies have been created over the last 30 years. Thus, the number and extent of secure 1991 tenancies continue to reduce. By 2005, the number of secure 1991 tenancies was down to around 6,350 and seven years later in 2012, this total had reduced by 15% to around 5,400. During the same period, the total amount of land held by secure 1991 tenants reduced by 18% to 885,000ha.

Fig 1 below is reproduced from the report of the Land Reform Review Group (Scottish Government 2014a) and charts the evolution of the number of tenanted and owner-occupied farms through the bulk of the 20th Century.

**Figure 1 - Number of agricultural holdings in Scotland Owned or Rented 1912-80**

![Graph of agricultural holdings in Scotland 1912-80](image)

Source Scottish Government (2014a)

More recently, the trend of a slow decline in the area of rented land in Scotland has continued, as the figures overleaf, also presented by the LRRG (Scottish Government 2014a) serve to illustrate.
In his foreword to the Review of Agricultural Holdings Legislation interim report, the Cabinet Secretary for Rural Affairs, Food and the Environment, Richard Lochhead MSP states that Scotland has “one of the lowest proportions of rented land anywhere in Europe” (Scottish Government 2014b). Figure 2 shows the amount of rented land as a current share of utilised agriculture area in selected countries.

**Figure 2: Rented land as a share of agricultural area in selected countries, ranked**
WHY IS TENANCY IMPORTANT?

The Review of Agricultural Holdings Review interim report (Scottish Government 2014b) sets out the vision for the tenant farm sector as “a dynamic sector that gets the best from land and the people farming it, provides opportunities for new entrants and forms part of a sustainable future for Scottish farming as a whole” (page 16). The tenant farming sector is considered important to agriculture because land is an expensive capital asset, and therefore tenancy and other arrangements allow farmers to farm without the capital cost of owning land, the profits from tenancy being shared between the tenant and the landlord. In particular, this allows new entrants to access the industry.

OTHER ARRANGEMENTS

A distinction can be made between tenancy, where the relationship between landlord and tenant is governed by a specific body of law on “agricultural holdings”, and other arrangements such as share farming and contract farming, where one person farms land owned by another person, but where the legal arrangements fall out with this special body of law.

Cook and Grieve (2009) reviewed routes into farming. Their report sees a staged entry into farming for new entrants as they gradually accumulate the necessary capital, experience and skills, with tenancy being a final stage. The report describes five arrangements which are all used to a greater or lesser degree in farming in Scotland. It reviews the pluses and minuses of each option.

*Incentivised employment contract*

This is simply an employment contract which pays bonuses or provides other benefits, in return for achieving performance above pre-agreed levels. Examples given of this arrangement include:

- Payments for physical or financial performance above a pre-agreed level e.g. a payment to the shepherd for each lamb sold above a 160% lambing percentage
- Physical benefits or rights for a good employee e.g. right given to a shepherd to keep a number of his own ewes with the farmer’s flock
- Contracts designed to give an employee flexibility to develop their own interests, independent of the employer’s farm e.g. flexi-time, annualised hours

*Share farming*

The basic principle is that two (or more) parties each provide different inputs and then share the profit on the basis of their respective contribution and the risk each carries. Usually the relationship is between an owner who provides land and infrastructure (buildings, fencing, drainage, roads, drier, perhaps some machinery, variable levels of livestock) and covers related fixed costs (electricity, insurance, etc) while the other party provides labour, variable levels of machinery, livestock, input costs and management. Note the contrast with Contract Farming (see 2.4) where the “contractor” may effectively make all the input decisions, but does not pay for the inputs.

An agreement is drawn up which states everyone’s responsibilities and which sets out the profit split – say 50:50 or 60:40 or 70:30 depending on each party’s material contribution and
The profit shares vary as with all partnership agreements. The parties, however, each run their own separate businesses with their own VAT registration, accounting and tax assessments.

