Passage of the

Agricultural Holdings (Amendment) (Scotland) Bill 2011

SPPB 175
Passage of the
Agricultural Holdings (Amendment) (Scotland) Bill 2011

SP Bill 3 (Session 4), subsequently 2012 asp 6

SPPB 175

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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected.

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The annexes to the Rural Affairs, Climate Change and Environment Committee’s Stage 1 Report were not published as part of the Report, but were available on the web only. They are reproduced in full in this volume after the Stage 1 Report. The annexes include all the oral evidence taken, and written evidence and supplementary correspondence received, by the Rural Affairs, Climate Change and Environment Committee and relevant extracts from the Committee’s minutes.

The Finance Committee did not report to the Rural Affairs, Climate Change and Environment Committee on the Financial Memorandum at Stage 1. Written submissions received by the Finance Committee in response to its standard questionnaire are included in this volume.

The Bill did not include any provisions for delegated powers and there was, therefore, no Delegated Powers Memorandum and no report on the Bill by the Subordinate Legislation Committee.

At Stage 2 no Groupings of Amendments were produced as there was only one amendment lodged.
At Stage 3 no amendments were lodged. There was, therefore, no “As Passed” version of the Bill produced. The Bill was passed in its “As Amended at Stage 2” form.
Agricultural Holdings (Amendment) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to amend the law governing succession to agricultural tenancies and the review or variation of rent under such tenancies.

**Succession**

1 **Succession by near relatives**

In paragraph 1 of Part III of Schedule 2 to the Agricultural Holdings (Scotland) Act 1991 (c.55), for the definition of “near relative” substitute—

““near relative” in relation to a deceased tenant of an agricultural holding, means a surviving spouse, civil partner, child or grandchild of that tenant;”.

2 **Prohibition of upward only rent reviews etc.**

In section 9 of the Agricultural Holdings (Scotland) Act 2003 (asp 11), before subsection (1) insert—

“(A1) Where, by virtue of any provision, a review of rent due as payable under a lease constituting a limited duration tenancy—

(a) may be initiated only by the landlord; or

(b) may only determine that the rent is to be increased,

the provision concerned is void and the rent due as payable under the lease is instead to be reviewed and determined in accordance with this section.”.

3 **Effect of VAT changes on determination of rent**

In section 13(9) of the Agricultural Holdings (Scotland) Act 1991, after paragraph (c) insert—

“(d) a variation of rent arising from—
(i) the exercise or revocation of an option to tax under Schedule 10 to the Value Added Tax Act 1994 (c.23); or
(ii) a change in the rate of value added tax applicable to grants of interests in or rights over land in respect of which such an option has effect.”.

General

4 Transitional provisions

(1) The amendment made by section 1 has effect in respect of a notice to quit given in accordance with section 25(2) of the Agricultural Holdings (Scotland) Act 1991 only if the deceased tenant to whom that notice relates died on or after the day on which section 1 comes into force.

(2) The amendment made by section 2 has effect only in respect of a provision for review of rent made on or after that section comes into force.

(3) The amendment made by section 3 has effect in relation to a variation of rent arising from the exercise or revocation of an option, or a change in rate of value added tax, that takes effect before that section comes into force.

5 Commencement

(1) This section and section 6 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force at the end of the period of 2 months beginning with the day of Royal Assent.

6 Short title

The short title of this Act is the Agricultural Holdings (Amendment) (Scotland) Act 2012.
Agricultural Holdings (Amendment) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to amend the law governing succession to agricultural tenancies and the review or variation of rent under such tenancies.

Introduced by: Richard Lochhead
On: 31 October 2011
Bill type: Executive Bill
AGRICULTURAL HOLDINGS (AMENDMENT) (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Agricultural Holdings (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 31 October 2011:

   - Explanatory Notes;
   - a Financial Memorandum;
   - a Scottish Government Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 3–PM.
INTRODUCTION

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

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

THE BILL

4. The policy objective of this Bill is 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. This Bill contains three main provisions:

- to extend the definition of “near relative” (being the class of successors who are entitled to serve counter notice to a notice to quit) to include a grandchild of a deceased tenant farmer;
- to prohibit lease terms which provide for upward only or landlord only initiated rent reviews in Limited Duration Tenancies; and
- to provide that changes in rent resulting from the exercise or revocation of the option to tax by a landlord, or a change in the rate of VAT where such an option has effect, do not qualify as a “variation of rent” such as would prevent parties from seeking a determination from the Land Court on the rent for a period of three years.

Succession

Section 1: Succession by near relatives

5. Section 1 replaces the current definition of “near relative” in paragraph 1 of Part III of Schedule 2 to the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”) with an extended definition. The definition has been extended to include a grandchild of a deceased tenant.

6. The definition was previously extended 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).

7. The reference to an adopted child has been deleted. Section 40(1) of the Adoption and Children (Scotland) Act 2007 (status conferred by adoption) provides that “an adopted person is to be treated in law as if born as the child of the adopters or adopter.” As “child” automatically includes “adopted child” the reference to “adopted child” is unnecessary.
8. The definition operates within the context of Section 25 of the 1991 Act which is the operative provision. Section 25 applies where notice to quit is given to the tenant of an agricultural holding who acquired right to the lease of the holding by succession.

9. Where notice to quit is given to a successor tenant who is a “near relative” of the deceased tenant, that person is entitled to give the landlord a counter notice requiring that the Scottish Land Court consents to operation of the notice to quit.

10. A landlord can serve an incontestable notice to quit on any successor as tenant if they are not a near relative of the deceased tenant.

11. The addition of “grandchild” to the class of “near relatives” will afford a grandchild who succeeds a statutory protection, as it will confer upon him or her the right to serve a counter notice to a notice to quit.

**Review of rent etc.**

*Section 2: Prohibition of upward only rent reviews etc.*

12. Section 2 amends section 9 of the Agricultural Holdings (Scotland) Act 2003 through the insertion of a new subsection to provide that rent review provisions which provide for the upward only review of rent or for reviews which can be initiated only by the landlord in a limited duration tenancy, are void. Where such provisions appear, the rent shall instead be determined in accordance with the statutory formula set down in the remainder of section 9.

*Section 3: Effect of VAT changes on determination of rent*

13. Section 13 of the 1991 Act sets out circumstances under which the landlord or tenant farmer of an agricultural holding may seek to have the rent payable in respect of the holding determined by the Scottish Land Court. Subsection (8) states that a reference to the Scottish Land Court may not be made within 3 years of the commencement of the tenancy, the last variation of the rent or the last time a previous direction was given that the rent should remain unchanged. Subsection (9) sets out certain circumstances where subsection (8) may be disregarded.

14. Section 3 amends section 13 of the 1991 Act to the effect that the exercise or revocation of the option to tax, or a change in the rate of VAT where such an option has effect, does not qualify as a variation of rent for the purposes of the Section 13(8)(b) of the 1991 Act.

**General**

*Section 4: Transitional provisions*

15. Subsection (1) provides that the change in the definition of “near relative” has effect in respect of a notice to quit given by a landlord to a tenant who has acquired interest in the tenancy on succession only if the deceased tenant farmer to whom the notice relates died on or after the date on which section 1 comes into force.
16. Subsection (2) clarifies that the prohibition on upward only and landlord only initiated rent review clauses giving rise to annulment, has effect only in relation to such clauses where they are made after section 2 comes into force.

17. Subsection (3) provides that the changes made by section 3 of the Bill will apply to options, revocations or VAT rate changes that have effect before the date of Royal Assent. This means that in cases where an option to tax had effect, the changes in the rate of VAT which occurred in January 2010 and January 2011 will not prevent parties seeking a reference to the Scottish Land Court to determine the rent for a period of 3 years from the rate change.

FINANCIAL MEMORANDUM

INTRODUCTION

18. This document relates to the Agricultural Holdings (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 31 October 2011. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

19. This document sets out the financial implications of the Agricultural Holdings (Amendment) (Scotland) Bill. It should be read in conjunction with the Policy Memorandum and the Bill itself.

COSTS ON THE SCOTTISH ADMINISTRATION

20. The Bill concerns commercial lease arrangements between landlords and tenant farmers and as such there are no costs on the Scottish Administration arising out of this Bill. The Scottish Land Court is funded through the Scottish Consolidation Fund and its budget for 2011-12 is £410,682. This does not include judicial salaries. It is not expected any additional casework will arise as a consequence of the Bill. It is possible that someone could challenge the inclusion of an upward only or landlord only initiated rent review provision in a lease, however, this is considered to be unlikely given the clarification this Bill would provide. There is also the potential for rent review disputes to be brought forward as a consequence of the clarification of the definition of rent with respect to changes in VAT. However, this simply affects the timetable of any potential dispute. Consequently it is not considered that there will be any impact on legal aid.

COSTS ON LOCAL AUTHORITIES

21. A response to the consultation from Falkirk Council indicates that they, and possibly some other local authorities, are landlords of agricultural holdings. Where local authorities are landlords of agricultural holdings they will be affected by the proposed changes to the legislation prohibiting upward only or landlord only initiated rent reviews, in the same way that any other landlord will be affected. The legislative change will restrict the ability of landlords to include
upward only or landlord only rent review clauses within future leases. This will prevent local authorities from either insisting on increased rents or stopping tenants from requesting a rent review. Although this may prevent local authorities from generating additional income, it is unlikely that local authority leases would contain such provisions as they are deemed to be unfair insofar as they do not allow for adjustments to take account of market conditions.

**COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

**Landlords and tenants**

22. Paragraph 21 applies equally to private landlords as it does to local authorities and any other public bodies who are landlords of agricultural holdings.

23. It is possible, although extremely unlikely, that landlords will continue to include upward only or landlord only initiated provisions in leases following any enactment of this Bill. In such cases, it may be necessary for the tenant to challenge the legality of such a provision in the Scottish Land Court. Also, the effect of the VAT provision relating to rent reviews may result in reviews being brought forward, where it was previously thought that it was not possible for a review to be referred to the Scottish Land Court for 3 years. However, once again, this is extremely unlikely.

24. The costs of cases that come before the Scottish Land Court vary depending on the circumstances of each case. Cases can vary significantly in terms of complexity and length. 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 £1,500 to £3,500 per day depending on the experience and seniority of the advocate involved.

**SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

25. On 31 October 2011, the Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead MSP) made the following statement:

“In my view, the provisions of the Agricultural Holdings (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
These documents relate to the Agricultural Holdings (Amendment) (Scotland) Bill (SP Bill 3) as introduced in the Scottish Parliament on 31 October 2011

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

26. On 26 October 2011, the Presiding Officer (Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Agricultural Holdings (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
AGRICULTURAL HOLDINGS (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Agricultural Holdings (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 31 October 2011. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 3–EN.

POLICY OBJECTIVES OF THE BILL

2. The policy objective of this Bill is 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.

3. There are two principal statutes which regulate agricultural tenancies in Scotland, namely, the Agricultural Holdings (Scotland) Act 1991 and the Agricultural Holdings (Scotland) Act 2003 (“the 1991 Act” and “the 2003 Act” respectively). The Public Services Reform (Agricultural Holdings) Scotland Order 2011 (“the Order”) which came into force on 22 March 2011, made a number of amendments to those Acts.

4. Those amendments were designed to give effect to a set of recommendations made by the Tenant Farming Forum (“TFF”) which the Scottish Ministers agreed to implement by revising the legislation governing agricultural holdings. It had originally been the intention to include provisions in the Order prohibiting the inclusion of upward only or landlord only initiated rent reviews under the 2003 Act and extending the definition of “near relative” in Schedule 2 to the 1991 Act to include a grandchild of a deceased tenant of an agricultural holding. However, those provisions were omitted from the Order on the basis that they fell outwith the vires conferred by section 17 of the Public Services Reform (Scotland) Act 2010.

5. In response to the consultation on the Order, some industry stakeholders expressed disappointment that these two measures which had formed part of a “package” of reforms could not be included in the Order. Disappointment was also expressed that the opportunity had not been taken to correct an anomaly arising from the English High Court case of Mason v
This document relates to the Agricultural Holdings (Amendment) (Scotland) Bill (SP Bill 3) as introduced in the Scottish Parliament on 31 October 2011

Boscawen\(^1\) regarding the incorporation of VAT in agricultural rents under the Agricultural Holdings Act 1986, in so far as it casts doubt over the equivalent provision in Scottish legislation. An amendment was included in the Finance Act 2009 to rectify the anomaly arising from that case in England.

6. The Bill implements the two provisions which were omitted from the Order and makes an amendment similar to that made in England regarding the VAT issue.

7. The Bill makes provision as follows—
   - it contains an amendment to Schedule 2, Part III of the 1991 Act to extend the definition of “near relative” (section 1);
   - it amends section 9 of the 2003 Act to nullify lease terms in Limited Duration Tenancies which provide for upward only and landlord only initiated rent reviews (section 2); and
   - it contains an amendment to section 13 of the 1991 Act that provides that changes in rent resulting from the exercise or revocation of the option to tax by a landlord, or a change in the rate of VAT where such an option has effect, do not qualify as a “variation of rent” such as would prevent parties from seeking a determination from the Scottish Land Court on the rent for a period of three years.

Section 1 - Succession by near relatives

8. The first of these measures relates to succession. Where a tenant farmer dies and the tenancy passes by succession, a landlord is entitled to serve a notice to quit on the successor tenant farmer. A landlord can serve an incontestable notice to quit on any successor as tenant if they are not a “near relative” of the deceased tenant farmer. Where the successor tenant is a “near relative” of the deceased tenant farmer, that person is entitled to give the landlord a counter notice requiring that the Scottish Land Court consents to operation of the notice to quit. In other words, “near relatives” enjoy a degree of protection that other successors do not.

9. The definition of “near relative” currently includes a surviving spouse, surviving civil partner and a natural or adopted child of the deceased tenant farmer. Grandchildren are not included and the practical effect is that where there are three generations of a tenant farming family and the second generation dies before the first (i.e. where a parent who would otherwise succeed dies before the grandparent tenant), a grandchild may be prevented from succeeding to the tenancy if the landlord serves a notice to quit as he or she will be unable to contest that notice by way of serving a counter notice. The Scottish Government considers that the class of persons entitled to this degree of statutory protection should be widened to include a grandchild. It is considered that making it easier for grandchildren to inherit farm tenancies will help new and younger entrants get a start in tenant farming, which will be beneficial to the wider agricultural industry.

\(^1\)(2009 1 W.L.R 2139)
10. It is therefore proposed to extend the definition of “near relative” to include “grandchild” within the list of relatives of a deceased tenant farmer who are entitled to give a landlord counter notice requiring that the Scottish Land Court consents to the operation of the notice to quit.

Section 2 - Prohibition of upward only rent reviews etc.

11. The second measure relates to rent reviews. The Scottish Government considers that there are public policy grounds for nullifying the inclusion of rent review clauses in Limited Duration Tenancies (LDTs) that allow for upward only or landlord only initiated reviews. Where they do appear, the policy is that any such terms should be struck out.

12. In an LDT under the 2003 Act, parties enjoy freedom to contract - they are not restricted in any way when agreeing the contractual provisions which will appear in the lease for a review of rent. It is therefore possible at present for parties to agree to upward only rent reviews, or provision whereby the landlord only, not the tenant farmer, can instigate a review of rent.

13. There is evidence that some LDTs contain review of rent clauses that allow for upward only or landlord only initiated reviews. The nature of these provisions is such that they could result in tenants being burdened by uneconomically high rents, thus undermining their security of tenure.

14. As such, it is considered that there are strong public policy grounds in favour of them being nullified. Section 9 of the 2003 Act provides an implied lease term covering rent review arrangements for LDTs where the lease contains no such provision. It is proposed to insert a provision which would effectively nullify upward only and landlord only initiated review of rent clauses in this section. Where they do appear, the policy is that any such terms should be struck out and the provisions of section 9 would apply.

15. This provision is to apply only to review of rent provisions in LDTs entered into after the law is changed so as not to interfere with the contractual position of parties who have already entered into leases containing such provisions. Agreements between landlords and their tenant farmers that are already in place will continue unaffected by this provision until their expiry.

Section 3 - Effect of VAT changes on determination of rent

16. The Bill also includes a further provision relating to VAT and rent reviews, which has also been agreed by the TFF and mirrors a recent amendment to English agricultural holdings legislation. The judgement in the Mason v Boscawen case has cast doubt over the provisions in the 1991 Act regarding the three year rent review cycle. The case concerned the definition of rent and the Court held that VAT charged on rent is part of the rent for the purposes of the Agricultural Holdings Act 1986.

17. Reaching this conclusion gave rise to an unintended consequence; it followed that a change in the rate of VAT chargeable constituted a change of rent which prevents the parties to a lease under the Agricultural Holdings Act 1986 from referring the rent to arbitration for a period of three years from the date of the rate change. The exercise or revocation of the option to tax by a landlord would have the same effect.
18. In view of the unintended consequences of that judgment, the opportunity was taken to include an “emergency” amendment to the 1986 Act in the Finance Act 2009, Section 79 of which provides that changes in the VAT chargeable on rents is to be disregarded for the purposes of the rent arbitration provisions of the 1986 Act.

19. The equivalent Scottish legislation, Section 13 of the 1991 Act, is cast in almost identical terms to the English legislation that was the subject of the case and there is concern that if the judgement were to be followed by the Scottish Courts, the same problem would arise under the 1991 Act.

20. Although there has been no case law in Scotland on this point as yet, it is considered that the judgement in Mason v Boscawen has the potential to cause confusion in Scotland, although only in the limited number of cases where the option to tax has been taken and as such it is in the interest of the Scottish agricultural tenancy industry to clarify the position in Scotland.

21. Section 13 of the 1991 Act sets out circumstances under which the landlord or tenant farmer of an agricultural holding may seek to have the rent payable in respect of the holding determined by the Scottish Land Court. Subsection (8) states that a reference to the Scottish Land Court may not be demanded within three years of the commencement of the tenancy, the last variation of the rent or the last time a previous direction was given that the rent should remain unchanged. Subsection (9) sets out certain circumstances where subsection (8) may be disregarded and this does not currently include changes in rent resulting from the exercise of an option to tax, the revocation of such an option or a change in the rate of tax.

22. Therefore, a provision has been included in the Bill that would amend the law to clarify that any variation of rent in consequence of the addition of VAT (or election to waive exemption) or, where VAT applies, any variation in the rate, would not prevent a reference to the Scottish Land Court to determine the rent.

23. It is considered that implementing the outstanding two recommendations made by the TFF will help to facilitate new entrants to the tenant farming sector by making it easier for grandchildren to inherit agricultural tenancies and increase confidence in the sector by prohibiting upward only or landlord only rent reviews. Providing clarity on the effect of changes in rent arising from changes in VAT, or by the exercise by a landlord of an option to tax, will also help to reduce uncertainty.

ALTERNATIVE APPROACHES

24. Since “near relative” is defined in statute there are no alternatives other than to amend the primary legislation through a Bill. In relation to the proposal to prohibit upward only or landlord only initiated reviews of rent, it is possible to encourage landlords and their tenant farmers not to include such provisions within leases but this provides no guarantee that such arrangements will not be entered into. Therefore, primary legislation is considered to be the only way of achieving these aims. Similarly, in the absence of any definitive case law on the VAT issue, primary legislation provides the only means of clarifying the effect of changes in VAT on rent.
CONSULTATION

25. The package of measures agreed by the TFF was submitted to Scottish Ministers after extensive consultation with the constituent members of the TFF. In relation to the proposals contained within the Bill, the Scottish Government conducted a consultation exercise on a draft Bill between 22 March 2011 and 30 June 2011. The analysis of the consultation response indicated that the measures in the Bill command broad support from a number of different stakeholders. Of the 16 responses received, 4 were from individuals and 12 were from stakeholder organisations. The consultation identified a few areas that required further consideration. In particular, the transitional arrangements for section 1 of the Bill relating to the changes in the definition of a “near relative” required further consideration.

26. The Scottish Government has adjusted the draft Bill to reflect the majority of these comments.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

27. The Bill deals with the terms of agricultural leases between private individuals and their landlords. The Bill is intended to create a better environment to encourage the letting of farm land to tenant farmers and encourage new entrants into tenant farming, supporting activity and sustainable development within rural communities. The only impact the Bill has on local government is, where local authorities are landlords of agricultural holdings, they will be affected by the proposed changes to the legislation prohibiting upward only or landlord only initiated rent reviews, in the same way that any other landlord will be affected. Both male and female grandchildren will be provided equal opportunity by having the potential to succeed a tenancy. It is considered that the Bill has no effect on human rights and island communities the majority of which have a combination of crofting, tenant farming and farming on them.

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2 http://www.scotland.gov.uk/Publications/2011/03/18095404/0
3 All the consultation responses, where permission was given to publish them, can be found on the Scottish Government’s website at http://www.scotland.gov.uk/Publications/2011/08/08143730/0.
Rural Affairs, Climate Change and Environment Committee

3rd Report, 2012 (Session 4)

Stage 1 Report on the Agricultural Holdings (Amendment) (Scotland) Bill

Published by the Scottish Parliament on 24 February 2012
Rural Affairs, Climate Change and Environment Committee

Remit and membership

Remit:
To consider and report on agriculture, fisheries, rural development, climate change, the environment and other matters falling within the responsibility of the Cabinet Secretary for Rural Affairs & the Environment.

Membership:
Claudia Beamish
Graeme Dey
Annabelle Ewing (Deputy Convener)
Rob Gibson (Convener)
Jim Hume
John Lamont
Richard Lyle
Margaret McDougall
Dennis Robertson

Committee Clerking Team:
Clerk to the Committee
Lynn Tullis

Senior Assistant Clerk
Nick Hawthorne

Assistant Clerk
Clare O’Neill

Committee Assistant
Eileen Martin
INTRODUCTION

Parliamentary scrutiny

1. The Agricultural Holdings (Amendment) (Scotland) Bill\(^1\) was introduced in the Scottish Parliament on 31 October 2011 by the Cabinet Secretary for Rural Affairs and the Environment. The Bill was accompanied by Explanatory Notes,\(^2\) which include a Financial Memorandum, and by a Policy Memorandum,\(^3\) as required by the Parliament’s Standing Orders.\(^4\)

2. Under Rule 9.6 of Standing Orders, the Parliamentary Bureau referred the Bill to the Rural Affairs, Climate Change and Environment Committee (“the Committee”) to consider and report on the general principles.

3. No secondary committee was appointed to scrutinise the Bill. However, the Finance Committee did seek views on the Financial Memorandum to the Bill, and subsequently wrote to the Committee, appending the responses. The Committee notes and comments on the evidence taken by the Finance Committee later in this report.

4. The Committee issued a call for views on the Bill’s general principles on 10 November 2011 and 13 written submissions were received (including supplementary submissions).

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\(^{1}\) Agricultural Holdings (Amendment) (Scotland) Bill. Available at: http://www.scottish.parliament.uk/S4_Bills/Agricultural%20Holdings%20(Amendment)%20(Scotland)%20Bill/Bill_as_introduced.pdf

\(^{2}\) Agricultural Holdings (Amendment) (Scotland) Bill. Explanatory Notes. Available at: http://www.scottish.parliament.uk/S4_Bills/Agricultural%20Holdings%20(Amendment)%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf

\(^{3}\) Agricultural Holdings (Amendment) (Scotland) Bill. Policy Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Agricultural%20Holdings%20(Amendment)%20(Scotland)%20Bill/Policy_Memo.pdf

5. In publishing its call for views, the Committee acknowledged that there was an on-going related debate about wider land reform and agricultural tenancy issues which are not addressed by the Bill. The Committee agreed to focus its Stage 1 scrutiny on the specific provisions in the Bill, but also agreed to accept written evidence on the wider issues, which it would return to following completion of the passage of the Bill.

6. The Committee took evidence in public session at meetings on 11, 18 and 25 January 2012.

7. Extracts from the minutes of all the meetings at which the Bill was considered are attached at Annexe A. Where written submissions were made in support of evidence given at meetings, these are reproduced, together with the extracts of the Official Report of the relevant meetings, at Annexe B. All other written submissions, including supplementary written evidence, can be found in Annexe C. In addition, the Committee received a number of private and anonymous submissions relating to wider land reform and agricultural tenancy issues.

8. The Committee thanks all those who have assisted with its scrutiny of the Bill and is grateful to all those who made private and anonymous submissions, often of a personal and sensitive nature.

BACKGROUND TO AND PURPOSE OF THE BILL

Contents of the Bill

9. The Policy Memorandum which accompanies the Bill states that the policy objective of the Bill is 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.”

10. Specifically, the Bill makes three changes to the current law on agricultural holdings. It—

- amends the definition of “near relative” (being the class of successors who are entitled to serve a counter notice to a notice to quit) who may succeed to a secure agricultural tenancy to include grandchildren;
- prevents certain restrictions for rent reviews in limited duration tenancies; and
- disappplies VAT rate changes and options to tax from being variations in rent which prevent rent reviews.

Background

11. The Bill is a piece of amending legislation which proposes changes to two Acts which regulate agricultural tenancies in Scotland: the Agricultural Holdings
12. The Public Services Reform (Agricultural Holdings) Scotland Order 2011 ("the 2011 Order"), which came into force in March 2011, made further amendments to these two Acts.

13. There are three types of tenancy agreement commonly found in Scotland, those under the 1991 Act (which are the most common and offer the most security), and those created by the 2003 Act: Short Limited Duration Tenancies (SLDTs) (lasting for no more than five years), and Limited Duration Tenancies (LDTs) (originally lasting for a minimum of 15 years, but amended by the 2011 Order to last a minimum of ten years). Land is also let through short term (less than one year) grazing or mowing lets.

14. The Bill contains two amendments to the existing legislation which were originally part of a package of recommendations intended for inclusion in the 2011 Order, put forward by the Tenant Farming Forum (TFF), an industry-led body established to facilitate debate between landowners and tenants.

15. However, for legal reasons, these two recommendations were not included in the 2011 Order, to the disappointment of the TFF and the then Rural Affairs and Environment Committee. These two measures were the change to the definition of near relative as the class of people who could issue a counter-notice to a notice to quit served when a tenant dies, and the prohibition of upward-only and landlord-only initiated rent reviews. These measures are two of the three amendments included in this Bill.

16. The third change included in the Bill (the VAT measure) was not included in the original package of recommendations from the TFF, but is a precautionary change supported by the Scottish Government and the TFF following a legal ruling in England which suggested that changes in VAT would be considered a variation in rent.

17. The TFF has stated that these three measures have agreement amongst all of its members, which represent both landlords and tenants, and the TFF and Scottish Government are keen for the changes to become law as quickly as possible. There are a number of other outstanding issues surrounding agricultural tenancy law which still require attention. The TFF and the Scottish Government are of the view that consideration of these issues is not currently at a stage where they could be included in this Bill. However, the Committee understands that these

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8 The TFF is made up of the following members: National Farmers Union Scotland (NFUS); the Royal Institute of Chartered Surveyors Scotland (RICS); Scottish Land and Estates (SLaE); the Scottish Tenant Farmers Association (STFA); and the Scottish Association of Young Farmers.
9 See Rural Affairs and Environment Committee letter to Richard Lochhead Cabinet Secretary for Rural Affairs and the Environment 6 December 2010.
issues will continue to be discussed during, and after, the passage of the Bill. Many of these issues are discussed in detail elsewhere in this report.

**Scottish Government consultation**

18. The Scottish Government published a consultation on its proposals for a bill on 22 March 2011, with a closing date of 30 June 2011. On 10 August 2011, the Scottish Government published the sixteen responses it had received. These consisted of two anonymous submissions, two individual submissions, and twelve submissions from organisations.

19. On 18 August 2011, the Scottish Government published an analysis of those responses. The analysis showed a large majority of support for each of the three proposals.

20. However, the analysis also revealed a difference in opinion on when the succession proposals should take effect, and if and how they should be applied ‘retrospectively’. This issue emerged again in the Committee’s evidence-taking and is discussed below.

21. The Committee notes the Scottish Government’s consultation on the proposed bill and is of the view that it was appropriately conducted. The Committee welcomes the publication of the responses and the analysis of the responses.

**Policy Memorandum**

22. The Committee found the Policy Memorandum which accompanied the Bill to be helpful in clearly setting out the policy objectives of the Bill, why the approaches taken in the Bill were favoured over possible alternate approaches, and possible effects on various groups and organisations.

**Statistics and data**

23. On 6 January 2012, the Scottish Government published a document entitled *Trends in Agricultural Tenancy Agreements from 2005 to 2011*. This showed that the total number of holdings with tenancy agreements has decreased steadily by 727 (almost 10 per cent) from 7,470 in 2005 to 6,743 in 2011. These statistics provided the backdrop for the evidence-taking sessions the Committee had with stakeholders and with the Cabinet Secretary.

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24. During the course of its Stage 1 scrutiny of the Bill, it became apparent to the Committee that there were gaps in data and statistics which made it difficult to fully understand how effective the Bill would be in achieving its policy aims, and, perhaps more crucially, what further changes would be required to improve the health of the tenant farming sector in Scotland.

25. Whilst information is available on the number of holdings, information on the area of rented land is not available, and little data exists on contract farming. Scottish Government officials told the Committee, in supplementary written evidence, that the statistics currently collected are derived from the June Agricultural Census and that this does not include questions which would allow the collection of data relating to the number of tenants purchasing land, or the landowner taking back control of the land. The evidence added—

“We are looking into the possibility of estimating this information by linking the June Census data to the corporate register of holding, which contains holding details, and by exploring other data sources such as land sales from the Register of Scotland.”

26. The Committee was keen to get behind the latest statistics to try to establish why the fall in the total number of holdings with tenancy agreements had taken place.

27. When the Cabinet Secretary appeared before the Committee, a number of questions were posed to him about available data relating both to the specific provisions in the Bill, and to wider policy issues such as the number of new entrants lacking access to tenancies. In supplementary evidence to the Committee, the Cabinet Secretary confirmed that the Scottish Government did not have the data that the Committee was looking for. Giving oral evidence, the Cabinet Secretary said—

“We are aware of the lack of data on the issue and are working with the industry on ways of capturing a lot more to understand exactly what is happening out there.”

28. In terms of the agricultural census, Iain Dewar, the Scottish Government’s Bill team leader, explained what questions the census currently asks, and what could be done to improve the information—

“At the moment, the information that we collect through the agricultural census gives us a high-level picture. It provides us with information about the amount of land that is rented and owner-occupied in Scotland. Since 2005, it has also given us some general information about the number of tenancies. We fully acknowledge that we need to get to the detail underneath that

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14 Scottish Government. Supplementary written evidence.
information so that we can better understand the interactions and what happens when a 1991 tenancy comes to an end.\textsuperscript{16}

29. The Committee is concerned about the lack of available data on many of the issues it was examining as part of its scrutiny of the Bill. The Scottish Government agreed that more data needed to be gathered to better understand the tenant farming sector in Scotland. The Committee recommends as a matter of urgency that the Scottish Government work with all relevant parties to ensure that the required data is collected, so that any future changes to agricultural holdings legislation can be based on a more robust evidence base.

30. The Committee also recommends that the Scottish Government review the questions asked in the current agricultural census, to ensure that the most appropriate and beneficial questions are being asked with a minimum of bureaucracy.

GENERAL PRINCIPLES OF THE BILL

31. The Committee makes specific comment on the three provisions in the Bill, and other issues that were raised during its scrutiny, in the main body of this report below. However, to state at the outset, the Committee broadly welcomes the three proposals contained in the Bill which it believes are overdue, and recommends that the Scottish Parliament support the general principles of the Bill at Stage 1, to allow the Bill to pass to Stage 2.

PROVISIONS IN THE BILL

Succession by near relatives

Background

32. The Committee notes that the changes being proposed in the Bill make no change to the law of succession itself, which is governed by the Succession (Scotland) Act 1964 (“the 1964 Act”).\textsuperscript{17}

33. Tenants can currently assign tenancies to anyone who would be entitled to succeed to the intestate estate according to the 1964 Act if the landlord consents to the assignation (consent may only be withheld on reasonable grounds). This is a wider list of individuals than those defined as near relatives, including a spouse, civil partner, children, grandchildren, siblings, nieces and nephews.\textsuperscript{18} Those defined as near relatives, are a spouse, civil partner, and children only.

34. Currently, when a tenant farmer dies, a landlord has the right to issue a notice to quit on the successor tenant. This can be an incontestable notice to quit if the successor is not a near relative. This affords near relatives additional

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\textsuperscript{17} Succession (Scotland) Act 1964. Available at: http://www.legislation.gov.uk/ukpga/1964/41

\textsuperscript{18} Section 2 of the Succession (Scotland) Act 1964 specifies in which order relatives would be eligible to succeed to an estate where there is no will.
protection (in this case, the ability to serve a counter notice which requires attention from the Scottish Land Court) which others do not have.

Definition of near relative
35. The current legal definition of near relative includes a surviving spouse, surviving civil partner and a natural or adopted child of the deceased tenant farmer, but not a grandchild or any other relative. This is widely considered to no longer be acceptable, hence the proposal in the Bill, in section 1, to amend the definition of near relative to include grandchildren.

36. The evidence received by the Committee was unanimous in welcoming a change to the definition of near relative. However, there was some debate about whether the Bill goes far enough in extending the definition. Evidence was received suggesting that the revised definition of near relative should extend beyond the proposed addition of grandchildren, to include other relatives, such as nieces and nephews and cousins.

37. Although the consensus reached within the TFF was for an extension of the definition to include grandchildren only, in oral evidence to the Committee, the Scottish Tenant Farmers Association (STFA) and the National Farmers Union Scotland (NFUS), both TFF members, indicated support for further widening the definition. The NFUS told the Committee—

“It seems a little bit strange that, during your lifetime, you can assign a tenancy to a wider class of people, yet, at the point of your death, it is restricted to certain categories."

38. And the STFA added—

“From a tenant's perspective, we would encourage the definition of “near relative” to be extended beyond a grandchild to include nephews and nieces.”

39. Another submission to the Committee also supported further extending the definition, stating that—

“We would support the Bill in as far as the change to include grandchildren as near relative successors but would suggest that it does not go far enough in that nieces and/or nephews should also be included.”

40. However, another TFF member, Scottish Land and Estates (SLaE), was not in favour of extending the definition, believing that doing so could destabilise the balance of rights between landlords and tenants.


21 The individual who made this submission supplied contact details but asked for them to be withheld due to the sensitive nature of the submission.

22 Anonymous submission B. Written submission.
41. This divergence of views within the TFF demonstrates the degree of compromise that has been reached in the provision in the Bill. Phil Thomas, the Chair of the TFF, noted that—

“There has been strong support for the amendment to legislation that is in the Bill. That does not rule out any widening of the approach, but it is important that there is a step-by-step process.”

23

42. Scottish Government officials confirmed that there was no legal impediment which would prevent the definition of near relative being further amended. However, the Scottish Government’s legal adviser did add—

“[…] we must bear in mind that, if we confer new rights on people by extending the definition and the benefits that flow from it to nieces and nephews, there will be an associated disadvantage or disbenefit to a landlord who might be contesting a notice to quit.”

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43. This note of caution was echoed by the Cabinet Secretary when he told the Committee—

“With legislation, we have to be careful about unintended consequences. We have to safeguard the rights of both landlords and tenants. Some would argue for extending the definition of “near relative” to go beyond grandchildren, but others would argue that such a definition might tie down a tenancy and make it so secure that the landlord who signed up for it in the first place would no longer have flexibility and would have their rights and expectations infringed.”

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44. In terms of why the specific decision had been taken by the Scottish Government to only extend the definition to include grandchildren, the Cabinet Secretary told the Committee—

“The “near relative” issue is one of those measures that the tenant farming forum unanimously agreed had to be addressed. We have before us the proposal to extend the definition of “near relative” to include grandchildren as a result of the forum’s consensus view. We could easily ignore that consensus and put an alternative—or extend the definition further—in the legislation. However, we have chosen not to do that, because we agreed with the tenant farming forum that we would take forward its recommendations on a consensual basis, and its recommendation was to extend the definition of “near relative” to grandchildren.

Having said that, I will not sit here today and say that that is the end of the story. It has taken more than 100 years to get the current legislation on the books, and I cannot pretend to bring all the long-term solutions to the

committee overnight. However, there is much more work to be done, and the succession issues will be part of that."

45. The Committee notes all the supportive evidence it received on the issue of extending the definition of near relative as it relates to the class of people who can serve a counter-notice to a notice to quit, upon the death of a tenant. The Committee supports the principle of the definition being extended.

46. The Committee acknowledges that the position reflected in the Bill, to extend the definition to include grandchildren, is consistent with the consensual view established in the Tenant Farming Forum, which advised the Scottish Government on the contents of the Bill. However, the Committee is aware that individual members of the TFF have differing views on the issue and is not unsympathetic to the call made by some for the definition to be further extended to include other relatives. Whilst noting the points made to the Committee that further extending the definition could potentially destabilise the consensus reached in the TFF, and also possibly lead to unintended negative consequences in the balance of rights between landlords and tenants, the Committee recommends that the Scottish Government re-examine this issue and seek further comment from the TFF and its individual members ahead of Stage 2 on whether the definition should be amended to be more similar to the rules on assignation, for example to include nephews and nieces.

Transitional provisions

47. Section 4 of the Bill states that the new succession provisions will come into force in relation to a notice to quit only when the deceased tenant to whom that notice relates has died on or after the day on which section 1 of the Bill comes into force (which is at the end of the period of 2 months beginning with the day of Royal Assent). This section was drafted in response to the Scottish Government’s consultation, where several respondents noted that the transitional arrangements, as they stood at the time, were not clear. Caroline Mair, rural affairs solicitor in the Scottish Government’s directorate for legal services, explained to the Committee—

“We changed the transitional provision to make it clear that it will affect only cases in which a tenant farmer has died after the act comes into force. We believe that is a nice, clear and unambiguous cut-off point.”

48. However, the majority of stakeholders within the TFF do not agree with the Scottish Government’s position. The TFF response to the Scottish Government’s consultation stated—

“The majority of TFF members believe that the provisions of Clause 1 should apply to situations where the tenant has died before the Bill comes into force but the legatee or acquirer of the lease has not yet given notice under s11(2)

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49. In its written submission to the Committee, the STFA outlined its reasons for wanting to alter the proposal in the Bill—

“Section 1 [the succession provisions] should apply where the tenant has died before the Bill comes into effect and notice has not yet been served to transfer the lease, either as a bequest or by intestate succession. Thus any notices served to transfer a lease after the Bill comes into force will be effective even though the tenant had died before the commencement of the new Act. This is only fair and right considering the unforeseen delays to the bill. STFA would seek an amendment to this effect.”

50. However, SLaE presented an alternate view, supporting the provisions as outlined in the Bill and detailing its opposition to the sort of changes proposed by other stakeholders—

“Scottish Land & Estates is aware of reports in the media that certain interests may seek to have Section 4(1) amended to be relevant to tenants who have died before the coming into force of that section. In other words, they seek retrospective legislation in this respect. Scottish Land & Estates takes this opportunity strongly to oppose this argument […]”

51. The SLaE submission then goes onto make a number of points in relation to this issue, namely that—

- retrospective legislation is not, in principle, a good thing;
- it may set a precedent in terms of future agricultural holdings legislation that established positions could be altered – this may have a negative impact on landowners in terms of confidence etc;
- it is not appropriate to give a deceased individual statutory rights;
- the numbers likely to be affected by the absence of a retrospective provision are likely to be very small;
- as drafted, the effect of section 4(1) is clear and provides certainty to all concerned.

52. The issue was discussed at the evidence-taking session with TFF members. The STFA and NFUS both asserted their view that the Bill should be changed to capture those people in the middle of the process. The STFA noted that this change was originally intended to be made in the 2011 Order, and it would be unfortunate if the delay prevented some people being able to benefit from the

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29 Scottish Tenant Farmers Association. Written submission.
30 Scottish Land and Estates. Written submission.
provisions in the Bill. The Committee heard that whilst some anecdotal evidence was available, robust data on how many people would be affected by such a change was not available. Witnesses agreed, however, that the number of people affected would, in all likelihood, be small.

53. When the issue was discussed with the Cabinet Secretary at Committee, he stressed that the Scottish Government wanted to avoid retrospective legislation if at all possible, and that the Government wanted the Bill to have a clear cut-off point to avoid ambiguity. Hence the decision that section 1 would apply once commenced to those tenants who die on or after the day of commencement. The Cabinet Secretary stressed that the number of people who may be negatively affected by this is likely to be very small (“one or two”). However, the Cabinet Secretary did say that he would “reflect” on the issue further.

54. The Committee notes that the issue of when the transitional provisions come into force is the only issue on which the Scottish Government has not adopted the majority view of TFF members. In this regard, the proposal in the Bill stands out from the consensus agreed on the other issues.

55. The Committee notes all the evidence it heard on this issue and is not persuaded that the approach taken in the Bill is the correct one. The Committee agrees that passing legislation which applies retrospectively is not, generally speaking, good practice. However, in this instance, the Committee does not believe that altering the Bill so that section 1, when commenced, applies in circumstances where a tenant has died, but the near relative has not yet served notice to the landlord of acquiring the lease, would be passing retrospective legislation. Rather, it would be altering the point in a specific process at which the section should be able to be enforced.

56. The Committee can see no persuasive case for excluding tenants in such circumstances and is also mindful that there was an expectation that the provision would have been included in the 2011 Order, and therefore come into force at an earlier point. The Committee therefore recommends that the Scottish Government look at this issue again, and consider bringing forward an amendment at Stage 2 which would apply to near relatives of tenants who have died, but who have not yet notified a landlord that a lease has been acquired.

Rent reviews

57. Section 2 of the Bill amends section 9 of the 2003 Act by inserting a new subsection preventing upward-only and landlord-only initiated rent reviews in a limited duration tenancy (LDT).

58. This proposal has received widespread support. The STFA stated that—

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“This proposal will remove the disadvantage felt by tenants finding themselves in a position of weakness when negotiating the terms of a lease in a sellers market and having to agree to such conditions.”

59. There is no information available on the number of upward-only or landlord-only initiated rent review clauses that have been included in tenancy agreements. The Scottish Government told the Committee, in supplementary evidence, that—

“[…] the exact terms of a lease are a private matter between a landlord and a tenant and no information is held by the Scottish Government on the number of LDT leases with an upward-only or landlord-only rent review clause.”

60. TFF members also had no empirical data on the issue, though anecdotally such clauses were known to exist in a small number of cases.