**Equity Arrangements and Partnerships**

This is relatively simple, yet very rare. Several individuals contribute capital to the ownership of a farm or a farm business. Each stake is represented as a number of shares if this is a company, or partner’s capital if this is a partnership. The ownership structure often does not match the management responsibility. For example one of the partners may manage the business, while the others simply have an ownership share. The owners receive a share of the profit in relation to their stake, while the working owner also receives a wage. In many respects this is not dissimilar to many family farms where one sibling actively farms and the others are equity partners, but less active in management of the business.

While standard partnerships open individuals to unlimited liability, since 2001 there has been the option throughout the UK of using a Limited Liability Partnership (LLP). These were introduced to meet the needs of the professions (solicitors, accountants, etc), but are now being used in agriculture, with several successful examples, especially in English arable areas. Under LLP the members have limited liability (reduced risk to personal wealth from creditors’ claims), but still have the flexibility of partnership agreements. In the UK most partnership examples involve established farmers combining their farming businesses, but not the ownership of their land. Likewise expansion by these corporate or partnership businesses has been through contract or tenancy arrangements. In New Zealand and Australia there are more examples of equity arrangements being formed to buy farms and, as land prices have risen worldwide, this has become the way for some to get into land ownership.

**Contract Farming Agreements**

These are well established throughout the UK. They operate in both livestock and crop situations, but are much more widespread in the latter. They have been attractive because they are covered by contract law (and hence avoid tenancy legislation) and because they allow the landowner to be classed as a farmer (with the tax and subsidy ownership benefits that brings) without actually having to do the physical farming.

In a contract farming agreement (CFA), the farm occupier (landowner or tenant) provides the land, buildings and fixed equipment and, crucially, continues to pay all the costs and receives all the income. The “contractor” provides all the labour and machinery and effectively does all the farming. The two parties meet regularly to agree the farming policy. A separate bank account is set up by the occupier (usually called the No.2 account) and from this all the costs for the farming covered by the agreement is paid, and into this all the sale proceeds and relevant subsidies are paid.

The occupier receives a pre-agreed “retention” or “first share”. The contractor receives a payment (contractor’s basic fee) for all the work done on the farm, at pre-agreed contract rates. The profit (or divisible surplus) which is left after these payments are made, and all the costs and incomes are accounted for, is then split between the occupier and contractor, typically 20:80. The contractor gets the big share of the divisible surplus to act as an incentive to improve profits.

The overall aim is that the occupier gets a reasonable and fixed return, while the contractor has the incentive to gain from a good profit (but a lower return if the profit is poor). The occupier carries the greater risk, because even if there is a large loss, the contractor’s basic fee is still paid.
There is complete flexibility over what land and buildings and fixed equipment are included in the agreement. Some agreements include SFP and other subsidies, others do not.

**Contract growing**

This term covers a wide range of crop and livestock sub-contract systems. The farmer provides labour, skills and variable levels of facilities (buildings and machinery). A large grower or a processor provides the livestock, possibly feed and other stock inputs, plants/seeds/crop inputs, and usually a blueprint or management input.

**TYPES OF TENANCY**

Agricultural holdings law is described more fully below, but under this legislation there are five possible tenancy arrangements:

- Leases of less than a year for grazing or mowing
- Short Limited Duration Tenancies (SLDT) of up to 5 years
- Limited Duration Tenancies (LDT) of a minimum of 10 years (an SLDT can be converted to an LDT at any time during the lease)
- “1991 Act tenancies” or “secure tenancies” entered into under the 1991 Act or preceding legislation, where the tenant’s security of tenure is protected by the legislation e.g. the tenancy does not come to an end at the term prescribed in the original lease, but continues by “tacit relocation”. A 1991 Act tenancy can be converted to an LDT.
- Limited partnership tenancies which evolved as a work around to the security of tenure of 1991 Act tenancies. They evolved as a response to the Agricultural Holdings (Scotland) Act 1991, to allow the landlord to regain vacant possession of land. In a limited partnership, the landowner or their agent is the limited partner, and the person who is in practice farming the land (and who may previously have been a 1991 Act tenant) is the general partner. The legal tenant of the land is the limited partnership, which lasts for a minimum term specified in a partnership agreement. At the end of the term specified in the partnership agreement, it may terminate automatically or may allow for termination by notice being given by either the limited or general partner, which will effectively end the tenancy since the tenant will no longer exist.