61. The Scottish Government also confirmed that the provision would not apply retrospectively, i.e. any established contracts which contain such provisions will continue to contain them if the Bill is enacted. The Bill will, however, prevent any future contracts from containing such clauses.

62. The NFUS, although supportive of the proposal, brought the Committee’s attention to the fact that some of its members were not in favour of such clauses being banned in future. The NFUS explained to the Committee that—

“Some people objected to the practice whereby, in order to secure a tenancy, someone goes in with what is called key money, which means that they start off paying an unrealistically high rental rate, which they hope to negotiate down in the long term, due to economic circumstances. Many of our members felt that having a provision for upward-only rent reviews would serve those individuals right. It was felt that having such a provision might bring a bit more normality into the bids for the tenancy in the first place, and ensure that those who were bidding did so on a fairer basis, with regard to the economic performance that could be achieved.”

63. The Committee raised the issue highlighted by the NFUS with the Cabinet Secretary. He told the Committee—

“To be frank, I have not really considered that in my deliberations, and I cannot recall that point being made to me during my discussions with the NFUS. Some farmers may hold that view, but members may rest assured that many more farmers and others who are involved in the debate hold the alternative view that we should tackle that issue and, for the avoidance of doubt, simply make it law that any such clauses that are inserted into leases would be void.”

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33 Scottish Tenant Farmers Association. Written submission.
34 Scottish Government. Supplementary written submission.
64. SLaE also broadly supported the proposal, but noted that it may further restrict freedom of negotiation at the start of a contract, thus stifling, rather than enabling, new tenancies.

65. The Committee questioned witnesses on whether any possible restriction on the ability to contract would make it less likely that landowners would enter into tenancies, or unduly determine the type of tenancies granted, or would limit the supply of land.

66. The view of stakeholders was, broadly, that although any restriction of freedom to contract could contribute to some of the negative impacts listed above, there were other greater contributors to the wider issue of making land available to let.

67. The Cabinet Secretary believed that the proposal in the Bill was an appropriate one, and did not feel that recent statistics which showed an almost 10 per cent drop in agricultural tenancies since 2005 could be explained by any imposed restrictions within contract negotiations.

68. The Committee notes comments made about the proposal possibly further restricting the freedom of negotiating contracts, but does not believe that banning such clauses will have an unwanted negative effect in this regard.

69. The Committee notes the widespread support for the rent review provisions in the Bill and supports the removal of upward-only rent reviews, and landlord-only initiated rent reviews, in a limited duration tenancy. The Committee believes these are positive and welcome measures.

70. The Committee does not believe that the proposal should apply retrospectively, as it would not be prudent to attempt to unpick existing contracts which were legal at the time of establishment.

Effect of VAT changes on determination of rent

71. Section 3 of the Bill disapplies VAT rate changes and options to tax from being variations in rent which prevent rent reviews.

72. This provision received widespread support in evidence given to the Committee. The STFA commented that it—

"[...] has no objection to this additional amendment to agricultural holdings. It is prudent to clarify whether or not changes to VAT will constitute a variation of rent. This will bring Scotland in line with England."\(^{37}\)

73. In oral evidence with stakeholders, no issues were raised with regard to this section of the Bill.

74. The Committee notes the unanimous support for this provision in evidence submitted to it and supports the disapplication of VAT rate

\(^{37}\) Scottish Tenant Farmers Association. Written submission.
changes and options to tax from being variations in rent which prevent rent reviews.

OTHER ISSUES

Wider land reform issues

75. Several other issues which did not specifically relate to the provisions in the Bill were raised with the Committee in both written and oral evidence. These are discussed below.

76. In addition, as mentioned at the start of this report, the Committee also received a number of other submissions (predominantly private and anonymous submissions) on wider land reform issues. The Committee will consider these at a later date, once the passage of the Bill has been completed.

77. In its written submission, the STFA summarised what it believed the current mood in the tenant farming sector to be—

“There is a profound sense of frustration and dissatisfaction within the tenanted sector as illustrated by recent calls in the press for an extension of tenants’ right to buy provisions. STFA recommends that the RACCE Committee examine the root causes of this dissatisfaction within the wider context of its Land Reform review. The Cabinet Secretary has indicated his intention to review the operation of agricultural legislation and STFA and its members welcome the opportunity to submit evidence. It is important that tenancy law be modernised so that the tenanted sector can play its part in an inclusive modern Scotland.”

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78. The STFA concluded its submission by saying—

“It has become apparent over the last few years that significant flaws have developed in the way in which the tenanted sector is operating. The problems articulated above have led to calls for extreme measures to be taken and there is a need to examine the root causes of this sense of dissatisfaction and solutions identified. STFA believes that this can only happen through open debate and therefore welcomes this opportunity to engage with the RACCE Committee to charter a road map to a successful tenancy system in Scotland as part of a wider review of Land Reform.”

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79. The Committee believes that the Bill makes necessary, albeit relatively moderate, changes to agricultural tenancy law in Scotland. However, as the evidence from stakeholders and the Scottish Government has demonstrated, there is much work still to be done to improve the law further, to address the recent trend of a decline in the number of agricultural tenancies, to make more land available for rent, and to encourage a greater number of new, and younger, entrants into farming.

38 Scottish Tenant Farmers Association. Written submission.
39 Scottish Tenant Farmers Association. Written submission.
80. The Committee recommends that, following the completion of this Bill, the Scottish Government continue to work with the TFF and other stakeholders, landowners and tenants across Scotland, to review the operation of agricultural legislation and address the other challenges facing the tenant farming community in Scotland as soon as possible.

New entrants

81. The Policy Memorandum which accompanies the Bill states that—

“The policy objective of the Bill is 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.”

82. The issue of how to create the best conditions to attract new entrants into tenant farming was discussed by the Committee during its Stage 1 scrutiny. The recent statistics which showed a 10 per cent drop in agricultural tenancies suggest that there is still much work to be done to attract new entrants.

83. TFF members discussed with the Committee some of the challenges that the sector faces in attracting new entrants. The Committee is aware of barriers, such as access to finance and the availability of land, and it is clear that there is no easy or quick solution to the problem.

84. The provision of starter-units (land made available on specific terms for new entrants to gain experience of farming on a smaller scale) was discussed, as was the establishment of a “new entrant enabler”, a mentor tasked specifically with working with potential new entrants to help them establish themselves. The TFF is also going to invite representatives of a new entrant representative body to an upcoming TFF meeting to discuss what can be done to provide greater support for new entrants.

85. The Cabinet Secretary spoke to the Committee about the various methods new entrants can use to attempt to enter the farming industry, of which tenant farming was only one—

“There is a case for establishing a register that aspiring new entrants can put their name on, and I am looking at how we can achieve that. From time to time, I come across individuals who wish to have their own farm [...] In the case of tenancies, it would be good to establish a national register with the co-operation of all the stakeholders. That would allow those who can make land available to know there is a demand and to understand the kind of people who want to get on to the first rung of the ladder, and it would help us to understand how many such people are out there.”

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40 Agricultural Holdings (Amendment) (Scotland) Bill, Policy Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Agricultural%20Holdings%20(Amendment)%20(Scotland)%20Bill/Policy_Memo.pdf
86. The issue of how to attract more new entrants into farming, and creating the best conditions to allow that to happen, has been a recurring theme for this Committee and its predecessor committees. In terms of attracting more tenant farmers, the Committee believes that this Bill will make a necessary, but modest, contribution to achieving that goal.

87. The Committee acknowledges that attempting to reverse the current trend of falling numbers of agricultural tenancies will require long-term policy making, using a range of tools, including legislation. The Committee recommends that the Scottish Government continue to actively engage with the sector as a matter of urgency. The Committee also recommends that the Scottish Government give consideration to consulting on the possible establishment of a new entrants register.

Conservation tenancies

88. In its written submission, RSPB Scotland urged the Committee to recommend that the Scottish Government, the TFF and others consider the options for establishing “conservation tenancies” “in the next legislative update”.

89. In its written submission, RSPB Scotland explained that—

“[...] our land management options, where a (pre-2003 Act) limited partnership or an existing agricultural tenancy does not exist, excludes the establishment of either new tenancies, SLDTs or LDTs. This is because such arrangements would permit the tenant to carry out management in contradiction to the charitable or grant conditions referred to above. Under these circumstances, our partnership approach to management is restricted to annual grazing lets and/or contract cropping. Nevertheless, there are places and occasions where it would be desirable to enter into longer term agreement with partners. This would reduce overheads, but also provide greater security for both parties – as well as more certainty in delivering conservation (public policy) outcomes.”

90. The submission goes on to suggest that the creation of “conservation tenancies”, similar to SLDTs/LDTs, but amended to secure the necessary conservation requirements, could solve the current limitations faced by the RSPB in letting land. The RSPB also suggest that such a system could benefit other NGOs and also Scottish Government agencies.

91. RSPB Scotland note that precedent for this exists in two other Acts: The Abolition of Feudal Tenure (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003, which both allow Ministers to approve “conservation bodies” who may attach “conservation burdens” on land.

92. The RSPB acknowledge that this Bill may not be an appropriate vehicle for bringing forward this change, but draws the proposal to the attention of the Committee in a bid to start a debate which could inform future legislative changes.

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42 RSPB Scotland. Written submission.
93. The Cabinet Secretary expressed an interest in looking into the RSPB’s idea further.\(^{43}\)

94. **The Committee notes the RSPB’s suggestion for establishing conservation tenancies in Scotland and believes that the idea should be examined in more detail. The Committee also notes the Cabinet Secretary’s positive response to the suggestion and recommends that he work closely with the RSPB and other stakeholders over the coming months to try to establish such tenancies in Scotland where appropriate. The Committee would welcome the Scottish Government keeping it up to date on progress on this issue.**

**Investment in holdings**

95. Another issue raised with the Committee was the lack of clarity surrounding the responsibility for investment in holdings. It appears to the Committee that this is another example of the delicate balance which needs to be achieved and maintained between landlords and tenants. Currently, tenants may be reluctant to make investments in their holdings for a number of reasons, such as a lack of security of tenure; a lack of clarity concerning compensation when they leave a tenancy (“waygo” payments – discussed below); a fear of investments leading to significantly increased rents; and a lack of clarity, despite attempts to address this in the 2003 Act, around what a tenant is responsible for paying for, and what a landlord is responsible for paying for. Similarly, landlords may be reluctant to invest because the cost of any investment may not make economic sense compared to the increased rent which could be secured as a result.

96. An anonymous submission sent to the Committee gave an example of one area of dispute—

“What some agricultural lawyers take the view that the landlord is responsible for storm damage and some agricultural lawyers take the opposite view. Clarification of this point should be treated as a matter of urgency.”\(^{44}\)

97. It seems to the Committee, from the evidence it received, that a stalemate exists between some landlords and tenants on this matter, which is obviously another key issue in establishing trust between the two parties, and creating a vibrant and healthy tenant farming sector.

98. **The Committee recommends that the Scottish Government and the TFF re-examine the issue of investment in holdings, to—**

- assess whether proposals could be brought forward to clarify who is responsible for paying for what and in what circumstances; and

- set out where the most appropriate balance is for the creation of a vibrant and healthy tenant farming sector.

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\(^{44}\) Anonymous submission B. Written submission.
Waygo compensation

99. In its written submission to the Committee, the STFA highlighted the problem of compensating out-going or retiring tenant farmers for investment made in the holding over the course of a tenancy (often referred to as “waygo” or tenant improvements compensation).

100. In attempting to arrive at a desirable balance between landowners and tenants, which will achieve a healthy tenant farming sector for both parties, the STFA felt that the lack of appropriate waygo compensation had a negative impact on tenants investing in holdings, or even seeking out holdings in the first place.

101. The 2003 Act amended provisions relating to waygo, but the view of the STFA described the issue as remaining a “grey area” which required clarification.45

102. The Chair of the TFF, Phil Thomas, told the Committee that the issue of waygo is “on the TFF’s list of things to look at”.46 The Cabinet Secretary also told the Committee that the issue was on the Scottish Government’s radar—

“We are aware of on-going concerns in the tenancy sector about waygo compensation and issues surrounding that. We cannot pull a rabbit out of a hat to give landlords enough confidence that it is worth while letting land and at the same time address some of tenants’ concerns about compensation at waygo. However, we are keen for the industry to look at that. Within 18 months of the act coming into force, we will review its impact so far, which is an opportunity for the committee and the industry to have its say. We are aware that there are issues surrounding waygo.”47

103. The Committee notes the comments made in evidence about the lack of clarity surrounding compensation paid to out-going or retiring tenants for any investment made to the holding during the course of a tenancy. The Committee welcomes the commitment of the TFF and the Scottish Government to examine this issue in more detail and believes that clarity in relation to waygo compensation needs to be established as a matter of urgency.

Land agents

104. An anonymous submission made to the Committee suggested that there was an issue with the behaviour of some land agents—

“The recent tactics of some agents have left tenants in shock and can only be described as bullying behaviour which has had a very negative effect on landlord/tenant relations [...] The actions of a few land agents who operate nationwide (and are gradually replacing resident factors), combined with the actions of some legal advisors over the last decade, have damaged landlord

45 STFA. Written submission.
and tenant relations to such an extent that it is difficult to see good relationships ever being restored.”

105. The NFUS told the Committee that the way in which land agents act on behalf of some landlords in discussions with tenants can give rise to tension and conflict within negotiations. It went on to recommend that a code of practice should be established and enforced to govern better the role of land agents in the process.

106. The Royal Institute of Chartered Surveyors Scotland (RICS) responded to this point, confirming that RICS and its members have “rigorous guidance” on how agents should behave and conduct themselves, but added that this did not apply to all land agents, as not all agents were members of RICS. RICS confirmed that it had produced a guidance note on a code of conduct and that this would be revisited within the TFF.

107. The Cabinet Secretary told the Committee that he did not feel the development of a code of practice in this area was the responsibility of Government, but was supportive of the industry itself developing a code—

“A code of practice to address some of the issues with land agents would be a good thing, as long as there is a way in which the professional organisations of which the agents are members can enforce it internally.”

108. The Committee supports the development of a code of practice which would ensure a greater consistency of practice and behaviour amongst those providing land agent services. However, it is essential that any such code be applicable to all land agents operating in Scotland, whether acting on behalf of landlords or tenants, and irrespective of their membership of RICS, and that the code had some “teeth” to ensure it could be appropriately enforced.

109. The Committee recommends that the Scottish Government closely monitor the development of a code within the industry, via the TFF, to ensure that any code is fit for purpose.

Dispute resolution

110. The issue of how to resolve disputes between landlords and tenants as appropriately, quickly and cost effectively as possible is a difficult one to deal with. Until 2003, arbitration was a statutory requirement, but was abolished in the 2003 Act, with wide spread support, because it was thought by a majority of stakeholders to be too costly and overly bureaucratic.

111. However, that change has led to the Land Court being the only body able to rule on issues of dispute, and evidence given to the Committee suggests that that has not proven to be a practical option for many people, particularly tenants.

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48 Anonymous submission A. Written submission.
112. The Land Court has made an order setting the rent for only one rent review case since the 2003 Act came into force.\(^{50}\) Most cases have been put on hold or settled out of court. Rather than improve the situation, the 2003 Act seems to have continued to ensure that the process of dispute resolution is expensive and not fit for purpose.

113. In oral evidence to the Committee, Scott Walker of the NFUS told the Committee—

“The TFF wants to work long and hard to see how we can provide some dispute resolution, solve the problems that bring people into conflict with one another and avoid the costly process that has unfortunately evolved in the Scottish Land Court, with both sides feeling the need to employ a Queen’s counsel and all the associated costs of that. We are looking long and hard at arbitration as a means of solving such disputes. In addition, NFU Scotland is considering other alternatives, which we still have to work through.”\(^{51}\)

114. This view was reinforced by the STFA who agreed that alternative, cheaper methods of dispute resolution, other than recourse to the Land Court, needed to be available.

115. Phil Thomas, Chair of the TFF, told the Committee that the TFF does not have a role in administering dispute resolution, but said that the TFF could provide a platform to try to improve the current situation—

“[…] in our past few meetings we have considered the opportunities that the Arbitration (Scotland) Act 2010 presents. Many people do not want to end up in the Land Court, because it is costly, time-consuming and difficult. Therefore there must be greater focus on alternative possibilities, and arbitration is clearly one strand. There may also be opportunities in facilitated dispute resolution, but we have not teased out what mechanisms might be best for that. However, we are signed up to getting better relationships between tenants and landlords.”\(^{52}\)

116. The Cabinet Secretary told the Committee that the Scottish Government had asked the TFF to address this issue—

“Clearly, we encourage arbitration. We are very much in favour of going down a route that is more cost-effective than ending up in the Land Court […] that is expensive, emotionally and financially draining, and can lead to difficulties, particularly for those who do not have much money or wealth in the first place. It is worth bearing it in mind that arbitration was statutory until the 2003 act but, because that provision was seen as too bureaucratic and expensive, it was removed. We have come round in a bit of a circle because

\(^{50}\) On 9 February 2012, the Court of Session ruled on the appeal of this case, and asked the Land Court to reconsider its decision. One consequence of this may be that there will be a further delay in other outstanding cases that are currently on hold.


the Land Court is equally expensive and bureaucratic in some cases. We are now looking at using arbitration again, and I wrote to the tenant farming forum just over a year ago, urging it to consider the issue […] I am not ruling anything out at this point. I am waiting to hear back from the tenant farming forum about how it sees a better way forward. We need a better way forward. We should not have long drawn-out court cases if we can avoid it.”

117. In addition, written evidence from the Scottish Agricultural Arbiters and Valuers Association, suggested that the Arbitration (Scotland) Act 2010 could provide opportunities for the tenant farming sector—

“We recently held an Arbitration Conference and are engaged in discussion with the TFF relative to development of an arbitration procedure suited to disputes arising from agricultural tenancies, particularly rent reviews […] At the most general level our observation is that the procedure provided by the Arbitration (Scotland) Act 2010 should so far as possible apply to arbitration under the Agricultural Holdings (Scotland) Acts.”

118. The Committee supports the calls for the issue of dispute resolution to be looked at again as a matter of urgency, and recommends that the Scottish Government work with the TFF to bring forward proposals for improving dispute resolution as soon as possible. The Committee also recommends that the TFF continue to work with the Scottish Agricultural Arbiters and Valuers Association with regard to the possible opportunities afforded by the Arbitration (Scotland) Act 2010.

Land Registration etc. (Scotland) Bill

119. Richard Blake, from SLaE, raised two issues with the Committee, both relating to the Land Registration etc. (Scotland) Bill, which is a piece of Scottish Government legislation currently being scrutinised at Stage 1 by the Economy, Energy and Tourism Committee.

120. The first issue he raised was that under the Land Registration etc. (Scotland) Bill, limited duration tenancies greater than 20 years will be required to be registered. The second issue, which he said was potentially of greater concern, was that the Bill states that all paperwork relevant to such tenancies would need to be registered in the land register. His fear was that these two proposals could lead to increased costs for landlords and tenants, as well as cluttering up the land register with unnecessary paperwork.

121. The Committee raised this issue with the Cabinet Secretary, who confirmed that he had recently met with SLaE to discuss the matter.

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54 Scottish Agricultural Arbiters and Valuers Association. Written submission.
55 Land Registration etc. (Scotland) Bill (2011). Available at: [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/44469.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/44469.aspx)
122. In supplementary evidence to the Committee, the Scottish Government explained why it did not consider that the Land Registration etc. (Scotland) Bill presented any issues of concern for the tenant farming industry—

“Registration of Limited Duration Tenancies is only possible for those leases in excess of 20 years. Registration of such leases is in favour of the tenant and is voluntary. The general benefit of registration to the tenant in a registrable lease is that registration vests in them a real right. This has two main elements. Firstly it will give them certainty that they will be able to enforce the terms of the lease against any successor landlord. Secondly, it will make it possible for a Standard Security to be registered over the lease giving them a possible source of funding. This is the current law and will remain the law under the Bill.

The change in the Bill is that registration of a lease in excess of 20 years will also result in registration of the landlord's ownership interest. Any additional cost as a result of this change is likely to be marginal as, in registering the lease, the Keeper is required to examine the landlord's title anyway. The Minister for Energy, Enterprise and Tourism, Fergus Ewing, who has responsibility for the Bill, and the Keeper, will consider whether it would be appropriate to waive any additional fee that would otherwise be payable by tenant farmers because of the sector-specific interests.”

123. The Committee notes the concerns raised by Scottish Land and Estates regarding possible negative consequences of provisions in the Land Registration etc. (Scotland) Bill on landlords and tenants entering into limited duration tenancies of longer than 20 years. The Committee also notes the Cabinet Secretary’s written response, which explains why he does not consider the provisions to be of concern.

124. The Committee recommends that the Scottish Government ensure that there is regular communication between officials working on both Bills to ensure that, as both bills progress through Parliament, and possible amending stages, there are no unintended consequences on either Bill.

Future legislation

125. Another theme which emerged in evidence-taking, was this Bill is not, and should not be seen as, the end of the reform of agricultural tenancy law. Rather, this Bill is another stage in an on-going process of improving conditions for renting and letting land, ensuring an appropriate balance is achieved between the needs of landlords, existing tenants and new entrants, which will lead to a healthy tenanted farming sector in Scotland.

126. The TFF has noted that since working on the provisions in the Bill, it has turned its attention to other outstanding issues, such as dispute resolution, waygo and new entrants, in a bid to achieve similar levels of consensus between all of its members as it managed to achieve with the three proposals in the Bill.

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56 Scottish Government. Supplementary written evidence.
127. One suggestion made to the Committee was that it may be beneficial in the future to consolidate the law relating to agricultural tenancies, in order to make the law clearer to locate and understand. Richard Blake told the Committee—

“We might have to consider a consolidation act at some stage because we are beginning to get fragmented legislation, which does not help. We might be back here at the committee in a few years’ time.”

128. Whilst the Cabinet Secretary did not specifically comment on whether the Scottish Government would consider a consolidation act in the future, he did state that the current Bill, if enacted, and other relevant legislation, would be reviewed after an 18 month period to assess how well the law was working, and whether the policy objectives were being adequately achieved.

129. The Committee is of the view that future legislation on the issue of agricultural tenancy should not be ruled out. Indeed, it is a consequence of the approach of encouraging the TFF to achieve a consensus amongst all of its members, and then providing advice to the Scottish Government, that issues need to be progressed on a step-by-step basis. Therefore future amending or consolidation Bills may be required.

130. Whilst consolidating legislation can often be time consuming and complicated it may be beneficial to those trying to make sense of the law. The Committee asks the Scottish Government to consider the need for such legislation.

FINANCIAL ISSUES

131. The Finance Committee considered its approach to the Financial Memorandum (FM) of the Bill at its meeting on 16 November and agreed to adopt a level 1 scrutiny. This level of scrutiny is applied where there appears to be minimal additional costs as a result of the legislation. Applying this level of scrutiny means that the Committee will not take oral evidence, nor will it produce a report. The Committee’s approach was to seek written comments from relevant organizations through its agreed questionnaire and then pass these comments to the lead committee.

132. Three responses were received, from the NFUS, Scottish Legal Aid Board and the Law Society for Scotland, and no comments of substance were made. The Finance Committee therefore gave no further consideration to the FM.

133. The only comment of note was made by the Scottish Legal Aid Board—

“The Board does not believe that this legislation will result in notable costs for the legal aid fund. There have only been 13 cases involving grants of legal aid for cases in the Scottish Land Court and the Lands Tribunal for Scotland in the previous 5 years.”

58 Scottish Legal Aid Board. Written submission to the Finance Committee.
134. The Committee notes the comment made by the Scottish Legal Aid Board that the Bill, if enacted, would not result in notable costs for the legal aid fund.

135. The Committee thanks the Finance Committee for the scrutiny it conducted and, given the small number of responses, and lack of comment in evidence, has no further issues to raise with regard to the Financial Memorandum.
ANNEXE A: EXTRACTS FROM THE MINUTES OF THE RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

EXTRACT FROM THE MINUTES

10th Meeting, 2011 (Session 4)
Wednesday 9 November 2011

Agricultural Holdings (Amendment) (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed future work in relation to the Bill.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

EXTRACT FROM THE MINUTES

1st Meeting, 2012 (Session 4)
Wednesday 11 January 2012

Agricultural Holdings (Amendment) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

David Barnes, Deputy Director, Fiona Leslie, Land Tenure Branch Policy Officer, Agriculture and Rural Development Division, and Caroline Mair, Solicitor, Rural Affairs, Directorate for Legal Services, Scottish Government.

Agricultural Holdings (Amendment) (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

EXTRACT FROM THE MINUTES

2nd Meeting, 2012 (Session 4)
Wednesday 18 January 2012

Agricultural Holdings (Amendment) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Christopher Nicholson, Vice Chairman, Scottish Tenant Farmers' Association;
Andrew Wood, Royal Institution of Chartered Surveyors;
Richard Blake, Legal Adviser, Scottish Land and Estates Ltd;
Scott Walker, Chief Executive, National Farmers Union Scotland; Phil Thomas, Chairman, Tenant Farming Forum.

**Agricultural Holdings (Amendment) (Scotland) Bill (in private):** The Committee considered the evidence heard earlier in the meeting.

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**RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE**

**EXTRACT FROM THE MINUTES**

**3rd Meeting, 2012 (Session 4)**

**Wednesday 25 January 2012**

**Agricultural Holdings (Amendment) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Richard Lochhead, Cabinet Secretary for Rural Affairs and the Environment, Iain Dewar, Bill Team Leader, Agriculture and Rural Development Division, and Caroline Mair, Solicitor, Rural Affairs, Directorate for Legal Services, Scottish Government.

**Agricultural Holdings (Amendment) (Scotland) Bill (in private):** The Committee considered the evidence heard earlier in the meeting.

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**RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE**

**EXTRACT FROM THE MINUTES**

**5th Meeting, 2012 (Session 4)**

**Wednesday 22 February 2012**

**Agricultural Holdings (Amendment) (Scotland) Bill (in private):** The Committee agreed its Stage 1 Report.
ANNEXE B: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

1st Meeting, 2012 (Session 4), 11 January 2012

ORAL EVIDENCE .........................................................................................................................

David Barnes, Deputy Director and Fiona Leslie, Land Tenure Branch Policy Officer, Agriculture and Rural Development Division, Scottish Government
Caroline Mair, Solicitor, Rural Affairs, Directorate for Legal Services, Scottish Government

SUPPLEMENTARY WRITTEN EVIDENCE ....................................................................................

Scottish Government Bill team

2nd Meeting, 2011 (Session 4), 18 January 2012

ORAL EVIDENCE .........................................................................................................................

Christopher Nicholson, Vice Chairman, Scottish Tenant Farmers' Association
Andrew Wood, Royal Institution of Chartered Surveyors
Richard Blake, Legal Adviser, Scottish Land and Estates Ltd
Scott Walker, Chief Executive, National Farmers Union Scotland
Phil Thomas, Chairman, Tenant Farming Forum

3rd Meeting, 2011 (Session 4), 25 January 2012

ORAL EVIDENCE .........................................................................................................................

Richard Lochhead, Cabinet Secretary for Rural Affairs and the Environment
Iain Dewar, Bill Team Leader, Agriculture and Rural Development Division, Scottish Government
Caroline Mair, Solicitor, Rural Affairs, Directorate for Legal Services, Scottish Government

SUPPLEMENTARY WRITTEN EVIDENCE ....................................................................................

Cabinet Secretary for Rural Affairs and the Environment

ANNEXE C: LIST OF OTHER WRITTEN EVIDENCE

Submissions received in response to call for views:

- The Law Society of Scotland
- MJ McCall
- NFU Scotland
• RSPB Scotland
• Scottish Agricultural Arbiters & Valuers Association
• Scottish Land & Estates
• Scottish Tenant Farmers Association (STFA)
• Tenant Farming Forum (TFF)

Anonymous submissions:

• Submission A
• Submission B
• Submission C
Agricultural Holdings (Amendment) (Scotland) Bill: Stage 1

10:02

The Convener: Item 3 is our first evidence session on the Agricultural Holdings (Amendment) (Scotland) Bill. We will hear from Scottish Government officials on the content of the bill and associated documents. It is not for officials to answer questions on policy decisions, but they can offer clarification on the content of the bill and associated documents. The policy aspects should be left to our discussion with the Cabinet Secretary for Rural Affairs and Environment. We expect to hear from stakeholders at next week’s meeting, and the cabinet secretary at the meeting on 25 January.

I welcome the Government officials. David Barnes is deputy director of the agriculture and rural development division; Fiona Leslie is the land tenure branch policy officer in the agriculture and rural development division; and Caroline Mair is a solicitor, rural affairs, in the directorate for legal services.

I invite questions from members.

Aileen McLeod (South Scotland) (SNP): Section 1 of the bill seeks to amend the definition of “near relative” to include grandchildren of a deceased tenant, who would be eligible to inherit a family tenancy from a grandparent. What do you mean by “near relative”? Why is the extension limited to grandchildren?

David Barnes (Scottish Government): I thank the committee for inviting us here and wish you a happy new year, as it is your first meeting in 2012. I make it clear that I am a policy official and my legal adviser will kick me under the table if, at any point, I stray into legal territory in a way that is not wholly accurate.

The term “near relative” has different definitions across statute—it does not have a fixed definition, so it is possible for the bill to define the term in whatever way the legislature decides. What the Government has put in the bill is precisely what the tenant farming forum recommended and, as far as I am aware, there would be no legal impediment to making a change to the definition proposed in the bill. The definition extends to grandchildren but no further because that was the TFF’s recommendation. As the committee will know, the bill is part of the process of implementing a package of recommendations from the TFF, and that is the policy reason why the definition in the bill extends to grandchildren but no further.
Claudia Beamish: Is there any impediment to extending the definition of “near relative” beyond grandchildren to nephews and nieces? There is the possibility of other people being involved. I take your point about the submission from the tenant farming forum, but would it be possible to extend the definition?

David Barnes: Caroline Mair will answer from a legal perspective and, as the question touches on policy, I will give a response on the policy. However, as the convener said, the policy questions are for the cabinet secretary.

Caroline Mair (Scottish Government): I cannot see any particular legal impediment to extending the definition. However, we must bear in mind that, if we confer new rights on people by extending the definition and the benefits that flow from it to nieces and nephews, there will be an associated disadvantage or disbenefit to a landlord who might be contesting a notice to quit.

David Barnes: I will complete that answer by touching on why the Government is holding tightly to the TFF recommendations. Over the years, relations between the different parties—the landlord side and the tenant side—have, at times, been strained and the Government has put great effort into making progress in a consensual way. The significance of the TFF recommendations is that, by definition, they have the consensual support of all sides in the debate, who have collected around the table. It is for the cabinet secretary to answer the policy question whether he would be prepared to move from that position. For us, it is significant that the bill, as drafted, has that consensual support. Anything other than that would not have, at least demonstrably, the consensual support of all sides in the debate. As Caroline Mair says, any change to the interests of one side will have a countervailing effect on the interests of the other side.

Graeme Dey (Angus South) (SNP): I am looking for guidance on how extended succession would work in practice. Is the assignment of tenancies standard—is it the norm? If it is not, is there a danger that extending the definition of “near relative” could lead to a dispute arising whereby a spouse and a child who helped to farm under a tenancy both sought to take up the tenancy when the tenant died? I wonder whether there could be a potential difficulty in extending the definition.

Fiona Leslie (Scottish Government): I do not perceive there to be a significant difficulty with priority. My understanding is that the position depends on the type of lease that the family member who works the tenancy has under the Agricultural Holdings (Scotland) Act 1991. That is important because, if the lease says that it is only for the lifetime of the tenant, there may be difficulties with assignation anyway. However, if it does not say that, the practical likelihood of a problem arising would be low given that, if the wife and the son or daughter worked the unit on behalf of the father—who was taking a less involved role—there would be an assumption that they would take on the tenancy. It would be a matter for the individual family and the landlord, depending on their future intentions. That is where the area of dispute could kick in.

Graeme Dey: So you do not envisage that it will be a problem.

Fiona Leslie: No, but if the NFU Scotland perceives an issue with that, it might be able to give detailed examples when it gives evidence next week.

The Convener: Are you aware that, in crofting tenure, assignation can be by agreement between the tenant and a successor? That provides a resolution mechanism if the assignation is outwith the family. There is already a precedent in Scottish agriculture.

David Barnes: Yes. It would be naive and unrealistic to think that any legislation that is introduced would entirely avoid the risk of dispute. However, as you say, there is precedent and arrangements are already in place. Therefore, although we are not naive enough to think that there would never be any dispute in an individual case, we are confident that the matter has been considered in enough detail by enough experts—not only within the Government but in the stakeholder groups and professional bodies—to ensure that the matter is as clear as it can be and that the risk of dispute is acceptably low.

The Convener: A wee bit more clarity is required.

Annabelle Ewing (Mid Scotland and Fife) (SNP): I will go back to the definitions and will pick up Graeme Dey’s point. If two children and/or two grandchildren, for example, were involved in the farm, what competition would there be between them in the event of the tenant’s death?

Caroline Mair: It would depend on who had succeeded to the tenancy. To talk about changing the law of succession in agricultural holdings is a bit of a misnomer. That is not what we are doing; we are simply changing a definition that applies when a landlord serves a notice to quit following the passage of a tenancy by succession.

The changes that we are making would not affect the first stage of the process, which concerns who succeeds to the tenancy, whether that be testate or intestate succession. That would be determined first, under the terms of a bequest, the terms of a will or the law of intestate succession under the Succession (Scotland) Act.
The prohibition of upward-only rent reviews and landlord-initiated rent reviews will apply only to LDTs under the Agricultural Holdings (Scotland) Act 2003. As David Barnes said, it will not have retrospective effect; it will prohibit the inclusion in future LDTs of such terms, which are perceived as unfair. The provision was included as part of the package that the TFF recommended. It is not proposed in the bill to address that issue.

Jim Hume: That was going to be my second question. Would that be the case with all LDTs and with traditional partnership agreements? If not, is there room for the bill to address that issue?

Caroline Mair: The prohibition of upward-only and landlord-only-initiated rent reviews will apply only to LDTs under the Agricultural Holdings (Scotland) Act 2003. As David Barnes said, it will not have retrospective effect; it will prohibit the inclusion in future LDTs of such terms, which are perceived as unfair. The provision was included as part of the package that the TFF recommended. It is not proposed in the bill to interfere with the contractual terms of 1991 act tenancies.

Fiona Leslie: Mr Hume might find it helpful to know that landlords and tenants can negotiate their rent through section 13 of the 1991 act, which contains statutory provisions on the code that they should follow in such negotiations. Therefore, there is potential for partnerships under the 1991 act that are still running to explore the issue.

Jim Hume: That is helpful, thank you.
Annabelle Ewing: Do the witnesses have intelligence on how things stand in practice where there is not such a prohibition—that is, where there is the possibility of an upward or downward rent review? Are there many examples of downward rent reviews? I would have thought that market circumstances would normally dictate an upward direction.

David Barnes: We do not have data on that. As I said, in an area in which there is no statutory collection of data we rely very much on intelligence from stakeholder organisations, with which we work closely through the TFF, and individuals. We have not had a conversation with stakeholders about the issue that you raised, although we can certainly do so. However, if the committee takes evidence from stakeholder groups, they might be able to help you with what I guess will be anecdotal evidence rather than statistically valid data on the matter.

John Lamont: Am I correct in thinking that the ban on upward-only rent reviews will not deal with a situation in which the level of rent at which a tenant farmer entered a tenancy has become unsustainable because of changes in market conditions and should arguably be reduced? The provisions will only stop the rent going up; there is no provision that will allow a reflection of changing market conditions to be incorporated into a lease where the rent is frozen.

David Barnes: The provisions for fixing the level of rent in a rent review are set out in legislation and are untouched by the bill. If market conditions ought to lead to a change in the rent—in one direction or another—provision in that regard, first, exists in statute and, secondly, is untouched by the bill.

The proposed new provision does not say that the rent must go down in certain circumstances; it simply says that a clause that says that the rent can only ever go up cannot be put into a tenancy. The issue of whether rent should go up, down or stay the same will continue to be covered by the existing rent-review provisions.

Graeme Dey: I will digress slightly and talk about the stats behind the proposals. You are aware that there was a 10 per cent drop in tenancies in Scotland between 2005 and 2011. Do you have figures on the extent to which the drop is due to tenants purchasing their farms or to landowners taking back vacant land and perhaps reletting it under alternative arrangements?

David Barnes: I am happy to take that question to our statisticians, to ascertain whether we can come back to the committee with an answer, although I am not confident that our statistical sources will enable us to discern the trends that you mentioned.

The Convener: I have a question about the commencement procedure. The bill says:

“The other provisions of this Act come into force at the end of the period of 2 months beginning with the day of Royal Assent.”

Why will it take two months to apply very simple provisions?

Caroline Mair: To my knowledge, the two months is a standard amount of time to allow people to become aware of changes to legislation and take them on board. I can take the question away and come up with a more specific answer.

The Convener: Is it related to the fact that we do not know when Her Majesty will put pen to paper?

Caroline Mair: Yes. We do not know when the bill will receive royal assent. A date will be set, which people can be made aware of.

Annabelle Ewing: On implementation, the two-month period is fairly standard, although it may vary slightly. I imagine that the philosophy behind it is that it accords with the idea that while people must be aware of the law—there is not an excuse not to be aware of the law—it is reasonable to allow a short bed-in period.

I have a couple of questions on section 4, on transitional provisions. First, I note that there is, in effect, a retrospective effect of the provisions on VAT. If there has been an election or a change in the VAT rate before implementation of the act, that is to be reflected, whereas other provisions do not benefit from that retrospective effect. I will deal with those other provisions in a minute. Why is the VAT provision retrospective?

Caroline Mair: The provision is not retrospective per se—it applies to circumstances that exist when the act comes into force. It has to work that way or it would not achieve its intended effect because recent changes in VAT would have the effect of freezing rents for three years. What we are clarifying in the bill is that a change in the rate of VAT or an option to tax will not constitute a variation of rent such as would prevent parties from having the rent reviewed for the next three years. If that were not to apply to VAT changes that have taken place in the past couple of years, in cases that are affected by that change in VAT the rent would effectively be frozen for a three-year period from the date of that change, or from the date that any option to tax was taken by the landlord. It would not therefore achieve its effect, which is the mischief that we are trying to rectify with the provisions.

Annabelle Ewing: My next question concerns the date on which section 1 would come into effect. I think that the provisions in section 4(1) are clear about that, but the view has been
expressed—you may be aware of it from the papers—that they are not.

There are also differing views about whether the provisions should apply to situations in which the tenant has died before the bill has come into force but where the legatee or acquirer of the lease has not yet given notice under the relevant provisions. Views on that have been expressed by the Scottish Tenant Farmers Association and the NFUS. Will you comment on those issues?

Caroline Mair: Certain responses to the draft bill that was put out for consultation raised issues about the transitional arrangements. We took those on board and amended the transitional provision in the light of those comments. It is hoped that that has clarified the position. We changed the transitional provision to make it clear that it will affect only cases in which a tenant farmer has died after the act comes into force. We believe that that is a nice, clear and unambiguous cut-off point.

We are aware that there are two differing views on when the change to the definition of “near relative” should take effect, and we have preferred one of the views, which is that it should affect only cases in which a tenant has died after the coming into force of the new law.

10:30

Annabelle Ewing: I note the rationale that has been given that the cut-off point is “clear and unambiguous”, but I presume that scenarios in which the tenant has died before the bill has come into force, but notice has not yet been served—such as the NFUS and the Scottish Tenant Farmers Association suggest—would not be beyond possibility. I presume that that would apply only in a finite number of circumstances. What is your opinion of that?

Caroline Mair: My understanding is that how far back we would have to go in time would depend on whether the tenancy is passing by testate succession or intestate succession. If a tenant dies and the estate is distributed and wound up according to the law of intestate succession, it may take some time. It would introduce a degree of uncertainty to apply the changed definition to circumstances in which a tenant might have died, for example, up to a year before. We would be changing the rights and expectations of some parties whose circumstances are extant at the point when the act comes into force.

David Barnes: I will supplement what Caroline Mair said by referring back to the balance of interests. It is an interesting situation: the two organisations that the member mentioned are both members of the TFF, and the whole raison d’être of the TFF is to broker compromises between organisations that have differing views. It is possible for a single organisation to have its own view—if it were up to that organisation in isolation, it would have a certain preference—while in the context of the TFF it signs up to a compromise that is slightly different. We are aware that we are living in a situation in which there are differing nuances of view.

As Caroline Mair said, we are aware of a small number of cases and of some organisations that have made representations to ask, in effect, for the bill’s provisions to be amended in a way that would shift the balance of interest in favour of a certain small group of potential new tenants. Once again, I refer back to the point that, by definition, there would be a countering effect on the interests of other parties and that the question of consensus is so important for the Government that that effect is a good reason to hesitate.

I will step back from the actual facts and suggest a hypothetical scenario. There may be no cases for which the changed definition would be a problem—let us say that the relations between the landlords and tenants in the small number of potentially affected cases are such that everything can be sorted out amicably. There might therefore be no positive benefit for those cases from amending the bill in the way that some organisations have suggested, but there might be a negative effect on the consensus. The organisations, the tenant farming forum and the Government are trying to work together consensually in difficult areas. I offer that as a hypothetical scenario; I am not suggesting that it is the reality, but we risk undermining confidence in the consensual nature of the TFF for changes that would not have significant benefits for cases in the real world.

We are aware of the representations and the Government has put its position in the bill. The reasons that I have just set out are reasons for us to hesitate rather than simply to adopt without question the suggestions that have been made by those organisations.

Annabelle Ewing: Thank you. I have a final point on that. Obviously, we will pursue this and other issues through the evidence that we will gather from stakeholders in due course. If a notice has not been served, it could be argued from a semantic legal perspective that in a sense there is no retrospective effect because the de facto position is that a notice has not been served. However, I will leave that for another day. I presume that there have been examples in Scots law of legislation that has had retrospective effects—I do not imagine that that has never happened.
David Barnes: Yes—the Government’s position thus far in response to those representations is not based on there being a legal impediment.

Caroline Mair: It is possible to pass legislation that has a retrospective effect, but we generally try to avoid that because we prefer not to interfere with established circumstances or the existing rights of parties. It is preferable for new law to have a future effect rather than a retrospective one so that it does not interfere with established rights of parties who rely on it.