The interim report of the Review of Agricultural Holdings (Scottish Government 2014a) presented the latest statistics on the number of these types of tenancies.

**Table 3 - Number of each type of Agricultural Tenancy in Scotland 2007, 2010 and 2013**

<table>
<thead>
<tr>
<th>Tenancy Type</th>
<th>2007</th>
<th>2010</th>
<th>2013</th>
<th>Difference</th>
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<tbody>
<tr>
<td>Small Landholders Act</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Holdings</td>
<td>31</td>
<td>84</td>
<td>118</td>
<td>87</td>
</tr>
<tr>
<td>Hectares</td>
<td>1,884</td>
<td>3,785</td>
<td>5,197</td>
<td>3,313</td>
</tr>
<tr>
<td>LDT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Holdings</td>
<td>107</td>
<td>192</td>
<td>292</td>
<td>185</td>
</tr>
<tr>
<td>Hectares</td>
<td>27,202</td>
<td>44,615</td>
<td>76,177</td>
<td>48,975</td>
</tr>
<tr>
<td>SLDT</td>
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<tr>
<td>Holdings</td>
<td>257</td>
<td>387</td>
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<tr>
<td>Hectares</td>
<td>50,956</td>
<td>70,796</td>
<td>87,210</td>
<td>36,254</td>
</tr>
</tbody>
</table>
AGRICULTURAL HOLDINGS LEGISLATION

Agricultural tenancies in Scotland other than those under crofting law and the small landholding Acts are regulated by agricultural holdings legislation. The principle statute is the Agricultural Holdings (Scotland) Act 1991 c.55, as amended (‘the 1991 Act’).

THE 1991 ACT

The 1991 Act was a consolidating Act and brought together legislation on farm tenancies made between 1949 and 1991. The Act maintains 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.

Security of tenure under the 1991 Act

In a tenancy granted under this legislation the landlord’s rights to serve a notice to quit are restricted. This meant that leases did not come to an end at the end of a term specified in the original lease, and instead they continued by “tacit relocation”. They are also heritable and have passed from generation to generation in many cases. Where a landlord serves a notice to quit on the tenant, the tenant may serve a counter notice on the landlord, which means that the landlord is required to seek an order from the Scottish Land Court to enforce the notice to quit. The Act specifies how the Court must consider such an application from a landlord, the effect of which is to protect the rights of the tenant. A “1991 Act tenancy” therefore provides the tenant with security of tenure and limits the landlord’s ability to obtain vacant possession of land.

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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 effect of this legislation was to inhibit the creation of new farm tenancies, because if a landlord let land under such a tenancy they had little prospect of regaining vacant possession. Among other things this would affect the value of the land should they ever wish to sell because land with a sitting tenant is much less valuable than land with vacant possession (with a value of around 50-60% of the value of land with vacant possession).

THE 2003 ACT

The Agricultural Holdings (Scotland) Act 2003 (‘the 2003 Act’) 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 and the Scottish Law Commission. These proposals 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 2003 Act as passed is therefore more far-reaching than had been envisaged at the time of the White Paper (TFF 2007). 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 (LDTs) which had a minimum length of 15 years and no maximum, and Short Limited Duration Tenancies (SLDT) 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. 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, the 2003 Act gave tenants the right to harvest timber they have planted. The definition of good husbandry was also 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. If the tenant wants to have the option to exercise this right, they must register an interest in the land with Registers of Scotland. Once registered, if a landlord wishes

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Made up of the National Farmers Union of Scotland (NFUS) and the Scottish Landowners Federation (now Scottish Land and Estates (SLaE))
to sell the land, they must offer the tenant first refusal before they can place it on the open market. If a price cannot be agreed between the landlord and tenant, an independent valuation is undertaken. There is a 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. The Land Reform Review Group (Scottish Government 2014a) state that there had been 1,463 registrations by tenants by early 2014, of which 906 are still active. No information is available on the reasons behind the 557 registrations which have come off the register. The report states that:

Some registrations would have been removed because they had lapsed, while others may have been rescinded for inaccuracies. In some cases, the right may had been exercised or the tenancy may have ended for other reasons. The Review Group’s understanding is that, while no purchases have apparently taken place by a tenant exercising their right under the legislation, the existence of the right has facilitated that outcome in some cases.

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 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

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 intestate estate (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

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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.
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.

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). The main changes are to the two new types of tenancy introduced by the 2003 Act. The Order reduced the minimum term of a LDT from 15 years to 10 years and allows an SLDT to be converted to an LDT at any time, instead of only at the end. 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”; an amendment to the provisions for 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 (TFF 2011).

AGRICULTURAL HOLDINGS (SCOTLAND) (AMENDMENT) ACT 2012

Two of the proposals for changes to agricultural holdings laws made by the Tenant Farming Forum could not be implemented through the 2011 Order, because they were outwith the scope of the power in the Public Services Reform (Scotland) Act 2010 to make such orders (ultra vires). These were a change to the definition of who is a near relative of a tenant farmer and the prohibition of upward-only and landlord-only initiated rent reviews. A third change related to VAT was discussed and agreed by the TFF though it was not included in the original package of measures.

These three measures were implemented by the Agricultural Holdings (Amendment) (Scotland) Act 2012 (‘the 2012 Act’). Section 1 of the Act amends 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.

Section 2 of the Act prohibits 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 (LDTs and SLDTs), an unforeseen consequence was that some shorter term leases contain rent review clauses that only allowed an increase in rent or which could only be initiated by the landlord. These were 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 does not have retrospective effect and only applies to leases agreed on or after section 2 came into force (12 September 2012).

Farm rents are reviewed periodically, and in most cases landlords and tenants agree changes to the rent by negotiation. Where they cannot agree either party can apply to the Land Court to determine the rent. Landlords and tenants cannot ask the Land Court to determine rent within three years of the last variation of the rent. In an English case it was held that VAT formed a part of the rent and therefore constituted a variation of the rent and therefore preventing a rent review for three years from the date of change in the VAT rate. Although there had been no similar cases in Scotland there was a concern that a Scottish Court might follow this decision. Section 3 of the Act therefore makes clear that a change in VAT should not count as a variation
of rent for the purposes of determining when a rent review could be initiated. This section also applies retrospectively to any changes in rent that resulted from VAT changes.

The provisions of the Bill as introduced are discussed in SPICe Briefing 12-02 (Marsden 2012).

AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003 REMEDIAL ORDER 2014

On 24 April 2013 the Supreme Court issued its judgment in the case of Salvesen v Riddell, which involved a dispute between a land owner and a tenant over the dissolution of a Limited Partnership. The judgement identified a defect in section 72 of the Agricultural Holdings (Scotland) Act 2003. The court found that the effect of the operation of section 72(10) contravened landlords’ rights under Article 1 of the First Protocol of the European Convention on Human Rights. The Supreme Court suspended its judgement until 23 April 2014 to allow the Scottish Government time to consult with the industry and achieve the necessary correction. The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 is that correction.

Background: Limited Partnerships and the 2003 Act

The Scottish Executive’s (2000) initial proposals for the Agricultural Holdings (Scotland) Bill did not intend to alter arrangements for existing limited partnership tenants. Nor did they envisage a right to buy for tenant farmers. However, when the proposals for a draft bill were made, the Executive consulted on a pre-emptive right to buy for secure tenants (i.e. farmers with tenancies under the 1991 Act or earlier legislation) (Scottish Executive 2002). This pre-emptive right to buy remained in the Bill when it was introduced to Parliament, and has been enacted in the 2003 Act. The right allows a tenant to register an interest in part or all of the land they rent with Registers of Scotland, and then they have a right to buy the land if the landlord wants to sell or transfer it. If they cannot agree a price with the landlord, the legislation provides a process for appointing an independent valuer.