The Convener: Thank you very much. As there are no other questions, I thank our witnesses for their evidence. I know that we have points to follow up with stakeholders and the minister in due course.
Dear Mr Gibson

Agricultural Holdings (Amendment) (Scotland) Bill

At the meeting of the Rural Affairs, Climate Change and Environment Committee on Wednesday 11 January 2012, the Committee took evidence from officials on Stage 1 of the Agricultural Holdings (Amendment) (Scotland) Bill.

During the course of that evidence officials were asked why the Commencement section provides that the substantive provisions of the Bill will come into force 2 months after Royal Assent. The Committee wanted to know if the Bill could be brought into force within a shorter period after Royal Assent.

The Scottish Government policy on the commencement of Bills is that, in general, no Act or part of an Act should be brought into operation earlier than 2 months after Royal Assent. The purpose of this general rule is to ensure that those who will be affected by the Bill have reasonable opportunity to acquaint themselves with its final form and to prepare for its coming into force.

The period of two months may be waived in exceptional circumstances or where there are pressing reason such as the need for early implementation. It is not felt that the circumstances justify departure from the usual position on this occasion.

During the course of the evidence giving session, officials were also asked if there were any available figures on the extent to which the decrease in agricultural tenancies were due to:

- Tenants purchasing land; and or
- Land becoming vacant and being taken back into control of the land owner.

The statistics on the number of holdings with tenancy agreements have been derived from information collected through the June Agricultural Census. The June Census serves as an annual stock take of land use and livestock numbers present on agricultural holdings in...
Scotland. It is run primarily to meet the information needs of EC Statistical regulations and also collects information on the number and area of tenancy agreements.

It is not possible to tell directly from the June Census if the decline in tenancy agreements is due to tenants purchasing the land or the land owner taking back control of the land, as these types of questions are not included on the June Census. We are looking into the possibility of estimating this information by linking the June Census data to the corporate register of holdings, which contains holding details, and by exploring other data sources such as land sales from the Registers of Scotland.

It is not yet known if this estimation would provide robust findings on the main drivers for decreasing tenancy agreements.

We have also provided further background statistics for the information of the Committee (Annex A). In the table, we are unable to provide figures pre 2005 for the number of holdings with tenancy agreements (excluding crofts) or the number of rented holdings with at least one croft, as these were not collected. The diagram demonstrates the upward trajectory of owned holdings compared to the slow downward trajectory of holdings with rented land. I hope you find the Annex helpful.

Yours Sincerely

David Barnes
Deputy Director Agriculture & Rural Development Division
### Number of holdings with rent land or owned land and number of holdings with tenancy agreements

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of holdings with tenancy agreements (excluding crofts)</th>
<th>All holdings with rented land (including crofts)</th>
<th>Number of rented holdings with at least one croft</th>
<th>% of rented holdings with tenancy agreements</th>
<th>Total holdings with owned land</th>
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- ■ Number of holdings with tenancy agreements (excluding crofts)
- ○ All holdings with rented land (including crofts)
- ■ Total holdings with owned land
- ▲ Number of rented holdings with at least one croft
The Convener: Item 2 is the Agricultural Holdings (Amendment) (Scotland) Bill. This is our second evidence session on the bill. We will hear from member organisations of the tenant farming forum, in advance of hearing from the Cabinet Secretary for Rural Affairs and the Environment next week. I welcome our witnesses, who are Christopher Nicholson, vice-chair of the Scottish Tenant Farmers Association; Andrew Wood, from the Royal Institution of Chartered Surveyors; Richard Blake, legal adviser to Scottish Land & Estates Ltd; Scott Walker, chief executive of NFU Scotland; and Phil Thomas, chair of the tenant farming forum.

I do not expect anybody to make statements so, without further ado, we will go straight to our questions, which arise from our discussion of the issues with the bill team.

Aileen McLeod (South Scotland) (SNP): I thank our witnesses for coming to the committee. Section 1 of the bill seeks to amend the definition of "near relative" to include grandchildren of a deceased tenant, who would then be eligible to inherit a family tenancy from a grandparent. What is your understanding of the term "near relative"? Should the change be limited to grandchildren only? Last week, we heard from the Scottish Government’s bill team, who said:

“there would be no legal impediment to making a change to the definition proposed in the bill.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 11 January 2012; c 500.]

Should the definition be extended beyond grandchildren?

Christopher Nicholson (Scottish Tenant Farmers Association): From a tenant’s perspective, we would encourage the definition of “near relative” to be extended beyond a grandchild to include nephews and nieces. There are arguments that it should go further afield and perhaps should be in line with the class of relatives who have an entitlement to an estate if someone dies intestate. We hope that the definition will be expanded, as that would allow easier succession to and possibly assignation of heritable tenancies, which would help to preserve the number of heritable tenancies in Scotland.

Richard Blake (Scottish Land & Estates Ltd): It is worth flagging up a couple of points from a landowner’s point of view. First, the legislation—the Agricultural Holdings (Scotland) Act 1991, as
amended by the Agricultural Holdings (Scotland) Act 2003—is complicated. Everybody at this end of the table realises that. As Professor Thomas will probably confirm, the tenant farming forum did a lot of work to achieve consensus on the amendment to the definition of “near relative”. However, there is a deeper issue, which is that many of the definitions refer back to the Succession (Scotland) Act 1964. That causes confusion, particularly for non-lawyers, but probably for lawyers, too, in certain areas. You are probably aware that the Government has been looking at amending the Succession (Scotland) Act 1964. If there are policy issues to do with definitions in the 1964 act, that might be the time to look at that issue.

Secondly, under the 1991 act, as amended by the 2003 act, secure tenants now have a wider ability to assign tenancies. A Scottish Land Court case, Fleming v Ladykirk Estates Ltd, confirmed how that would work when a nephew was to have the assigned tenancy. Taking into account the Succession (Scotland) Act 1964 issues—or policy changes that the Government might introduce—and the fact that, under the 2003 act, tenants have a wide ability to assign during their lifetime, I think that, with a bit of planning before death, many of the complications that come after death can be avoided, as it is already possible to assign to a wider class.

**Annabelle Ewing (Mid Scotland and Fife) (SNP):** I have a follow-up question for Mr Blake. As a lawyer in a previous life, I have dealt with the 1964 act. I do not see the particular difficulty, because it is an issue that is dealt with every day in the legal profession, but it certainly might take some time for any amending legislation on succession in Scotland to come to fruition. In the interim period, what is your particular concern with respect to the 1964 act?

**Richard Blake:** With the 1964 act as it stands now, as far as Scottish Land & Estates is concerned, the widening of the definition of “near relative” in section 1 of the bill to include grandchildren clarifies the situation following certain court cases. In the Salvesen v Graham case in the Scottish Land Court several years ago, grandchildren were brought in. The bill clarifies that succession by grandchildren is now permitted and we do not have any particular objection to that. If, as a matter of principle, we are looking at extending the definition of “near relative” beyond direct descendants, it could be argued that that takes away from landlords more rights that they have under existing legislation.

**The Convener:** I would like to follow that up, but Scott Walker will comment first.

**Scott Walker (NFU Scotland):** I come back to assignment and succession as is proposed in the bill. As has been said, the provisions in the bill have been discussed at length in the tenant farming forum. NFU Scotland welcomes the clarity that the bill brings, so we whole-heartedly support it.

A wider issue that should perhaps be examined at a later date is assignment compared to succession. It seems a bit strange to the layman, and certainly to many of our members, that in some situations there is a wider definition of whom you can assign a tenancy to than of who can get succession to it. It seems a little bit strange that, during your lifetime, you can assign a tenancy to a wider class of people, yet, at the point of your death, it is restricted to certain categories. That is a point to consider, but there is an industry-wide consensus that the bill is a step in the right direction.

**Professor Phil Thomas (Tenant Farming Forum):** I will follow up on Scott Walker’s comments. Strange as it may seem, a great concern from the standpoint of both landowners and tenants is that the legal framework might change in a way that causes unintended consequences. My impression from much of the discussion on the tenant farming forum is that there is concern that whatever is done is done in a systematic way that does not lead to consequences that nobody has envisaged. There has been strong support for the amendment to legislation that is in the bill. That does not rule out any widening of the approach, but it is important that there is a step-by-step process.

**The Convener:** Has the tenant farming forum compared the methods for assignation in tenant farming with those in crofting? There are procedures for dealing with assignation in crofting whereby a formal process can be initiated if the assignation goes beyond a certain degree of family membership.

**Professor Thomas:** The answer is probably no. I am certainly not aware that such a comparison has been made. As you well know, crofting law is a bit of a law unto itself, so perhaps comparisons would not be exact.

**The Convener:** I wondered about that. I come from a crofting neck of the woods and there is longstanding agreement on how assignation should work. I would have thought that the tenant farming forum would be looking at such matters.

On succession, I understand the issue to be about whether heritable property is shared between the spouse and children, which has little to do with how assignation works.

**Richard Blake:** The first point is whether a tenancy is heritable property. This is probably not the place to have a discussion about that. The Scottish Law Commission considered the point
felt that having such a provision might bring a bit more normality into the bids for the tenancy in the first place, and ensure that those who were bidding did so on a fairer basis, with regard to the economic performance that could be achieved.

We weighed up that position against the social justice factor and asked whether it was correct for any tenancy agreement to specify that rents could move only in one direction. The union came to the conclusion that upward-only rent reviews are wrong, which is why we support the amendment that the bill proposes. It is worth bearing in mind the reasons why some people might have gone into their agreements with an extremely high rent in the first place, as that explains why there is not universal support for the removal of such provisions.

Richard Blake: Scottish Land & Estates was happy with the wording of this section by way of consensus within the tenant farming forum. However, it is worth pointing out that some sections of the industry feel that limited-duration tenancies are as near as damn it to the farm-business tenancies that exist in England, which allow for quite a lot of freedom of contract, and that this in some way constrains the ability to contract by way of negotiation at the beginning.

I have no difficulty with the provisions of the section as they stand. I am happy with it. It will bring clarity and certainty to the situation.

Jim Hume: Could you expand on your point about the ability to contract being constricted?

Richard Blake: Another member of the panel might have mentioned that this type of landlord-only or upward-only rent review is possibly more common in free-market contracts, such as commercial leases, which simply reflect the general law of contract, where both parties are negotiating with each other. The proposal represents another restriction that is being brought in. We have no difficulty with that, but it leads further away from freedom of negotiation at the beginning of the tenancy. That is the point that I am trying to make.

Professor Thomas: Just for clarity, the comparison that is always made is the comparison with England and Wales, where the degree of freedom to contract is, broadly speaking, much wider, so that the various types of tenancies might have additional clauses dealing with specific issues that would be ruled out under Scottish law.

Annabelle Ewing: Is it the case that, in England and Wales, there are dispute resolution mechanisms that are not available to parties in Scotland? That might be seen as a balancing factor.
Professor Thomas: The reality is that there would be different disputes, because the nature of the contract would be different. I will let Richard Blake comment on the detail of the legalities around the resolution of those disputes, but they are a bit different. There is a long tradition of the two countries having different approaches to tenanted land.

Richard Blake: I cannot comment on the English dispute resolution process. In Scotland, under section 13 of the 1991 act, any sort of alternative dispute resolution is available.

Christopher Nicholson: I will comment on the comparison between the English and Scottish systems for determining rents. We fully support the amending of legislation to outlaw upward-only and landlord-initiated rent reviews. In England, the statutory system for determining rents is slightly different, and rents tend to follow the economic condition of agriculture more closely than they do in Scotland. From the mid-1990s onwards, there was a downturn in agricultural profitability, and rents in England came down accordingly. However, in Scotland, that did not happen to the same extent—in fact, there were very few, if any, rent reductions. Our system of determining rents is based on comparables and places less emphasis on economic conditions. That means that we welcome what is happening.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I want to return to the freedom of parties to contract. Will the restrictions on the ability to contract—perhaps as part of a bigger package—make it less likely that landowners will enter into tenancies, or will they skew the type of tenancies granted and the type of relationships entered into with farmers? Will the restrictions limit the supply of land?

Professor Thomas: We have to put the issue in context. Inevitably, the nature of contract arrangements will influence the contracts being made, and that would apply in England and Wales as well as in Scotland. However, the factors that limit the amount of land becoming available tend to be rather different. At the moment, the long-term view of the revision of the common agricultural policy is causing quite a lot of uncertainty, and that is likely to have a much greater influence on the environment in which people operate than will the details of the sections in this bill. However, contract arrangements will have some influence.

Richard Blake: Greater freedom of contract with less prescriptive statutory legislation would, in our view, make it easier to let all manner of rural properties. I am thinking not necessarily only of farmland but of disused farm buildings, or of different things brought together into one package. We—that is, Scottish Land & Estates Ltd, not the tenant farming forum—raised the issue of a Scottish style of farm-business tenancy with the Cabinet Secretary for Rural Affairs and the Environment three or four years ago.

Scott Walker: The terms of a contract are always an issue for the security of the tenant and for confidence in future investment—and therefore for the ability to increase the quantity of land that comes on to the market. If you offered total freedom of contract, more land would probably come on to the market, but you have to ask what conditions the tenant would be left with. We firmly believe that some sort of contractual relationship would have to be put in place; the structures of the Agricultural Holdings (Scotland) Act 2003 would be needed in order to give the right balance and to give security to the tenant in his relationship with the landlord.

I will touch on the point made by Phil Thomas. Many factors other than the terms of the lease will affect people’s decisions, and CAP reform is one of the big ones. There is a lot of uncertainty over future entitlements.

Another issue that we might touch on later if time permits is also to do with taxation policy and whether there is encouragement under the taxation regime for the letting of land and for its letting to certain individuals. There is also the question of how taxation influences an individual’s decision on whether to farm the land in hand or whether to let the land out. It is a complicated situation, but the NFUS firmly believes that a structure needs to be put in place. The structure under the bill will be hugely important to tenants, owner-occupiers and those who will wish to lease out land in the future.

The Convener: From the Scottish conditions over the past 20 or 30 years, it is clear that there have been far fewer secure tenancies and that far more limited partnerships and the like have been brought in. Do you think that the prohibition of upward-only rent reviews is strongly linked to the shortage of land that is available to be held securely and that people are arguing over a dwindling resource in order to get into agriculture?

Andrew Wood: I do not think that that is one of the big issues for the letting of land. Even to address the issues that Mr Walker raised, landlords and tenants can make use of lease premiums or find other ways of contracting through offering key money or making their position more advantageous for a tender of letting land. The other issues that have been spoken about are all, in financial terms, much greater obstructions to access to land.

Christopher Nicholson: Much comparison is made with English farm-business tenancies, which have been operating in England since 1995. There
are plenty of statistics to show how they have worked, and they have not been the success that people had expected. As far as I know, the English tenanted area has not gone up. The average length of FBTs is very low—I suspect that it is less than five years—and greater issues are at play; for example, a landowner might wish to contract a farm and retain himself as the farmer to gain tax advantages. In addition, CAP reform is hanging over us at the moment, which has an effect.

The Convener: We take that point on board. Obviously, the limited partnership arrangements have been the most popular, but they are in a similar situation in that they have less security than a secure tenancy would have, which must be a drag on their potential.

Christopher Nicholson: A lot of limited partnerships will have started in the 1970s and 1980s and will typically have been for up to a 20-year period, but those are now coming to an end. Those tenants now find themselves in a difficult position. That situation shows that short tenancies that are not for the lifetime of the tenant will not encourage tenants to make the investments that are necessary in today’s farming.

The Convener: So, given the number of people who are in limited partnerships, we would need to consider having further legislation if fewer people are getting access.

Professor Thomas: The situation is complicated. The recent survey figures show clearly that the number of tenancies has declined by about 10 per cent over the past five years. However, we must also recognise that there is a wider economic context. Over the past few years, farming or buying land in any form has become an attractive prospect because the opportunity to invest money elsewhere has seemed less secure. A lot of people who might have invested outside agriculture 10 years ago are now investing in agriculture and land.

Secondly, when somebody comes into farming as an initial entrant and buys or becomes a tenant of a relatively small piece of land, the only way in which they can make that a viable business is to run it relatively intensively. That creates a need for capital investment but, at present, it is difficult for new entrants to get capital investment. The way in which the land law operates is not the only issue, because economic factors are in operation.

Richard Blake: I will try to keep my comments as short as possible, but several points arise from the question and from my colleagues’ comments. First, I want to clarify for the committee that, since the 2003 act, limited partnership leases cannot be entered into, so there has been a natural withering away of such leases. That will come through in the statistics as we progress—there will be no new limited partnership leases, because we are not allowed to do it.

My second point is on the statistics that have been mentioned. Andrew Wood and I were involved in the break-up of an estate near Perth, when I was in private practice up there. In many cases, the landowner offers secure tenants the possibility of buying the land through negotiation, and often on favourable terms. That approach immediately takes out a swathe of secure tenancies from the statistics, because the tenants become owner-occupiers. I would struggle to name many owner-occupiers who have bought out their tenancies in that situation and who then make the land available for let. That removes from the statistics a number of tenancies pre the break-up of an estate.

The Convener: What sort of number are we talking about?

Christopher Nicholson: The STFA reckons that, since the 2003 act, about 100 tenants have bought their farms. Therefore, that point does not account for the drop of 1,000 in the number of secure tenants in recent years.

Richard Blake: I have a third point, which is on the figures. I do not have the figures immediately in front of me, although I have them with me. I understand why the Government has used the statistics in the way that it has, but there is an issue on the number of short limited duration tenancies—which, under the 2003 act, are tenancies of up to five years. Because the process started, I think, in 2005, the first batch of SLDTs will have come to an end by 2010. Therefore, the figure for the latest year in those statistics will not necessarily show the full number of tenancies that have been created under the 2003 legislation.

Fourthly, I want to give an example that might help the committee to understand where we are coming from. I have a member who has a hill farm on the west coast and who ran a series of grazing tenancies with a shepherd. The shepherd has retired as the grazing tenant and the son of the shepherd wants to take over. He has another job, but he wants to farm part time as a new entrant. However, the landowner and the prospective tenant are finding it difficult to find a mechanism under the legislation whereby the prospective tenant can come in as a new entrant but the landlord can invest in fencing and drainage, as the tenant does not have sufficient capital to do that. There is no possibility of a limited partnership arrangement and not really a possibility of a partnership arrangement. Therefore, unfortunately, that one might be dead and buried.
Annabelle Ewing: A point was made earlier about the ability to attract financing. I would have thought that, for a lender, the more security there is on a loan, the more attractive it is because there is a greater possibility of recouping the money if things go belly up. That is another element to bear in mind. Professor Thomas raised the issue of access to finance, but it is important to bear that issue in mind. The situation is not as straightforward as was suggested, because there are other normal commercial issues for the lender, as there would be with any other financial loan.

Professor Thomas: That is absolutely right. The point that I was trying to get across, which might seem a little hidden, is that if someone initially comes into farming on a small scale, they can make a viable business only by having a quite intensive business, which by definition generally involves a greater level of capital investment. There is another barrier to entry, if entry is on a small scale. If a person can get a tenancy that provides a land area on which they can run a viable business on an extensive basis, the amount of investment that they must make is often much less.

Andrew Wood: On what happens at the end of limited partnerships, in practice a number of people go into shorter-term arrangements, often for family reasons. If someone has granted a limited partnership to someone and their son then returns to the farm, potentially to farm himself, a shorter-term arrangement might be offered, to fit in with that.

We find that people have a lot of confidence in limited duration tenancies, which are being used in practice and are being granted as a substitute for limited partnerships. There are not vast numbers of LDTs, but they are active and they are out there, and there is confidence in the mechanism and how it operates.

Scott Walker: I return to investment, which is a thorny subject for our members at both ends of the spectrum, up and down the country. How someone invests in a tenanted farm is a complicated issue, not just in the sense of the return from investment in agriculture, which is a reflection of the profitability of different agricultural enterprises, but in the sense of what happens when a tenancy comes to an end and who benefits from waygo—the compensation that is payable.

From talking to our members throughout the country, we think that uncertainty in relation to waygo compensation hinders investment by landowners and tenants. To be fair to landowners, if they invest in a holding there is an issue about the return that they can expect from the rent. Anyone who invests in a business must consider the return that they will get.

The issue is tied up with the profitability of agriculture. The other big issues for us are, first, the length of term of an agreement, because the longer that someone has access to the land to get a return on their investment, the more encouragement there is to invest, and secondly, what form of compensation someone thinks that they will receive when the tenancy comes to an end.

The Convener: The Scottish Tenant Farmers Association had something to say about waygo in its submission. Is it the on-going job of the tenant farming forum to address such issues? If so, why has the issue not been addressed?

Christopher Nicholson: It should have been properly addressed in the 2003 act, because there was agreement among all parties that any genuine improvement that was applicable to farming that the tenant had made should be compensated for, irrespective of write-down agreements, missing paperwork, lack of written consent and so on. However, compensation remains a grey area in the 2003 amending act.

The Convener: That leaves us anticipating that a further bill or order might be needed in the future.

Professor Thomas: For clarification, the item is on the TFF’s list of things to look at. I cannot comment on why it was not looked at earlier, simply because my occupancy of the chairmanship has been relatively short term, so we are talking about a period before my time. It is probably fair to say that, after the 2003 act was passed, the TFF initially tried to try to come together on areas in which it thought that there might be low-hanging fruit—that is, areas in which consensus might easily be reached. The approach brought forward a number of matters.

We are now dealing with some of the more difficult issues, of which waygo is one and the whole issue of dispute resolution and arbitration is the other. The good news or the bad news—depending on how members want to look at it—is that we will probably return here at some stage.

Richard Blake: The waygo, improvements and dilapidations issue is horrendously complex on both sides—the landlords’ side and the tenants’ side. There is a considerable lack of understanding. The tenant farming forum is trying to clarify advice to all parties on what the bill means, not just on dilapidations and waygo but on various other areas.

We might have to consider a consolidation act at some stage because we are beginning to get fragmented legislation, which does not help. We might be back here at the committee in a few years’ time.
The Convener: Believe it or not, there have been similar suggestions in the crofting world. The thought of consolidation legislation fills us with horror, but if it is needed we will have to think about it—it might become a priority.

Graeme Dey (Angus South) (SNP): I apologise if I take the discussion off on a slight tangent. We have touched on how difficult it is for new entrants to get into farming. My question is directed at Richard Blake. I know that you are the legal adviser to Scottish Land & Estates but will you update us on the progress that has been made by your organisation on providing starter units for new entrants? Perhaps as important, how are you getting on identifying ways of creating what I think you have referred to as down-the-line churn to ensure that those who move on from those starter units have somewhere to farm?

Richard Blake: You are right in implying that as the legal adviser I do not know very much about that. Scott Walker might know a bit more about where the joint initiative has got to on that. Sorry to pass the buck.

Scott Walker: As you can imagine, starter units are a hugely important issue for our members. Whether it is landowners, tenants or owner-occupiers, there is a consensus in the industry that we want to do everything possible to help new people to get started in agriculture.

I will go off on a slight tangent before I answer Graeme Dey’s question. There is always the issue of what is meant by new entrants. A traditional new entrant to farming would be a farmer’s son, whose route into agriculture is pretty clear cut: he waits on the farm and works for endless hours until his father basically hands over the cheque book and the business to him. It can often be at the tender age of 55 or 60 that he starts making decisions.

Recently we have been interested in the alternative routes. How do individuals who do not have a traditional route into agriculture get started? When I first looked at the issue many years ago, I thought that the best way to get somebody started in the industry was to set them up with a 150 or 200-acre piece of land with buildings and a house—in other words, what is thought of as the traditional way into agriculture. However, if we want to do that on a large scale, that is generally not possible, for various reasons. Therefore, I look at all the other individuals out there who have clawed their way into the industry through different routes and through their hard work and endeavours. That has often meant that they have worked or contracted somewhere and that they have a little bit of land and a building.

Richard Blake referred to the joint initiative. We have been working with other organisations that have access to land, buildings and properties and looking at how we could bring them together with new entrants. We could get a new entrant enabler, for instance, to work in the industry and try to build the confidence of individuals who wish to get started, allow them to bid for land and buildings, and provide education and mentoring. That would be helpful.

In addition, the enabler would actively go out to individuals who have land, buildings and any other sort of asset so that they could work with people to get started. At the moment, that is only an idea or a concept; I should say that it is one that is heavily criticised in some quarters—not everyone likes it. However, we are being innovative and are looking at the many different ways in which people can get started.

Graeme Dey: This is obviously an important subject. The committee would be grateful if you could keep us up to date on the progress or lack of progress that is being made.

The Convener: We will return to the issue. As you say, if the CAP reform has an effect on renting and leasing land, we will want to consider the issue in that context, without changing our work programme any further in the next two or three months.

Claudia Beamish (South Scotland) (Lab): Can any of the representatives before us give us an indication of what interest there is among families and new entrants who might want to enter the industry, given that we are in a time of uncertainty? I am not asking for statistics, necessarily, but it would be interesting if some light could be shed on that.

Scott Walker: It is difficult to give figures. In the past two years, two members of the staff of NFUS have left to start a farm. One moved to France, because they found that to be an easier route into the industry, and one now farms just outside Blairgowrie.

We hear mixed views from different people. We hear about land being offered to rent and there being apparently no new entrants who wish to take up that land. A number of years ago—before Phil Thomas became the chair of the TFF—we contracted out a bit of work that studied the barriers to new entrants and held a number of meetings around the country with people who wanted to enter farming but had encountered difficulties in doing so. Those meetings were attended by a huge number of people of a huge range of ages. There were people from traditional farming families who knew that they were not going to inherit the farm and were therefore looking for a different route in, and there were...
people ranging in age from 19 to 50, who had worked on farms and were looking for alternatives.

One of our ideas would be for the new entrant enabler to gather those very statistics so that we could get on the books the number of people who wanted to get a start in the industry and track their development over time. We could record how many people we got started and find out where they were in terms of the development of their business five or 10 years down the line. At the moment, however, I am unable to give you any exact numbers.

Professor Thomas: You can get some sense of the numbers from the number of student registrations. In the late 1980s, the number of students in agriculture was declining quite steeply. That has now reversed quite significantly and is going in the other direction. However, it is quite difficult to analyse that because the analysis depends on people’s perceptions of agriculture. We went through a period in which the perception was that agriculture was overproducing and we had mountains of food and so on. Now, there is a clear perception that there are world shortages of food, and the situation will get worse and more challenging, which means that agriculture will become a central strategic industry again. Young people buy into that in a big way.

Christopher Nicholson: With regard to new entrants and the current basis on which land is let, any let land on the market has only an SLDT, which is for up to five years—or for lucky people, an LDT, which might be for 10 or 15 years. That kind of basis for farming land is unlikely to attract new entrants; indeed, it is more likely to attract established farmers who, if they lose the tenancy 10 years down the line, will be able to survive. Only yesterday, I was speaking to someone who has had three limited partnerships come to an end; this family are farming year-to-year on grazing lets on those partnerships, and they have two other partnerships that are due to end. New entrants can see that unless they have an owned farm or heritable tenancy in their family background, they are probably unwise and would be ill advised to go out and bid against established farming families for a short or limited duration tenancy, because such a move will be unsuitable in establishing them long term.

Richard Blake: I want to make a couple of brief points, the first of which is in response to Chris Nicholson’s reference to 10 to 15-year LDTs. We have been getting some detail on new tenancies or two to see how the legislation has been bedding in and, although we do not yet have all the figures available to give out, we have been quite surprised at the number of LDTs of more than 20 years—and, in some cases, more than 30 years.

Secondly, as I think that Phil Thomas will confirm, the TFF is to invite a new entrant body or new entrant representatives to discuss the issues around new tenants getting into agriculture and allow the forum to better understand the situation. Indeed, I believe that that will happen at its next or next-but-one meeting.

Professor Thomas: We are trying to revisit the strand of work to which Scott Walker referred earlier and see whether we can begin to get a practical hands-on feel for what might be done for new entrants. Scott Walker has already highlighted one initiative and we have also taken an interest in land being leased from the Forestry Commission, the Crown Estate and other institutional bodies. Although, historically, many of those organisations have tended to consolidate and bring together any small properties that have become available, they have become much more receptive to the notion of keeping small properties small with the specific aim of creating opportunities for new entrants. We would quite like to encourage such an approach. Obviously, the properties need to be viable but it would be good to open up somehow or other a greater range of opportunities for people coming in.

The Convener: Thank you for that. Annabelle Ewing will ask about the issue of transitional provisions.

Annabelle Ewing: Thank you, convener, but I wanted first to add something to the previous debate. A number of helpful statistics have been referred or alluded to. Do those who compile those statistics intend to put them into the public domain to give a scientific basis to and inform not only our debate but the broader debate on the key issue of new entrants to the sector? Such a move would be very helpful.

Secondly, I have received an e-mail from a constituent—I will not take up the committee’s time going into the detail and, in any case, I do not think that they wish me to do so—and the bottom line is that they are in a dispute and feel that they have nowhere to go or, indeed, nowhere they can afford to go. Does the TFF have any role in helping to mediate or facilitate dialogue between a landlord and a tenant who are having issues?

Professor Thomas: We have very little direct involvement in that regard, but we can do quite a lot to try to improve the situation. For example, in our past few meetings we have considered the opportunities that the Arbitration (Scotland) Act 2010 presents. Many people do not want to end up in the Land Court, because it is costly, time-consuming and difficult. Therefore there must be greater focus on alternative possibilities, and arbitration is clearly one strand. There may also be opportunities in facilitated dispute resolution, but we have not teased out what mechanisms might
be best for that. However, we are signed up to getting better relationships between tenants and landlords.

On statistics, any that we get our hands on will appear in the public domain.

**The Convener:** Thank you. We are dealing with issues in the order in which they appear in this short bill, so is everyone happy with the VAT changes element?

**Members indicated agreement.**

**The Convener:** Excellent. We have agreement on something, which is good. The next issue is transitional provisions.

**Annabelle Ewing:** I raised a point with the bill team last week about whether the succession provision would have retrospective effect given section 4(1), but I now know that the provision will apply only when tenants die on or after the date when the legislation comes into force and not when tenants die before that date on whom a notice has not been served. I understand that the majority view of the tenant farming forum, though, was that the latter position should prevail—that is, that there should be a retrospective effect for a set of circumstances that, in practice, will be tightly defined. Now that we know that the bill will not have retrospective application in that regard, will each of you indicate whether you support the bill as introduced or whether you would prefer it to reflect your initial position?

**Professor Thomas:** There was complete agreement in the TFF that the bill lacked clarity on this issue, so everybody will welcome the clarity that has been given in that regard. Organisations in the TFF had different views: there was greatest support for the bill having retrospective effect; but one group favoured the provision applying only when the bill came into force. That view was given largely from a legal standpoint, I think, but I will let other people comment on that. There was consensus that however the bill operates, not many cases will fall into the category in question, so although there will be a small advantage to certain people and a small disadvantage to certain people, the number of people involved will not be huge.

**Christopher Nicholson:** We hoped that the provision would be retrospective. I agree that only a small number of people will be involved, but we know of one or two. The succession provision was meant to be part of the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011, so the people involved were under the impression that when the tenant died, they would be able to succeed to the tenancy. However, because that provision could not be part of the order, they had to wait for this bill. If the provision is not retrospective and does not apply when the tenant has already died, they will be in a difficult position.

**Richard Blake:** We made our position clear in our written submission. As a solicitor, I do not, in principle, like retrospective legislation—I am not sure whether Annabelle Ewing would agree—because it does not bring clarity and leads to uncertainties in the future. As Christopher Nicholson said, only one or two individuals will have a problem in this regard. The numbers are a moving target because when a tenant has died the window is open for a maximum of 12 months, which obviously will continue to move forward as the bill process continues—some people will drop out and others might come in if they die later in the 12-month period. At the moment, advisers to a deceased tenant’s family will not have a clue about what they should do by way of notice unless they see certainty in the legislation.

11:00

**Annabelle Ewing:** The key point is that the process involves the serving of a notice; that is a very clear element. Therefore, it would be easy to ascertain the group of people who would be impacted. Although they are not a usual occurrence in Scottish legislation, there have been retrospective applications from time to time; I took the matter up directly with the bill team last week. Therefore, this would not set any great precedent because there have been similar examples in the past. In particular, I take on board the comments of Christopher Nicholson and Professor Thomas on the fact that a very small group of people would be impacted, for whom, as Christopher Nicholson said, any amendment to the legislation could be very important.

**Scott Walker:** We have considered this issue long and hard and we view it on the basis that very few people will be affected. We do not view it as an issue of retrospective legislation as such, but merely as something that gives clarity to individuals who have not gone through the entire process. Provided that someone has not gone through the entire process, we believe that this aspect of the bill should still be allowed to apply to them. In that sense, we would not support what is proposed in the bill and would prefer the view that is held by most of the organisations within the TFF to apply. We recognise that that will cause difficulty for some people but the TFF agreed to the change some time ago. Because of the delay in implementing the measure, it may be happening a lot later than the industry had hoped.

**The Convener:** Thank you very much. Are there any other questions from members?

**Jim Hume:** I have a small point about retrospection applying only to landlord-initiated
rent reviews. If I recall correctly, the Government officials informed us that the provisions would apply only to any new tenancy agreements and so on that are signed after the bill’s enactment. Did the tenant farming forum think that that was correct, or would its representatives be more happy with the existing agreements?

Professor Thomas: In essence, the provision reflects the legal position. From the standpoint of the Scottish Government and the regulator, there is a tendency to be uneasy about retrospective legislation. Richard Blake will comment more widely on the legal aspects. It was accepted from the outset that how the matter is expressed in the bill would be how it would work. The difference between that and the issue about the transitional provisions was that there was a clear understanding among everybody in the group that somebody, or possibly a few people, would feel disadvantaged by the transitional process. The flavour of the discussion was that it would be helpful if that could be avoided. That is the view of the TFF.

Annabelle Ewing: Can I make a technical comment that might help my colleague, Jim Hume? I fully understand why one would not seek to have a provision that impacted on the freedom to contract and was also retrospective. I do not think that anybody would ever seriously suggest such a provision. Scott Walker made the point very well with regard to the application of section 1 to transitional arrangements, in that the key difference is that the process has not been gone through—de facto, he is right. The provision is not retrospective because the process has not happened. From a legal perspective, that is the key point that I noted when I read the various submissions.

Professor Thomas: Your legal understanding is much better than mine.

The Convener: I think that we have exhausted the questions. If the witnesses would like to make any final, brief comments, they now have the opportunity to do so.

Richard Blake: The first thing that I was going to say is that I have to go, because I must give evidence to another committee on the Land Registration etc (Scotland) Bill. The evidence that I will give to that other committee covers two issues that are pertinent to tenancies and tenancy legislation. The first one—which I have raised with the TFF; I have not raised the second one yet—is that it is worth noting that, under that bill, when a limited duration tenancy is entered into for more than 20 years, it will have to undergo an application for first registration. I suspect that that will lead to additional costs for both parties—tenants and landlords. I do not know whether there has been much crossover between the bill teams.

The second issue is perhaps of more concern. As drafted, the Land Registration etc (Scotland) Bill states that all paperwork to do with the terms of a registered lease must be registered in the land register. It seems to me to be unwieldy and a little crazy that written discussions between a land agent and a tenant, rent review memorandums, decisions of court and so on must all be registered in the land register. That would not seem to assist anyone; it will only clutter up the land register.

Scott Walker: My comments are not on the Agricultural Holdings (Amendment) (Scotland) Bill as such. As I think most people will be aware, considerable tension can often exist between landlords and tenants and there are a number of areas in which landlords and tenants can come into dispute, some of which have been touched on. Whether we are talking about the rent review process, investment in holdings or waygo, there is general consensus among the witnesses on the areas that cause dispute, even if there is not a consensus on how we should solve those disputes.

The TFF wants to work long and hard to see how we can provide some dispute resolution, solve the problems that bring people into conflict with one another and avoid the costly process that has unfortunately evolved in the Scottish Land Court, with both sides feeling the need to employ a Queen’s counsel and all the associated costs of that. We are looking long and hard at arbitration as a means of solving such disputes. In addition, NFU Scotland is considering other alternatives, which we still have to work through.

Another issue that it would be fair to bring to the attention of members and one that I hear often gives rise to lots of conflicts is to do with the way in which land agents act on behalf of landlords in their on-going discussions with tenants. We strongly favour the enforcement of a code of practice in that area so that everyone knows timeframes and how the process should be conducted.

In the many cases of dispute in which NFU Scotland is involved, it is extremely rare for the land agent to be breaking the law—inevitably, land agents are on the right side of the law—but we tend to find that some of their practices might leave a little to be desired and would certainly not be considered to be best practice. We would favour a strongly enforced code of practice to which all sides of the industry signed up and adhered. We would like that code to have some teeth and there to be some recognition that if either side—tenant or landlord—does not adhere to it, a dispute can be progressed at the Scottish Land Court.

The Convener: Thank you for that.
Andrew Wood: Let me update Scott Walker on a matter of which he is not yet aware. The RICS and its members have rigorous guidance on how chartered surveyors behave and conduct themselves, but not all agents are chartered surveyors. What might be called sharp practice, rather than illegal practice, is an issue not just for landlords but for tenants’ agents—we act on both sides. I have agreed and will present to the TFF a paper on a code of conduct. A guidance note on a code of conduct has been produced in the past, which we will work up with the TFF. We will consider the wider range of people who are involved in advising landlords and tenants and how they might deal with issues.

The Convener: Thank you. I do not want to prejudge discussions that we will have on land reform in future, but I can certainly say that disputes that arise often point to the person in the middle—the agent, of whatever stamp. When a middleman takes an inordinate cut in the process, that creates a huge problem for the relationship between tenant and landowner. We have sufficient evidence on that to consider. We look forward to the production of codes of conduct, which I am sure will address some of the issues, but I am sure that we will return to the matter after the bill has been passed.

Christopher Nicholson: I support everything that Scott Walker said about areas in which disputes arise, in relation to which we need different and cheaper methods of resolution. We also think that the legislation requires modifying in the areas that he was talking about, such as assignation, succession, rent reviews, consents for improvement and waygo compensation.

The issue is not just the cost of taking a case to the Scottish Land Court. Richard Blake mentioned the Fleming v Ladykirk Estates case, which demonstrated that a tenancy could be assigned to a nephew. However, although the tenant won the case in the Land Court, the nephew did not become the tenant, because the landlord started an appeal process to the Court of Session and the tenant did not have the financial means to fight the case. The tenancy was lost and one more new entrant from a farming family was denied a start.

Professor Thomas: Members will appreciate that we have no shortage of items for your agendas.

The Convener: It has been useful to have a run round the issues, which has demonstrated that the two-page bill that we are considering is only the start of the committee’s work. I thank all the witnesses for their candour in giving evidence, which has been useful. We look forward to seeing the cabinet secretary next week.
Agricultural Holdings (Amendment) (Scotland) Bill: Stage 1

10:30

The Convener: Item 5 is our final evidence session on the Agricultural Holdings (Amendment) (Scotland) Bill. We will question the cabinet secretary on what we have heard during our consideration of the bill. Again, I welcome the cabinet secretary, Richard Lochhead, and his Scottish Government officials, who are Iain Dewar, bill team leader, agriculture and rural development division; and Caroline Mair, solicitor, rural affairs, directorate for legal services. I invite questions from members.

Aileen McLeod (South Scotland) (SNP): Good morning. One of the key aspects that we have been discussing in our evidence sessions on the bill is the proposed succession provisions in section 1 and how a near relative should be defined. The bill proposes to include grandchildren in that definition. There is also an issue about the differences between those who can be assigned a tenancy and those who can succeed to a tenancy.

It is clear from our evidence that the proposed definition of “near relative” reflects the consensus that was reached by the members of the tenant farming forum. That said, when we took evidence last week, Christopher Nicholson from the Scottish Tenant Farmers Association said:

“From a tenant’s perspective, we would encourage the definition of ‘near relative’ to be extended beyond a grandchild to include nephews and nieces. ... We hope that the definition will be expanded, as that would allow easier succession to and possibly assignation of heritable tenancies, which would help to preserve the number of heritable tenancies in Scotland.”

In addition, Scott Walker from NFU Scotland said:

“It seems a bit strange to the layman, and certainly to many of our members, that in some situations there is a wider definition of who you can assign a tenancy to than who can get succession to it. It seems a little bit strange that, during your lifetime, you can assign a tenancy to a wider class of people, yet, at the point of your death, it is restricted to certain categories. That is a point to consider, but there is an industry-wide consensus that the bill is a step in the right direction.”—[Official Report, Rural Affairs and the Environment Committee, 18 January 2012; c 520, 522.]

I would be interested in your view on whether the current definition in the bill will deliver the objectives of giving tenants greater security and encouraging new entrants or whether we should extend the definition.

Richard Lochhead: Thank you for the opportunity to come before the committee to give evidence on the bill, which is of course very
important for the future of the tenancy sector and which I hope will help to attract new entrants, as Aileen McLeod suggested.

I am sure that I do not need to tell the committee that there has been a long, challenging and often difficult road to get to where we are today in terms of the relationship between landlords and tenants in Scotland, with the first agricultural holdings act dating back to 1883. Over the subsequent century-plus, there have been changes from time to time to try to improve that relationship: to improve the balance of power between landlord and tenant; to ensure that we have a healthy tenancy sector in Scotland; to offer the necessary protection; and to make land available for letting so that new entrants can get on the first rung of the ladder. That is a big challenge that we face.

Today we are discussing the remaining measures that have still to be implemented following the previous parliamentary session, when the tenant farming forum considered the future of the matter, with a particular emphasis on how to attract new entrants to agriculture.

The “near relative” issue is one of those measures that the tenant farming forum unanimously agreed had to be addressed. We have before us the proposal to extend the definition of “near relative” to include grandchildren as a result of the forum’s consensus view. We could easily ignore that consensus and put an alternative—or extend the definition further—in the legislation. However, we have chosen not to do that, because we agreed with the tenant farming forum that we would take forward its recommendations on a consensual basis, and its recommendation was to extend the definition of “near relative” to grandchildren.

Having said that, I will not sit here today and say that that is the end of the story. It has taken more than 100 years to get the current legislation on the books, and I cannot pretend to bring all the long-term solutions to the committee overnight. However, there is much more work to be done, and the succession issues will be part of that. That is recognised by the tenant farming forum, and certainly by the witnesses whom Aileen McLeod quoted in her question.

Related to this issue are the wider succession laws. Aileen McLeod rightly highlighted the difference between assignation and succession. We are talking about succession today, and there is perhaps no alignment in Scottish law per se between assignation and succession. The Scottish Law Commission has reported on succession issues, and the Scottish Government will respond to that in the coming months. This is a very legalistic issue and it is impacted upon by the wider law of succession in relation to all sectors of Scottish society. We will pay attention to that and see where that debate goes. We recognise, with regard to this particular legislation, that the succession issue is unfinished business.

The Convener: Are there any further points on that?

Claudia Beamish: Good morning again, cabinet secretary. What do you see as the advantages and disadvantages of extending the definition of “near relative” to nephews and nieces? As Aileen McLeod highlighted, that was raised as an area of concern.

Richard Lochhead: As Aileen McLeod mentioned, we want there to be more opportunities available—where that can be justified—to encourage the continuation of the farming tenancy within the family. We therefore have a definition of “near relative” at present, which is taken into account as it is in the interests of agriculture that it should be, but the case has been made to the Government in recent years that that definition is too tight. If the grandchild in the family wishes to take on the lease for the farm and become the tenant, they should have that opportunity.

It is clear that the debate as to how far we extend the definition will continue, and it is not easy to work out where the cut-off point should be in defining “near relative”. As Aileen McLeod mentioned, some people feel that nieces and nephews should be captured by the definition.

As I said, we will work with the tenant farming forum and we will listen to the committee, which will address the issue in its stage 1 report, to see how the debate progresses in future. I think that most people—and certainly the tenant farming forum—recognise that it would be reasonable to include grandchildren as near relatives. If a farmer passes away at a fair age, and the grandchildren are coming up through the ranks and are involved in farming, it would make sense to allow them the opportunity to take on the tenancy, because their parents may not be around. We feel that that is a fair definition of “near relative” at this time.

Graeme Dey (Angus South) (SNP): Rather than revisiting the issue of nieces and nephews a year or two down the line, would it not be practical and sensible to get things right now, at this stage? There may not be a clamour, but sections of the industry are certainly keen to do that.

Richard Lochhead: Some stakeholders want to extend the definition, and I understand why they would want to put that case, but there certainly is not a clamour for it. All members of the committee will know that any farmer—whether an owner-occupier or a tenant—will have strong views on a variety of issues, including how to improve the amount of land coming on to the market for letting, and how to encourage new entrants. Those issues
are difficult, and for many reasons it has taken a long time to get to where we are today. I cannot turn back the clock and change history; I can only deal with the situation before me at the moment.

With legislation, we have to be careful about unintended consequences. We have to safeguard the rights of both landlords and tenants. Some would argue for extending the definition of "near relative" to go beyond grandchildren, but others would argue that such a definition might tie down a tenancy and make it so secure that the landlord who signed up for it in the first place would no longer have flexibility and would have their rights and expectations infringed.

We have not closed the door on any of the issues that we are discussing here. We have already given a commitment to consider, within 18 months of the act coming into force, the impact of the changes. In this session of Parliament, there will be an opportunity to consider how effective the latest changes have been in attracting new entrants and in helping the tenancy sector in Scotland.

Margaret McDougall: I would like to ask for some clarification, because I have come to this bill quite late on. If a tenant dies intestate and more than one grandchild is interested in succeeding to the farm, what is the procedure for deciding which grandchild will take on the tenancy?

Richard Lochhead: I have been cabinet secretary for a number of years now, and still I am seeking clarification on many of the issues that we are discussing, so do not consider seeking clarification a weakness in yourself. We are all seeking clarification on the legislation relating to agricultural holdings. It is a complex and difficult area, wrapped up in legalities, so I will bring in my legal colleague, Caroline Mair, to elaborate.

Different circumstances can arise when a tenancy is passed down the generations to near relatives. When a tenant passes away, there may be a will, or there may not be a will. The wider legal context kicks in when there is no will. If there is a will, and if a grandchild is named as the person taking on the tenancy, that will happen—and if Parliament passes this bill, grandchildren will have the right to inherit a tenancy. If there is no will, we move into a wider legal sphere. I will ask Caroline Mair to talk about the wider law of succession and what happens if there are various grandchildren.

Caroline Mair (Scottish Government): If there was no will, the tenancy would pass by the laws of intestate succession, under the Succession (Scotland) Act 1964. That would happen first. The amending bill is not changing that; the amendment that we are making is to change the definition of "near relative", which is relevant only when a landlord subsequently serves a notice to quit on a successor tenant. Matters such as competition between two grandchildren who want to succeed to the tenancy are determined under the law of succession, which the bill will not change.

10:45  Richard Lochhead: A separate debate is going on in Scotland about the law of succession, which impacts on such circumstances.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I have a general question. A point on which you have touched and which we considered last week with the NFUS and other witnesses is the bill's impact on the ability of landowners and prospective tenants to negotiate freely.

There is an idea that the freedom to contract is being undermined in some way. That is having an impact on supply of land, which in turn has an impact on new entrants' ability to come into farming. Farmers and landowners have told me that because they are not able to negotiate freely, they are entering into more short-term arrangements, as opposed to more secure tenancies. That means that tenant farmers are no longer prepared to invest in the land and farm steadings in the way that they would do if they had a more secure tenancy.

Given the drop in tenancies, which was highlighted a few weeks ago, are you concerned that, by interfering with parties' contractual freedom, you are indirectly undermining parties' ability to enter into the arrangements that they want to enter into? I know that that is not the Government's intention.

Richard Lochhead: Don't worry—I welcome general questions on the topic. Your question gets to the heart of the debate. You used the word "interfering"; others, including me, say that we are regulating, to ensure that there is not an imbalance of power between tenants and landlords. We have historical baggage to deal with in that regard, which is why we have regulation to ensure that a democratic approach is taken.

We are talking about three key measures, which are left over from work in previous sessions of the Parliament. In the first session, we adopted measures to improve flexibility in leases, in the Agricultural Holdings (Scotland) Act 2003, to make it easier for landlords and tenants to strike the deal that is best for them. Time will tell whether the increased flexibility that we introduced makes a difference, particularly in relation to the transfer from a short limited duration tenancy to a limited duration tenancy—the five-year and 10-year leases issue—to make it easier for landlords and tenants to have a longer lease, if that is more
appropriate for them, without having to start from scratch. I hope that the 2003 act will make a difference and that the extra flexibility will mean that more leases are created. That was the whole purpose of the approach. As I said, we will review the position, to see whether the new approach has worked. If it has not worked, the Parliament will have the opportunity to do more.

I do not think that we are interfering. South of the border, there is more freedom of contract, but many people argue that that is at the expense of security of tenure. There are many short-term leases south of the border and commentators there say that it is even more difficult for new entrants to come into farming. New tenancies and leases are not just about new entrants; they are about the existing set-up and how the whole system works. We are trying to have a system in which it is a bit easier for new entrants to get on to the first rung of the ladder. There might be more freedom of contract and flexibility south of the border, but it comes at the expense of security of tenure and does not necessarily help new entrants.

In Scotland, we are in a different situation and a different environment. We are trying to create a different regulatory regime, which promotes new entrants, in particular, and frees up more land for let while giving landlords the confidence to let their land.

**John Lamont:** I thank the cabinet secretary for that answer, but how does the 10 per cent drop in the number of tenancies fit with what he has just said?

**Richard Lochhead:** As I have said before, there are no magic bullets. I do not think that anyone around this table or anyone in Scotland, including me, can come up with one solution that will suddenly get all of us to where we want to get to, as we are in a difficult environment. Many factors influence the availability of land for let in Scotland. The flexibility or lack of flexibility of the agricultural holdings legislation could be one factor, which is why we are addressing that issue, but there are many other issues. We know that the demographics and the profile of younger people in Scotland are changing, which can have an impact, but the economics of agriculture are perhaps the biggest factor. Anyone who is looking to become a farmer will consider the economics, which will, I hope, continue to improve and make it more attractive for new entrants to come on board. However, a range of factors—not only what we are discussing today—influences a person’s decision on whether to get involved in agriculture in Scotland.

There is a range of reasons for the 10 per cent drop in the number of tenancies. I do not welcome it, as I want to ensure that we have a healthy tenancy sector in Scotland, and we should be concerned by it, but tenant farmers buy their farms and become owner-occupiers, and then, by definition, less land is let. We have bigger farms in Scotland than there are elsewhere, so the economics sometimes drive tenant farmers to rent more land, which means that there is less space for new entrants to come in. Therefore, a range of factors is involved, and we have to tackle all of them, not just what we are discussing today.

**The Convener:** I want to clarify a point before we move on from section 1, on succession by near relatives. I understand that the acceptance of grandchildren as near relatives for the purposes of succession was won in case law in the Scottish Land Court. Will you confirm that, as it puts a perspective on our difficulties in reaching the stage that we are now at of putting into law something relating to grandchildren?

**Richard Lochhead:** There have been cases, which I will ask Caroline Mair to speak about. I recall that the conclusion of a case was not specifically down to the definition of a near relative, but I ask her to elaborate on that.

**Caroline Mair:** I would need to know the exact case in order to offer any meaningful legal comment, but I would be happy to provide any further written detail if that were requested.

**The Convener:** If I remember rightly, I think that there was one involving Cawdor Estates, but I may be wrong, and I do not want to be quoted exactly on that. I wanted to establish the fact that case law often leads to the obvious necessity for change.

The next section is on the prohibition of upward-only rent reviews.

**Jim Hume:** I think that we were all fairly surprised that there were cases, albeit just a few, in which tenancies’ rents could only go up and tenancy reviews could be initiated only by the landlord. It is interesting that the NFUS put a different spin on things. I think that a substantial but not large number of its members stated that it was sometimes beneficial to have clauses saying that rents could only go up because, otherwise, people proposing to take on tenancies could offer an extra large amount per year so that they would win the tenancy and then negotiate down afterwards. Have you considered that in any of your deliberations?

**Richard Lochhead:** To be frank, I have not really considered that in my deliberations, and I cannot recall that point being made to me during my discussions with the NFUS. Some farmers may hold that view, but members may rest assured that many more farmers and others who are involved in the debate hold the alternative view that we should tackle that issue and, for the avoidance of doubt, simply make it law that any
such clauses that are inserted into leases would be void.

Jim Hume: I have asked this question before, and although it was a different audience I presume that I will get the same answer. When the bill is passed and receives royal assent, will existing tenancy agreements that have an upward-only rent review clause or a landlord-initiated-only review clause be seen as unfair and changed or is it only new tenancies that will be affected?

Richard Lochhead: We have a clear position that we will not apply the change retrospectively. It will be the law that, although any future leases cannot have such clauses, existing leases will stay as is. We have no reason to believe that there is a great number of them.

Jim Hume: I understand that it is a cleaning-up process.

A couple of points were raised at a meeting with the NFUS yesterday that some of us attended. The first concerns the problem at waygo when tenants have made improvements, such as a shed, with or without the landlord’s permission or knowledge. There is an argument about whether the landlord will take over the improvements. Has the Government considered help for the arbitration of that so that there is investment in tenanted farms and tenants are rewarded for investing?

The second point was about diversification. It has been stated that, in many diversification projects, landlords look for a share. In one example, a landlord wanted 80 per cent of the income from a diversification project. That basically stops anyone from wanting to diversify. Is that something that you will consider in this session?

Richard Lochhead: We are aware of on-going concerns in the tenancy sector about waygo compensation and issues surrounding that. We cannot pull a rabbit out of a hat to give landlords enough confidence that it is worth while letting land and at the same time address some of tenants’ concerns about compensation at waygo. However, we are keen for the industry to look at that. Within 18 months of the act coming into force, we will review its impact so far, which is an opportunity for the committee and the industry to have its say. We are aware that there are issues surrounding waygo.

Jim Hume: And the diversification issue as well I presume.

Richard Lochhead: That would be linked, yes.

Annabelle Ewing: I want to add something to the debate on upward-only rent reviews, in case it is helpful. Although the bill would prohibit the inclusion of such a clause in future leases, that does not mean that rents would not go up. In the commercial sector, even when a tenant manages to negotiate away an upward-only rent review— which does not happen every day of the week because of the imbalance in the respective powers of the tenant and the landlord—we find that the rent can still go up, according to the applicable circumstances, when the rent is being reviewed. It is important to bear that in mind. I am sure that the tenant farming forum is well aware of that; we note that it has signed up to this provision.

Richard Lochhead: That is a fair comment. The issue is the prohibition of upward-only rent reviews and landlord-instigated-only rent reviews. Landlords and tenants support what we are doing on that. As Annabelle Ewing says, there will still be a rent negotiation and the opportunity to change rent levels.

The Convener: Section 3 is on the effect of VAT changes on the determination of rent.

11:00

Annabelle Ewing: The committee considered issues relating to section 4(1) in the evidence session with the bill team and in our stakeholder evidence session last week. At present, the provisions on near relatives will apply only when a tenant has died on or after the date when the legislation comes into force. In our previous evidence sessions, it emerged that the majority view in the tenant farming forum was that the provision should apply when a tenant has died before the legislation enters into force, but no notice has been served. Why was the majority view in the tenant farming forum not reflected in the bill? Scott Walker of the NFUS said:

“Provided that someone has not gone through the entire process”—

or, in effect, no notice has been served—

"we believe that this aspect of the bill should still be allowed to apply to them. In that sense, we would not support what is proposed in the bill and would prefer the view that is held by most of the organisations within the TFF to apply."—

[Official Report, Rural Affairs, Climate Change and Environment Committee, 18 January 2012; c 536.]

Does the cabinet secretary agree?

Mr Walker also said that he does not believe that such a move would be retrospective in the true sense, because the process would not have been gone through and there would therefore be a clearly identifiable set of circumstances to which the measure could be applied. I ask the cabinet secretary to comment on the debate that we have had on the subject.

Richard Lochhead: The member raises a valid concern, but the subject is a difficult one, for a couple of reasons. First, as you will imagine, we would rather avoid retrospective legislation
because we do not want to be challenged on it. As I said, existing situations have expectations and rights built into them. If we try to change those retrospectively, we must be careful about the surrounding legalities. Therefore, our default position is not to implement legislation retrospectively. Secondly, with any new measure, there is a cut-off point; there will always be some people who just miss out on the benefit, irrespective of when the measure is introduced. Whatever we do on the definition of the term "near relative", I expect that some people will miss out because of the timing, but it might be only one or two people, given that nobody expects many people to be affected by the measure.

We are reluctant to legislate retrospectively, but the member will have the opportunity to make her view known to the committee.

Annabelle Ewing: I wonder whether the bill team could reflect a bit more on the point that, because the application is dependent on a practical step being taken—a notice being served—the measure would not be retrospective in the true sense, as it would apply in a certain set of circumstances. That was the point that the chief executive of the NFUS and others made. I hope that that legal point will be reflected on further, because it perhaps addresses the concern about retrospective legislation. I am trying to be helpful.

Richard Lochhead: That is a helpful point. I assure the member that I will reflect on the point, which we are aware of.

The Convener: As there are no further points on that matter, I would like to correct something that I said earlier about succession. At last week's meeting, Christopher Nicholson talked about the need for a wider agreement on assignation, succession, rent review and so on. He said:

"The issue is not just the cost of taking a case to the Scottish Land Court. Richard Blake"—

of Scottish Land & Estates—

"mentioned the Fleming v Ladykirk Estates case, which demonstrated that a tenancy could be assigned to a nephew. However, although the tenant won the case in the Land Court, the nephew did not become the tenant, because the landlord started an appeal process to the Court of Session and the tenant did not have the financial means to fight the case. The tenancy was lost and one more new entrant from a farming family was denied a start."—[Official Report, Rural Affairs, Climate Change and Environment Committee, 18 January 2012; c 539.]

That case involved a nephew and puts in context the gains that have been made, mainly through the Land Court. I am sure that there are also cases that involve grandchildren, on which it would be interesting to reflect as we draw up our stage 1 report on the principles of the bill. The process of securing change seems extremely slow. I did not want to cast aspersions on other estates; but the Ladykirk Estates case is germane to the issue of nephews, nieces, grandchildren and so on.

Graeme Dey: I will ask about a more general issue, given that we have the cabinet secretary with us. A 10 per cent drop in the number of tenancies in Scotland has been referred to. During our evidence session with stakeholders, the Scottish Tenant Farmers Association said that it thinks that somewhere in the region of 100 tenants have bought their farms since the 2003 act came in. It was also brought to our attention that when a large estate is broken up tenants can “lose” tenancies and become owner-occupiers. It is clear that such factors impact on the drop in tenancies; it is also clear that a large number of tenancies appear to have gone. What do you think lies behind the figures?

Richard Lochhead: We need a healthy tenanted sector in Scotland. We need everyone who has influence over the amount of land that can be let in Scotland to rise to the challenge of ensuring that the next generation of food producers and farmers has access to land to farm. That is the biggest challenge that we face in the context of this debate. We need landowners, landlords and owner-occupiers, as well as tenants, and to acknowledge that that is a priority.

Of course, the people who have the most power in that regard are those who own the land. Given the nature of land ownership in Scotland, we need people who have land to do what they can to make more land available. The Government is speaking to such people more than it has ever done, making in the strongest terms the point that we need to see more land put on the market. We feel that the legislation takes account of the needs of not just tenants but landlords, so the environment should be right for more land to come on to the market for letting. If that does not happen, we will have to keep returning to the issue. That is the Parliament’s job, and I am sure that the committee takes a close interest in the issue. Given that we have the cabinet secretary behind the figures?

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Graeme Dey: It appears that less land is being made available. Why is that?

Richard Lochhead: Agriculture has changed. As I have said before, we are not frozen in time. The economic and global environment—not just the Scottish or European environment—is radically different from the environment 100 years ago. The size of farms is different and the number of people who are available to work in agriculture is different. There are new technologies. The whole profile of land use and agriculture in Scotland is changing and will continue to change.
There is an added complication, in that many landowners are awaiting the outcome of the common agricultural policy reform process before they make their next move. They might be hesitant, so I say to them that if they agree that we need new entrants in agriculture, as they say that they do, they should please do what they can to make land available. They have the land; they can make it available.

The bill is reasonable and takes account of the needs of landlords and tenants. We will return to the debate time and again, until we are confident that the next generation of farmers in Scotland has the opportunity to farm.

The Convener: Concerns have been expressed in our discussions about the need for more adequate information on the number of tenancies and we are well aware of the debate in the press about reductions, particularly in secured tenancies. I do not know whether you will be able to answer this series of questions just now, but I need to put them on the record to help our deliberations. First, is it normal practice for a tenancy to pass through assignation to the next hand, but such information is very difficult to make land available. They have the land; they can make it available.

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As I said, I am happy for you to answer these questions later, but if you can respond immediately, that is fair enough.

Richard Lochhead: You are probably best to ask the questions and I will see whether I can answer them. If not, I will get back to you.

The Convener: I want to put them on the record anyway.

How many individuals will be affected by the change to the definition of “near relatives”? How many limited duration tenancy agreements included upward-only or landlord-only rent clauses? Are estimates available for new entrants lacking access to farm tenancies? To what extent is the 10 per cent drop in the number of tenancies in Scotland between 2005 and 2011 a result of tenants purchasing their farms or landowners taking land back in hand or reletting it under alternative arrangements?

It would be very helpful to get some answers to those questions.

Richard Lochhead: I am happy to write back to the committee on those questions; indeed, they are questions that I often ask. We are aware of the lack of data on the issue and are working with the industry on ways of capturing a lot more to understand exactly what is happening out there. In particular, it would be fantastic to have an answer to your final question on exchange of tenancies and the number that have been taken back in hand, but such information is very difficult to gather. However, it is a fundamental question and I agree with the committee that getting an answer to it would give us an exact picture of what is happening out there and allow us to understand why it is happening and to address some of the issues.

I am afraid that other issues, such as the number of people who will be affected by the change to the definition of “near relatives”, will depend on future circumstances. I do not want to predict the demise of any particular farmer in Scotland, but the fact is that we cannot predict who will wish to take over tenancies when existing farmers pass away, or the demand from grandchildren to inherit them.

I will do my best to come back on your questions, convener.

The Convener: We will give you a list to ensure that you get back to us before we produce our report.

Richard Lochhead: We will let you know exactly where we are going with gathering data and new ways of doing these things.

Claudia Beamish: At last week’s meeting with industry stakeholders we were told that there were as yet no figures for the possible number of informal expressions of interest from new entrants keen to get into the industry, some of whom are not relatives of farmers but have been involved with the industry in some way. Those people are finding things very difficult and I wonder whether there is any possibility of collecting data on that issue. I also wonder whether you can provide—if not today, then at some other point—information on efforts by the Forestry Commission and the Crown Estate to develop starter units and RSPB Scotland’s suggestion regarding the possibility of conservation tenancies.

Finally, I know that, given the very difficult economic circumstances, there is no magic wand in this respect and that all businesses are finding it difficult to secure finance. However, the committee is aware of the difficulties faced by new entrants in getting finance for short tenancies. As with the questions that the convener asked, are you able to comment on those matters now or do you want to get back to us?

Richard Lochhead: I can probably answer all three points and maybe follow up with some more detail.

The first issue to address is understanding how many potential new entrants there are in Scotland and how they wish to enter the industry. Today we are talking about tenancies, but many aspiring entrants find different ways of getting into the industry. As the industry is so capital intensive, the most challenging way is to become an owner-occupier, and the evidence shows that most new
entrants who are owner-occupiers manage to achieve that only with support from family who have existing connections to agriculture. It is very difficult for anyone who is not currently involved in agriculture through family connections to become a new entrant as an owner-occupier. There are some very wealthy people who achieve that—I know many of them—but it is not easy for other people whom we want to encourage.

11:15

There is a case for establishing a register that aspiring new entrants can put their name on, and I am looking at how we can achieve that. From time to time, I come across individuals who wish to have their own farm—I am sure that committee members meet such people, too. In the case of tenancies, it would be good to establish a national register with the co-operation of all the stakeholders. That would allow those who can make land available to know that there is a demand and to understand the kind of people who want to get on to the first rung of the ladder, and it would help us to understand how many such people are out there.

We want to look at such a register, and Claudia Beamish makes a good point. I fully accept that there is a lack of data overall, and the issue relates to the previous point from the convener.

I am interested in the idea of starter units. A lot of industry work is taking place at the moment, and I am very interested in the RSPB idea of conservation starter units. I will look into that—thank you for bringing it to my attention. As a Government, we are also looking at what influence we have. As the committee may know, the Forestry Commission is in the midst of establishing starter units. There will be more announcements on that issue in due course, and I will follow up in more detail. I agree that the Crown Estate and other landowners in Scotland have a role to play. The Crown Estate is working on that at the moment, so there is a lot of dialogue taking place with some major public sector landowners to see what can be done.

The final question was on finance. At the moment, new entrants receive extra finance through the Scotland rural development programme. They receive added support from other schemes that are up and running, and there are specific new entrant schemes available. However, as we have just discussed, although Government and European schemes to assist with cattle, equipment, training and skills are important and there is more to do through them, they are pretty meaningless if people cannot get access to land or, in some cases, access to several million pounds to purchase and own a farm. There is a big jigsaw. We can put some bits of the jigsaw together, but we also have to address some fundamental issues.

Margaret McDougall: When it gave evidence last week, and when I spoke to it yesterday, the NFUS raised the issue of land agents. Does the Scottish Government have any proposals for taking forward a code of practice for land agents?

Richard Lochhead: We have no direct proposals, but I understand that the industry is looking at the issue. That fact has maybe been alluded to in the evidence that the committee has received from witnesses. The chartered surveyors, who tend to be involved in the land agent business, are all members of a professional organisation, which is looking at the issue.

Some of the anecdotes that we hear describe situations that are not healthy for the tenancy sector in Scotland. Some of the practices that I have heard about are abhorrent, but I have often heard the stories only anecdotally. I like to think that the majority of individuals are involved in negotiating and drawing up agreements that lead to good outcomes. We have to remember that there are many good, healthy and positive relationships between landlords and tenants, and we must not tar everyone with the same brush.

Through legislation, we are trying to protect our tenants and ensure that the problems that occur in the cases that are brought to our attention do not happen again. A code of practice to address some of the issues with land agents would be a good thing, as long as there is a way in which the professional organisations of which the agents are members can enforce it internally.

Margaret McDougall: So the Scottish Government would have no input into that whatsoever.

Richard Lochhead: We have no intention of using legislation in that regard. The professional bodies are clearly the best people to police any individual who is out of line or behaving in a way that we think is unacceptable in today's age. Such people should be held to account by their professional organisation.

The Convener: On that point, cabinet secretary, Andrew Wood from the Royal Institution of Chartered Surveyors pointed out that not all land agents are members of his organisation. Can you confirm whether we have the ability to regulate the affairs of the RICS in the Scottish Parliament, given that it might be something to look into?

Richard Lochhead: To answer your question specifically, there are always ways and means in terms of codes of practice. As you know, there is legislation elsewhere in the Scottish Parliament whereby we make codes of practice conditional or statutorily establish codes of practice. Frankly, we
could have the power to ensure that codes of practice were a factor, but in the case of land agents who are members of professional bodies, those bodies should hold their members to account. I would much rather see the industry ensure that the land agents whose services are used are members of professional bodies. That is surely the way forward.

The Convener: Thank you for that.

Annabelle Ewing: Leading on from that, in Scots law an agent by definition acts further to the instruction of somebody else. That brings us back to the essence of this debate regarding the power balance, shall we say, between the tenant and the landlord. The agent acts on the instructions mostly to the essence of this debate regarding the power of the landlord, but from time to time acts on those instructions outwith the cabinet secretary's jurisdiction, but I felt that it was important to put on the record that those concerns were raised at the evidence session last week.

I was heartened to hear last week from the tenant farming forum in particular of the determination to explore further the use of the Arbitration (Scotland) Act 2010 as a potential way forward for avoiding terribly lengthy and costly cases coming before the Land Court and for finding a better dispute resolution mechanism for the sector. That was very encouraging, but obviously such things take time. What, if anything, can the Scottish Government do to facilitate the examination of how the 2010 act can be used in that regard? I understand that it is an excellent piece of legislation and that there is a determination to use it in any event to make Scotland a centre for arbitration. The sector that we are discussing would perhaps be an important start on that road. Can the cabinet secretary comment on that?

My more technical question concerns the Land Registration etc (Scotland) Bill. Scottish Land & Estates Ltd expressed last week what was at least a minor concern about the fact that limited duration tenancies of more than 20 years will require to be registered and wondered what the fee level would be. It was also concerned by what it understood to be a requirement to register all paperwork for such leases. I am not entirely sure that the requirement would be as wide as Scottish Land & Estates fears. Obviously, though, those are technical questions concerning a bill that is outwith the cabinet secretary's jurisdiction, but I felt that it was important to put on the record that those concerns were raised at the evidence session last week.

Richard Lochhead: It so happens that I met Scottish Land & Estates last week in the Parliament to discuss a range of issues and, as you can imagine, many of them were related to some of the issues that we are discussing today. Scottish Land & Estates made a similar point to me about the Land Registration etc (Scotland) Bill, which I undertook to consider. You have reinforced that organisation's concerns, so that will ensure that it is at the top of my mind to do something about that.

Clearly, we encourage arbitration. We are very much in favour of going down a route that is more cost effective than ending up in the Land Court. As you said, that is expensive, emotionally and financially draining, and can lead to difficulties, particularly for those who do not have much money or wealth in the first place. It is worth bearing it in mind that arbitration was statutory until the 2003 act but, because that provision was seen as too bureaucratic and expensive, it was removed. We have come round in a bit of a circle because the Land Court is equally expensive and bureaucratic in some cases. We are now looking at using arbitration again, and I wrote to the tenant farming forum just over a year ago, urging it to consider the issue. When I go around Scotland and speak to farmers, I hear some horrific stories about the impact of long drawn-out legal cases that end up in the Land Court. That is not good; if we can do anything to support an alternative way of resolving such disputes, the Scottish Government will do it. I am not ruling anything out at this point. I am waiting to hear back from the tenant farming forum about how it sees a better way forward. We need a better way forward. We should not have long drawn-out court cases if we can avoid it.

Jim Hume: I will return to some of the convener’s questions. The Scottish Government told us that there was a lack of figures and data about how many tenants have become owner-occupiers and how many landlords have taken their land back in hand. For as long as I can remember, twice a year, in December and June, farmers and farm-holdings have had to fill in returns in which they have to state the hectarage that they own or tenant. Cabinet secretary, you could extrapolate some information from those data.

Richard Lochhead: We discussed that previously. Iain Dewar will give you a bit of information about where we think the debate stands.

Iain Dewar (Scottish Government): At the moment, the information that we collect through the agricultural census gives us a high-level picture. It provides us with information about the amount of land that is rented and owner-occupied in Scotland. Since 2005, it has also given us some general information about the number of tenancies. We fully acknowledge that we need to get to the detail underneath that information so that we can better understand the interactions and what happens when a 1991 tenancy comes to an end. Is the tenancy to be bought or converted to a limited duration tenancy? If it is to be converted to
an LDT, will the tenant be the same or will there
be a new tenant? Is the conversion happening at
the point of succession? It is quite difficult to
interrogate the data to extract that information. We
have started discussions with statisticians about
how we might take the data that we get from the
agricultural census and cross-reference it with
corporate database information and perhaps
information from the Registers of Scotland about
who owns title to the land, and so on.

It is a very complicated business. At the
moment, we are hoping to get that information and
put an evidence base in place to inform the
proposed review of agricultural legislation so that
the review will have a sound evidence base.

The Convener: That feeds into what we were
discussing earlier. Off the top of my head, I
wonder whether the census should contain
questions that allow you to access more directly
the changes that might have taken place, if it is not
too complicated already.

Richard Lochhead: We reduced the number of
questions in the census and we took that as
reducing bureaucracy. We have been talking
about it ever since we reduced the number of
questions. We will take that idea away and think
about it. However, you are right that we need to
ask the right questions, which are those that we
need to know the answers to.

The Convener: I think that we have run out of
questions for the moment, but we have left you
with quite a few more to answer before we make
up our minds about our report. I thank the cabinet
secretary and his officials. We have had a wide-
ranging discussion in a legalistic area, but it is one
that is important to so many people out there who
are producing the staff of life, our most
fundamental product. It is important that we know
that there is an opportunity for people to do that
and the bill should make it easier for that to
happen.

Richard Lochhead: Thank you for today's
opportunity. There are no simple answers to some
of these complex issues and we will treat your
views and comments about the issues that have
been before us today and about the wider debate
very seriously. We need to hear your ideas and
conclusions from listening to the evidence. No one
has a monopoly on the solution to what is a very
serious issue for Scotland, which is the future of
our land. To ensure food production, we need to
ensure the future of the tenancy sector, so that
young people who want to get involved in
agriculture get that opportunity. That is still a huge
challenge for the nation because we do not have
all the answers. The Government will gratefully
receive anything that you can contribute to that.

The Convener: Thank you very much. We now
move into private. I thank those who have been
with us in the public gallery and those who have
given evidence.
6 February 2012

Dear Rob

AGRICULTURAL HOLDINGS (AMENDMENT) (SCOTLAND) BILL

Thank you for inviting me to give evidence on the Agricultural Holdings Bill on 25 January 2012. There were a few points of detail that I said I would come back to you on and I am now writing to provide you with further information on these points.

The first issue related to case law on the definition of near relative and the succession of grandchildren to tenancies. You referred to Cawdor Estates and I understand that this may be a reference to the Stephen v Trustees of Cawdor Marriage Settlement Trust case referred to in the STFA’s written evidence to the Committee. The STFA also referred to the Salveson v Graham case as another example where the issue of grandchildren inheriting tenancies led to court action.

In the cases of Stephen v Trustees of Cawdor Marriage Settlement Trust and Salveson v Graham, the Court of Session and the Scottish Land Court reached similar decisions, on almost identical facts, regarding the law of succession to joint tenancies. Both involved grandchild successors. However, the Scottish Government does not consider that either case is judicial authority for grandchildren being brought within the definition of “near relative” under the Agricultural Holdings (Scotland) Act 1991 and, therefore, it is necessary to amend the law in order to allow grandchildren to contest any notice to quit served on them. Further information on these cases can be found in Annex A to this letter.

You also sought a response on a number of specific questions, which I have set out in Annex B to this letter. As you will see, we are unable to provide responses to these questions. However, as we discussed at the Committee meeting, the Scottish Government is undertaking an exercise to see what further information can be gleaned from data currently held on tenant farms. This will help to provide a sound evidence base ahead of the wider review of agricultural holdings legislation that the Scottish Government is committed to.
Claudia Beamish asked for some further information on starter units and I am happy to inform you that, as part of the Forestry Commission's initiative, they have recently offered two units for let near Lochgelly and Cardenden in Fife. I hope more will follow and that the private sector will also rise to the challenge.

Annabelle Ewing mentioned the Land Registration etc. (Scotland) Bill and I undertook to consider this further. Registration of Limited Duration Tenancies is only possible for those leases in excess of 20 years. Registration of such leases is in favour of the tenant and is voluntary. The general benefit of registration to the tenant in a registrable lease is that registration vests in them a real right. This has two main elements. Firstly it will give them certainty that they will be able to enforce the terms of the lease against any successor landlord. Secondly, it will make it possible for a Standard Security to be registered over the lease giving them a possible source of funding. This is the current law and will remain the law under the Bill.

The change in the Bill is that registration of a lease in excess of 20 years will also result in registration of the landlord's ownership interest. Any additional cost as a result of this change is likely to be marginal as, in registering the lease, the Keeper is required to examine the landlord's title anyway. The Minister for Energy, Enterprise and Tourism, Fergus Ewing, who has responsibility for the Bill, and the Keeper, will consider whether it would be appropriate to waive any additional fee that would otherwise be payable by tenant farmers because of the sector-specific interests. Having considered this issue, and in particular the fact that registration of leases will remain voluntary, I am satisfied that the Land Registration etc. (Scotland) Bill does not present any issues for the tenant farming industry.

I hope that this letter addresses all the outstanding issues from my evidence on 25 January 2012.

RICHARD LOCHHEAD

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1 A tenant in a non registrable lease (i.e. a lease of 20 years or less) can have a real right vest in them by possession rather than registration - Leases Act 1449
ANNEX A

In the evidence session held on 18 January 2012 (see column 521 of the Official Report) Richard Blake, giving evidence on behalf of the STFA, suggested that the case of Salvesen v Graham was authority for grandchildren having been "brought in" to the definition of near relative by means of judicial interpretation. It was suggested that the amendment contained in the Bill was merely a clarification of a point already determined by the courts.

During the third evidence session held on 25 January you asked officials to confirm whether the acceptance of grandchildren as near relatives for the purposes of succession was won in case law in the Scottish Land Court. A case involving Cawdor Estates was mentioned.

In the cases of Stephen v Trustees of Cawdor Marriage Settlement Trust and Salvesen v Graham the Court of Session and the Scottish Land Court reached similar decisions, on almost identical facts, regarding the law of succession to joint tenancies. Both involved grandchild successors. However, the Scottish Government does not consider that either case is judicial authority for grandchildren being brought within the definition of "near relative" under the Agricultural Holdings (Scotland) Act 1991.

Both cases dealt with the legal position of agricultural tenancies held jointly, where two parts of the tenancy had passed by succession. In each case, a joint tenancy was held by a father and a grandparent. The father, in each case, predeceased the grandparent; his interest in the lease was acquired by his son. The grandparent then died. The grandparent's joint interest in the tenancy was then transferred to the same son.

The landlord, in each instance, argued that the interest which the son had inherited from the grandparent continued to form a separate interest from that which the son had acquired from his father, and sought to terminate the former grandparent's interest by notice to quit under s 25 of the Agricultural Holdings (Scotland) Act 1991, on the ground that the son was not a near relative successor of the grandparent. The landlord went on to submit that termination of the former grandparent's interest in the lease withdrew the consent which the landlord contended was required in order to continue a joint tenancy by tacit relocation and that, accordingly, the tenancies themselves were terminated by the operation of the notices to quit served under s 25.

However, in both cases the respective courts held that the inheritance of the grandparent's interest in the tenancy by the son, having previously acquired the other interest from his father, merged the two interests into a single person with the result that the former grandparent's interest was, by that merger, extinguished. The grandparent's interest having already been extinguished could not be terminated at a later date. It followed that the tenancies were, at that point, held by the son as sole tenant, fully protected by the Agricultural Holdings (Scotland) Acts.

In both cases the part of the joint tenancy inherited from the grandparent was effectively merged with the interest inherited from a parent. The successor tenant was therefore protected as he was effectively inheriting as a "near relative" from his father (the grandfather's interest having been subsumed into the part of the tenancy which had already passed from father to son).

In summary, the cases provide authority on the matter of succession to joint tenancies. They do not broaden the definition to near relative so as to encompass a grandchild of a deceased tenant. It just so happens that in both cases the successor tenant had inherited one of two joint interests from a grandparent.
ANNEX B

Is it normal practice for a tenancy to pass through assignation to the next generation?

The Scottish Government does not currently hold information on whether it is normal practice for a tenancy to pass through assignation to the next generation. Anecdotal evidence suggests that it is fairly common in the case of secure 1991 tenancies where a son or daughter shows an interest in taking on the tenancy and has the appropriate skills and experience to operate the farm business.

The Scottish Government will be reviewing the data that it currently holds from returns to the agricultural census, other surveys and IACS data to see whether it would be possible to obtain this information ahead of the proposed review of agricultural holdings legislation, although no specific data is held on the relationship of the previous tenant to the current tenant.

How many individuals will be affected by the change to the definition of “near relatives”?

It is not known how many individuals will be affected by the change to the definition of “near relatives” since it is not known how many grandchildren may have an interest in succeeding to a tenancy. However, it is considered that such a provision will assist with the succession of farm tenancies within families and help to deliver new and young entrants into farming.

In relation to transitional arrangements, it is not known how many individuals will benefit since much will depend on when the Act comes into force and whether a tenant farmer made a will before they passed away.

How many limited duration tenancy agreements included upward-only or landlord-only rent clauses?

The exact terms of a lease are a private matter between a landlord and a tenant and no information is held by the Scottish Government on the number of LDT leases with an upward-only or landlord-only rent review clause.

Are estimates available for new entrants lacking access to farm tenancies?

Estimates are not currently available for new entrants lacking access to farm tenancies.

To what extent is the 10 percent drop in the number of tenancies in Scotland between 2005 and 2011 a result of tenants purchasing their farms or landowners taking land back in hand or reletting it under alternative arrangements?

The Scottish Government does not currently hold information on transactions relating to individual tenancies. The Scottish Government will be reviewing the data that it currently holds from returns to the agricultural census, other surveys and IACS data to see whether it would be possible to obtain this information ahead of the proposed review of agricultural holdings legislation.
Submission from the Law Society of Scotland

The Rural Affairs sub-committee (“the committee”) of the Law Society of Scotland (“the Society”) welcomes the opportunity to comment on the Agricultural Holdings (Amendment) (Scotland) Bill and has the following brief points to make.

As far as the committee is concerned, this legislation is to be welcomed as it is simply implementing the last of the package of recommendations made by the Tenant Farming Forum to Scottish Ministers to increase the availability of agricultural land for let in order to encourage new entrants into farming.

Apart from supporting the proposals in its submission to the pre-legislation consultation, the committee raised two small drafting points, which we are pleased to note have since been rectified.

I trust these comments will be of some assistance. If you require any further information, please do not hesitate to contact me.

Yours sincerely

Katie Hay
Law Reform Officer
Submission from MJ McCall

Consultation on Agricultural Holdings (Amendment) (Scotland) Bill

1. Succession by near relatives – fully support.

2. Rent reviews proposal to outlaw upward only and landlord initiated rent reviews only – fully support.

3. Also changes to VAT with regard to variation – fully support clarification.

4. FURTHER CONSIDERATIONS:

Absolute Right To Buy (ARTB) firmly believe in right to buy for '91 Tenancies and those prior, but not short limited duration tenancies (SLDTs) or limited duration tenancies LTDs or Partnerships for the following reasons:

a) Few '91 tenancies after mid 1970s. Almost all '91 tenants have now been in occupation for at least 30 yrs therefore the farm has never been vacant for at least a generation, so if tenant was to buy estate would be fully compensated the valuation would be that of land with sitting tenant.

b) '91 tenants are often put under pressure so landlord can realize full capital values.

c) Expense of settling numerous disputes is prohibitive and is weighted in favour of the party with most cash, more often than not, the landlord. Too much money which could have been spent on agriculture has to go to lawyers and professional advisors.

d) Diversification and improvements when you have an unhelpful estate and no successor the temptation is to stop any diversification or improvements as the cost of retrieving would be prohibitive.

e) Many other problems between '91 tenants and landlords i.e. resolving disputes through Land Court – slow cumbersome and expensive, Rent Reviews should be based on capability of farm rather than comparables. Landlords investment still difficult even though legally obliged to etc. All these problems which have been with us for years could be done away with the ARTB and all efforts could be concentrated on making LDTs and SLDTs fairer and more equitable.
Submission from NFU Scotland (NFUS)

1. NFU Scotland (NFUS) represents some 9,000 farmers, crofters and growers across Scotland. This response, from NFUS, comments on the Scottish Parliament’s call for views on the Agriculture Holdings (Amendment) (Scotland) Bill.

2. NFUS welcomes and supports the Agriculture Holdings (Amendment) (Scotland) Bill.

3. As a member of the Tenant Farming Forum (TFF), NFUS welcomed the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011, now enacted, but was disappointed that two elements of the total package for change as sought by the TFF were not included. The omissions included widening the class of beneficiary who may succeed to a tenancy to include a grandchild, and amending the rent review provisions to prohibit ‘upward only’ and ‘landlord only’ initiated reviews.

4. In summary, the view of NFU Scotland is:
   - Extending the definition of ‘near relative’ in the Agricultural Holdings (Scotland) Act 1991 to include grandchildren is welcomed and supported.
   - It is necessary that Clause 4(1) be amended to make it clear what the transitional provisions mean, as the present wording is not clear.
   - Prohibiting the inclusion of rent review clauses in Limited Duration Tenancies that provide for ‘upward only’ or ‘landlord only’ initiated reviews is welcomed and supported.
   - The change clarifying the situation on changes in rent arising from changes in VAT or by the exercise of a landlord of an option to tax is welcomed and supported.