Many landlords issued dissolution notices to bring an end to limited partnership tenancies around the time the legislation was being developed with the draft Bill consultation and when the Bill was being considered by Parliament. The Executive was concerned that some of these notices were made by landlords seeking to avoid the impact the new legislation might have, rather than because this was something that they would have done for other legitimate reasons. This led to amendments which were enacted in sections 72 and 73 of the 2003 Act. These sections relate to the rights of tenants who were general partners in a limited partnership tenancy where the landlord gave notice to end a limited partnership tenancy after 16 September 2002 (the date when The Agricultural Holdings (Scotland) Bill was introduced to the Scottish Parliament).

Section 72 affected tenants differently depending on when the notice of dissolution was served. Where the termination notice was served between 16 September 2002 and 30 June 2003 the general partner could serve notice under section 72(6) which would continue the tenancy as a 1991 Act tenancy with security of tenure. The general partner would then be in the position of the tenant in their own right. In such cases the landlord could apply to the Land Court for an order disapplying the effect of section 72(6), but would only be successful if the Land Court was satisfied that the notice was not served for the purpose of depriving the general partner (tenant) of the benefit of section 72(6) and the Land Court considered it reasonable to make the order.

By contrast where the termination notice was served on or after 1 July 2003 the general partner could still become the tenant by virtue of section 72(6) but section 72(10) of the 2003 Act then applied retrospectively to any changes in rent that resulted from VAT changes.
permits the landlord the benefit of section 73. Access to the relief given by section 73 is denied to landlords who served notice before 1 July 2003 when section 72 of the Act came into effect.

Section 73 modifies the requirements for the service of a notice to quit leading to recovery of vacant possession by the landlord. It ensures that a general partner (now the tenant) obtains in most circumstances a guaranteed notice period before they are required to quit the land. There is a double notice provision. Firstly the landlord must give the tenant notice of not less than two years, nor more than three years before the end of the lease - notice that they intend to give notice to quit. Then the notice to quit itself must be given not less than one year, nor more than two years before the end of the tenancy specified in the lease, or where the lease has continued beyond the term stipulated at the end of a period of continuation. The landlord may also apply to the Land Court to reduce these notice periods.

The Salvesen v Riddell case and the Supreme Court

The validity of section 72 of the Agricultural Holdings (Scotland) Act 2003 was challenged in the Salvesen v Riddell case where on appeal the Supreme Court held that subsection 72(10) of the 2003 Act was incompatible with landlords’ rights under Article 1 Protocol 1 of the European Convention on Human Rights (ECHR - relating to the peaceful enjoyment of property) and so was outwith the legislative competence of the Scottish Parliament.

The Supreme Court recognised that the legislation has had effect from 2003 and that a number of parties that were not involved in the Salvesen v Riddell court case may have been affected. To be in the affected group a party would need to have served or received a dissolution notice for a Limited Partnership between 16 September 2002 and 30 June 2003. The Scottish Government identified a number of groups affected by the defective sections of the 2003 Act, including that a tenant may now have a full 1991 tenancy; or that the landlord may have sold either to the tenant exercising a pre-emptive right to buy, or to a new landlord. The Scottish Government consultation sets out the different groups that could be identified as being affected by the defect in its consultation on the remedial order.

The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014

The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 was made on the 2 April 2014 under section 12 of the Convention Rights (Compliance) (Scotland) Act 2001. The Order makes amendments to the Agricultural Holdings (Scotland) Act 2003 to address the incompatibility, arising from section 72(10) of that Act, with Article 1 Protocol 1 of the European Convention on Human Rights.

The order corrects a legal defect but does not address the issue of losses sustained as a consequence of the defect. The Order provides landlords affected by the defective sections of the Agricultural Holdings (Scotland) Act 2003 a means to recover vacant possession. It allows those affected landlords the “relief” of section 73, whereby the landlord has a route to termination of the lease and the recovery of vacant possession after a double notice period.
SMALL LANDHOLDINGS

Small landholders are tenants under the Small Landholders Acts 1911-1931. The character of these small landholdings is similar to crofts and the legislation governing them has a shared history with crofting. However, while once numerous, there are few Small Landholders left in Scotland. Data in the interim report of the agricultural holdings review included in table 3 above showed 118 small landholders in 2013, with a total area under this tenure of some 5,000ha, and which, anecdotally, are scattered from Strathspey to Stranraer (Scottish Government 2014a and b). The Land Reform Review Group report describes the historical evolution of the Small Landholders Acts:

The Crofters Holdings (Scotland) Act 1886 provided a statutory framework governing the relationship between tenants and landlords over small holdings where only the land (as opposed to the house and other structures) is leased. The legislation provided the tenants with rights of security of tenure, succession, fair rents and compensation. However, as described earlier, the restriction of the application of the 1886 Act to seven counties in the Highlands and Islands, meant the qualifying tenants under the legislation were restricted to those counties.