Details

5. NFUS welcomes the introduction of the Agricultural Holdings (Amendment) (Scotland) Bill to the Scottish Parliament. NFUS supports the proposals to extend the definition of “near relative” in the Agricultural Holdings (Scotland) Act 1991 to include grandchildren and amend the rent review provisions in the Agricultural Holdings (Scotland) Act 2003 in order to prohibit the inclusion of rent review clauses in LDTs that provide for upward only or landlord only initiated reviews.

6. NFUS is aware that the Bill includes a further provision relating to VAT and rent reviews, which mirrors a recent amendment to English agricultural holdings legislation. NFUS welcomes the fact that this would clarify the situation on changes in rent arising from changes in VAT or by the exercise of a landlord of an option to tax. Such changes would not constitute a ‘variation of rent’ that would prevent either a landlord or tenant from seeking a determination from the Scottish Land Court on the rent for a period of three years.

7. Clause 4 (1) concerning the transitional provisions around the change in definition of ‘near relative’ does not make it clear whether the provisions of Clause 1 will affect the transfer of leases where the tenant has died before this Bill comes into force. It is important that Clause 4(1) is amended to make it clear what the transitional provisions mean, as the present wording is not clear.

8. NFUS believes that the provisions of Clause 1 should apply to situations where the tenant has died before the Bill comes into force but the legatee or acquirer of the lease has not yet given notice under s11(2) (bequest of a lease) or s12(1) (intestate succession to a lease) of the 1991 Act.
Submission from RSPB Scotland

Summary
RSPB Scotland notes the general policy objectives and terms of this bill. The bill, as introduced, proposed modest changes to the 1991 and 2003 Acts that will not affect RSPB Scotland’s interests. We therefore have no comment to make on the substance of this bill.

However, this legislation is constantly under review and debate, through for example the Tenant Farming Forum (TFF), and legislative updates are regular occurrences. Given this, we urge the Committee to recommend that the Scottish Government, the TFF and others consider the options of establishing “conservation tenancies” in the next legislative update.

RSPB Scotland and our land management
RSPB Scotland manages 79 nature reserves across Scotland, totalling over 70,300ha. 26 of these reserves are managed in collaboration with 56 farmers or crofters, who are tenants, graziers, and/or carry out cropping under contract farming arrangements appropriate to the conservation circumstances on over 5,000ha. Although we do farm “in-hand” at some large sites, it is our policy to work with partners as much as possible.

RSPB Scotland’s land management role relates to the sound management of our assets acquired with charitable funds. By virtue of the Society’s responsibility to its members and Scots charity law¹, we are obliged to manage land for the benefit of conservation, albeit with procedures in place to ensure full participation of local communities in our management planning. Moreover, our conservation objectives for these sites are also public policy objectives, defined by the EU, the Scottish Government and/or Scottish Natural Heritage – this is often recognised by the designation of many sites as SSSI, SPA and/or SAC. As a result of meeting these public policy objectives, we are also fortunate to receive some grant support for the acquisition and management of land, from the state and/or HLF and others – these grants will usually be on condition that the land is managed for these public conservation purposes.

Thus, our land management options, where a (pre-2003 Act) limited partnership or an existing agricultural tenancy does not exist, excludes the establishment of either new tenancies, SLDTs or LDTs. This is because such arrangements would permit the tenant to carry out management in contradiction to the charitable or grant conditions referred to above. Under these circumstances, our partnership approach to management is restricted to annual grazing lets and/or contract cropping. Nevertheless, there are places and occasions where it would be desirable to enter into longer term agreement with partners. This would reduce overheads, but also provide greater security for both parties – as well as more certainty in delivering conservation (public policy) outcomes.

“Conservation tenancies”
For these reasons, we believe that, in future, it could be useful (to RSPB Scotland and other conservation landowners, including other NGOs and Government agencies) to create a scheme of “conservation tenancies.” Such a scheme might be like SLDTs/LDTs but amended so as to ensure that conservation requirements can be secured. A precedent for such an approach exists in the Abolition of Feudal Tenure (Scotland) Act 2000 and Title Conditions (Scotland) Act 2003 which allows Ministers to approve “conservation bodies” who may attach “conservation burdens” on land.

While it may be inappropriate at this stage to amend this bill, we would be very pleased to discuss this concept with the Scottish Government and other stakeholders. Accordingly, we urge the Committee to recommend that the Scottish Government, the TFF and others consider the options of establishing “conservation tenancies” in the next update to agricultural holdings legislation.

For further information please contact:

Lloyd Austin, Head of Conservation Policy or Julia Harrison, Parliamentary Officer
RSPB Scotland, Ground Floor, 2 Lochside View, Edinburgh Park, Edinburgh EH12 9DH Tel: 0131 317 4100
Email: lloyd.austin@rspb.org.uk or julia.harrison@rspb.org.uk

Registered Charity England and Wales Number 207076, Scotland Number SC037654. December 2011
RSPB Scotland is part of the Royal Society for the Protection of Birds, the UK-wide charity which speaks out for birds and wildlife, tackling the problems that threaten our environment.

Nature is amazing - help us keep it that way.

¹ Registered in Scotland: No SC037654.
Submission from Scottish Agricultural Arbiters and Valuers Association

Agricultural Holdings (Amendment)(Scotland) Bill – Call for Views

We write in response to your call for views on the above Bill.

We welcome the agreement within the Tenant Farming Forum which allowed the practical proposals contained in the Bill to go forward on the basis of a consensus.

We take this opportunity to urge that advantage be taken of the Arbitration (Scotland) Act 2010 to develop arbitration as a credible form of ADR for resolving disputes arising from agricultural tenancies, particularly rent reviews.

We recently held an Arbitration Conference and are engaged in discussion with the TFF relative to development of an arbitration procedure suited to disputes arising from agricultural tenancies, particularly rent reviews.

In that regard we make the following observations.

Section 79 of the Agricultural Holdings (Scotland) Act 2003 outlines “Arbitration: procedure etc” relative to SLDTs and LDTs. Mirror provision for 1991 Act Tenancies is contained in Section 61A of the Agricultural Holdings (Scotland) Act 1991. Both sections were enacted before the Arbitration (Scotland) act 2010. With reference to the subsections of both sections we suggest:

(4) It would be beneficial to specify that arbitrations under both sections are governed by the Scottish Arbitration Rules in Schedule 1 of the Arbitration (Scotland) Act 2010. Some interpret Section 16 of the Arbitration (Scotland) Act 2010 [Statutory arbitration:special provisions] and this subsection as meaning the Scottish Arbitration Rules do not apply.

(6) Parties should have the right to agree to disapply the right of appeal to the Land Court in both sections. That would be consistent with the fact that the right of appeal to the Outer House contained in Rule 69 of the Scottish Arbitration Rules is a default rule.

At the most general level our observation is that the procedure provided by the Arbitration (Scotland) Act 2010 should so far as possible apply to arbitration under the Agricultural Holdings (Scotland) Acts.

We hope the above comments are helpful.

Yours faithfully

John A Mitchell
Secretary
Submission from Scottish Land & Estates

The Agricultural Holdings (Amendment) (Scotland) Bill

Scottish Land & Estates (formerly The Scottish Rural Property and Business Association) is a membership organisation, uniquely representing the interests of landowners and land managers in Scotland. Our membership includes those who own or manage agricultural land held and farmed under a variety of tenures and contractual arrangements, as well as professional firms who advise rural land managers who may be landlords or tenants.

Accordingly, Scottish Land & Estates and its membership are key stakeholders and therefore are pleased to take this opportunity to submit written evidence on the content of The Agricultural Holdings (Amendment) (Scotland) Bill.

General Comments:

1. Scottish Land & Estates is a representative organisation on the Tenant Farming Forum (TFF), an industry body tasked with promoting a “healthy farm tenanted sector in Scotland.” As such, Scottish Land & Estates has played a full part in the lengthy discussions within TFF which led to the recommendation being made by TFF to the Cabinet Secretary on an agreed package of measures which, it was hoped, would ease concerns within the industry stemming from the construction of certain key areas within the existing statutory framework for Agricultural Holdings.

2. Scottish Land & Estates remains firmly committed to the principles within that agreed package and to ensuring that those measures omitted from The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 are enacted. Scottish Land & Estates also seeks to ensure that any new legislation which amends the existing Agricultural Holdings (Scotland) Acts 1991 and 2003 is clear, workable and fit for purpose.

3. Scottish Land & Estates is not in favour of retrospective legislation, which fails to give certainty and works against the provision of clear advice to landlords and tenants within the agricultural sector and which may risk sending the signal to all parties that arrangements entered into between parties are at risk of future retrospective legislation.

4. Scottish Land & Estates believes that the principles behind the detailed provisions within the Bill, when taken with the provisions of the said Order, do improve the legislation in this area. Scottish Land & Estates supports both the extension of the definition of “near relative” in the Agricultural Holdings (Scotland) Act 1991 to include grandchildren (Section 1) and also the amendment of the rent review provisions in the Agricultural Holdings (Scotland) Act 2003 in order to prohibit the inclusion of rent review clauses in LDTs that provide for upward only or landlord only initiated reviews (Section 2).

5. These amendments, if enacted, would result in the enactment of all parts of the original package of measures recommended to the Cabinet Secretary by the TFF.

6. Scottish Land & Estates welcomes the further provision relating to VAT and rent reviews (Section 3), which has been debated and agreed by the TFF and mirrors a recent amendment to English agricultural holdings legislation. This will clarify the situation on changes in rent arising from changes in VAT or by the exercise of a landlord of an option to tax. Such changes would not constitute a “variation of rent” such as would prevent either a landlord or tenant from seeking a determination from the Land Court on the rent for a period of three years.

7. Scottish Land & Estates is committed to the purposes of the Tenant Farming Forum and remains convinced that the Forum is the appropriate place to discuss areas of concern and interest to the tenanted sector with a view to reaching a consensus for the benefit of a healthy tenanted sector.
Specific Comments:

1. Scottish Land & Estates is very conscious of the technical difficulties brought about by very complex agricultural holdings legislation. These difficulties can result in protracted and expensive litigation between a landlord and a tenant. It is therefore of considerable importance to ensure that any amended legislation is simple, clear and fit for purpose and that it is not retrospective in nature.

2. Scottish Land & Estates particularly welcomes the change in the transitional provisions in the Bill compared with the draft Bill which was published for Consultation by the Scottish Government earlier in 2011. Section 4 (1) of the Bill clearly states that Section 1 will only be relevant in relation to the death of a tenant on or after the coming into force of that section.

3. Scottish Land & Estates is aware of reports in the media that certain interests may seek to have Section 4 (1) amended to be relevant to tenants who have died before the coming into force of that section. In other words, they seek retrospective legislation in this respect.

4. Scottish Land & Estates takes this opportunity strongly to oppose this argument on the following grounds:

   - In principle, retrospective legislation is not to be encouraged as it has the potential to interfere with the established position of the parties (whether contractual or regulated by statute).

   - In relation to the particular issue of agricultural holdings, retrospective legislation may signal an intent of parliament that it is willing to interfere in the future with existing legal positions by way of retrospective legislation. At a time when all parties should be seeking to encourage and build confidence in the agricultural tenanted sector, this will lead to increased nervousness among landowners who are already operating within the constraints of a highly regulated and complex framework.

   - It does not seem appropriate to give new statutory rights to a deceased individual.

   - The present statutory position is that the successor of a deceased tenant has 12 months from the date of the tenant’s death within which to give the required “near relative” notice to the landlord. As nobody can predict when the relevant provision will come into force, it cannot be known how many holdings may be affected by the absence of retrospective effect by the extension of the “near relative” class to include a grandchild, but it is believed that the number will be very small, most likely to be in low single figures. Meantime, the effect of Section 4 (1) will give certainty to relevant advisers and family members in the event of the death of a tenant before the coming into force of that Section.

   - Accordingly, given both that the likely very small number of relevant deaths in the narrow window (given the time limits referred to above) before Clause 1 will become law and also that the issue will wither away after those time limits have passed, the simplest and clearest approach would be for no amendments to be made to Section 4 (1). As drafted, this provision gives clarity and certainty, and will avoid retrospective legislation. Any other position could cause difficulties in advising whether the successor to a deceased tenant should delay giving the appropriate notice. Any delay in giving notice could run the risk in missing the strict statutory time limit with potentially significant consequences for the successor of the deceased tenant.

For further information or clarification on this written evidence, please contact:

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Submission from Scottish Tenant Farmers Association (STFA)

Summary

- STFA supports the bill amending Agricultural Holdings legislation as defined.
- In welcoming the change to include grandchildren as “near relative” successors STFA recommends the provision takes immediate effect from the commencement of the act, even if the tenant has already died, providing the successor has not yet served notice to claim the tenancy.
- STFA supports the proposed changes to rent review provisions in Limited Duration Tenancies.
- STFA highlights the need to encourage new entrants into the industry
- STFA recommends further review of elements of the legislation causing frustration and dissatisfaction amongst the tenanted sector such as: compensation at waygo; investment in tenanted holdings; rent reviews; the future of Limited Partnership tenancies; the resolution of agricultural disputes and the role of the Land Court.
- STFA would like to see the development of a voluntary arbitration system and codes of practice for land agents in dealing with tenants.
- STFA would recommend that this review of tenancy legislation should be undertaken within the context of a wider review of Land Reform.

1. Background

1.1 The Scottish Tenant Farmers Association (STFA) represents tenant farmers throughout Scotland. It’s stated aim is to support and enhance the tenanted sector and in that role welcomes the opportunity to respond to the above order on amendments to agricultural holdings legislation.

1.2 The number of tenanted farms in Scotland has been declining steadily over the last seventy years; from 68% of farms tenanted in 1940 to 28% in 2008. Initially, much of this reduction in tenanted land has been through large estates being split up and farms sold to sitting tenants, but latterly, landowners have preferred to either take land back in hand, use contract farming arrangements or rent out on short term arrangements.

1.3 The Scottish Tenant Farmers Association (STFA) believes that, if the tenanted sector is to survive, action must be taken; firstly to encourage more land to be made available for rent to allow new entrants access to the industry and secondly to remove obstacles and to encourage succession to existing tenancies.

1.4 STFA was disappointed that two of the key elements of the package agreed by the Tenant Farming Forum were not included in the Public Services Reform Order in March 2011. These were:
   a) Changes to the definition of “near relative” which would allow a grandchild to inherit the lease of a tenanted farm from a grandparent and:
   b) The move to outlaw “landlord only” and “upwards only” rent review clauses in Limited Duration Tenancies.

1.5 STFA welcomes the Agricultural Holdings (Amendment) Bill as essential “tidying up” following the Order of March 2011

2. Succession by near relative

2.1 STFA welcomes this long overdue amendment to agricultural holdings legislation which will allow a grandchild to inherit a family tenancy from a grandparent
2.2 The issue was highlighted a few years ago when Simon Stephen (Cawdor Discretionary Trust vs Stephen) and Douglas Graham (Salveson vs Graham), were issued with notices to quit because they were not “near relatives” of their grandparents. After protracted and costly legal battles they both were able to retain their tenancies as extensively covered by the press in 2007 and 2008.

2.3 STFA was disappointed that the proposed measures to extend the definition of “near relative” to include grandchildren was omitted from the Order of March 2011. STFA is aware that at least one young tenant has been prevented from succeeding in to the family tenancy due to the delay.

2.4 In light of this, STFA believes that the provisions of section 1 should apply where the tenant has died before the Bill comes into effect and notice has not yet been served to transfer the lease, either as a bequest or by intestate succession. Thus any notices served to transfer a lease after the Bill comes into force will be effective even though the tenant had died before the commencement of the new Act. This is only fair and right considering the unforeseen delays to the bill. STFA would seek an amendment to this effect.

3. Rent reviews
3.1 STFA welcomes the proposal to outlaw upwards only and landlord only initiated rent reviews clauses. Rent provisions in Limited Duration Tenancies permit parties to a lease freedom of contract in the conduct of rent reviews. This has, on occasion, led to the insertion of a clause specifying that rents can only move upwards and/or can only be initiated by the landlord. This proposal will remove the disadvantage felt by tenants finding themselves in a position of weakness when negotiating the terms of a lease in a sellers market and having to agree to such conditions.

3.2 Variation of rent: STFA has no objection to this additional amendment to agricultural holdings. It is prudent to clarify whether or not changes to VAT will constitute a variation of rent. This will bring Scotland in line with England.

4. Further considerations
There is a profound sense of frustration and dissatisfaction within the tenanted sector as illustrated by recent calls in the press for an extension of tenants’ right to buy provisions. STFA recommends that the RACCE Committee examine the root causes of this dissatisfaction within the wider context of its Land Reform review. The Cabinet Secretary has indicated his intention to review the operation of agricultural legislation and STFA and its members welcome the opportunity to submit evidence. It is important that tenancy law be modernised so that the tenanted sector can play its part in an inclusive modern Scotland.

5. New entrants into agriculture
5.1 Encouraging new entrants and young people into agriculture remains a major priority for Scotland. The EU Commission’s proposals for CAP reform also emphasise the need to encourage a new generation of farmers. The new CAP regime places new entrants at the heart of its reforms, however, access to land still remains the vital missing ingredient.

5.2 The Scottish Government introduced a New Entrants Scheme as part of the Rural Development Programme but there has been limited uptake by genuine new entrants. The Tenant Farming Forum has examined the main barriers to new entrants and recommended the introduction of greater flexibility in to SLDTs and LDTs which were enacted upon in the Public Services order in March 2011, but, as yet the supply of available let land has not increased.

5.3 STFA recommended that, in the absence of land being made available to new entrants in the private sector, the Scottish Government looked to its own resources to provide starter units for new entrants. STFA is therefore pleased to note that Forestry Commission Scotland is actively looking to release some of the land it has purchased back in to agriculture as starter units. It is to be hoped that this initiative will encourage similar action from the private sector and from other public bodies such as the Crown Estate Scotland.
6. Succession
6.1 Most new entrants to farming will continue to emerge from existing farming families, whether they are owner-occupiers or 1991 “secure” tenants. The latter play an important role in providing stability and continuity and it is important that this element of the tenanted sector is not allowed to contract any further. At present tenanted farms becoming vacant are generally either taken back in hand or relet on short-term arrangements this trend is further exacerbated by the uncertainties surrounding CAP reform.

6.2 Succession to Secure tenancies is limited to a narrow class of near relative successors; spouse, children, adopted children, civil partners and now grandchildren. The RACCE Committee may like to consider the merits expanding this class of successors to include nephews and nieces and even non-relatives under certain circumstances to allow greater access to security of tenure.

7. Waygo compensation
7.1 Encouraging older tenant farmers to retire is as important as encouraging new entrants. Considerable frustration is expressed by tenants seeking to retire that the waygo compensation will not reflect a lifetime’s investment nor provide a retirement fund. In fact many outgoing tenants find they receive minimal waygo compensation.

7.2 The 2003 AHA sought to rectify this by outlawing future write-down agreements and providing compensation in full for tenant’s improvements which had already been written down. This aspect of the 2003 Act remains a grey area and much has still to be legally challenged.

7.3 Minutes of 8th January 2003 of the stakeholders group regarding waygo compensation show agreement that, “where an improvement made by the tenant is not essential, then any write-down agreement should continue to have effect. However, where the improvement is essential, the tenant should be able to receive the statutory level of compensation waygo (reflecting its value to an incoming tenant), notwithstanding:

(a) The terms of any write-down agreement to the contrary,
(b) The terms of any post-lease agreement which transfers this statutory duty from landlord to tenant; and
(c) Any failure on the part of the tenant to provide the landlord with proper notice (since, in any event, the landlord would have been obliged to undertake the improvement).”

7.4 Unfortunately, the changes made to waygo provisions in the 2003 Act have not reflected the intention of the measure, despite the agreement of stakeholders and Minister. The RACCE may seek to recommend clarification of this issue in future legislation and thus remove this source of dissatisfaction.

8. Investment in Holdings
8.1 Lack of investment in tenanted holdings is becoming an increasing source of frustration for tenant farmers. There is a marked difference in the levels of investment on owner-occupied farms in comparison to tenanted units.

8.2 Landlords are generally responsible for renewing and replacing fixed equipment (houses, buildings, fences, drains and so on) once it becomes beyond use. In fulfilling renewal and replacement obligations, landlords are only bound to replace like with like and are not expected to improve fixed equipment. If the capital works carried out constitute improvement the landlord is entitled to ask for an increase in rent as is only right and proper. However, it would now seem that landlords have become more reluctant to invest in tenanted farms, as the resultant increase in rent is not considered to be a good return on capital despite the increase in the value of the farm that the investment represents.

8.3 The 2003 Act gives the tenant the right to withhold his rent if a landlord has failed to fulfil his obligations. However, this is only enforceable through the Land Court and most tenants are reluctant to enforce their rights due to the expense and delays associated with the legal procedure.
8.4 The tenant’s responsibilities extend to the repairs and maintenance of fixed equipment and he may be held in breach of lease for dilapidations if he fails to do so.

8.5 Tenants are reluctant to invest in their holdings unless they can receive compensation for their investment at the end of the tenancy, especially if the lease is of a limited duration. Landlords frequently withhold their consent to a tenant’s improvement because of the requirement to pay compensation to the tenant at a future waygo. As a result, many tenants are forced to quit their farm with little or no compensation for a lifetime’s investment.

8.6 STFA would recommend that the RACCE Committee examine ways of encouraging investment in tenanted units by ensuring that landlords fulfil their duties to renew and replace fixed equipment, always providing that the tenant has played his part by maintaining and repairing it throughout the lease. On the other hand, tenants should be encouraged to improve their holdings safe in the knowledge that they will receive fair compensation should the tenancy come to an end.

9. Rent reviews
9.1 The rent review procedure has become an increasing source of contention and its shortcomings have been highlighted by the recent Moonzie rent review case. This is the first full rent review to have come before the Land Court since the 2003 Act in which the Court decided in the tenant’s favour is under appeal to the Inner House, and a decision is imminent.

9.2 There are two main issues regarding rent reviews: (a) What can be done to make dispute resolution more accessible, more affordable and less time consuming, and: (b) Is s13 of the 1991 Act governing rent reviews still relevant and were the tests still appropriate? (Question (a) is covered in Para 11).

9.3 The methodology of assessing rents, based on the open market, is no longer practicable where there no longer exists a market for 1991 tenancies. As a consequence, the adjustments that have to be made in order to compare rents render the rent review process unnecessarily complex, cumbersome and contentious.

9.4 STFA would recommend a thorough review of the way in which rental values are assessed. In particular STFA would like to see rental value assessed in a way which placed greater emphasis on the potential earning capacity of the farm having regard to prevailing economic conditions and the level of settled rents, with all the usual disregards of tenants improvements and so on. We believe this would encourage a much more objective valuation of rent and remove much of the confrontation which is currently present in rent review negotiations.

10. Limited Partnership tenancies
10.1 Limited Partnership tenancies were conceived as a device to circumvent the security of tenure that the 1948 Act conferred on to tenants. Most tenancies created from the 1970s up till the Scottish Government restricted their use in the 2003 Act were let on that basis.

10.2 A practical consequence of the creation of Limited Partnership tenancies is that once the contractual period is finished, the tenant may find himself operating on a year to year basis with little more security than before the 1948 Act. This clearly is not the way to encourage forward planning and investment in a farming business. Furthermore, such tenants may find themselves precluded from taking part in rural development programmes which operate on a five year basis.

10.3 STFA would seek to explore ways in which Limited Partnership tenants could be afforded greater security of tenure.

11. Dispute Resolution
11.1 The abolition of statutory arbitration in 2003 was welcomed and it was widely expected that dispute resolution would become simpler, quicker and less expensive, especially where relatively straightforward disputes such as rent reviews are concerned. In fact, although the
Land Court has dealt with a number of landmark cases, it has only had the opportunity to make a decision on one rent review in the six years since the 2003 Act commenced.

11.2 All of the rent review cases referred to the Land Court so far have been settled out of court, not through choice but because of fears of the costs associated with pursuing the case through court. Despite the best intentions of the court the system is still open to delaying tactics prolonging the process and incurring prohibitive costs. Even if a decision is reached by the Land Court it is open to appeal as instanced by the Moozie case.

11.3 It is plain that in relation to the settling of rent disputes by the Land Court at least two of the three guiding principles outlined by the Law Commission in their report are not being followed. (See Annexe A) Disputes are not being dealt with expeditiously and are subject to avoidable delays, they are not being dealt with economically and are incurring vast expense and, indeed, a better quality of justice in rent reviews is not being achieved, as cases are not coming to court.

11.4 The rent review procedure is failing the agricultural industry at present. The system is proving to be open to abuse and encourages the use of aggressive and sometimes bullying tactics by land agents. Too much time, money and effort is being wasted on what should be a straightforward negotiation between landlord and tenant. The consequent stress and strain involved is souring relationships between parties and doing long-term damage to what should be a partnership between landlord and tenant.

11.5 As a consequence of the above, the industry is currently exploring the creation of an informal arbitration system under the auspices of the Arbitration Act 2010. It is to be hoped that protocols can be developed alongside a robust arbitration procedure and administered by a panel of trained, impartial arbitrators who will inspire the trust and confidence of all parties to a dispute. STFA is playing its part in working to achieve this goal.

11.6 As well as developing an alternative method of resolving disputes STFA would also recommend the establishment of agreed protocols and robust and enforceable codes of practice for land agents governing their dealings with tenants, particularly in relation to rent reviews. STFA would also recommend the setting up of a Tenancy Complaints Tribunal as a way of giving teeth to a code of practice.

Conclusion
It has become apparent over the last few years that significant flaws have developed in the way in which the tenanted sector is operating. The problems articulated above have led to calls for extreme measures to be taken and there is a need to examine the root causes of this sense of dissatisfaction and solutions identified. STFA believes that this can only happen through open debate and therefore welcomes this opportunity to engage with the RACCE Committee to charter a road map to a successful tenancy system in Scotland as part of a wider review of Land Reform.
Guiding principles:

1. **There should be a better quality of justice for the parties**

6.4 The existing system has the inevitable result that the arbiter appointed to decide a question between landlord and tenant may not be the appropriate person to decide it. Under such a system there is a greater likelihood that the parties, or one or other of them, will be dissatisfied with the decision and therefore will exercise every opportunity of appeal that is available. This in turn leads to delay and expense and puts a further burden on the resources of the courts. It also leads to a loss of confidence in the system. We are satisfied that this is at least one of the considerations that discourage landowners from letting land on agricultural tenancies.

6.5 In pursuit of this principle we suggest that the system should make it possible for every dispute between the landlord and the tenant of an agricultural holding to be dealt with by whichever tribunal is best fitted to give an expert decision on the question. Therefore, if the dispute relates solely to a practical farming question, the parties should be free to have it dealt with, in the first instance at least, by a practical person. But if the dispute relates to a matter of law or to a matter of agricultural expertise involving a more general question, or any combination of these questions, either party should be entitled to have it resolved by a specialist court.

6.6 On any view, the all-embracing provision whereby questions or differences between landlord and tenant are compulsorily remitted to arbitration is nowadays entirely inappropriate for the sort of questions that commonly arise.

2. **All disputes between landlord and tenant of an agricultural holding should be dealt with expeditiously and without any avoidable delay**

6.7 The exigencies of modern agriculture are such that both parties require to plan in detail for their respective investments in the holding. Grants and subsidies have to be applied for. Quotas have to be bought, sold and let. Contracts of employment have to be entered into. Borrowings have to be arranged and secured. Tax planning has to be done. Any system of dispute resolution that involves periods of years rather than weeks or months is inimical to all of these needs. Uncertainty during the course of an agricultural holdings dispute may inflict upon either party irrecoverable loss. Worse still, delay and expense can put pressure on a party to compromise a well-merited case. It is, we think, notorious that tenants make concessions in rent negotiations in order to avoid the trouble and expense of an arbitration. It is also notorious that the law’s delays can lead to the payment by the landlord to the tenant of an undeserved premium. We have in mind particularly the case where a landlord who is under stress to sell is faced with a seemingly groundless claim to a tenancy. In such a case the prospect of a protracted litigation may mean that the realistic option is to buy the claimant out.

6.8 For these reasons it is essential that the procedures by which disputes between landlord and tenant are resolved should have the minimum of formality consistent with justice and fair play, should give the parties the fewest possible opportunities to stall and to cause expense for tactical reasons, and should hold out to both parties the prospect of an early and final resolution of the dispute. In this way the disruptive effects upon the practical running of farms and estates of a long-running litigation can be minimised.

3. **All disputes between landlord and tenant of an agricultural holding should be conducted as economically as possible with the minimum of expense**

6.9 It is undesirable that money in the industry should be spent on protracted and unnecessarily complex litigations. It is also undesirable that one party should be able to force the other into a spending race, for example in the instruction of counsel and expert advisers as a means of exerting pressure. There is therefore a case for providing that certain expenses should be irrecoverable by one party from the other. In addition to the cost caused to individual litigants there is also the cost to the public purse. In making our proposals, we have had both costs in mind
Submission from Phil Thomas, Chair of the Tenant Farming Forum (TFF), on behalf of the members of the TFF

Background

The Tenant Farming Forum (TFF) is an industry-led body comprising of representatives of: NFU Scotland, Royal Institution of Chartered Surveyors in Scotland, Scottish Land and Estates, Scottish Tenant Farmers Association, Scottish Association of Young Farmers. It has an independent Chairman and its work is assisted by a representative of Law Society of Scotland.

The TFF was established following the Agricultural Holdings (Scotland) Act 2003 to facilitate debate about matters of common interest to landowners and tenants and about the operation of the landowner/tenant interrelationship. The primary purpose of the TFF is to help to promote a healthy farm tenanted sector in Scotland.

Early in its existence, 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 free up land to rent. The TFF subsequently put forward a list of agreed changes, most of which were implemented through secondary legislation (The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011).

The Agricultural Holdings (Amendment) (Scotland) Bill aims to introduce the two TFF-proposed changes which, apparently for legal reasons, were not included in the Services Reform Order and to add a third, technical, change proposed by the Scottish Government.

TFF’s Overview

The TFF welcomed The Public Services Reform (Agricultural Holdings) (Scotland) Order 2011, but was disappointed that two elements of the total package for change that had been sought were not included. The Forum therefore welcomes the Agricultural Holdings (Amendment) (Scotland) Bill which seeks to extend the definition of “near relative” in the Agricultural Holdings (Scotland) Act 1991 to include grandchildren and to amend the rent review provisions in the Agricultural Holdings (Scotland) Act 2003 in order to prohibit the inclusion of rent review clauses in LDTs that provide for upward only or landlord only initiated reviews. These amendments, if adopted, would result in all the original measures recommended to the Cabinet Secretary by the TFF being enacted.

Additionally, the Bill includes a further provision relating to VAT and rent reviews, which has been debated, agreed and is approved of by the TFF. It mirrors a recent corresponding amendment to English agricultural holdings legislation.

The Forum considers the clarification of the situation on changes in rent arising from changes in VAT or by the exercise of an option to tax is necessary and helpful. Such changes would not constitute a “variation of rent” such as would prevent either a landlord or tenant from seeking a determination from the Land Court on the rent for a period of three years.

The TFF therefore accepts and welcomes the Agricultural Holdings (Amendment) (Scotland) Bill as a further improvement in agricultural holdings legislation.

Points of TFF Discussion

During the consultation on the proposals for the Bill the TFF raised a number of technical points on the initial draft. These were as follows:

1. There was discussion of whether the long title of the Bill was sufficiently specific, because the TFF felt it important that the Bill was limited to the three specific points that it was intended to address. It was suggested the title might be modified to read: “An Act of the Scottish Parliament to amend the law governing succession of near relatives to agricultural tenancies and the upward or landlord initiated only review or variation of rent and effect of VAT changes on determination of rent under such tenancies” However, it appears that the parliamentary draftsmen
considered this change was not necessary to maintain the Bill’s specificity to the three points being addressed.

2. There was discussion that, for consistency with the wording of the 1991 Act, Clause 1 should be reworded “as near relative in relation to a deceased tenant of an agricultural holding means a surviving spouse, surviving civil partner, child or grandchild of that tenant”. This amendment has been included in the wording of the Bill as presented.

3. There was discussion of Clause 4 (1) – Transitional provisions, where the TFF considered the original draft did not make clear whether the provisions of Clause 1 would only apply to situations where the tenant died after the Bill became law or apply to situations where the tenant had died before the Bill becomes law but the legatee or acquirer of the lease has not yet given notice under s11(2) (bequest of a lease) or s12(1) (intestate succession to a lease) of the 1991 Act. This need for clarity has now been addressed in the Bill as presented.

4. When the TFF discussed this issue, the majority of members believed that the provisions of Clause 1 should apply to situations where the tenant has died before the Bill comes into force but the legatee or acquirer of the lease has not yet given notice under s11(2) (bequest of a lease) or s12(1) (intestate succession to a lease) of the 1991 Act. However, other members were of the view that it was legally clearer if the provision only applied after the Bill came into force. It is this second view that has been preferred in the Bill as presented.

5. It is not clear how many individuals would be advantaged or disadvantaged by the decision by the different options for the transitional provisions. However, the consensus is that the number of people affected will be small.
Anonymous submission A

Agricultural Holdings Bill, submission of evidence to RACCE Committee

I support the bill amending the Agricultural Holdings Act, and in the interests of grandchildren anticipating succession from grandparents, the bill should be passed as soon as possible.

However, there is a worsening sense for frustration amongst tenants which has recently resulted in heated debate in the farming press. The problems can mainly be traced to inadequacies in the Agricultural Holdings legislation, questionable behaviour by some landlords and their agents towards tenants, and landlords attempting to optimise their positions with regard to asset valuations, taxation and CAP. The current bill is a good opportunity for the RACCE committee and MSPs to collect evidence and consider the need to modernise the Agricultural Holdings legislation: it is now 20 years since the last consolidating act of 1991. Listed below are some tenancy issues which require debate and resolution. Unless otherwise stated, the tenancies discussed are old style tenancies (secure 1991 Act tenancies, including pre 1949 tenancies). There may be over 6,000 secure 1991 Act tenancies in Scotland, but less than 1,000 of the new 2003 Act limited duration tenancies.

1) Investment in holdings
The nature of farming has changed over the last 30 years, and modern farms are now more reliant on machinery and fixed equipment to remain viable. Landlords are reluctant to invest in fixed equipment, and are not required to upgrade or modernise, and in the case of pre 1949 tenancies, many of which continue, have never been required to provide fixed equipment (section 5 of the 1991 Act which covers fixed equipment obligations does not apply to pre 1949 Act tenancies). An average sized family farm probably requires an investment of £500,000 each generation in order to modernise fixed equipment. This level of investment is unlikely to come from landlords and so tenants must be encouraged to make the investments. There are two main areas of legislation which could be modified to encourage investment by tenants:

i) Obtaining landlords consent
The problem for tenants wishing to make investments is that landlords frequently withhold consent, knowing that the only option for the tenant is to apply to the land court. Landlords then use consent as a bargaining tool, such as giving consent but only in return for something else. The only solution here is to remove all grounds on which landlords can withhold consent to ensure that they cannot prevent future investment (including on farm diversifications) by the tenant.

ii) Waygo compensation for tenants’ improvements
Tenants are unlikely to invest if there is any doubt over the compensation they may receive at waygo for their past investments. The 2003 Act was intended to address this issue, but unfortunately it remains a grey area, particularly with regard to write down agreements and the requirement to prove that proper notices were received.

It is worth noting that tenants on pre 1949 leases are likely to have had no investment on their holdings from their landlords since the start of the lease (now over 60 years ago), so all modern fixed equipment has been provided by the tenant. I do not know what proportion of Scottish leases are pre 1949, but of the tenants I have met about a third have pre 1949 leases. In the case of some old pre 1949 leases the tenant may have provided the original houses, cottages and stone steadings, all services, roads, and all the land improvements including drainage and stone removal. These holdings have seen no significant landlord investment since the enclosures in the 1700’s, and poor quality rough grazing of 200 years ago may now be capable, through continual tenants’ improvements, of high value arable cropping such as potato production. These tenant families have carried out improvements which may represent over 50% of the present market value of the farm, but are unlikely to be eligible for compensation at waygo under current legislation due to past write down agreements or missing letters of consent.
The Agricultural Holdings Act assumes that improvements have been made by the landlord, unless the tenant can prove otherwise with letters of landlord’s consent. However, a fairer way, given the reluctance of landlords to invest in the past and now, would be to assume the improvements are the tenants unless the landlord can prove otherwise. At the very least there should be a better balance than the current system for compensation at waygo.

This aspect of tenancy law weighs heavily in the favour of the landlord, in that when the landlord makes an offer at waygo to the tenant for improvements, there is no element of competition as the landlord is not bidding against any other party. If assignation and succession provisions were broadened, then landlords would be forced to compete with other interested parties when a sitting tenant wished to quit.

2) Succession and assignation of leases
The area under secure tenancies in Scotland is continually diminishing, mainly due to tenants without eligible successors being forced to give up their secure tenancies. This land is usually taken back in hand, contract farmed, or re-let on short term leases, and a potential successor (often a nephew or cousin of the departing tenant) is thus denied an opportunity to enter into farming.

If there was a wider class of relatives eligible to inherit tenancies through succession and assignation, and even non relatives if necessary, many more new entrants would be able to make a secure start in farming, and the area under secure tenancies would be maintained.

One stumbling block in this area is landlords’ expectations of eventually taking land back in hand (achieving vacant possession) without the need to pay any compensation to out going tenants for vacant possession. Landlords see that with the existing limited scope for leases to be passed on through assignation and succession, it is only a matter of time before any holding comes back in hand. This long term desire of landlords to obtain vacant possession is much stronger now than 40 years ago due to the huge rises in land values since the 1960’s, and has resulted in some tenants finding themselves in very uncomfortable positions as their landlords resort to any means available to them to bring holdings back in hand. Many current disputes and long drawn out legal cases are a direct result of landlords aiming for vacant possession at any cost.

If this expectation of eventual vacant possession could be removed from the equation, by say broadening the class of people eligible to inherit through assignation and succession, or ring fencing secure tenancies so that there is no prospect of them being taken back in hand, many of the current disputes and poor relationships could have been avoided. The current legislation, which largely originates from the 1949 Act when land values were low, fails to deal effectively with the present situation. To put into perspective, land values prior to WWII were about 15 times the annual rent payable, by the 1960’s not much more than 20 times the annual rent, but in today’s market (hugely distorted from agricultural value by lifestyle buyers, large city bonuses, roll over requirements to avoid capital gains tax, Agricultural Property Relief from inheritance tax etc), land values are about 80 times the annual rent. It is no surprise that many of today’s landlords will go to great lengths and use any tactics to achieve vacant possession, and their secure tenants find themselves in stressful, high pressure situations which previous generations could not have foreseen.

3) Rent reviews
There are two main inadequacies of the current rent review process:

i) Process
The existing land court process of dispute resolution is time consuming and costly, and an alternative method should be encouraged. Currently members of the TFF are working on alternative dispute resolution.

ii) Methodology
From my experience of rent reviews, I have never seen any methodology from landlords’
agents except for the method of asking for a certain rent which they ‘feel is about right’ and threatening legal action if one does not agree to it. Even in the recent court case involving Moonzie Farm, Fife, the court mentioned in its decision the lack of methodology shown by the landlord’s agent, and his inability to demonstrate how he had reached his asking figure. The current methodology of assessing rents is governed by section 13 of the 1991 Act, and is based on an open market rent for 1991 Act tenancies. However, this is no longer practical as there no longer exists a market for 1991 tenancies, and the complex adjustments necessary give rise to widely varying results. Recent RICS/SAAVA rent review open days, where leading land agents attempt to set the rent for an example farm, result in such wide differences in rents from different agents that the difference from lowest to highest is sometimes 100%. No wonder there is so much uncertainty over rent reviews, if land agents are seen to fail in such a non contentious classroom environment.

One solution to the rent review problem would be to review section 13 of the 1991 Act, and develop a process and methodology similar to crofting rent reviews. However, this would be strongly opposed by landlords.

Furthermore, there is growing frustration amongst tenants who are issued rent review notices by landlords who have shown no intention of complying with their minimal landlord obligations, such as removing fallen trees from wood sides and fixing the resulting damage to fences. Landlords continually fail to fulfil their obligations yet continually expect increased rents. Possibly the easiest and least contentious way to encourage landlords to fulfil their obligations would be to make all rent review notices invalid if landlord obligations have not been fulfilled.

4) Abuse by landlords of the tenant’s repairing, and in some cases renewing obligations
The tenant’s responsibilities under the 1991 Act extend to repairs and in some cases to the renewing of fixed equipment, which is fair enough if the tenant is the sole user of the fixed equipment. However, some fixed equipment is subject to heavy use by the landlord, for example farm roads used by gamekeepers, shooting tenants, estate foresters, and estate staff who may live on the tenant’s holding, as well as shared water supplies, electricity supplies and some buildings that may be used by the landlord: in these cases the landlord should be obliged to contribute to the maintenance of the fixed equipment which he makes use of. At the very least, the 1991 Act requires modernising so that it is clear that a tenant cannot be forced to bear the repair or renewal burden for fixed equipment which is also used by the landlord.

5) Conduct for land agents
Landlords usually employ land agents to deal with tenants. The recent tactics of some agents have left tenants in shock and can only be described as bullying behaviour which has had a very negative effect on landlord/tenant relations. The TFF guide to good relations is mostly ignored by agents which questions the usefulness of RICS sitting on the TFF. However, they are only acting as instructed by the landlord. There is a recent trend for landlords to choose agents with ruthless reputations at the expense of those agents who are most likely to follow the TFF guide. A code of conduct or system of accreditation for land agents may help in restoring relationships, but the aspirations of landlords regarding the methods used by their agents also needs to change.

It is also worth mentioning the approach of some legal firms when dealing with tenants which is often based on maximising the duration of any litigation in an attempt to maximise the tenant’s legal costs to the point where the tenant’s cash flow runs out. There are many recent examples of this tactic being employed successfully by landlords to achieve, for example, the prevention of assignation or succession of tenancies and increases in rents.

The actions of a few land agents who operate nationwide (and are gradually replacing resident factors), combined with the actions of some legal advisors over the last decade, have damaged landlord and tenant relations to such an extent that it is difficult to see good relationships ever being restored.
6) **Absolute right to buy**

This is a wide topic and is not just about ownership and rights to occupation, but also about rights to succession and assignation, rights which landlords will attempt to restrict to themselves. Along with many NFUS tenant members, some of whom sit on the NFUS Tenants’ Working Group, I do not agree with NFUS’s assessment of the effects of ARTB. By comparison with Continental Europe where there has been considerable land reform, it is clear that the division of land amongst a greater number of landowners makes for a more vibrant tenanted sector.