The Small Landholders (Scotland) Act 1911 then sought to extend the principles of crofting tenure to the rest of Scotland. The purpose of the Act was “to encourage the formation of small agricultural holdings in Scotland and to amend the law relating to the tenure of such holdings (including crofters’ holdings)”. The Act provided that the Crofters Acts were to be read as if the expression “landholder” were substituted for “crofter” and that the Act “shall have effect throughout Scotland”.

The 1911 Act, while giving extra rights to existing small holders outside the Crofting Counties, was related to the Government’s land settlement programme and empowered the Board of Agriculture created by the Act to establish new holdings. The Act also obliged the Board “to compile and from time to time revise a register of small holdings throughout Scotland”. However, while the register was started in 1912, it was suspended during the First World War and never updated after that.

The 1911 Act was followed by the Land Settlement (Scotland) Act 1919 and the Small Landholders and Agricultural Holdings (Scotland) Act 1931. The Crofters (Scotland) Act 1955 then re-introduced the separation between croft tenancies and other small landholdings (which continued to be held under the Small Landholders Acts 1911-31). When Scotland’s agricultural tenancy legislation was consolidated in the Agricultural Holdings (Scotland) Act 1991, which remains the primary legislation, the Act did not deal with crofts or small landholdings. Crofting legislation was then consolidated through the Crofters (Scotland) Act 1993, which also remains the primary legislation. As a result, small landholders are still being dealt with under Acts which have not been updated for over 80 years (Scottish Government 2014a).

The Crofting Reform etc. Act 2007 allowed Ministers to designate areas for crofting outside the original crofting counties by Order. The Crofting (Designation of Areas) (Scotland) Order 2010 extended the scope of crofting tenure to Nairn, Moray, three parishes in Argyll and Bute, Arran and the Cumbraes. The 2007 Act also provides a process whereby small landholders in areas to which crofting tenure has been extended can convert their holdings to a croft. However, the Land Reform Review Group found that, to date, no small landholders have succeeded in doing this (Scottish Government 2014a Section 27, para 11).

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7 The Small Landholders (Scotland) Act 1911 (c 49), Land Settlement (Scotland) Act 1919 (c 97) and the Landholders and Agricultural Holdings (Scotland) Act 1931 (c 44)
CURRENT DEBATE ON AGRICULTURAL HOLDINGS LEGISLATION

The Scottish Government continues to be concerned about Scotland having “one of the lowest proportions of rented land anywhere in Europe”. In the foreword to the Review Of Agricultural Holdings Legislation interim report the Cabinet Secretary for Rural Affairs, Food and the Environment, Richard Lochhead MSP states "I am determined that we do all we can to turn this tide, not just for the good of the tenanted sector but because of the importance of the tenanted sector to Scottish agriculture as a whole" (page 3). A number of initiatives have been set up in recent years (Scottish Executive 2014b).

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.

The TFF’s stated purpose is to 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. As noted above the TFF developed proposals for changes to agricultural holdings law which have been implemented through the 2011 Order and the 2012 Act.