ARTB is seen by some as the lasting solution to the current problems in the tenanted sector. However, given current land prices ARTB would be out of reach for many tenants and their situation would be no better than the current one. A more practical solution may be to significantly increase the rights of assignation and succession for tenants, which can only be fair given that some tenant families have made several generations worth of investments and improvements to their holdings. One only has to visit pre 1949 Act tenanted holdings to see how little has been done by landlords since WWII. Unlimited rights of succession and assignation may be a more suitable solution for many tenants, and serve as a means to encourage investment in holdings by tenants. If tenants are not to be given an ARTB, then freedom of assignation and succession may be the only way to maintain a healthy tenanted sector.

A half way measure to ARTB is one which is common in some European countries, whereby the tenant owns the farmyard sites which may contain all the houses and buildings on the holding. This offers many advantages, in particular allowing the tenant to use the buildings (usually provided by the tenant) as security to raise money from bank loans. At present, a bank cannot have a mortgage or security charge over a tenant’s buildings as the current restrictions on assignations would prevent any transfer of the asset to the bank if the bank ever wished to exercise its right to possession of the asset. The current arrangement makes it difficult for tenants to raise loans from banks on the back of their investments in tenant’s improvements. Given that tenants are relied upon to make the investments in fixed equipment, this measure - ownership of farmyards and sites of fixed equipment - would encourage investment by tenants and make the financing of fixed equipment more available to tenants.

7) **Retiring tenants and landlords’ expectation of vacant possession**

Due to the narrow class of persons able to acquire tenancies through assignation or succession, some older tenants find themselves farming without any successors. Landlords see this situation as a golden opportunity to take land back in hand without the need to pay any compensation to the tenant; they only need to wait until the tenant gives up through ill health or death. As compensation for vacant possession and fair compensation for improvements is unlikely to be forthcoming in such a situation, the tenant has little means to afford retirement and so continues farming into old age. The resulting situation is far from ideal, and one often hears landlords complaining about older tenants with no successors struggling on with farming and so denying someone else the opportunity.

Here are two possible solutions to this problem:

i) The first solution could be to broaden the class of persons able to acquire tenancies through assignation or succession and even include non-relatives if necessary to allow security of tenure to continue, and to ensure a successor to allow a smooth transition from old tenant to new.

ii) The second solution could be to allow the landlord to take the farm back in hand provided fair compensation for vacant possession and improvements have been paid to the tenant. A fair price for vacant possession could be 25% of market value, which is approximately half the difference between vacant and non vacant possession values, and would allow the tenant to retire off the holding.

8) **Conflict with game rearing and shooting**

As game shooting becomes more and more intensive with ever greater numbers of birds
reared, there arises more conflicts between landlords’ shoots and agricultural tenants. The problems arise in many different areas, and apply to shooting tenants as well as in hand shoots, for example:

i)  Crop damage
Reared pheasants are usually released in late August, at the same time most arable farms are starting their autumn sowing. Up to 1000 pheasants may be released in one wood of only a few acres from where they wander to surrounding fields. Crops are at their most vulnerable when germinating and pheasants can do a lot of damage at that stage, particularly so with oilseed rape, peas and beans. At this time of year, before the shooting season starts, it is not unusual to see up to 200 pheasants on a single 20 acre field. Further damage occurs at the other end of the growing season if there are significant numbers of pheasants left after the shooting season, when they have a tendency to live in, feed off, and trample ripening crops.

ii)  Damage to fixed equipment
Fences and dykes are often cut or knocked through to allow easier access for guns to reach their stands, or for gamekeepers to access their pheasant feeders. Shoots nowadays may involve up to 40 people (guns, beaters, pickers up) and a dozen vehicles. Such activity every week for 4 months over winter creates significant damage to farm roads and tracks, and any fence or dyke used as a crossing point. It is usually left to the tenant to fund the repairs, as the only recourse at present it to apply to the land court to withhold rent.

iii)  Bio-security
Modern farm livestock production, in particular poultry, is required to have a high degree of bio security and good health status which is monitored and audited by DEFRA or the Animal Health Office (SGRPID). In contrast, reared pheasants for shooting are not subject to the same monitoring by DEFRA or SGRPID, yet it is in essence intensive livestock production. Some of the diseases carried by reared pheasants (eg salmonella and Blackhead) create a bio-security risk for farm livestock, in particular poultry. Furthermore, pheasant hopper wheat feeders support large uncontrolled rat populations which would otherwise not be there, and which tend to move into farmhouses and buildings when pheasant feeding stops.

The attitude and behaviour of some landlords and their gamekeepers towards agricultural tenants clearly shows the flaws of the current system, in that the only option for the agricultural tenant is to apply to the land court which landlords know tenants are reluctant to do due to expense and delays, and the practical problem of having to prove the damage has resulted from game rather than other causes. Furthermore, in some cases the actions of gamekeepers appear to be used as a tool by landlords to intentionally obstruct tenants’ interests. Some landlords instruct their gamekeepers to avoid communication with agricultural tenants which demonstrates the desperation of such situations.

Some landlords are considerate in the management of their shoots, but others steadfastly refuse to pay anything towards crop damage; in these cases the tenant is forced, at considerable cost, to adopt his farming to the pheasant population and avoid growing susceptible crops such as beans or oilseed rape.

One solution would be for landlords to require the consent of secure agricultural tenants before rearing pheasants. This would ensure that landlords came to a sensible arrangement with tenants to determine compensation for game damage in order to obtain the tenant’s consent, and would result in a fairer system. Alternatively, tenants could be permitted to control pheasants causing crop damage which might encourage landlords to manage their pheasants more considerately.

There exists a BASC code of conduct for shoots, but it does not cover any agricultural tenancy related issues.

9)  New Entrants
New Entrants are unfortunately the body which is not well represented by NFUS and established landowner groups, but is often used as a political football by them. In the last 40
years, the old MAFF small holdings have disappeared and land prices have rocketed, so new entrants outside of established farming families have not had much of a chance. Abolition of Agricultural Property Relief on inheritance tax would help the case of new entrants by reducing land values, but is unlikely to be supported by established farming organisations.

10) Tenants and Agricultural Property Relief (APR)
There have been some cases where a tenant’s estate on death has been valued for inheritance tax (IHT) purposes, and HMRC has attached a significant value to the tenant’s agricultural lease. At present this does not represent a problem to the tenant’s successor, as the full value of the lease is exempted from IHT by APR. However, this may become a serious problem for tenants if APR is ever abolished. Landlords can avoid IHT by transferring the freehold of land to a next of kin, often when still a minor, to take advantage of the 7 year rule and Potentially Exempt Transfers (PET), whereby the land is not subject to IHT and is considered a PET if the landlord survives for at least 7 years from the date of the transfer. This transfer typically takes place when the landlord is still young enough to obtain cheap life assurance for the 7 year period to cover the IHT liability in the event of his death before the 7 year period has passed. In contrast, there is no certainty that tenants will be able to use the same 7 year rule to avoid IHT on the value of their leases as they cannot assign their leases without their landlord’s consent. If APR is eventually abolished and tenants do not have freedom of assignation, then tenants will be at a great disadvantage compared with landlords when it comes to managing their assets in order to minimise IHT liabilities.

11) Limited Partnership Tenancies
Limited partnership tenancies were introduced as a means to avoid the security of tenure that the 1949 Act provided to tenants. Most tenancies created during the 1970’s to 2003 were limited partnerships, often to new entrants at the time, who, now that the contractual period has finished (typically 10 -20 years) find themselves farming on a year to year basis with no security of tenure, and in no better position than tenants were prior to the 1949 Act. Methods of affording greater security of tenure to limited partnership tenants should be explored.

12) Tenant representation
Finally, it is difficult to find tenants willing to represent tenants’ interests, not just because of continual daily hands on farming commitments which prevents most tenants taking time off from their farming duties, but also because of the fear that any tenant who dares to stick his or her head above the parapet will draw unwelcome interest from land agents, factors, and landlords. It is clear that tenants who represent other tenants’ interests by sitting on the STFA board or the NFUS’s Tenants Working Group are often the ones who are singled out and pursued to the land court by landlords who clearly want to put tenants off the idea of taking part in any debate regarding the tenanted sector. For a similar reason it is hard to persuade tenants in difficult and unpleasant situations to allow their problems to become public, as they rightly see that doing so will only make their situation worse. If government is to encourage a debate over the tenanted sector, consideration should be given to these difficulties which will prevent many tenants from making a valuable contribution to this debate.
1. We would support the Bill in as far as the change to include grandchildren as near relative successors but would suggest that it does not go far enough in that nieces and/or nephews should also be included.

2. The proposed changes to the rent review provisions in Limited Duration Tenancies (LDTs) – the fact that this legislation needs to be brought in outlawing upward only or landlord only rent reviews clearly shows yet again that Short Limited Duration Tenancies (SLDTs) and LDTs are not achieving the outcomes that we were assured they would. SLDTs and LDTs would appear to go to people with huge resources. Certain Land Agents freely admit this is the only reason they rent farms to these people as they are able to pay the uneconomic rents for the period of the lease regardless of whether the farm is viable or not.

3. The main reason that landlords let farms is monetary. In most cases they have tried farming themselves and been unable to make a profit equal to the rent they expect their tenant to pay. Whilst landowners and their agents pay lip service to the idea of new entrants and the Government has suggested various incentives for successful new entrants, most new entrants do not have the resources to rent, stock and crop a farm and therefore landlords and their agents tend to view them as a poor risk. The definition “new entrant” on many Government schemes is far too rigid as many aspiring new entrants will not fall into any of the Government guidelines.

Although these are the only 3 issues that are being addressed by the Bill, the following items are also worthy of the Committee’s attention:- increasing frustration of both established tenants and hopeful new entrants have been recently highlighted in the press - the huge lack of investment by landlords in their tenanted farms even although they are in breach of their obligations clearly laid down in the lease, the huge cost of taking a landlord to court is beyond the reach of many tenant farmers. Tenant farmers are, in many cases, afraid to invest in their holdings even although this puts them at a huge disadvantage to the better equipped owner occupiers as the difficulties in getting the value of their investments either at the end of the tenancy or at waygoing are huge.

In a situation where the landlord is clearly in breach of his obligations and has consistently refused to rectify the position then the tenant should have the absolute Right to Buy enshrined in law. This would go some way to redress the balance in favour of the tenant as the current position favours the party with the deepest pockets which in 99% of the cases is the landlord. The other huge stumbling block for the tenant is that even if he successfully takes his landlord to court he will still be out of pocket as legal costs are only at best 50% recoverable. Whilst there are other “voluntary” methods of dispute settlement i.e. mutual consent, arbitration mediation etc., none of these have an enforceable outcome; i.e.- if one party does not agree then - no result. A simple legal framework laying down procedural steps which only looks at relevant issues, - i.e. in the case of farm rents, which are most of the causes of dispute, the productive capacity of the holding, bearing in mind the condition and quantity of fixed equipment provided by the landlord and discounting any tenants fixtures or improvements, would be much fairer to both parties.

In order to avoid many of their obligations some landlords are now only renting out bare land as this removes any question of fixed equipment. This obviously precludes any new entrant from getting a start as they cannot farm without buildings.
While many of the landlords organisations and, unfortunately, some farmer organisations who perhaps should know better, are suggesting that freedom of contract – such as Farm Business Tenancies in England – should be allowed. This would be a disaster for the tenanted sector as by its nature, farming is a long term business and nobody is going to invest in long term improvements – i.e. drainage, fencing, liming etc., if they only occupy the land for 364 days. Surely a better way of encouraging landlords to let land on a long term basis – i.e. 1991 Act tenancies – would be by offering them tax incentives on let land, provided it was on a long term let, equivalent to the reliefs available if he farmed the land himself. Short term lets – i.e. where the landlord could reasonably expect to have vacant possession of the holding at least once within his lifetime should be taxed at the highest rate possible.

Section 5 of the Agricultural Holding (Scotland) Act (2) (a) states that the replacement responsibility of the landlord is that he will effect such replacement or renewal of the buildings or other fixed equipment as may be rendered necessary by natural or by fair wear and tear. It does not mention storm damage; sub section (2)(b) states that the liability of the tenant shall extend only to a liability to maintain the fixed equipment on the holding in as good a state of repair (natural decay and fair wear and tear excepted) as it was in at the commencement of the tenancy or if it has been improved, replaced or renewed by the landlord during the tenancy.

Some agricultural lawyers take the view that the landlord is responsible for storm damage and some agricultural lawyers take the opposite view. Clarification of this point should be treated as a matter of urgency.
Anonymous submission C

I only wish to comment on the succession part of the coming Bill.

The recently published Government figures show a steep decline in the number and area of tenanted farms in Scotland. If this trend is allowed to continue, in 30 years there will be no long term tenanted family farms left.

Since the primary letting vehicle in use now for new lets is the Short Limited Duration Tenancies (SLDTs), with a few Limited Duration Tenancies (LDTs), neither of which are suitable for long term sustainable farming businesses, the remaining 91 act tenancies must be ring fenced and protected from further evictions.

The succession provisions must be widened to not only grandchildren, but also nephews, nieces, and business partners.

Where a sheep farmer for example has a keen young shepherd, but no family of his own, he should be able to take the shepherd into partnership, and after 2 or 3 years, pass the tenancy on to him. This would preserve the essential skills and hefted flocks so vital and scarce today. An older farmer would be far more likely to retire, secure in the knowledge that his lifetimes work will not be sold down the river and will be carried on ad infinitum.

Rural people, whether farmers or workers must have stability to invest in business, and build communities. Long term tenure is the only way to achieve this, better through ownership, but a 91 act tenancy coming a close second. Short term arrangements are a road to nowhere.
NFU Scotland (NFUS) represents 9,000 farmers, crofters and growers across Scotland. This response, from NFUS, comments on the Scottish Parliament’s Finance Committee’s consultation on the Agriculture Holdings (Amendment) (Scotland) Bill.

Response

Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

NFUS responded to the Scottish Government’s consultation, supporting the Bill, but did not comment on the financial assumptions made.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

N/A.

Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Yes.

Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Yes.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes.

Wider Issues

If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

No.
Finance Committee

Agricultural Holdings (Amendment) (Scotland) Bill

Submission from Scottish Legal Aid Board

Consultation

1. Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

_The Board was asked for comments on possible cost implications for legal aid by its Sponsor Department at the Scottish Government_

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

_The Board does not believe that this legislation will result in notable costs for the legal aid fund. There have only been 13 cases involving grants of legal aid for cases in the Scottish Land Court and the Lands Tribunal for Scotland in the previous 5 years._

3. Did you have sufficient time to contribute to the consultation exercise?

_Yes_

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

_Not applicable_

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

_Not applicable_

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

_Not applicable_

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

_This is not for the Board to comment on._

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

_This is not for the Board to comment on._
Finance Committee
Room T3.60
The Scottish Parliament
Edinburgh
EH99 1SP

By email: fergus.cochrane@scottish.parliament.uk

Ref: LS222B/KH
Date: 16 December 2011

Dear Mr Cochrane

AGRICULTURAL HOLDINGS (AMENDMENT) (SCOTLAND) BILL: FINANCIAL MEMORANDUM

Thank you for giving the Society the opportunity to consider the financial memorandum to the above bill. The Society’s Rural Affairs sub-committee has considered the memorandum and has no comment to make.

If I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely

Katie Hay
Law Reform Officer
DD: 0131 476 8351
E: katiehay@lawscot.org.uk
### Committee Recommendation

21. The Committee notes the Scottish Government’s consultation on the proposed bill and is of the view that it was appropriately conducted. The Committee welcomes the publication of the responses and the analysis of the responses.

22. The Committee found the Policy Memorandum which accompanied the Bill to be helpful in clearly setting out the policy objectives of the Bill, why the approaches taken in the Bill were favoured over possible alternate approaches, and possible effects on various groups and organisations.

### Scottish Government Response

The Scottish Government thank the Committee for their assessment of the Scottish Government consultation process and Policy Memorandum.

### Statistics and data

#### Committee Recommendation

29. The Committee is concerned about the lack of available data on many of the issues it was examining as part of its scrutiny of the Bill. The Scottish Government agreed that more data needed to be gathered to better understand the tenant farming sector in Scotland. The Committee recommends as a matter of urgency that the Scottish Government work with all relevant parties to ensure that the required data is collected, so that any future changes to agricultural holdings legislation can be based on a more robust evidence base.

30. The Committee recommends that the Scottish Government review the questions asked in the current agricultural census, to ensure that the most appropriate and beneficial questions are being asked with a minimum of bureaucracy.

#### Scottish Government Response

A number of options are being considered by Scottish Government analysts in order to establish how to collect and produce data that will be useful for underpinning any future legislation on agricultural holdings/tenancies.

For example:

(i) assessing Registers of Scotland property sales data with a view to ascertain why there has been a decline in tenancy agreements i.e. is land being
bought by tenant farmers or landowners? However, it is unclear if this will provide robust findings.

(ii) it may be possible to use HMRC stamp duty records to see if a sale has been made on agricultural land.

(iii) we may be able to utilise external contractors to conduct a bespoke survey, in order to address the very specific questions and qualitative issues that need investigated.

Policy officials working on the Bill team have met with the statisticians to review the content of the census with respect to Tenancy information. It has been agreed that the current June census is not appropriate for asking additional questions relating to tenancy – mainly due to the complex and qualitative nature of the required new questions. We believe that a bespoke survey is required for this purpose.

We have reviewed the wording and guidance on the 2012 June census tenancy sections and are content that the current baseline data collected on rented area and type of rental agreement is appropriate and worded in a clear and concise fashion. However, to further assist farmers in completing the form we have amended the guidance note to provide more information on secure tenancy types.

We will keep the Committee informed on developments in this area.

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<th>General principles of the Bill</th>
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<td><strong>Committee Recommendation</strong></td>
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<td>31. The Committee makes specific comment on the three provisions in the Bill, and other issues that were raised during its scrutiny, in the main body of this report below. However, to state at the outset, the Committee broadly welcomes the three proposals contained in the Bill which it believes are overdue, and recommends that the Scottish Parliament support the general principles of the Bill at Stage 1, to allow the Bill to pass to Stage 2.</td>
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<td><strong>Scottish Government Response</strong></td>
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<tr>
<td>The Scottish Government welcomes the Committee’s recommendation that the Bill should be proceed to Stage 2 and its support to the three proposals contained within the Bill.</td>
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Provisions in the Bill: Succession by near relatives – definition of near relative

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| 45. The Committee notes all the supportive evidence it received on the issue of extending the definition of near relative as it relates to the class of people who can serve a counter-notice to a notice to quit, upon the death of a tenant. The Committee supports the principle of the definition being extended.  
46. The Committee acknowledges that the position reflected in the Bill, to extend the definition to include grandchildren, is consistent with the consensual view established in the Tenant Farming Forum, which advised the Scottish Government on the contents of the Bill. However, the Committee is aware that individual members of the TFF have differing views on the issue and is not unsympathetic to the call made by some for the definition to be further extended to include other relatives. Whilst noting the points made to the Committee that further extending the definition could potentially destabilise the consensus reached in the TFF, and also possibly lead to unintended negative consequences in the balance of rights between landlords and tenants, the Committee recommends that the Scottish Government re-examine this issue and seek further comment from the TFF and its individual members ahead of Stage 2 on whether the definition should be amended to be more similar to the rules on assignation, for example to include nephews and nieces. |
| After further consultation with the members of the TFF, the Scottish Government disagrees with the Committee’s suggestion to further extend the definition of near relative beyond the current bill proposal at this time for the following reasons:  
The TFF do not support a further extension of the definition of near relative at this time as any extension is not the consensual view of the TFF. The TFF have agreed to further consider whether there is a requirement to further extend the definition of near relative and they will consider the wider implications of any extension in order to avoid any unintended consequences. |

The Scottish Government support the
proposed TFF approach and will ask the TFF to include the assessment of any further extension of the definition of near relative within their future workplan. This approach, will enable full consideration of the wider consequences of any further legislative change to be assessed.

It is appropriate to consult on this matter potentially either through the forthcoming review of agricultural holdings legislation or the consultation on the fundamentals of succession law.

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<td>54. The Committee notes that the issue of when the transitional provisions come into force is the only issue on which the Scottish Government has not adopted the majority view of TFF members. In this regard, the proposal in the Bill stands out from the consensus agreed on the other issues.</td>
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<td>55. The Committee notes all the evidence it heard on this issue and is not persuaded that the approach taken in the Bill is the correct one. The Committee agrees that passing legislation which applies retrospectively is not, generally speaking, good practice. However, in this instance, the Committee does not believe that altering the Bill so that section 1, when commenced, applies in circumstances where a tenant has died, but the near relative has not yet served notice to the landlord of acquiring the lease, would be passing retrospective legislation. Rather, it would be altering the point in a specific process at which the section should be able to be enforced.</td>
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<td>56. The Committee can see no persuasive case for excluding tenants in such circumstances and is also mindful that there was an expectation that the provision would have been included in the 2011 Order, and therefore come into force at an earlier point. The Committee therefore recommends that the Scottish Government look at this issue again, and consider bringing forward an amendment at Stage 2 which would apply to near relatives of tenants who have died, but who have not yet notified a landlord that a lease has been acquired.</td>
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<th>Scottish Government Response</th>
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<td>The Scottish Government noted that during the</td>
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evidence given during Stage 1 witnesses agreed that the number of people affected would, in all likelihood be small. The Scottish Government has reflected on the evidence provided, the views of the Committee and the further views provided by members of the TFF. As a result, the Scottish Government will now bring forward a Stage 2 amendment to the transitional provision so that the change in the definition of near relative will apply in cases where a tenant has died before the Bill comes into force but where notification has not yet been given to a landlord under section 11 or 12 of the 1991 Act, as the case may be.

Provisions in the Bill: Rent Reviews

| Committee Recommendation | 68. The Committee notes comments made about the proposal possibly further restricting the freedom of negotiating contracts, but does not believe that banning such clauses will have an unwanted negative effect in this regard.  
69. The Committee notes the widespread support for the rent review provisions in the Bill and supports the removal of upward-only rent reviews, and landlord-only initiated rent reviews, in a limited duration tenancy. The Committee believes these are positive and welcome measures.  
70. The Committee does not believe that the proposal should apply retrospectively, as it would not be prudent to attempt to unpick existing contracts which were legal at the time of establishment. |
| Scottish Government Response | The Scottish Government agrees with the views provided by the Committee regarding the rent review provision within the Bill. |

Provision in the Bill - Effect of VAT changes on determination of rent

| Committee Recommendation | 74. The Committee notes the unanimous support for this provision in evidence submitted to it and supports the disapplication of VAT rate changes and options to tax from being variations in rent which prevent rent reviews. |
| Scottish Government Response | The Scottish Government thanks the Committee for their support in the disapplication of VAT rate changes and options to tax from being variations in rent which prevent rent reviews. |
### Other issues: Wider land reform issues

| **Committee Recommendation** | 79. The Committee believes that the Bill makes necessary, albeit relatively moderate, changes to agricultural tenancy law in Scotland. However, as the evidence from stakeholders and the Scottish Government has demonstrated, there is much work still to be done to improve the law further, to address the recent trend of a decline in the number of agricultural tenancies, to make more land available for rent, and to encourage a greater number of new, and younger, entrants into farming. |
| **Scottish Government Response** | The Scottish Government will continue to work in partnership with stakeholders, including the TFF, to bring forward measures which encourage more agricultural land to be made available for let encouraging to tenant farmers and new entrants. |

| **Committee Recommendation** | 80. The Committee recommends that, following the completion of this Bill, the Scottish Government continue to work with the TFF and other stakeholders, landowners and tenants across Scotland, to review the operation of agricultural legislation and address the other challenges facing the tenant farming community in Scotland as soon as possible. |
| **Scottish Government Response** | The TFF will be bringing forward a workplan setting out the tenant farming issues they intend to address and Scottish Government look forward to working in partnership with the TFF to indentifying and providing solutions, where feasible, to address the challenges facing the tenant farming community in Scotland. Part of the solutions arising from the workplan may require legislative change. These solutions will be considered as part of our commitment to reviewing agricultural holdings legislation within 18 months of this Bill becoming an Act. |

### Other issues: New Entrants

| **Committee Recommendation** | 86. The issue of how to attract more new entrants into farming, and creating the best |
conditions to allow that to happen, has been a recurring theme for this Committee and its predecessor committees. In terms of attracting more tenant farmers, the Committee believes that this Bill will make a necessary, but modest, contribution to achieving that goal.

87. The Committee acknowledges that attempting to reverse the current trend of falling numbers of agricultural tenancies will require long-term policy making, using a range of tools, including legislation. The Committee recommends that the Scottish Government continue to actively engage with the sector as a matter of urgency. The Committee also recommends that the Scottish Government give consideration to consulting on the possible establishment of a new entrants register.

**Scottish Government Response**

Setting up a register is only one of several current initiatives by the Scottish Government and the industry to support and encourage new entrants to farming. The possibility of a register is being taken forward by the industry, who are currently fleshing out their proposals and considering appropriate funding sources.

The Scottish Government plans to develop a new advisory services for new entrants from April this year, which will complement the industry’s initiative. We also stand ready to consider with the industry the potential for additional funding support for elements of their initiatives.

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**Other issues – Conservation tenancies**

**Committee Recommendation**

94. The Committee notes the RSPB’s suggestion for establishing conservation tenancies in Scotland and believes that the idea should be examined in more detail. The Committee also notes the Cabinet Secretary’s positive response to the suggestion and recommends that he work closely with the RSPB and other stakeholders over the coming months to try to establish such tenancies in Scotland where appropriate. The Committee would welcome the Scottish Government keeping it up to date on progress on this issue.

**Scottish Government Response**

As indicated during the evidence giving session the Scottish Government will work with stakeholders over the coming months to fully explore all of the issues around the RSPB proposal, enabling further progress to be
made. We will provide a progress update to the Committee in due course.

Other issues – investments in holdings

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<th>Committee Recommendation</th>
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<tr>
<td>98. The Committee recommends that the Scottish Government and the TFF re-examine the issue of investment in holdings, to— • assess whether proposals could be brought forward to clarify who is responsible for paying for what and in what circumstances; and • set out where the most appropriate balance is for the creation of a vibrant and healthy tenant farming sector.</td>
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<th>Scottish Government Response</th>
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<tr>
<td>The Scottish Government will continue to work closely with the TFF in taking forward their future workplan, which has the potential to address issues around investments in holdings.</td>
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Other issues – waygo compensation

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<th>Committee Recommendation</th>
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<tr>
<td>103. The Committee notes the comments made in evidence about the lack of clarity surrounding compensation paid to out-going or retiring tenants for any investment made to the holding during the course of a tenancy. The Committee welcomes the commitment of the TFF and the Scottish Government to examine this issue in more detail and believes that clarity in relation to waygo compensation needs to be established as a matter of urgency.</td>
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<th>Scottish Government Response</th>
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<tr>
<td>As previously acknowledged during Stage 1 evidence, the Scottish Government will examine this issue in will continue to work closely with the TFF to consider this issue. The timescale of action on this issue is linked to its progress within the future TFF workplan.</td>
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Other issues – land agents

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<th>Committee Recommendation</th>
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<td>108. The Committee supports the development of a code of practice which would ensure a greater consistency of practice and behaviour amongst those providing land agent services. However, it is essential that any such code be applicable to all land agents operating in Scotland, whether acting on behalf of landlords or tenants, and irrespective of their membership of RICS, and that the code had some “teeth” to ensure it could be appropriately enforced.</td>
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<td>109. The Committee recommends that the</td>
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Scottish Government closely monitor the development of a code within the industry, via the TFF, to ensure that any code is fit for purpose.

### Scottish Government Response

The Scottish Government will work in partnership with the TFF during the development of a code of practice. During the forthcoming review consideration will be given to assessing if there is a need to further strength the code, once it is being utilised by the industry.

### Other issues – dispute resolution

#### Committee Recommendation

118. The Committee supports the calls for the issue of dispute resolution to be looked at again as a matter of urgency, and recommends that the Scottish Government work with the TFF to bring forward proposals for improving dispute resolution as soon as possible. The Committee also recommends that the TFF continue to work with the Scottish Agricultural Arbiters and Valuers Association with regard to the possible opportunities afforded by the Arbitration (Scotland) Act 2010.

#### Scottish Government Response

The TFF have already identified dispute resolution as a key issue which requires to be addressed. The Scottish Government expect this issue to feature within the future TFF workplan. We look forward to receiving the outcome of the recent work being undertaken by the TFF, and their member the Scottish Agricultural Arbiters and Valuers Association in developing their short form rent arbitration system.

### Other issues - Land Registration etc. (Scotland) Bill

#### Committee Recommendation

123. The Committee notes the concerns raised by Scottish Land and Estates regarding possible negative consequences of provisions in the Land Registration etc. (Scotland) Bill on landlords and tenants entering into limited duration tenancies of longer than 20 years. The Committee also notes the Cabinet Secretary’s written response, which explains why he does not consider the provisions to be of concern.

124. The Committee recommends that the Scottish Government ensure that there is regular communication between officials working on both Bills to ensure that, as both
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<th>Committee Recommendation</th>
<th>Scottish Government Response</th>
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<td>bills progress through Parliament, and possible amending stages, there are no unintended consequences on either Bill.</td>
<td>Scottish Government Response will continue to work closely with Land Registration etc. (Scotland) Bill) during the progress of both bills through the Scottish Parliament.</td>
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**Other issues – future legislation**

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<th>Committee Recommendation</th>
<th>Scottish Government Response</th>
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<tr>
<td>129. The Committee is of the view that future legislation on the issue of agricultural tenancy should not be ruled out. Indeed, it is a consequence of the approach of encouraging the TFF to achieve a consensus amongst all of its members, and then providing advice to the Scottish Government, that issues need to be progressed on a step-by-step basis. Therefore future amending or consolidation Bills may be required.</td>
<td>The Scottish Government thank the Committee for their views on the potential need for future agricultural holdings legislation. While the Scottish Government expects there to be a need for future legislative change as a result of case law and potentially as a result of the findings of the Review of Agricultural Holdings Legislation; it is not feasible for this Government to be able to bring forward consolidating legislation within this Parliament.</td>
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<tr>
<th>Financial issues</th>
<th>Scottish Government Response</th>
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<tr>
<td>134. The Committee notes the comment made by the Scottish Legal Aid Board that the Bill, if enacted, would not result in notable costs for the legal aid fund.</td>
<td>The Scottish Government also notes the comments made by the Scottish Legal Aid Board, that the Bill, if enacted would not result</td>
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<th>Committee Recommendation</th>
<th>Scottish Government Response</th>
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<tr>
<td>135. The Committee thanks the Finance Committee for the scrutiny it conducted and, given the small number of responses, and lack of comment in evidence, has no further issues to raise with regard to the Financial Memorandum.</td>
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in notable costs for the legal aid fund. We would also like to thank the Finance Committee for their scrutiny of the Financial Memorandum.
26 March 2012

Dear Rob

Agricultural Holdings (Amendment)(Scotland) Bill

Thank you for your letter of 1 March seeking confirmation of the Scottish Government position regarding the outcome of the recent Moonzie rent review case.

The Tenant Farming Forum (TFF) meet held last week specifically to consider the findings of the recent Moonzie Case. At that meeting, while some stakeholders were of the view that the Moonzie case highlights deficiencies in the formula for undertaking rent reviews for secure 1991 tenancies, all constituent members of the TFF agreed that rent review was a complex topic and that any changes should not be rushed through. As a result of that meeting all members of the TFF have agreed not to ask the Government to bring forward a Stage 2 amendment following the judgement in the Moonzie case.

On that basis I have considered the recent decision of the Court of Session in the Moonzie rent review case and I am not bringing forward a Stage 2 amendment relating to Section 13 of the 1991 Act. Instead, my officials will be working closely with the TFF to consider this issue within the next 12 months to enable me to address solutions developed by the TFF.

Yours sincerely

RICHARD LOCHHEAD
Agricultural Holdings (Amendment) (Scotland) Bill: The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead) moved S4M-02495—That the Parliament agrees to the general principles of the Agricultural Holdings (Amendment) (Scotland) Bill.

After debate, the motion was agreed to (DT).
Agricultural Holdings (Amendment) (Scotland) Bill: Stage 1

The Presiding Officer (Tricia Marwick): The next item of business is a debate on motion S4M-02495, in the name of Richard Lochhead, on the Agricultural Holdings (Amendment) (Scotland) Bill. I call Richard Lochhead, the Cabinet Secretary for Rural Affairs and the Environment, to speak to and move the motion. You have 10 minutes, Mr Lochhead.

14:33

The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead): Thank you, Presiding Officer.

This Government has two key policy objectives for tenant farming in Scotland: first, to ensure that tenant farmers have legislative protection; and, secondly, to have a vibrant tenant farming sector in Scottish agriculture so that the sector can continue to put food on our tables and help to care for Scotland’s environments.

I think that all members recognise the important role played by all our diverse agriculture in Scotland, and I am sure that members agree that Scottish agriculture continues to punch above its weight in our economy. That is underlined by the incredible success of our food and drink sectors that was announced only yesterday, with overseas exports of Scottish food and drink increasing by a massive 19 per cent in 2011 alone. Those exports are now worth around £5.5 billion to the Scottish economy and are achieving our national targets about six years early—that is just an illustration of the booming success in recent years of our food and drink sectors.

Our tenant farmers are of course an integral part of Scottish agriculture. Prior to 1883, the relationship between tenant farmers and their landlords was determined by freedom of contract. Since then, farming leasing arrangements between landlords and their tenant farmers, and their relationships, have been regulated by a series of acts of Parliament.

Before the Agricultural Holdings (Scotland) Act 2003 was passed, the only formal leasing arrangements that legislation permitted were a seasonal let of less than one year—my notes refer in brackets to a lease of 364 days, not 365 days, in the legislation—or secure tenancies, such as those in the Agricultural Holdings (Scotland) Act 1991, with which we are all familiar. When a tenant farmer has a long-term protected lease that is heritable, it can now be broken only by non-payment of rent or a material breach of the lease. Many factors—not just legislation—influence the trends in agricultural tenancies. Economic factors, the availability of land and labour, our farming systems, the health of the marketplace and changing rural communities all influence the sector’s health.

The purposes of agricultural holdings legislation are to protect the rights of the tenant and the landlord and to do what we can to enhance the productiveness of our land in Scotland. The legislation achieves that by encouraging tenant farmers to maintain proper husbandry of the land until the end of their lease while enabling them to receive value for the improvements that they have made to the land. The aim has been to ensure that neither party is disadvantaged by a tenancy agreement, and the bill has the same aim.

For some, tenant farming provides the first foothold on the farming ladder. It is a family tradition for some and it provides for others the opportunity and flexibility to farm in a way that suits their needs.

I am well aware that some tenant farmers face extreme hardship or economic difficulties, because they tell me that when I travel the length and breadth of Scotland. I know that there are difficult landlords and unscrupulous land agents, and we all wish that that was not the case. I know that tenant farmers provide some of our best produce and are dynamic businessmen. Many have contracts with leading retailers and provide some of the best beef and lamb that can be got anywhere. It is important to recognise that there are also excellent proactive landlords and fair-minded agents.

It is not easy to achieve growth and dynamism in an industry that is based primarily on the relationship between two individuals, in a country in which available land is limited. Balancing the needs of both parties is often challenging. It would be easy to sidestep some of the difficult issues that need to be addressed. I expect that I speak for many members when I say that we in the Scottish Government do not wish to take the easy option. The Government and I are committed to tenant farmers and to a vibrant tenant farming sector. The bill is one of the many tools that we are using to achieve that.

The bill marks the final stage in implementing the package of recommendations that were made to the Government by the Scottish tenant farming forum, with which we have worked closely in recent years to achieve our aims. I was disappointed when we could not include in the Public Services Reform (Agricultural Holdings) (Scotland) Order 2011 the two main amendments that are in the bill, but we could not abuse the power to make that order. I introduced the bill to enable the Government to complete its
commitment to implement the final two parts of the package of measures that our key tenant farming stakeholders proposed and to implement a further recommendation from the industry on VAT.

Section 1 of the bill amends part III of schedule 2 to the 1991 act to extend the definition of a “near relative” to include grandchildren. The current definition includes a surviving spouse or civil partner and a natural or adopted child of the deceased tenant farmer. The amendment will help to meet our objective of widening the class of people who are entitled to a degree of protection when succeeding to a secure 1991 act tenancy. It should also make it easier for grandchildren to inherit farm tenancies and should help new and younger entrants to get a start in tenant farming, which will be a key benefit to the agricultural sector.

Section 2 will amend section 9 of the 2003 act to nullify lease terms in limited duration tenancies that provide for upward-only and landlord-only initiated rent reviews. In a limited duration tenancy under the 2003 act, the tenant and the landlord enjoy freedom to contract and are not restricted in any way when agreeing the contractual provisions on rent review that appear in the lease. It is therefore possible at present for parties to agree to upward-only rent reviews or to a provision whereby only the landlord and not the tenant farmer can instigate a rent review. Our amendment will help to prevent landlords from burdening their tenants with limited duration tenancies that have uneconomically high rents. Our proposals will ensure that, when such clauses appear in leases in the future, any such terms should be struck out.

We do not propose to make the provision retrospective in order not to interfere with the contractual position of parties who have already entered into leases that contain such terms. Agreements between landlords and their tenant farmers that are already in place will continue to be unaffected by the provision until their expiry.

Section 3 contains the third provision, which will amend section 13 of the 1991 act, which relates to VAT and rent reviews. Under section 13 of that act, rent reviews take place in a three-year cycle, and any variation in rent prevents the parties from having a rent review for a further three years. The amendment simply clarifies that, if the VAT rate changes or the landlord chooses to change the VAT treatment of the rents, that will not qualify as a variation of rent. The amendment therefore avoids the situation in which a landlord and a tenant are unable to go to the Scottish Land Court for a rent review. Again, that has been agreed by the tenant farming forum and it mirrors a recent amendment to English legislation that arose from a recent court case. An agreed and carefully negotiated set of proposals has been provided that commands the support of the tenant farming forum, which includes all the main stakeholders in tenant farming in Scotland.

I know that the sector faces many other challenges and that many of those difficult issues have featured in the debate on the bill, but I also know from speaking to many tenant farmers and others that they wish their legislators to tread quite carefully, given the deep complexity that we are dealing with. Stakeholders have certainly said to me that they wish to avoid embarking on a further round of rushed changes to the legislation that may be well intentioned but which those with the necessary expertise to ensure that the changes will work have not been able to fully think through and analyse at this stage. I for one wish to heed their advice.

That is why, following my consideration of all the background information and the stage 1 evidence and committee reports, I will lodge only one of the amendments that the Rural Affairs, Climate Change and Environment Committee proposed. There will be a stage 2 Government-led amendment to the transition provision that is contained in section 4 so that the changes to the definition of “near relative” will apply in cases in which a tenant has died before the bill comes into force but notification has not yet been given to the landlord under the relevant provisions.

I have also considered the recent decision of the Court of Session in the Moonzie rent review case. As I indicated to the committee yesterday in writing, I will not lodge a stage 2 amendment to amend section 13 of the 1991 act. Some stakeholders may take the view that the Moonzie case highlights deficiencies in the formula for undertaking rent reviews in 1991 act tenancies, but all stakeholder groups agree that the rent review system is a complex topic and that any legislative change should be carefully considered to allow full consideration of potential impacts. We need detailed consultation on and discussion of that issue with the industry. Indeed, we have met the TFF to discuss the way forward on it, and I will hold a summit meeting with the TFF on 4 April in Inverness, at which we will discuss such issues. Let me be clear: I recognise that we need a system for determining rents that is fit for purpose. In that forthcoming meeting, we will consider whether an independent panel should be set up to assist in the process and to enable progress to be made in a much shorter timescale than might otherwise be the case.

Members will be aware of the recent Court of Session decision in the Salvesen v Riddell case. That case is still before the courts, so I am quite limited in what I can say about it, but we are
considering all our options, including the option of appeal.

I am only too aware that there are other important tenant farming issues that need to be addressed and to be acted on within a realistic timescale. At the summit that we will hold in a few days’ time with the tenant farming forum, we will discuss many of those issues, which cover rent reviews, dispute resolutions, broader succession issues, waygo arrangements and issues to do with fixed equipment. I do not want to pre-empt the TFF work plan, but I want a strict timetable that we can stick to.

Members will be aware that we have given a commitment that we will have a full review of all the legislation within 18 months of the bill becoming law. We will then take any action that requires to be taken in the Parliament, provided that the opportunity arises.

Given the complexity of the issues that we are considering, ours is the right course of action. The Government believes that it is important that the bill, which has been developed in close partnership with the key stakeholders, deserves members’ support, which I urge all members to deliver.

I move,

That the Parliament agrees to the general principles of the Agricultural Holdings (Amendment) (Scotland) Bill.

The Presiding Officer: I call Rob Gibson to speak on behalf of the Rural Affairs, Climate Change and Environment Committee.

14:44

Rob Gibson (Caithness, Sutherland and Ross) (SNP): There is an old Highland joke about a croft being a small piece of land surrounded entirely by large amounts of legislation. Given the amount of legislation on agricultural tenancies that has come forward in recent years and the time that such tenancies have taken up in the Scottish Land Court—and, sometimes, the Court of Session—we can be forgiven for thinking that the same joke can now be told about tenant farming.

Scrutinising the Agricultural Holdings (Amendment) (Scotland) Bill has been a process of two halves for the Rural Affairs, Climate Change and Environment Committee. On the one hand, we looked at the three modest, albeit necessary, changes that the bill proposes to agricultural tenancy law. On the other, we considered many other issues that are not directly covered by the bill, but which were raised by stakeholders, often anonymously, and which are fundamental to the policy behind the bill.

During our scrutiny of the bill, the Scottish Government published statistics that show that, between 2005 and 2011, there was a decline of almost 10 per cent in the number of agricultural tenancies in Scotland. There were 727 fewer holdings with tenancy agreements in 2011 than there were in 2005. That is a significant reduction, and we need to know what is leading to that trend. Those statistics focused the minds of the entire committee and led us to consider the fundamental issue that is at stake, which is how best to address the balance between landlords’ rights and tenants’ rights so that Scotland can, at last, have a healthy tenant farming sector to pass on to successors.