The Rent Review Working Group

The Rent Review Working Group (RRWG) was formed in June 2012 by the TFF to consider aspects of agricultural rent review procedures in Scotland, and more specifically, rent reviews in terms of Section 13 of the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”), as amended8. The Group produced its report to the TFF and the Scottish Government on the 28 November 2012 (TFF 2012). The report makes the following recommendations:

- There should be no further adjustment of Section 13 of the 1991 Act, as amended but attempts should be made to improve operation of the existing rent review formula in light of the clarification provided in the Moonzie decision.9

- Understanding of Section 13 of the 1991 Act, as amended, should be improved by developing –
  1. A practitioners guide;
  2. An explanatory note for service with rent review notices; and

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8 Section 13 of the 1991 Act was amended in 2003 by Section 63 of the Agricultural Holdings (Scotland) Act 2003 (“the 2003 Act”) with the Land Court being given primary jurisdiction over landlord and tenant matters referred to it and statutory arbitration per Schedule 7 of the 1991 Act being repealed. Section 13 of the 1991 Act was further amended by The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 and the Agricultural Holdings (Amendment) (Scotland) Act 2012.

9 This is a reference to Morrison Low v Paterson’s Executors
3. A lay persons guide.

- A voluntary rent register should be established and maintained to improve access to comparable rents

- The time taken and the cost of resolving disputes should be reduced by:
  1. Engaging with the Land Court to explore the possibility of a case management procedure applicable to rent review applications; and
  2. Developing the alternative dispute resolution procedures of arbitration or expert determination.

The Rural Affairs Climate Change and Environment Committee held a series of four evidence sessions on the issues raised in the Rent Review Group’s report, with the Group Members on the 6 March 2013; the Tenant Farming Forum Member Organisations on 20 March 2013; Professor Phil Thomas, Chair of the TFF on 19 June 2013; and with the Cabinet Secretary for Rural Affairs and the Environment on 18 September 2013 (Scottish Parliament Rural Affairs, Climate Change and Environment Committee 2013a –d).

In October 2013 the Central Association of Agricultural Valuers, RICS Scotland and the Scottish Agricultural Arbiters & Valuers Association published a Summary Guide to Scottish Agricultural Rent Reviews.

**Other work of the TFF**

The TFF is also engaged in looking at several other related areas of agricultural holdings law:

- arbitration;
- fixed equipment;
- diversification;
- investment;
- waygo; and
- assignations and succession.

The TFF (2013) published an update on the status of this work in May 2013.

**LAND REFORM REVIEW GROUP**

The Land Reform Review Group was established by the Scottish Government in 2012 with the remit to identify how land reform will:

- Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland
- Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development
- Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland.
Its final report *The Land of Scotland and the Common Good* was published in May 2014 with part seven devoted to agricultural land holdings and two recommendations relating to this sector in particular (Scottish Government 2014a). These recommendations are:

- The Review Group’s view is that the requirement for registration is an unwarranted constraint on the right of pre-emption of secure 1991 tenants under the Agricultural Holdings (Scotland) Act 2003. The Group recommends that the legislation should be amended to remove this requirement and to provide that all these tenants have first option on buying any part of their tenanted holding which their landlord decides to sell.

- The Review Group considers that the position of secure 1991 tenant farmers and their families as part Scotland’s rural communities, should be an important consideration in the Scottish Government’s current review of Scotland’s agricultural holdings legislation. The Group recommends that the Government should take full account of social and local community factors in determining whether the introduction of a conditional right to buy for tenants with secure tenancies under the Agricultural Holdings (Scotland) Act 1991, would be warranted in the public interest.

The Land Reform Review Group also recommended that small landholders should, like crofters, have a right to buy their holdings.

**SCOTTISH GOVERNMENT REVIEW OF AGRICULTURAL HOLDINGS LEGISLATION**

In November 2013 the Scottish Government announced details of its planned review of agricultural holdings. The Scottish Government appointed a six person group to advise it on the issue. The interim report was published in June 2014 (Scottish Government 2014a). The report states that the Scottish Government’s vision is for a Scottish tenant farming sector that is dynamic, getting the best from the land and the people farming it, and provides opportunities for new entrants, forming part of a sustainable future for Scottish farming. The aim of the Review Group is to determine what policy changes and solutions are required to enable the achievement of the vision, through consideration of the following aims:

- Provide opportunities for more flexible farming arrangements to enable farming businesses to develop and move through the tenant farming sector
- Provide the ability for tenant farmers and their landlords to develop their business relationships to optimise benefits and agree a fair and reasonable rent
- Modernise tenant farming legislation so that, it is flexible enough to meet the changing needs of the agricultural industry and economy; and
- Identify appropriate interventions and actions, including broader policy, legal and fiscal which can overcome barriers, weaknesses or omissions in the current tenant farming sector.