Alex Fergusson (Galloway and West Dumfries) (Con): Will the member take an intervention?

Rob Gibson: I will take a brief one. I have a lot to say.

Alex Fergusson: Given that the tax regime is the same throughout the United Kingdom and that farm business tenancies south of the border are similar to limited duration tenancies in Scotland, would the member care to speculate on why the number of tenancies has fallen in Scotland at a time when the number of tenancies has significantly increased south of the border?

Rob Gibson: I think that there has been enough speculation, but I suppose that, even in the member’s devo plus proposals, there might be a decision to take forward these kind of things in Scotland.

Our scrutiny showed that there are significant gaps in the data that is required to make informed, evidence-based decisions on how to address the challenges that are facing tenant farming. We simply do not have a full picture of what is happening in tenant farming across Scotland to underpin the decisions that we need to make. I welcome the Scottish Government’s commitment to review the questions that are posed in the agricultural census to ensure that the most beneficial questions are being asked, with a minimum of bureaucracy.

I turn to the three specific provisions in the bill, which correct anomalies in the law. The committee unanimously supports all of them in principle and hopes that they will lead to more land being made available to let and the creation of a more conducive environment that will encourage new entrants to join the industry.

The bill follows many years of protracted debate in the tenant farming forum. It aims to achieve compromise between landlords and tenants in order to make progress on tenancy law. It is important to note that it was intended that two of the three provisions would be included in a 2011 order, but they were delayed due to the need for primary legislation, as the cabinet secretary said. That prevented them from being included in earlier
instruments. Those provisions are long overdue, and the changes will complete the first phase of the tenant farming forum’s consideration.

The committee unanimously supports the extension of the category of tenants who can serve a counter-notice to a notice to quit that is issued by a landlord on the death of a tenant. The current definition of what constitutes a “near relative” in such circumstances is too restrictive, as it includes only the spouse or civil partner and any children, and it should be widened. The bill extends the definition to include grandchildren, which we welcome.

Many farmers made a case to the committee that the definition should be further extended to include, say, nieces and nephews. The committee was not unsympathetic to that call, but it was aware of possible unintended consequences of a further extension to the definition. We asked the Scottish Government to consult the TFF to see whether there was any appetite in that group for extending the definition to include other relatives. The TFF says that it does not support a further extension at this stage—although it will keep the matter under review—primarily because, as Scottish Land & Estates states:

“it would effectively extend tenant rights and send another negative message to landlords.”

There was also a debate in the committee about when the change in definition should come into force and how the transitional arrangements should work. Some of my colleagues will discuss those aspects in greater detail.

The other two provisions were unanimously backed by the committee—first, the changes that will see upward-only and landlord-only initiated rent reviews prohibited in future limited duration tenancies; and, secondly, the disappication of VAT rate changes and options to tax from being variations in rent that prevent rent reviews. The TFF agrees to those changes, as does the Scottish Government, and the committee supports them unanimously.

That brings me to the other issues that the committee received evidence on. We had a significant number of submissions, including anonymous and private submissions, from landlords and tenants, which gave the committee a startling insight into the challenges facing the tenant farming community in Scotland. Those included issues of wider land reform; how to attract more new entrants into farming and how best to support them; how to create the best environment for investment in holdings by landlords and tenants; how to make it clear beyond any doubt who is responsible for paying for what; and how tenants will be compensated for that investment when they move on or retire.

We called on the Scottish Government to consider establishing a register for prospective new entrants and also to work with the TFF in re-examining the issues of investment responsibility and appropriate compensation. Thankfully, the TFF is to produce a work plan setting out those priorities. I hope that that will not take another seven years and I am also pleased to learn that the industry is to take forward the idea of a new entrants register.

We heard evidence on the practices of land agents, and we support the development of a code of practice, which would, we hope, ensure greater consistency of practice and behaviour among all those providing land-agent services.

Members need to be aware of the legal disputes surrounding agricultural tenancies, which sadly end up in the Land Court and the Court of Session. The committee heard evidence on the establishment of a more effective system of dispute resolution and called on the Government to urgently look at arbitration.

In my speech during the stage 1 debate on the Land Registration etc (Scotland) Bill, I spoke about the need to dovetail that bill with the Agricultural Holdings (Amendment) (Scotland) Bill and the Long Leases (Scotland) Bill, which the Rural Affairs, Climate Change and Environment Committee is also scrutinising, and I stress that need again. We must develop a comprehensive picture of land use and ownership in Scotland, with better mapping.

The Agricultural Holdings (Amendment) (Scotland) Bill is not the solution to the many challenges facing the tenant farming community. Further legislation will be needed and we should not rule it out for fear of overregulation. The important thing is that the legislation does what we want it to do and helps those whom we intend it to help.

The fundamental question behind the bill still remains that of how we can improve the lot of tenants in the balance between the rights of agricultural landlords and the rights of agricultural tenants to ensure that Scotland can look forward to a healthy and vibrant tenant farming sector.

14:52

Claire Baker (Mid Scotland and Fife) (Lab): I am pleased to be speaking in this afternoon’s debate. As an MSP who is not on the Rural Affairs, Climate Change and Environment Committee, I thank the committee for an informative, well-argued and interesting report. I thank all the stakeholders who responded to the consultation and improved and challenged our understanding of the issues. I particularly thank the tenant farming forum. Its work on improving
agricultural holdings legislation to encourage the release of land to rent has been invaluable, and the bill responds to its concerns.

The bill is a narrow piece of legislation that discusses only three areas, yet it has highlighted the wider arrangements in Scotland and the need to improve the system for current farmers and future generations. This slim bill is recognised as a move in the right direction. Although no one is denying that there is more to be done, it is fair that we use this focused bill to bring the measures into law as quickly as possible. Labour will support the bill at stage 1.

At the heart of the debate around tenant farming is how we secure a sustainable future. We must question why we have seen a fall in the total number of holdings with tenancy agreements while, at the same time, there seems to be a rise in contract farming. The landmark land reform programme produced the Agricultural Holdings (Scotland) Act 2003 and, among other measures, introduced limited duration tenancies and short limited duration tenancies. There has been an increase in both of those, although there are perhaps still not as many as we would like there to be. However, the number of 1991 act tenancies and limited partnerships has declined and overall, as Rob Gibson pointed out, there has been a reduction of 10 per cent in the number of tenancy agreements.

By contrast, England’s tenanted sector has developed differently, with the decline in rented land being halted and even reversed. However, that is a complex comparison. In England, there is little security of tenure, and there is little evidence that any increase is due to new entrants. In Scotland, our tenanted sector must encourage long-term investment from the tenant and the landlord and ensure that they feel confident that their investment will be recognised. It must also support new entrants not just through the availability of land but through investment and other support.

The answer is not simple. We should recognise, as the cabinet secretary pointed out, that there is a lot of good practice in the sector and that there are good relationships. However, there is also an ageing population in farming, and we must make new opportunities easier to find.

The better the evidence, the easier it is to provide the correct policy response and, as the committee identified in its report, there are concerns about the lack of reliable data. We can assume that a number of the tenancies under the 1991 act are historical but, as the Government identified, we do not really know what happens when such a tenancy comes to an end. That gap is contributing to falling numbers, so the Scottish Government must take measures to improve data collection.

The bill looks to expand the options that are available when a 1991 tenancy comes to an end by extending the meaning of “near relative”, where the person concerned is a successor, to include grandchildren. In principle, we very much agree with extending the definition of who qualifies as a near relative, but I expect that it is an issue that will be returned to at stage 2. The Scottish Tenant Farmers Association and NFU Scotland question the difference in the interpretation of a near relative, depending on whether an assignation or a succession is involved, and the STFA, in particular, would like to include nephews and nieces. Others have expressed concerns about getting the right balance between landlords and tenants, and I agree with the committee that the Scottish Government needs to look at the issue again. Consensus is a good thing and events are moving along, albeit slowly, but we are continuing to see a decrease in tenant farming. If a further extension of the definition of a “near relative” would play a part in addressing that decline, we should consider that.

In relation to transitional provisions, I am pleased that the Scottish Government has responded to the committee and has indicated that it will lodge an amendment at stage 2. That is a sensible move that will capture those people who are in the middle of the process at the time of the bill’s passing.

Section 2 addresses rent reviews and prevents upward-only and landlord-only initiated rent reviews in a limited duration tenancy. I welcome the widespread support for that sensible measure, which I believe will be a positive move for future contracts.

The committee helpfully considered wider tenancy issues. The progress that has been made through devolution should be recognised, but we can make further improvements. The Government has an opportunity in this session of Parliament to make progress on tenant farming through legislation, if necessary, but also through policy direction. We can improve conditions for new entrants. Although starter units, a new entrants register and the introduction of mentoring are all positive, the common agricultural policy subsidy system does not support new entrants, whose needs must be central to discussions. I would like to see a more level playing field for new entrants when it comes to accessing subsidy support.

The RSPB proposal for conservation tenancies is worth further consideration. The RSPB argues that such tenancies could solve the current limitations that it and other non-governmental organisations face in letting land.
The committee identified another area that can act as a barrier to successful tenancies: the lack of clarity on investment in holdings and waygo payments. If a tenant does not feel secure in their current farming interests or in what will happen to their investment in the future, they will be reluctant to invest, while the landlord may not be convinced that investment will give them a return. It would be good to hear more from the Government on what it thinks the extent of the problem might be and how it could improve the present system.

From my discussions with the tenant farming forum and other stakeholders, I am aware of the work that they are doing on a code of practice for land agents and on proposals for dispute resolution. The recent decision by the Court of Session in the Moonzie case must raise questions about the effectiveness of the current legislation. I understand that 18 applications for rent review are still in the process, and the outcome of the Moonzie case will have an impact on those. Although the cabinet secretary has indicated that he does not intend to use the bill to address that issue, I welcome his announcement that a summit is to be held and his recognition of the significance of the decision to how we make progress.

This Parliament has been ambitious in addressing the historic legacy of Scotland’s land. That reflects the importance of access to our land in our culture and in our identity, and of modernising our relationship—working and leisure—with this great Scottish resource. The bill is narrow, but it goes to the heart of concerns about ownership and fairness, and although it will receive support today, I am sure that the bigger debate will continue.

14:59

**John Lamont** (Ettrick, Roxburgh and Berwickshire) (Con): The Scottish Conservatives are pleased to support the bill’s general principles. A vibrant tenanted sector is vital to Scottish farming. As a Parliament, we should do all that we can to create a better environment for the letting of farmland to tenant farmers and to encourage new entrants to tenant farming. I believe that the bill goes some way towards achieving that.

The Scottish Conservatives are happy to support a number of proposals in the bill, such as the extension of the definition of “near relative” to include grandchildren and the prohibition of upward-only rent reviews. However, I remain concerned about a number of issues, on which I will focus today.

On the suggestion that the definition of “near relative” should be extended, it became clear during scrutiny of the bill that some members of the Scottish National Party—particularly those from the Scottish National Party—would like the definition to be widened to include not only grandchildren, but nieces and nephews. The logic behind that is that some tenant farmers may not have children or grandchildren, and so the tenancy could be forfeited on their passing. However, if the tenancy rights were conferred on nephews and nieces, the tenancy could be carried on in the wider family, which would restrict the landlord’s ability to retake possession of the property.

On that point, I fully agree with the Cabinet Secretary for Rural Affairs and the Environment, who in his evidence to the committee cautioned that any extension of the succession rights could have unintended consequences. An overly broad definition could further limit the landlord’s confidence and create even more uncertainty in the tenanted sector. If such a definition was implemented in an attempt to protect the tenant’s rights, the landlord’s rights could be seriously undermined, which would make it more unlikely that a landlord would lease his land in the future in order to avoid the effective loss of his property.

**Annabelle Ewing** (Mid Scotland and Fife) (SNP): John Lamont will obviously have read the committee’s wonderful report, which he was involved in producing. Paragraph 37, which refers to the oral evidence that was taken, mentions that not only the Scottish Tenant Farmers Association but the NFU Scotland indicated support for a broader definition. I felt that it would be helpful if I pointed that out.

**John Lamont**: That was very helpful, but it does not necessarily mean that I have to agree with that view. I agree with the cabinet secretary’s view that there could be unintended consequences. We must think very carefully before further reforming the definition.

I raised in committee the issue of the bill’s impact on the ability of landowners and prospective tenants to freely negotiate their tenancy agreements, and the impact that that has on new entrants. There is a view that the freedom to contract is being undermined. That is having an impact on the supply of land, which in turn has an impact on new entrants’ ability to come into farming.

Tenant farmers and landowners have told me that, because they are unable to negotiate freely, they are entering into short-term arrangements rather than secure tenancies. As a consequence, tenant farmers are not prepared to invest in the land and the farm steadings in the way that they would have done if they had the benefit of a more secure tenancy.

Given the drop in the number of tenancies, which we have heard about already, we should be
concerned that, by further interfering with the parties’ contractual freedom, we could be indirectly undermining the parties’ ability to enter into arrangements as they wish to. I know that that is not the Government’s intention, but we must keep the unintended consequences of such changes in mind when we consider further reform.

In the brief time that is available to me, I will focus on the lack of data. In January, the Government released figures that showed a 10 per cent drop in the number of holdings with tenancy agreements between 2005 and 2011. However, it became apparent during the committee’s scrutiny of the bill that there is an issue around the lack of accurate data in a number of areas, including rented land, which makes it much more difficult to understand fully the extent of the implications of the bill or of any possible future reform.

The briefing note from Scottish Land & Estates states that there is scepticism about those numbers, which show only a snapshot of the issue and fail to take into account that there are a number of destinations for the land once the tenancy comes to an end. Some of the land is bought back by the tenant, some is taken back to be farmed by the landowner and some is split to support existing businesses and current tenants. I agree with the committee report that the Scottish Government must, as a matter of urgency, work with the relevant parties to ensure that more accurate data is collected.

The fundamental issue is that we must get the balance right between the rights of the tenant and those of the landlord. The relationship between the two parties must be based on mutual respect and confidence in the other party, rather than leave those involved fearful of letting their land or unwilling to invest in their tenanted property.

The bill will make progress in the right direction, and we are happy to support it, but we must be careful about further reform.

15:05

Annabelle Ewing (Mid Scotland and Fife) (SNP): Although I have the privilege of being the deputy convener of the Rural Affairs, Climate Change and Environment Committee, I speak not on behalf of the committee but as an individual MSP. As the convener said, however, there is considerable common ground in the committee on both the narrowly framed bill and the need to look at the wider issues concerning agricultural tenancy law in Scotland. I refer members to paragraph 80 of the report, which states:

“The Committee recommends that, following the completion of this Bill, the Scottish Government continue to work with the TFF and other stakeholders, landowners and tenants across Scotland, to review the operation of agricultural legislation and address the other challenges facing the tenant farming community in Scotland as soon as possible.”

In the short time that is available to me, I will focus on a matter on which some progress on the detail is already being made: succession—which we have already heard a bit about—and, specifically, persons who would have putative rights to a tenancy on the death of the tenant. Currently, although the tenant can assign the tenancy to a wider group of people, upon the tenant’s death it is only “near relatives” who will be afforded protection as successor tenants, in that they can serve a counter notice following a notice to quit being served by the landlord. As we have heard, the phrase “near relative” is narrowly defined and does not currently include grandchildren of the tenant, but the bill proposes to extend that protection to grandchildren of the tenant. In doing so, it acknowledges the consensus that was reached in the tenant farming forum, which is the industry body that was set up inter alia to consider improvements in the operation of agricultural tenancy law and practice.

As I said in my intervention on Mr Lamont, others also spoke in favour of there being a wider definition when they gave evidence to the committee, including the Scottish Tenant Farmers Association and the National Farmers Union Scotland. Although the committee had sympathy with those who support a wider definition, it felt nonetheless that, in accordance with the very delicate compromise that was achieved by the TFF, we should forge ahead with the approach as it stands.

It is a matter of some disappointment to me that matters cannot progress more quickly, but taking into account the hard work that has been done to get us where we are, on balance it is more important to respect the consensus and hope that it spurs people in the TFF on to more speedy work and the creation of more consensus on the broader issues that have been alluded to.

We have also heard about the important issue of lack of data. In order to inform our debate on the way forward, we must secure accurate and meaningful data. Otherwise, we will have a debate that is based on assertions and speculative figures, which would be no help to anybody.

On a conciliatory note, I believe that Scottish Land & Estates is to be commended for its change of heart during the committee process—which the cabinet secretary mentioned—on when the extended succession provisions should apply. The matter is not expected to affect too many people in practice but, nonetheless, Scottish Land & Estates showed willingness to compromise on the issue, so it should be given the credit that it is due. I
hope that that signals a willingness to engage on the wider issues in the same spirit of consensus, because it is the wider issues to which we now need to turn.

I commend all the committee members for their hard work in producing a consensual report.

15:09

David Stewart (Highlands and Islands) (Lab):

It might seem to be a great leap of imagination to compare this consensual stage 1 debate on the Agricultural Holdings (Amendment) (Scotland) Bill with the radical, pioneering and tempestuous work of the Highland Land League of the 1880s, but I will show that there is a link, if members are patient.

As members will know, the Highland Land League was the radical crofters' movement that won a clutch of Westminster seats, including my home city of Inverness, in the 1885 general election. Members will probably know that the Highland Land League was instrumental in the passage of the Crofters' Holdings (Scotland) Act 1886, which gave tenants—mainly crofters—security of tenure, rights and compensation for improvements, which survive today. I understand that the league's best-known slogan was:

"The people are mightier than a lord".

It has a contemporary ring to it, and would not be out of place in this week's edition of the West Highland Free Press.

The relationship between landlords and tenants, access to land, security of tenure and the role of community ownership have all radically changed since the days of the battle of the braes, when the famous dispute between crofters and landlords on Skye in the 1880s culminated in that battle between the police and crofters. As members may know, that led to the Napier commission, which radically changed crofting legislation. Coming to the present day, one of the great successes of devolution has been community land buyouts, from the island of Eigg to Eriskay in the Western Isles.

I agree with other members that the bill is not, on the surface, contentious, but there are deeper and wider issues, which many members have raised. That was touched on in particular by the Scottish Tenant Farmers Association, which I will come to later.

I congratulate Rob Gibson—who, unfortunately, is not in the chamber—and his committee for their thorough work on the stage 1 report. As we have heard, the committee has asked the Scottish Government to re-examine the definition of "near relative" to consider including, for example, nieces and nephews.

As for rent reviews, the committee is right to support the removal of upward-only rent reviews. The other main substantive area in the bill is the disapplication of VAT-rate changes from being variations in rent that prevent rent reviews.

I welcome the theme that emerged in the committee's evidence sessions that the bill will not end the need for further reform of agricultural tenancy law. However, a number of fundamental issues need to be resolved in future legislation—dispute resolution being the main one. As members will know, until 2003 arbitration was a statutory requirement. The Scottish Land Court is—outwith the Court of Session appeal powers—the only body that is able to rule on disputes, but that is not a very practical option for most tenants. There has been only one order setting the rent in one rent review since the 2003 act came into force. Clearly, expense and time are huge barriers to tenant farmers.

What is needed? I believe that alternative cheaper methods of dispute resolution are required, including facilitated dispute resolution and mediation. Perhaps the minister could say whether other opportunities that could be helpful are available under the Arbitration (Scotland) Act 2010.

I am also concerned about the current tenancy laws. We have heard about the Court of Session ruling in the case of Salvesen v Riddell. Lord Gill ruled that section 72 of the Agricultural Holdings (Scotland) Act 2003 was not compatible with the European convention on human rights. The STFA's chairman, Angus McCall, has said that the mood among farm tenants is now one of despondency. That is not surprising, given how the law has failed them and is sending out the wrong messages to wealthy and powerful landlords. It is of great concern that talented and able young tenant farmers are being lost to the sector.

I support the bill, but it is a work in progress. Future legislation is required to deal with the issues of new entrants, access to land and dispute resolution.

15:13

Graeme Dey (Angus South) (SNP):

One issue that came through loud and clear in the committee's inquiries on the bill was that of land agents and their practices. In his evidence, NFUS chief executive Scott Walker summed up the situation when he said that

"it is extremely rare for the land agent to be breaking the law ... but we tend to find that some of their practices might leave a little to be desired".

He called for the introduction of
those generating this propaganda simply want to see the healthy working relationships. It is therefore apparent that reality is the vast majority of tenants and landlords enjoy constructive discussions around the tenanted sector. The those with a land reform agenda to hijack the current adhered to by all sides of the industry.

Andrew Wood of the Royal Institution of Chartered Surveyors advised the committee that the RICS already has rigorous guidance in place for chartered surveyors, but suggested that the problem is that “not all agents are chartered surveyors.”

He also pointed out that sharp practice does not happen solely among landlords, but that tenants’ agents can be equally guilty of it. Mr Wood undertook to work up and present a code of conduct to the TFF, with consideration being given to what he termed “the wider range of people who are involved in advising landlords and tenants and how they might deal with issues.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 18 January 2012; c 538, 539.]

It was the unanimous view of the committee that greater consistency in practice and behaviour among people who provide land-agency services—whether they act on behalf of landlords or agents, and irrespective of whether or not they hold membership of the RICS—is desirable; that the code must have teeth; and that the Scottish Government should monitor development of the code to ensure that it is fit for purpose. The commitment from the Government to work in partnership with the TFF during the development phase and then to assess the need for further strengthening once it is being utilised is therefore welcome.

It is also positive that Scottish Land & Estates has indicated a willingness to explore proposals to improve relations between tenants, agents and landlords. However, it should be said that that commitment might sit better were it not for the organisation’s other recent pronouncement on the subject. According to its chief executive officer, there is little evidence to support the recent claims regarding the behaviour of landlords and agents. In the organisation’s in-house magazine, he said:

“It is clear to us that there is a determined campaign by those with a land reform agenda to hijack the current constructive discussions around the tenanted sector. The reality is the vast majority of tenants and landlords enjoy healthy working relationships. It is therefore apparent that those generating this propaganda simply want to see the break-up of Scotland’s estates.”

Of course, not all landlords, or those who act for them, behave poorly, but it is to be regretted that SLE appears to adopt that view on such an important issue. The majority of landlord-tenant relationships might function adequately or even well, so to claim that things are almost entirely hunky-dory is somewhat wide of the mark.

The negative influence that individuals or organisations acting as land agents can have on landlord-tenant relationships should not be underestimated. I am aware of one situation in the north-east of Scotland in which a tenant family and their landlord enjoyed a first-class and problem-free relationship for many years. The landlord then changed land agents, after which plans by the tenants to install a wind turbine on their land were met by a demand from the new agent for a cut of the profits from the turbine, which created resentment and mistrust where none had existed. Perhaps more concerning for the wider rural community was that a halt was then called to plans for further diversification that had the potential to create new jobs in the community.

Better regulation of land agents is a must, as is consideration of dispute resolution, which the TFF identified as a priority. The Scottish Government’s commitment to consider the outcome of the work that is being undertaken by TFF member the Scottish Agricultural Arbiters and Valuers Association on developing a short-form rent arbitration system, is also welcome. As the stage 1 report makes clear, there is a need for an appropriate, fast and cost-effective dispute resolution mechanism.

The changes that were brought in by the Agricultural Holdings (Scotland) Act 2003 were widely supported at the time on the grounds that the existing set-up was too costly and overly bureaucratic. However, the situation today is that the Scottish Land Court is the only body that can rule on disputes, which is not a viable state of affairs, particularly for people in the tenanted sector. I understand that the Scottish Land Court has settled just one rent-review case since the act came into existence, which is proof—were it needed—that the present arrangements are not fit for purpose.

The Deputy Presiding Officer (John Scott): You must close now, please.

Graeme Dey: The TFF is looking to arbitration as a way in which to resolve that issue. I suggest that is the way forward.

15:17

Angus MacDonald (Falkirk East) (SNP): I am pleased to speak in this stage 1 debate. Although I am not a member of the Rural Affairs, Climate Change and Environment Committee, my Economy, Energy and Tourism Committee is working on the Land Registration etc (Scotland) Bill, and I have an interest in the agricultural sector, as I originally hail from a farming family from the Isle of Lewis, although that feels like a lifetime ago.
I am particularly pleased that the SNP Government is committed to supporting Scotland’s tenant farmers and to having a vibrant tenant farming sector in Scottish agriculture. Those of us who have followed the Scottish Government’s plans from day 1 in 2007 are heartened by the success to date of the measures to encourage new entrants into farming. In 2007, the SNP Administration was the first Administration to introduce a dedicated new-entrant scheme, which so far has resulted in 63 new entrants securing funding totalling more than £1.1 million. The funding can include interest-rate relief of up to £40,000, plus an establishment grant of up to £30,000, which is the maximum support that is allowable under European Union rules. The work of the tenant farming forum and the recommendations in its report “Assisting New Entrants into Scottish Farming” must also be acknowledged and appreciated.

I was extremely encouraged by the announcement last week that the Scottish Agricultural College is to deliver a new programme of activities, funded by the Scottish Government, to address concerns about the lack of new entrants to farming. I believe that the Scottish Government is aware of the calls for the development of a broader range of opportunities and the creation of new opportunities for the next generation of farmers. The Scottish Agricultural College will help to deliver the skills that are required to ensure that new entrants have the capability and confidence to develop and build successful businesses. That will enable new entrants to grasp the opportunities that are created by related initiatives that are run by other sector stakeholders.

Attracting and assisting new entrants to agriculture are seen as key components in ensuring that Scottish agriculture continues to be a dynamic and competitive industry. That is acknowledged by a number of organisations, including the NFUS, Forestry Commission Scotland, Scottish Land & Estates and the Crown Estate.

The Scottish Agricultural College’s senior business consultant Douglas Bell, who will manage the new programme, has said:

“It is important that potential new entrants are aware of possible opportunities, including industry initiatives and that they have the knowledge and skills to take advantage of them. They need encouragement and an awareness of their supply chain as well as the skills to identify and capitalise on business opportunities.”

The new programme will be available to new entrants from April this year and, this autumn, the potential new entrants will be invited to a starter workshop, which will be delivered in four locations in Scotland. That collaborative workshop will offer an overview of support measures and knowledge of the issues that are involved in getting started.

Next year, there are to be a series of guidance notes and a dedicated website for new entrants. Throughout the project, a number of case studies will be developed to illustrate the range of entrant opportunities, show how barriers were overcome and identify key success factors. We wish the SAC well with it. It is “a project which will help to contribute to the long term viability of rural communities ... It offers an opportunity for a new generation of farmers ... to play their full part in achieving sustainable growth through food production and the environmental management of agricultural land”.

I congratulate the Scottish Government on introducing the initiative.

I am pleased to note that members of the Rural Affairs, Climate Change and Environment Committee have highlighted the urgency of the situation and the need to reverse the current trend of falling numbers of agricultural tenancies, which requires long-term policy making. I note that the committee highlighted issues that Scottish Land & Estates raised regarding possible negative consequences of provisions in the Land Registration (Scotland) Bill—which is currently going through the Economy, Energy and Tourism Committee—on landlords and tenants who enter limited-duration tenancies of longer than 20 years, and I note the cabinet secretary’s response. The Economy, Energy and Tourism Committee will take note of that—in particular, the request from the Rural Affairs, Climate Change and Environment Committee that there be regular communication between officials.

15:21

Jim Hume (South Scotland) (LD): I declare a farming interest.

The provisions in the Agricultural Holdings (Scotland) Bill are overdue. It is important that trust between tenants and landlords be restored in order to ensure that more land is let to farmers. It is worrying that the Government publication that the minister mentioned revealed that there are 10 per cent fewer holdings in Scotland now than there were six years ago. Indeed, the Rural Affairs, Climate Change and Environment Committee’s stage 1 report on the bill stated that the Government still has much work to do to attract new entrants.

The policy memorandum for the bill states that it is intended “to create a better environment for the letting of farmland”.

I will speak briefly about the first two of the three provisions, because the third provision, which concerns VAT, is mainly consensual.
The first provision concerns extension of the definition of “near relative” from a spouse, civil partner or child to include grandchildren. Although the tenant farming forum has endorsed that provision, it is clear from the evidence that the committee received that there are diverging opinions. The Scottish Tenant Farmers Association and NFU Scotland would like the definition to be extended to include, perhaps, nieces and nephews, whereas Scottish Land & Estates draws a line in the sand after the inclusion of grandchildren. I acknowledge the committee’s recommendation that the Government re-examine extending the definition, but I recognise the compromise provision that is outlined in the bill and the importance of injecting trust back into land letting. As the committee has said, any movement on that could risk destabilising the consensus.

There is also a divergence of opinion on when the changes to the definition of “near relative” should come into force. As it stands, the new succession provisions will not come into force until two months after royal assent, but most TFF members believe that the changes should apply if a tenant has died before the act comes into force but the acquirer of the lease is still to give notice. I do not believe that to permit that would be an example of retrospective legislation, and I support the committee’s call for the Government to reconsider the issue at stage 2. I would be grateful if the cabinet secretary could shed some more light on that today.

The second provision concerns the prevention of upward-only and landlord-only initiated rent reviews. I was surprised to learn that a number of upward-only rental agreements are in place, but that fact is not sufficient to prevent Parliament from legislating against such agreements being used in the future. Holdings agreements need to be market led, and there should be scope for tenants to request a rent review and to negotiate the price down if there are legitimate business reasons for doing so.

The available data on the amount of land that is rented was highlighted during the committee’s scrutiny of the bill. In committee, I highlighted the agricultural censuses that come out in June and December, which could be used to gather that information. I welcome the cabinet secretary’s admission that there is a problem with the data, and I look forward to the Government addressing it in the future.

Like the Government and the TFF, I am keen for the measures in the bill to become law as soon as possible. I was disappointed when they were not introduced in last year’s order, but the bill has been shaped by the sector and I acknowledge the good work of the TFF that has brought us to this point.

The Scottish Liberal Democrats will vote for the bill to progress to stage 2. As for the Salvesen v Riddell case, which the cabinet secretary mentioned, obviously it is sub judice, but a judgment is about to be made on it. If the decision goes against the Government, I would support it in any move to appeal.

15:25

Dennis Robertson (Aberdeenshire West) (SNP): As many members have already discussed the “near relatives” provision in the bill, I will not go down that route. Instead, I want to focus not on the legislation itself but on attitudes. In its briefing, Scottish Land & Estates paints a picture of itself as being ruthless. It is not for me to say whether landlords on estates in Scotland are ruthless but, as Jim Hume pointed out at the start of his speech, we need to consider the issue of trust. It is very important that landlords and tenants trust each other, but the fact is that such trust does not seem to exist at the moment; indeed, there is a degree of mistrust, with tenants feeling that they do not have the say that they should have.

I welcome TFF’s work. I certainly think that it is the right body to progress the agenda and so I urge it to examine attitudes and the relationships between our landlords and tenants. After all, if we are to move forward and if the legislation is to have the hoped-for impact, we must ensure that the attitudes of both parties are more agreeable than they are at the moment.

David Stewart: Does the member share my view that tenants are concerned about Lord Gill’s decision in the Court of Session, which effectively says that the Scottish Parliament’s first civil act was actually outwith its legislative competence? In other words, the 2003 act needs to be remedied—and soon.

Dennis Robertson: We are moving forward and the bill and amendments to it will try to address what happened in 2003.

We certainly need to consider the arbitration provisions in the 2003 act. There is a voluntary code of arbitration, but I am not sure that our tenants know about the process and about how to enter into it, so they need to be given more information in that respect.

We must encourage more people into our vibrant and world-class farming community. As the cabinet secretary said, there is no doubt that Scotland’s produce is the finest and the best; produce from nowhere else in the world can compare. However, we must ensure that, through the legislation, we protect the future of tenants in farming.
I endorse Claire Baker's comments and welcome the RSPB's proposal for conservation tenancies. That kind of diversity is part of the future for our tenant farmers and I hope that the cabinet secretary will encourage such an approach in his discussions with the TFF.

15:29

Margaret McDougall (West Scotland) (Lab):
The bill aims 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 the sector by making three main changes to the existing legislation. First, it seeks to amend the definition of "near relative"; secondly, it will prevent certain restrictions with regard to rent reviews in limited duration tenancies; and thirdly, it will disapply VAT-rate changes and options to tax as being variations in rent that prevent rent reviews. I will discuss those three changes individually.

The bill aims to expand the definition of "near relative" to include grandchildren; the definition currently covers only a surviving spouse, a civil partner or a natural or adopted child. Although the committee agreed unanimously on the need to widen the definition, there was debate about whether the bill goes far enough. I agree with the Scottish Tenant Farmers Association and the NFUS, which want the definition to be widened, there was debate about whether the bill goes far enough. I agree with the Scottish Tenant Farmers Association and the NFUS, which want the definition to be widened further. In its evidence to the Rural Affairs, Climate Change and Environment Committee, the STFA stated that it wants the definition "to be extended beyond a grandchild to include nephews and nieces."

The NFUS noted:

"It seems a little bit strange that, during your lifetime, you can assign a tenancy to a wider class of people, yet, at the point of your death, it is restricted to certain categories."—[Official Report, Rural Affairs, Climate Change and Environment Committee, 18 January 2012; c 520, 522.]

I see no practical reason why the definition of "near relative" cannot be extended. Fears were expressed by Scottish Land & Estates that extension could destabilise the balance between the rights of landlords and the rights of tenants, but that would be unlikely if the definition were extended just to nephews and nieces. That part of the bill needs to be explored further.

We must be careful in applying transitional provisions retrospectively. Applying legislation retrospectively seems to be a bad idea, and if the bill were to be applied retrospectively it would need to be extremely clear about whom it would and would not affect, in order to avoid any confusion. I welcome the Government's commitment to lodge an amendment to clarify that at stage 2.

There is widespread support for the provision on rent reviews. In its written submission, the STFA argued that

"This proposal will remove the disadvantage felt by tenants finding themselves in a position of weakness when negotiating the terms of a lease in a sellers' market and having to agree to such conditions."

Although there is no empirical evidence of any such upward-only or landlord-only rent review clauses, it is known that such leases exist. They may be only small in number, but they need to be tackled. Although the provision might restrict some freedoms in negotiating contracts, it should have no unforeseen negative effects. Therefore, the committee welcomes the change for now, as long as it is not retrospective.

The provision that disqualifies VAT-rate changes and options to tax from being variations in rent that prevent rent reviews was supported in almost all the evidence that was submitted to the committee. The STFA notes that the changes will "bring Scotland in line with England", and the committee fully supports the changes, and sees no issues with them.

There are still some issues with the bill, and certain aspects need to be refined. However, the committee currently agrees with the provisions, although more evidence needs to be taken on what some of them would mean in practice and whether further changes need to be made. I welcome the cabinet secretary's meeting with the TFF next week and hope that it will be fruitful in relation to land availability and support for new tenants.

15:33

Mark McDonald (North East Scotland) (SNP):

Presiding Officer, as a former member of the Rural Affairs, Climate Change and Environment Committee—although, to be frank, if you had blinked, you would have missed me—I always take great pleasure in contributing to rural affairs debates, especially because I represent North East Scotland, which has a vibrant farming sector.

I will focus on the issue of new entrants, which has come up quite a lot in the debate and is vital to the emphasis behind the bill. The point was made by Dennis Robertson that in no way should the bill, or any attempts to improve the situation for tenants, be viewed as a threat to landlords. In improving the situation for tenants and new entrants, we also have the opportunity to improve the situation for landlords. Given the decline in the number of tenancies, anything that we can do to boost that will improve the situation for many landlords.
It is fair to say that there is wide recognition among parties and stakeholders that something needs to be done to improve the situation and encourage new entrants. I note with interest that the committee said in its report, at paragraph 87, that

“attempting to reverse the current trend of falling numbers of agricultural tenancies will require long-term policy making, using a range of tools, including legislation.”

The committee’s comments acknowledge that although the bill will make a welcome contribution, other aspects will need to be looked at if we are to encourage new entrants into the tenant farming sector. I do not think that any member disagrees with that.

David Stewart: The Court of Session overturned the Scottish Land Court in relation to the role of single farm payments and argued that they are a factor in open-market rents. Does the member share my concern that that will affect new entrants’ ability to get into the market?

Mark McDonald: A number of factors prevent new entrants from coming into the sector—I certainly do not think that there is just a single contributory factor in that regard. I will come on to that.

Ideas will no doubt come forward from many places on how to encourage new entrants and on how to encourage landlords to take on tenants and give them land. I will throw out what I hope is a constructive suggestion from the NFU in my area—North East Scotland—which is that priority be given by landlords to new starts in relation to rural priorities, as part of the Scotland rural development programme. That approach would be attractive to landlords, because there would be more likelihood of investment if they leased to a new-start tenant. The potential for a new-starts category could be looked at, as part of the wider picture.

Dave Stewart and Alex Fergusson—in intervening on Rob Gibson—raised the parity of tax regime but disparity of outcome that exists north and south of the border. There is no silver bullet. I have heard complaints from farmers in my region about the difficulty of obtaining finance from the banking sector. Where we can apply specific Scottish solutions, we should consider doing so. I look forward to that debate taking place.

15:37

Alex Fergusson (Galloway and West Dumfries) (Con): This has been a welcome debate on the general principles of the Agricultural Holdings (Amendment) (Scotland) Bill.

I am happy to welcome the three changes to the current law that the Government is seeking to introduce through the bill. As we heard, the Government proposes, first, to amend the definition of a “near relative” who may succeed to a secure agricultural tenancy, to include grandchildren; secondly, to prevent certain restrictions for rent reviews; and thirdly, to disapply VAT rate changes and options to tax as variations in rent that prevent rent reviews. The proposals are to be broadly welcomed and there will be no argument or opposition to them from the Conservative benches.

There is much to be applauded in the committee’s stage 1 report, but I have reservations about some of the committee’s thoughts and recommendations, on which I will concentrate. In doing that, I am transported back to the heady days of the previous Agricultural Holdings (Scotland) Bill—those halcyon days when I convened the Rural Development Committee and the cabinet secretary and indeed the Minister for Environment and Climate Change were but enthusiastic members of it—[Interruption.] Oh, they were happy days, Mr Gibson.

During the debate on the previous bill, which was somewhat hijacked by the current Minister for Energy, Enterprise and Tourism’s enthusiastic advocacy of the absolute right to buy for agricultural tenants, I warned that, although no one wanted a reinvigorated, vibrant and effective tenanted sector more than I did, Ross Finnie’s genuine attempts to bring that about would be more likely to have the opposite effect. All these years later, it gives me no pleasure to say that I appear to have been proved right. The number of let farms has fallen dramatically. That has happened for a number of reasons, but I think that I can safely say that a principal reason is the suspicion of the right to buy that still exists, which has stifled an important sector for the past decade.

However, there is good news. There is at long last a glimmer of light at the end of a particularly long and dark tunnel. Through sitting together in the tenant farming forum, all parties are slowly but surely achieving agreement and trust—several members have rightly mentioned trust—and are finally beginning to break the deadlock that has existed for the past 10 years. The prize is immense because, if we allow the tenanted sector truly to flourish, then we solve the new entrants problem, or much of it, at the same time.

For generations the tenanted sector has provided the door into agriculture, but we politicians have done a lot to close that door. I think that it is up to us politicians to try to open that door again. That is why I shudder at the thought of any attempt to extend the definition of “near relative” and why there is still a degree of nervousness among those who have land to let
that, if they let it, it could be lost to them for ever through the introduction of a right to buy.

I heartily commend the cabinet secretary’s efforts to resist those possibilities. If he, too, genuinely wishes to bring about a reinvigorated, sustainable and vibrant tenanted sector, he must continue to resist. If he does, he will have our solid support. The way to success is surely through agreement in and through the tenant farming forum. Anything that is imposed from outside, be it by Government, by Parliament, by committee or by any other body, will simply extend the current difficult situation. Frankly, that would do nobody any good at all.

15:41

Claudia Beamish (South Scotland) (Lab): I am pleased to speak in this debate, which is so significant for Scotland’s vibrant agriculture sector.

I thank the cabinet secretary for setting the context and Dave Stewart for giving us an historical update. I commend the tenant farming forum for working towards a consensus on these challenging issues from a wide range of perspectives. As has been highlighted by a number of members, the committee broadly welcomes the three proposals in the bill and Scottish Labour will support the bill at stage 1.

Section 1, “Succession by near relatives”, defines “near relative”. Margaret McDougall and other members dealt in some detail with the issue, on which there are differing views. I stress that, although the committee wishes to show respect for the TFF consensus wherever possible and is keenly aware of the need to support a fair way forward for landlords and tenants, Scottish Labour finds it disappointing that the Scottish Government is unable to support the committee’s recommendation that the Government re-examine the issue and seek further comment from the TFF and its individual members ahead of stage 2.

Alex Fergusson: Why does the member feel that disharmony would be a good thing in an area—that is, the TFF—where harmony exists?

Claudia Beamish: That is certainly not what I am saying. Whenever consensus is possible, it is an excellent idea. However, a range of perspectives must be taken into account, which is what the committee has done, listening very carefully. The consensus is important, but it is also important that we take account of views as a committee, which is what we did. We simply ask the Scottish Government to look again at the issue of the definition of “near relative” at stage 2.

On a more positive note, the committee believes that it is good that the Scottish Government will introduce a stage 2 amendment on the transitional provisions.

The committee notes the widespread support for the provision on rent reviews and supports the removal of upward-only rent reviews and landlord-only initiation of rent reviews in a limited duration tenancy, believing that to be a positive and welcome measure. I note the cabinet secretary’s announcement of the meeting on 4 April, and I wish him and all those involved well in their deliberations.

The committee notes the unanimous support for section 3, “Effect of VAT changes on determination of rent”. As the cabinet secretary stressed in his opening remarks, the provision is in the interests of both landlords and tenants.

The committee received evidence on and discussed a number of important issues that lie beyond the scope of the bill, which my colleague Claire Baker and other members have highlighted. Annabelle Ewing emphasised the committee’s unanimous view in recommendation 80 that it is important that we continue to look at the issues from all perspectives to try to resolve them in the fairest way possible. I share the concern that our convener, Rob Gibson, expressed about the fact that some of those who submitted evidence felt the need to withhold their name. I would simply like that noted in this debate.