The review group has commissioned research, which is outlined in the report. Different research projects aim to quantify the level and type of tenure arrangements, and analyse the changes in types of tenure and the reasons for change since 1982; provide an understanding of tenure systems in other countries; and analyse disputes submitted to the Land Court between 2009 and 2013. A survey has also been commissioned to provide an understanding of the views and experiences of tenant farmers and of landowners, with a supplementary survey of owner-occupiers. Early findings of the research are found in the report, but full results will be published in due course.
In addition to commissioning research the review group has carried out stakeholder engagement to identify issues of concern. These discussions, research and work to date have led the review group to identify three broad key issues to be further explored.

1. The continuing contraction of the rented sector with secure tenancies “withering away” and a lack of turnover in the sector

2. Constraints on investment -with the increase in short-term lets and therefore difficulties in obtaining start-up finance, and rents not considered sufficient return for investment by landlords

3. The balance between the rights of landlords and tenants, and the manner in which risk is shared, with the perception of landlords that secure 1991 Act tenancies are a low-return/high risk investment with priority given to the tenants’ rights over the landlords interests. Whereas some tenants view the landlord as “holding all the cards”.

There has been much interest in the issue of an absolute right to buy (giving tenant an option to buy even if the landlord/owner is not willing to sell the land) and the interim report devotes chapter 8 to discussing it. The report argues that the policy rationale for any proposed right to buy must be clearly expressed, supported by evidence and must clearly explain how it supports the vision for the sector. The report therefore states that further consideration will be given to the following issues: the impact of potential right to buy on sustaining agricultural productivity; achieving diversity of ownership; and resolving disputes. The review group note the lack of real evidence on many of the issues related to right to buy and seek “clear evidence to support answering these questions”.

The interim report concludes by setting out our three broad areas that the group will focus attention on ahead of the final report, and are set out in the interim report summary (Scottish Government 2014c p 9-10). These are:

- Establishing a stable and effective framework for secure 1991 Act tenancies. This will include considering rents and rent review; issues related to investment, improvements and waygo compensation; retirement, succession and assignation; pre-emptive right to buy for secure 1991 Act tenancies

- Creating a new and flexible framework to stimulate diverse other arrangements. This will include consideration of relevant letting vehicles for the 21st century, and issues related to new entrants

- Ensuring a supportive wider cross cutting context. This will include considering landlord-tenant relationships as well as taxation and common agricultural policy impacts on the sector.

The Scottish Government decided, early in 2014, that the agricultural holdings review would also review the Small Landholders Acts. As part of its work to create a new and flexible framework of land tenure, the group is reviewing the Small Landholder (Scotland) Act 1911 and explore the potential to use it as a vehicle for creating suitable tenancies for New Entrants, including the use of powers of compulsory purchase. The group is also considering the proposal, made by the Land Reform Review Group, and also put to the group in other submissions they have received, that Small Landholders should have a right to buy their holdings.

A final report will be submitted to Scottish Ministers by December 2014.
SOURCES

Agricultural Holdings (Scotland) Act 1991 c.55

Agricultural Holdings (Scotland) Act 2003 asp 11

Agricultural Holdings (Amendment) (Scotland) Act 2012 asp 6


Convention Rights (Compliance) (Scotland) Act 2001 asp 7


Landholders and Agricultural Holdings (Scotland) Act 1931 (c 44)

Land Settlement (Scotland) Act 1919 (c 97)


Public Services Reform (Scotland) Act 2010 asp 8


Small Landholders (Scotland) Act 1911 (c 49)


Tenant Farming Forum [online resource]. Available at: [www.tenantfarmingforum.org.uk](http://www.tenantfarmingforum.org.uk) [Accessed 24 July 2014]


RELATED BRIEFINGS

SB 12-02 Agricultural Holdings (Amendment) (Scotland) Bill

SB 02-113 Agricultural Holdings (Scotland) Bill (contact SPICe)

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