I welcome the Scottish Government’s acknowledgement of the committee’s concern about the lack of available data on many issues. It is essential that that situation is addressed. The committee suggests that the Scottish Government and the TFF should re-examine the issue of investment in holdings in order to clarify who is responsible and find the most appropriate balance for the creation of a vibrant and healthy tenant farming sector, while of course taking landlords into account.

As I live in rural Clydesdale, I am keenly aware of the barriers that are faced by new entrants to farming—by relatives of farmers and totally new farmers. The committee believes that the bill makes a modest contribution in relation to new entrants but is concerned about the decline in the number of agricultural tenancies in that regard and for broader reasons.

Along with others, I have spoken in support of a register of new tenants, and I am pleased that that will be taken forward. I welcome the Scottish Government’s commitment to plans to develop the new advisory service for new entrants in April. I hope that the Government will find funding for that.

The committee supports further examination of conservation tenancies, which Dennis Robertson and my colleague Claire Baker highlighted. They are vital if we are to have new tenants and new entrants on environmentally supported land.
The committee wants a code of practice to apply to all land agents, whether or not they are members of the Royal Institution of Chartered Surveyors. As Graeme Dey emphasised, greater consistency of practice is essential.

SLE’s concerns about the break-up of estates seem misplaced but, as a way forward, the committee needs to assess the on-going scrutiny and change and to take all sides into account.

The committee believes that clarity is needed on waygo compensation as a matter of urgency. I hope that the Scottish Government will progress that.

The committee suggests that more legislation might well be needed on landlord and tenancy issues. The Scottish Government acknowledges that but says that that legislation is unlikely in this parliamentary session. That might well be acceptable for the consolidation of legislation but, in view of the uncertainty that the recent Scottish Land Court and appeal court cases have created, it is essential for the Scottish Government to look at the issue again, in order to clarify the position in relation to the 2003 act.

Dennis Robertson asked for information on disputes to be available to all parties. Any disputes that can be kept out of the courts should be kept out of them, given the time that court cases take from the lives of all concerned and given the cost.

The Deputy Presiding Officer: I ask you to close now, please.

Claudia Beamish: The committee supports calls for disputes to be looked at again. The Scottish Government expects the issue to feature in the new work plan, and the outcome will be looked at in future work.

The Deputy Presiding Officer: Thank you very much. That is excellent.

15:47

Richard Lochhead: The debate has been good. Many issues have been discussed that have been discussed for decades. David Stewart even took us back to the 1880s—a period that he remembers well. That indicates that some of the difficult and complex debates that we have had have been going on for more than a hundred years.

David Stewart: As he kindly compared me to someone from the 1880s, will the cabinet secretary give way?

Richard Lochhead: I will give way as a one-off.

David Stewart: Will the cabinet secretary clarify the position on Lord Gill’s judgment? I take it that the cabinet secretary is reluctant to make decisions about on-going court cases, but Lord Gill has made a ruling, so the case is not sub judice. Is the cabinet secretary looking to correct the 2003 act so that it is compatible with the ECHR and still protects tenants who are in limited partnerships?

Richard Lochhead: As the member knows, Lord Gill made a judgment on one element of the 2003 act. The member might have given the impression that the judgment related to the whole act, which I am sure he knows is not the case. We are considering our options. As I said in my opening speech, one option is seeking leave to appeal. We will keep Parliament updated on the course of action that we decide to take.

I congratulate the Rural Affairs, Climate Change and Environment Committee on its stage 1 report. The committee handled a lot of difficult and complex issues. The report was useful, particularly as it raised many issues that are outwith the bill’s scope but which the committee feels that the Government and the Parliament should look at. In my opening speech, I gave the commitment that we will look in the near future at many of the issues that the committee raised.

Like others, I commend the tenant farming forum. It involves many people and organisations that have different perspectives and backgrounds. It has been good that they have been willing to get round the table in the past few years to discuss many difficult issues that involve many vested interests. That helped the Government to conclude that it should introduce the measures that it brought forward in 2010 and those that are in the bill.

I remind members that we introduced a number of measures in 2010 that should help by giving more flexibility. They should help landlords to reach the conclusion that they should make more tenancies available and give tenants more security of tenure, given some of the issues that they face with their tenancy agreements. We replaced the two-man rule with a requirement for a viable unit, which the tenant farmers required; annulled post-lease agreements; reduced the minimum length of limited duration tenancies from 15 years to 10; allowed conversions of short limited duration tenancies to limited duration tenancies; and, of course, amended some of the fixed equipment provisions. On top of what we are debating, I hope that those measures give more comfort to landlords and tenants and will help to create more tenancies in the future and make both sides feel more comfortable with the current legislation.

It is key that we do everything that we can to increase the availability of land, as many members have mentioned, and to increase the number of tenancies that are available to help new entrants to get on the first rung of the ladder. At the moment, if a person’s family is not already
involved in farming or if they are not from a very rich family, it will be difficult for them to get hold of land other than by means of a tenancy to enter farming. That is a challenge, as we all recognise that we want to attract new blood into agriculture in Scotland. Various issues impact on people’s ability to get involved in agriculture, but the availability of tenancies and therefore land is a key issue. I appeal to everyone who has influence on the matter, particularly landowners, to look at what they can do to make more land available. I have met landowners who are 100 per cent behind the aim of ensuring that more tenancies are made available on their land—that represents proactive and forward thinking—but, unfortunately, I have also met landowners in Scotland who are 100 per cent behind the opposite direction. They want less land to be made available for tenants on their own holdings, and they want to clear their land of responsibilities, and I think that most members which must feel that there is a benefit from it. That is not healthy, and it is clear that we want to discourage that.

Alex Fergusson: Does the minister accept the broad principle that one is entitled to do as one wishes with one’s own property, whether it is a house or land for let or otherwise? As members have said, what is needed is a degree of trust that will allow people to let land as they might wish to do, and as the cabinet secretary and I would wish credit is due —

Richard Lochhead: I agree that a degree of trust is needed. Of course, we recognise that we are often talking about commercial relationships, in which there are two contracting parties, both of which must feel that there is a benefit from it. However, land ownership clearly brings extra responsibilities, and I think that most members recognise that it brings a social responsibility, if not also a moral responsibility, to help to make that land available and ensure that it is used productively for the benefit of the nation. That is an important principle to which many members would adhere, and that is why the issue that we are debating is important.

I am pleased that the Scottish Government is meeting its commitment to make more land available. As many members are aware, Forestry Commission Scotland is seeking applications for new entrants to farm small units of land on the national forest estate and—to give credit where credit is due—the Crown Estate has put four farms on the open market for let under a mixture of different types of tenancy. I hope that that will be a positive development for the rural communities concerned in Dumfries and Moray. Indeed, some estates in the private sector have also stepped up their efforts—I alluded to that before. We welcome the decision by Buccleuch Estates to let out 17 lots of farming land on its Queensberry estate in Dumfriesshire, and we hope that others will follow its example and that it will lead to positive developments. We want such arrangements to provide greater security for tenant farmers and to encourage long-term investment.

As many members have said, the availability of land is not the only obstacle for new entrants to agriculture. There is also the common agricultural policy, which is currently being renegotiated. CAP support is based on historical levels of payments, of course, so if farmers did not farm prior to 2002-03, they do not receive any support. They will have no access to land and tenancies or to support through the CAP.

The Scottish Tenant Farmers Association proposes to strengthen the double gate link to 2011 under the new CAP proposals. That suggests a possible way of dealing with the new entrant situation. I should explain to members that the double gate ruling means that, to qualify for new support under the new CAP, a person must have claimed at least one single farm payment entitlement in 2011, and they must put in a claim under the new system in 2014. That is known as double gate provision. As things stand, there will be little provision in the new proposals for anyone who enters farming after 2014. We want a policy that provides support to everyone who is farming, irrespective of when they entered farming.

We are taking many more steps to help new entrants. We have given support to the Scottish Agricultural College to provide a broader package of advisory support to new entrants, which will help to attract new blood into the industry. In addition, the Scottish Government is working with the industry to create a register of new entrants. Rob Gibson mentioned the need for that. A matchmaking service is perhaps required so that landowners who feel that they can make tenancies available will know who is looking for a tenancy. If we can help to support that, that will be a good thing as well.

In my opening speech, I touched on many of the issues that members raised. There are many other outstanding issues that are not addressed in the bill, but I have given a commitment that they will be addressed in the current five-year session of Parliament. We are at the beginning of a journey through the five-year session. Today, we have debated some measures that will help with the situation, but there is a lot more work to do. I accept that, and I know that the Parliament accepts it, too. However, at the heart of everything that we do in connection with improving tenancies and the tenancy sector in Scotland must be justice and fairness, as some members mentioned.

The Deputy Presiding Officer: I would be grateful if you would close now, please.

Richard Lochhead: We should recognise that many landlord and tenant relationships are ticking
along just nicely, but many are not, and those are the ones that we have to address. I thank members for their comments and their constructive support, and I commend the motion to the Parliament.
Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 6  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 4

Richard Lochhead

1 In section 4, page 2, line 10, leave out from <deceased> to <died> and insert <landlord of the tenancy in question is given notice of the tenant’s acquisition of the right to the lease of the agricultural holding (under section 11(2) or 12(1) of the Agricultural Holdings (Scotland) Act 1991)>
Present:

Claudia Beamish
Nigel Don (Committee Substitute)
Alex Fergusson
Jim Hume
Dennis Robertson

Graeme Dey
Annabelle Ewing (Deputy Convener)
Rob Gibson (Convener)
Margaret McDougall

Also present: Richard Lochhead, Cabinet Secretary for Rural Affairs and the Environment.

Apologies were received from Richard Lyle.

Agricultural Holdings (Amendment) (Scotland) Bill: The Committee considered the Bill at Stage 2.

Amendment 1 was agreed to (without division).

The following provisions were agreed to without amendment: sections 1, 2, 3, 5 and 6 and the long title.

Section 4 was agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.
The Convener (Rob Gibson): Good morning, everybody. Welcome to the 13th meeting in 2012 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off their mobile phones and BlackBerrys, as leaving them in flight mode or on silent will affect the broadcasting system.

We have received apologies from Richard Lyle, whom Nigel Don is substituting for.

Agenda item 1 is stage 2 consideration of the Agricultural Holdings (Amendment) (Scotland) Bill. I welcome the Cabinet Secretary for Rural Affairs and the Environment, Richard Lochhead, and his officials to the meeting. I invite him to introduce his officials.

The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead): Good morning. Given the topic, I have various legal representatives with me. Michael Anderson, Jonathan Brown, David Barnes and Fiona Leslie are the officials who are dealing with the bill.

It is good to be at the committee's 13th meeting. I am sure that it will not be unlucky for some.

The Convener: Excellent.

We move to consideration of the marshalled list of amendments. We will consider the bill in the following order: sections 1 to 6 and then the long title.

Sections 1 to 3 agreed to.

Section 4—Transitional provisions

The Convener: Amendment 1 is in the name of the cabinet secretary.

Richard Lochhead: As members know, during the stage 1 debate and in the Scottish Government’s response to the Rural Affairs, Climate Change and Environment Committee’s stage 1 report on the bill, I promised to lodge an amendment following my assessment of the evidence given by witnesses at stage 1 and by the committee in its stage 1 report.

As the committee knows, the bill marks the final stage in the implementation of recommendations made to the Scottish Government by the tenant farming forum. Those recommendations, a number of which have already been taken forward by an order under the Public Services Reform (Scotland) Act 2010, represent an agreed and carefully negotiated set of proposals that command stakeholder support from across the tenant farming sector.

When a secure agricultural tenancy passes, under the law of succession, the person succeeding must give notice of the acquisition to the landlord. Depending on the circumstances, that notice is given under section 11 or 12 of the Agricultural Holdings (Scotland) Act 1991. There is then scope for the landlord to serve a counter-notice and for the matter to be referred to the Scottish Land Court. Once the person has succeeded, under section 25 of the 1991 act, the landlord remains entitled to serve a notice to quit on the successor tenant farmer.

When the successor tenant farmer is not, as referred to, a “near relative” of the deceased tenant farmer, that notice is incontestable. When the successor tenant farmer is a near relative, the successor is entitled to serve a counter-notice, requiring that the Scottish Land Court consents to the operation of a notice to quit. In other words, near relatives enjoy a degree of protection that other successors do not.

Currently, the definition of a “near relative” includes a surviving spouse, a surviving civil partner and a natural or adopted child of the deceased tenant farmer. Section 1 of the bill amends that definition to include grandchildren. That change will help to meet our objective of widening the class of people entitled to that degree of protection when succeeding to an agricultural tenancy under the 1991 act. It will make it easier for grandchildren to inherit farm tenancies and will help new and younger entrants to get a start in tenant farming, which I think all members would agree will be beneficial to the wider industry.

Section 4 contains transitional provisions and section 4(1) contains the relevant provisions in relation to section 1. It currently provides for the change in the definition of a “near relative” in section 1 to have effect only where the death of the tenant farmer occurs after the bill comes into force. Amendment 1 will change that transitional provision so that it will now apply when the notice under section 11 or 12 of the 1991 act by which the successor tenant farmer acquires the tenancy is given on or after the date on which section 1 comes into force. Therefore, section 1 will now also cover circumstances in which the death of the tenant farmer occurs before the bill comes into force.
force but the process of acquisition by the successor is not complete.

The change is likely to benefit only a small number of individuals; nevertheless, it will afford those individuals and their families the same level of protection as all grandchildren will have in future.

Amendment 1 also gives effect to the views of the key members of the TFF. In line with the recommendations of the committee in its stage 1 report, the amendment is not involved in the passing of retrospective legislation; rather, it alters the point in the process to which the section applies.

For those reasons, I ask the committee to support the amendment.

I move amendment 1.

**Alex Fergusson (Galloway and West Dumfries) (Con):** I was not a member of the committee during earlier consideration of the bill, so I ask you to forgive my lack of understanding, cabinet secretary, but I think that I have just heard you say that this is not retrospective legislation. I have no problem with the impact of the amendment and I certainly do not intend to oppose it, but I have one or two concerns about the retrospective nature of what is being done. Could you expand on why you say that this is not about making retrospective legislation, if, indeed, that is what you said?

**Richard Lochhead:** It is not retrospective because the provision will apply only to situations that arise after the act comes into force. However, it changes the emphasis and puts it on the launching of the notice as opposed to the point at which the tenant farmer dies. If the amendment is agreed to, it will not matter whether the tenant farmer dies before or after the act comes into force; however, the notice will have to be served after the act comes into force. Had the provision been retrospective, it would have applied to all circumstances that arose before the bill came into force, but we took the decision not to take that approach. Before, what mattered was when the tenant farmer died. Now, it does not matter whether the tenant farmer dies before or after the act comes into force; what matters is when a notice is served.

**Alex Fergusson:** But there will still be an impact on a situation that could have occurred before the bill comes into force.

**Richard Lochhead:** Yes, as regards when the tenant farmer died.

**Alex Fergusson:** I would have thought that some of your legal representatives and others could have had considerable discussion about whether that is retrospective.

**Richard Lochhead:** The amendment places the emphasis on the point at which the notice to quit is served, but the situation could involve a farmer who died before the act came into force.

**Alex Fergusson:** So there is a retrospective element to it.

**Richard Lochhead:** In respect of the circumstances that lead to the notice to quit, but not in respect of the actual notice to quit.

**Annabelle Ewing (Mid Scotland and Fife) (SNP):** I recall the evidence that we took at stage 1 on this specific issue. We had an interesting discussion on this point. The view that was expressed by Scott Walker, the chief executive of the National Farmers Union Scotland, was that the proposal was not retrospective. I recall that there was support for such an amendment across the representatives on the tenant farming forum, with the exception of Scottish Land and Estates. However, I see from the explanatory note to amendment 1 that Scottish Land and Estates has said that, in the interest of the bill proceeding, it would be able to live with the amendment. I hope that I have not misrepresented anyone’s view.

**Jim Hume (South Scotland) (LD):** On that point, I may be wrong—and I am not speaking for Scottish Land and Estates, either—

**Alex Fergusson:** Nor am I.

**Jim Hume:** I think that Scottish Land and Estate’s opposition to retrospection was based on the provision going back perhaps five years—members may correct me if I am wrong. However, if my understanding is correct, the proposal does not seem to be legally retrospective.

**The Convener:** As members have no other points, I ask the cabinet secretary to wind up.

**Richard Lochhead:** I thank the committee again for the opportunity to move amendment 1. I listened closely to the committee’s views before lodging it.

This is a useful opportunity to confirm that I will be back in contact with the committee on many of the wider issues that face tenant farmers, which we have previously discussed, and as we look to progress the TFF’s on-going work. As members may know, the TFF is putting in place work plans on quite a good timescale to make recommendations to me, as cabinet secretary, and the committee. It will consider some issues that relate to recommendations in the committee’s report, such as extending the definition of a near relative and rent reviews. I give the committee that assurance.

In the meantime, I welcome the committee’s support—I hope—for this important amendment, which will make a difference to a small number of
families in respect of an issue that the committee flagged up to the industry and to me, as cabinet secretary.

Amendment 1 agreed to.

Section 4, as amended, agreed to.

Sections 5 and 6 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank everyone for their brevity.
Agricultural Holdings (Amendment) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to amend the law governing succession to agricultural tenancies and the review or variation of rent under such tenancies.

Succession

1 Succession by near relatives

In paragraph 1 of Part III of Schedule 2 to the Agricultural Holdings (Scotland) Act 1991 (c.55), for the definition of “near relative” substitute—

““near relative” in relation to a deceased tenant of an agricultural holding, means a surviving spouse, civil partner, child or grandchild of that tenant;”.

Review of rent etc.

2 Prohibition of upward only rent reviews etc.

In section 9 of the Agricultural Holdings (Scotland) Act 2003 (asp 11), before subsection (1) insert—

“(A1) Where, by virtue of any provision, a review of rent due as payable under a lease constituting a limited duration tenancy—

(a) may be initiated only by the landlord; or

(b) may only determine that the rent is to be increased,

the provision concerned is void and the rent due as payable under the lease is instead to be reviewed and determined in accordance with this section.”.

3 Effect of VAT changes on determination of rent

In section 13(9) of the Agricultural Holdings (Scotland) Act 1991, after paragraph (c) insert—

“(d) a variation of rent arising from—

(i) the exercise or revocation of an option to tax under Schedule 10 to the Value Added Tax Act 1994 (c.23); or
(ii) a change in the rate of value added tax applicable to grants of interests in or rights over land in respect of which such an option has effect.”.

General

4 Transitional provisions

(1) The amendment made by section 1 has effect in respect of a notice to quit given in accordance with section 25(2) of the Agricultural Holdings (Scotland) Act 1991 only if the landlord of the tenancy in question is given notice of the tenant’s acquisition of the right to the lease of the agricultural holding (under section 11(2) or 12(1) of the Agricultural Holdings (Scotland) Act 1991) on or after the day on which section 1 comes into force.

(2) The amendment made by section 2 has effect only in respect of a provision for review of rent made on or after that section comes into force.

(3) The amendment made by section 3 has effect in relation to a variation of rent arising from the exercise or revocation of an option, or a change in rate of value added tax, that takes effect before that section comes into force.

5 Commencement

(1) This section and section 6 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force at the end of the period of 2 months beginning with the day of Royal Assent.

6 Short title

The short title of this Act is the Agricultural Holdings (Amendment) (Scotland) Act 2012.
Agricultural Holdings (Amendment) (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to amend the law governing succession to agricultural tenancies and the review or variation of rent under such tenancies.

Introduced by: Richard Lochhead
On: 31 October 2011
Bill type: Executive Bill
AGRICULTURAL HOLDINGS (AMENDMENT) (SCOTLAND) BILL

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Agricultural Holdings (Amendment) (Scotland) Bill (introduced in the Scottish Parliament on 31 October 2011) as amended at Stage 2. Text has been added or amended as necessary to update information previously provided and reflect amendments made to the Bill at Stage 2 and these changes are indicated by sideling in the right margin.

INTRODUCTION

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

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

THE BILL

4. The policy objective of this Bill is 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. This Bill contains three main provisions:
   • to extend the definition of “near relative” (being the class of successors who are entitled to serve counter notice to a notice to quit) to include a grandchild of a deceased tenant farmer;
   • to prohibit lease terms which provide for upward only or landlord only initiated rent reviews in Limited Duration Tenancies; and
   • to provide that changes in rent resulting from the exercise or revocation of the option to tax by a landlord, or a change in the rate of VAT where such an option has effect,
do not qualify as a “variation of rent” such as would prevent parties from seeking a determination from the Land Court on the rent for a period of three years.

Succession

Section 1: Succession by near relatives

5. Section 1 replaces the current definition of “near relative” in paragraph 1 of Part III of Schedule 2 to the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”) with an extended definition. The definition has been extended to include a grandchild of a deceased tenant.

6. The definition was previously extended 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).

7. The reference to an adopted child has been deleted. Section 40(1) of the Adoption and Children (Scotland) Act 2007 (status conferred by adoption) provides that “an adopted person is to be treated in law as if born as the child of the adopters or adopter.” As “child” automatically includes “adopted child” the reference to “adopted child” is unnecessary.

8. The definition operates within the context of Section 25 of the 1991 Act which is the operative provision. Section 25 applies where notice to quit is given to the tenant of an agricultural holding who acquired right to the lease of the holding by succession.

9. Where notice to quit is given to a successor tenant who is a “near relative” of the deceased tenant, that person is entitled to give the landlord a counter notice requiring that the Scottish Land Court consents to operation of the notice to quit.

10. A landlord can serve an incontestable notice to quit on any successor as tenant if they are not a near relative of the deceased tenant.

11. The addition of “grandchild” to the class of “near relatives” will afford a grandchild who succeeds a statutory protection, as it will confer upon him or her the right to serve a counter notice to a notice to quit.

Review of rent etc.

Section 2: Prohibition of upward only rent reviews etc.

12. Section 2 amends section 9 of the Agricultural Holdings (Scotland) Act 2003 through the insertion of a new subsection to provide that rent review provisions which provide for the upward only review of rent or for reviews which can be initiated only by the landlord in a limited duration tenancy, are void. Where such provisions appear, the rent shall instead be determined in accordance with the statutory formula set down in the remainder of section 9.

Section 3: Effect of VAT changes on determination of rent

13. Section 13 of the 1991 Act sets out circumstances under which the landlord or tenant farmer of an agricultural holding may seek to have the rent payable in respect of the holding
determined by the Scottish Land Court. Subsection (8) states that a reference to the Scottish Land Court may not be made within 3 years of the commencement of the tenancy, the last variation of the rent or the last time a previous direction was given that the rent should remain unchanged. Subsection (9) sets out certain circumstances where subsection (8) may be disregarded.

14. Section 3 amends section 13 of the 1991 Act to the effect that the exercise or revocation of the option to tax, or a change in the rate of VAT where such an option has effect, does not qualify as a variation of rent for the purposes of the Section 13(8)(b) of the 1991 Act.

**General**

**Section 4: Transitional provisions**

15. Subsection (1) provides that the change in the definition of “near relative” has effect in respect of a notice to quit given by a landlord to a tenant who has acquired interest in the tenancy on succession only if the successor gives the landlord of the tenancy in question notice of his or her acquisition of the right to the lease under section 11(2) or 12(1) of the Agricultural Holdings (Scotland) Act 1991 on or after the day on which section 1 comes into force.

15. Subsection (2) clarifies that the prohibition on upward only and landlord only initiated rent review clauses giving rise to annulment, has effect only in relation to such clauses where they are made after section 2 comes into force.

16. Subsection (3) provides that the changes made by section 3 of the Bill will apply to options, revocations or VAT rate changes that have effect before the date of Royal Assent. This means that in cases where an option to tax had effect, the changes in the rate of VAT which occurred in January 2010 and January 2011 will not prevent parties seeking a reference to the Scottish Land Court to determine the rent for a period of 3 years from the rate change.
Agricultural Holdings (Amendment) (Scotland) Bill: The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead) moved S4M-03153—That the Parliament agrees that the Agricultural Holdings (Amendment) (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
The next item of business is a debate on motion S4M-03153, in the name of Richard Lochhead, on the Agricultural Holdings (Amendment) (Scotland) Bill. I invite members who wish to speak in the debate to press their request-to-speak buttons now.

Now that everyone is in place and the cabinet secretary is ready, I am happy to give him a generous 10 minutes to speak to the motion.

15:40

The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead): Thank you, Presiding Officer—I will speak very slowly. I welcome you back from your visit yesterday to Scotsheep; indeed, it is good to see you back in the chamber, chairing a debate on another very important agricultural sector.

I begin with a formality. For the purposes of rule 9.11 of standing orders, I wish to advise Parliament that Her Majesty, having been informed of the purport of the Agricultural Holdings (Amendment) (Scotland) Bill, has consented to place her prerogative and interests, so far as they are affected by the bill, at the disposal of the Parliament for the purposes of the bill.

The bill represents another chapter in the development of legislation on farm tenancies in Scotland, which, of course, form a crucial part of Scottish agriculture. Modernisation of farming tenancies was central to the agrarian reforms in the agricultural revolution of the 18th century, and those changes led to the modern Scottish farming landscape that we all see and love today.

However, as we know, this is a very complex— and sensitive—area with regard to legislation, regulation and management because of the balance that needs to be struck between the interests of tenants and landlords. Indeed, the tenant farming forum, comprising leaders from all sectors of the industry, was established some years ago to provide advice on how tenant farming arrangements can be improved for all concerned. The bill is the latest step in that process. Although it is not, as I will make clear later, the end of the story, it represents the culmination of one important phase of work.

In 2009, the TFF made a set of recommendations on addressing certain obstacles to new entrants into agriculture. Although most were implemented, two recommendations could be introduced only through primary legislation. The
bill implements both of those recommendations, plus a later recommendation on the technical treatment of VAT.

The bill has six sections. Section 1 amends schedule 2 in part 3 of the Agricultural Holdings (Scotland) Act 1991, extending the definition of “near relative” to include grandchildren in cases where a deceased farmer’s tenancy is passed by succession. The purpose of that amendment, which was sought by the sector, is to preserve family farming traditions and, of course, to help younger entrants to get a start on the farming ladder.

Section 2 amends section 9 of the Agricultural Holdings (Scotland) Act 2003. At present, it is possible to say in a limited duration tenancy that only the landlord can initiate a rent review or that the rent can only ever go up. Such clauses tip the balance too much in favour of the landlord and, understandably, many people in agriculture wanted the situation to be addressed. The TFF considered the matter and, as it recommended, the bill will stop such practices in the future, putting tenant farmers on a much more level footing with landlords. I am sure that such a move will be welcomed by the chamber.

In response, again, to concerns that were expressed by the industry, section 3 amends section 13 of the 1991 act, which relates to VAT. As members know, the 1991 act says that a rent dispute can be referred to the Scottish Land Court for determination, but only once every three years, and the industry was worried that if, for example, the treatment of VAT in a lease were to be changed that could shut off the option of going to the Land Court for rent review for the subsequent three years. The bill clarifies that that is not the case.

At stage 2, I lodged a Government amendment to section 4(1), which is on the timing of the changes. The amendment means that the new definition of “near relative” will also apply when a tenant farmer has died before the bill comes into force, provided that a notice has not already been served.

Section 5 sets out the timing of the commencement of the act and section 6 states the short title.

Nobody should underestimate how much effort has been made to get to where we are today. Without mutual respect and co-operation across the sectors, we would not have the level of stakeholder support that the bill, which addresses some sensitive and difficult issues, now carries. A great deal of work has been done within the TFF and between the TFF and the Government, and it is thanks to that hard work and constructive dialogue that areas of consensus have been developed.

However, we cannot be complacent. Scotland needs a sustainable and vibrant tenant farming sector, not least because a tenancy is the first step on the ladder for new entrants to farming. I think that we all accept that we want to attract many more young people into farming, and indeed new entrants of all social backgrounds and ages. As I am sure many members are aware, the lack of new blood coming into agriculture is an issue throughout Europe. At an event in Brussels two or three weeks ago, I heard the commissioner say that only 17 per cent of farmers in Europe are under 35, and there are many similar statistics.

The Government has introduced a number of initiatives to help tenant farmers and new entrants. We have supported industry-led initiatives such as the monitor farms programme and new entrant workshops. We were the first Administration to introduce a dedicated scheme for new entrants, which is delivered through the Scotland rural development programme, and the scheme now provides the maximum support that is allowed under European Union rules. To date, the scheme has given new entrants access to more than £1.1 million of funding. As the Parliament will recall, we offered to make up to £10 million available for that budget heading within the SRDP in the period of six or seven years for which the programme has been in place. The fact that, although some farmers have clearly benefited, the full £10 million has not been taken up perhaps illustrates that barriers to new entrants exist elsewhere in agriculture.

Such initiatives are important, but they must be surrounded by the right support framework under the future common agricultural policy. The position of tenant farmers must be protected and new entrants must be properly catered for from day one. We have committed to setting up a new entrant panel to look at how the new CAP can encourage new entrants. Discussions in Europe are moving in the right direction, but it is fair to say that they have gone nowhere near far enough. We need to broaden the national reserve to cover all new entrants and not just those under 40. We need the ability to keep on using the national reserve throughout the life of the next CAP and not just at the beginning. We also need to ensure that the eligibility criteria for the new system meet the interests of tenant farmers as well as those of new entrants and active farmers who do not hold any current entitlements. I hope that members will join the Government’s efforts to influence the European Commission and the European Parliament in those areas.

However well designed the policy framework is, tenant farming can thrive only if there is access to
land, so we must have more landowners bringing forward land for rent. Some progress has been made on that front in recent months. The Forestry Commission Scotland, which is under the remit of the Scottish Government, has stepped up to the challenge and put land on the rental markets, as have the Crown Estate and some private landlords. I welcome those recent announcements, but we need many other people to follow suit in the coming months.

In the same period, we need to continue to work on improvements to tenant farming arrangements, and a crucial aspect is the way in which rent reviews are carried out. Many members have expressed concern about that, as have many people in Scottish agriculture. Some members of the Rural Affairs, Climate Change and Environment Committee were in Bute last week, where they heard at first hand about the difficulties that tenant farmers can face in undertaking rent reviews. I am sure that those members will refer to that visit when they speak in the debate. The issue is complex, especially given the range of situations in Scotland, so it needs expert consideration.

Alex Fergusson (Galloway and West Dumfries) (Con): The cabinet secretary said that there is a need for a lot more land to come on to the rental market in the coming months. Can he reassure me on that? I do not believe that the matter can be addressed in a few months. Does he agree that this is a longer-term thing? As he says, progress is being made, and we need to encourage that progress so that, in the coming months and indeed years, more land comes on to the market.

Richard Lochhead: I accept that it is a long-term process, but the debate has been taking place in the Parliament and throughout Scotland for the past few years and, although I welcome the progress that has been made, many landowners and other people and organisations with a lot of influence in the debate could perhaps devote a little more effort to the issue. I welcome the fact that the issue has a higher profile than ever before, and that minds are being concentrated across the many sectors that are involved in the debate. I hope that we can get more effort in the very near future, although I recognise that there will not be an overnight solution.

I am particularly delighted that the TFF has announced today the launch of its rent review working group, which is a panel of independent experts that will look at rent review arrangements and report its findings to the TFF and the Scottish Government later this year. The Government plans to offer financial support to the group, as we are very keen to see it succeed.

The four members of the group have been chosen for their skills and knowledge, and not because of any particular organisational affiliation. The group will be chaired by Henry Graham, a farmer of 30 years, who has also been an agribusiness adviser for the Clydesdale Bank. The other members are Ian Duncan Millar MBE, John Ross CBE, and John Mitchell, a senior partner at Anderson Strathern LLP. I hope that the Parliament will agree that that is an upstanding and much-respected group of individuals with a huge amount of experience and knowledge of the issues, who are the right people for the job. The group will report in November 2012, which will enable the TFF to make recommendations to the Government by, I hope, May 2013. I urge members to support the group and allow its members the time to do their work and bring forward their conclusions.

In parallel with the rent review working group, the TFF plans to address other areas of conflict between tenants and their landlords. Those workstreams will be on issues such as equipment repair and renewal, investment in hoardings, waygo compensation, diversification, and ascertainment and succession. As part of the ascertainment and succession workstream, the TFF will explore further with the parliamentary committee its suggestion that the definition of “near relative” in section 1 should be extended to include nieces and nephews.

The TFF identified the need for a workstream to look at plugging gaps in the data on tenant farming. There was much discussion of that at stage 1 and stage 2. Accordingly, the Government will take the lead on a data workstream, with assistance and input from TFF members. Delivery of all the workstreams will be no mean feat, and no one here should underestimate the effort that will be required by the TFF to enable the completion of the work before the end of 2013.

The outputs from those workstreams will feed into a review of agricultural holdings legislation. We committed, through our manifesto, to undertake a review within 18 months of the bill becoming an act. I will provide further information to the Parliament on the scope of that review once the outputs of the workstreams and the TFF’s recommendations are to hand.

There is still much to do for the future. In the meantime, we have an important step to take today to implement the last pieces of the previous set of TFF recommendations through the bill and to welcome the plan of work for the future. I hope that we can all join together to support the bill, to help move forward our tenant farming sector in Scotland.

It gives me pleasure to move,

That the Parliament agrees that the Agricultural Holdings (Amendment) (Scotland) Bill be passed.
Claudia Beamish (South Scotland) (Lab): The Agricultural Holdings (Amendment) (Scotland) Bill makes a modest contribution to clarifying and rationalising the relationships between landlord and tenant in the sector and, as such, Scottish Labour supports its passage today.

In relation to succession, the cabinet secretary stated at stage 2 that the broadening of the definition of “near relative” to include grandchildren would

“help to meet our objective of widening the class of people entitled to that degree of protection”.—[Official Report, Rural Affairs, Climate Change and Environment Committee, 9 May 2012; c 922.]

In our keenness to encourage opportunities for new entrants, we argue, as we did at stage 1, that the broadening of the definition of “near relative” to include nephews and nieces, despite the tenant farming forum’s previous consensus on that issue. That would further broaden the opportunities for new entrants to the sector. I note the cabinet secretary’s remarks about the TFF’s workstream in that regard.

I welcome the Scottish Government’s initiatives for new entrants, including the new entry panel, and I note the remarks about the national reserve. Certainly, Scottish Labour members on the Rural Affairs, Climate Change and Environment Committee, my colleague Claire Baker and I, and others will be working hard to help move forward the CAP in that regard, to give a broader opportunity for new entrants, amongst other issues.

Will the cabinet secretary, in his closing remarks, comment on progress on the development of conservation tenancies, as mooted by RSPB Scotland and others, in addition to the organisations that he has highlighted today, which are working to broaden the tenancies that they offer?

As many have acknowledged during the passage of the bill, many wider issues must still be resolved, from the perspective of both landlords and tenants, to enable the sector to move forward in a confident and secure way.

The TFF reached consensus on a number of challenging issues at the start of the process and has continued to do so during the bill’s progress. However, in our view, it has been an uneasy consensus on some of the challenging issues. I have been aware of major investment, such as a new state-of-the-art milking parlour and a large range of sheds for free-range chickens, to highlight but two.

However, concerns about tenancy matters were expressed to the Rural Affairs, Climate Change and Environment Committee during its visit to Bute; Margaret McDougall and, I am sure, other members will highlight that. Oral and written evidence to the committee has made me keenly aware of the need to reach the stage at which, more generally, the individual who owns is confident to let and the individual who rents is confident to invest. There are those who say that the sector should be left in peace to get on with things. Others say that there has been enough chipping away at landlords’ rights, but others again say that their rights as tenants are unclear and do not offer enough security.

In the TFF, as I highlighted, there has been an apparent consensus, which has led to the introduction of the bill. However, the consensus has been uneasy on a number of matters and, in my view, it has not always been a consensus between equal partners. In that context, the future work plan of the TFF is to be welcomed as it is working towards a tenanted sector in which there is fairness and certainty.

Douglas McAdam, of Scottish Land & Estates, said that

“Agricultural Holdings legislation is complex and emotive. However, it is important that everyone with an interest, particularly politicians and decision-makers have clear, hard facts at their disposal. The industry as a whole will benefit from a more evidence-led approach.”

I am sure that all those on the TFF agree with that approach, which must lead to a settled and fair outcome for all.

I believe that there is consensus in the chamber that the rent review section of the bill is a step forward. Today’s announcement by the cabinet secretary that an independent rent review group for secure tenancies will be set up is welcome, as is the offer of technical and secretarial support and the clear reporting timeline. How regularly should rent be reviewed, even if it is not always changed? Will rent be determined by the market alone or by some additional measure? Analysis of the current process and scrutiny of section 13 of the Agricultural Holdings (Scotland) Act 1991 and of the English system will enable the sector to work towards a model that I hope will bring confidence to both sides. Those who have been named as members of the group will inspire confidence in the process, as there is respect for their independence, their experience and their expertise—in particular, the group includes the necessary legal representation.
The Rural Affairs, Climate Change and Environment Committee suggested that the Scottish Government and the TFF should

"re-examine the issue of investment in holdings, to ... clarify who is responsible"

and find

"the most appropriate balance ... for the creation of a vibrant and healthy tenant farming sector."

The inclusion of the issue in the TFF’s work programme will focus the different perspectives. Investment protocols may well be a useful possible way forward, and the group’s consideration of diversification is also welcome. It is essential for clarity to be brought on waygo compensation.

A clear timeline for working to resolve those issues is imperative, as is reporting to the Scottish Government. The Rural Affairs, Climate Change and Environment Committee, of which I am, of course, a member, will take a keen interest in those issues.

The aim must be to bring certainty to the sector and to help to restore trust where it has been broken. We support the bill as part of that process, but in doing so we hope that it is another step forward and not an end in itself.

15:59

Alex Fergusson (Galloway and West Dumfries) (Con): I refer to my entry in the register of members’ interests, in which it will be seen that I own land that is tenanted—I am delighted to say that I have a very good relationship with my two tenants.

I echo the cabinet secretary’s comments to the other Deputy Presiding Officer in welcoming him back to the chamber from Scotsheep. If we are truly serious about parliamentary reform, in two years’ time our sitting hours will revolve around us all having the ability to go to Scotsheep—I was very sad not to be able to do so for the first time in a very long time.

I am delighted to take part in the debate, particularly as we had no stage 3 amendments to discuss and only one stage 2 amendment, to which I will return a little later. I am greatly heartened that no attempts were made to amend the bill substantially from the bill that was introduced. The potential for that existed, and rumours abounded that amendments might be lodged to widen the definition of a “near relative” to include the nephews and nieces of existing tenants, in addition to their grandchildren, as was always proposed in the bill. I will continue the excellent example that my colleague Jamie McGrigor set this morning by quoting himself. In the stage 1 debate, I said:

“I heartily commend the cabinet secretary’s efforts to resist those possibilities.” [Official Report, 28 March 2012; c 7787.]

I am happy to repeat that endorsement now, just as I am happy to commend those who might have wanted to lodge amendments for not doing so. Lodging amendments would have been a great mistake, and I will explain why.

As has been said, we all know that the situation between landlords and tenants is at a delicate stage. It would take little by way of an uninformed intervention by politicians to upset it. I say that in the full knowledge that a time might well come when someone feels that the situation must be upset or that they need to intervene, but that time is most assuredly not now.

Members might well ask why I say that. I say it simply because I agree with the cabinet secretary that progress is being made. It is better progress than I have ever witnessed in the Parliament’s lifetime. As responsible politicians, we must do everything in our power to support, encourage and sustain that progress if we are to bring about what we all want in our country’s national agricultural framework—a genuinely vibrant tenant sector in which trust is restored and in which both sides can have confidence in each other.

Claudia Beamish: Perhaps the member might agree that the possible amendments on nephews and nieces—they certainly were not rumours—that some members considered lodging at stage 2 were not ill informed, but that they were not lodged because of respect for and sensitivities in relation to the tenant farming forum. Those amendments were not considered not to be appropriate provisions that might go forward in the future to give new entrants more opportunity.

Alex Fergusson: I hope that the member accepts that I was being as gentle as I always try to be in debates in the chamber. I was very aware of the possibility that amendments would be lodged and I hope that she accepts that I commended her and others indirectly for not lodging amendments, for the reasons that I just gave.

Trust and confidence already exist in much of the tenanted sector. I was really pleased to hear the cabinet secretary acknowledge that in reply to Rob Gibson’s question this morning. It is a fact—even if some seek to deny it—that most landlords and tenants in the agricultural sector get on quite well and have a mutually beneficial relationship.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): Will the member take an intervention?

Alex Fergusson: I will give way if I can have some time, Presiding Officer.
Rob Gibson: I see the train of the member's argument about good relations, which I welcome. Does he agree that good relations occur more often in smaller estates than in larger ones?

Alex Fergusson: I will answer that better when we as the Rural Affairs, Climate Change and Environment Committee have seen a number of those relationships across Scotland—the member was right to call for that this morning and I commend him for that. If he will forgive me, I will not answer his question at the moment, but I will bear it in the open mind that I always have on such issues, as I am sure that he would concede.

The problems of which we are all made aware all too often on the pages of the farming press—almost weekly at the moment—are largely at the extremes of the debate. It is absolutely right to address them, which is why I am pleased to note the great progress that is being made in the tenant farming forum. I have said before that my party will support any measures that are agreed through that forum, because we believe—in the words of the great and one and only Winston Churchill—that

“To jaw-jaw is ... better than to war-war.”

Talking through the issues, negotiating the way forward and agreeing the outcome might take longer than imposing legislation, but it must be the best way forward if we are to maintain the progress that has been made. I hope that we all agree on that, for the time being at least.

The legislation that is before us today is essentially, as other members have said, to tidy up the previous legislation, and it will of course have our support at decision time. The sections that relate to VAT and rent reviews are to be welcomed, and I am happy to join other members in warmly welcoming NFU Scotland's announcement this very morning that it has established a short-life working group to consider specific aspects of rent review procedures in Scotland. It is worth noting publicly that that announcement was made on behalf of the tenant farming forum.

That is yet more progress, which I am sure that we all applaud. I endorse the comments that have been made about the four individual members of the short-life working group, who are hugely respected throughout the agricultural world.

I have one reservation that concerns the issue of retrospective legislation. At stage 2, I had a discussion with the cabinet secretary about what I believe is a retrospective element of the bill. The cabinet secretary said:

“Therefore, section 1 will now also cover circumstances in which the death of the tenant farmer occurs before the bill comes into force but the process of acquisition by the successor is not complete.”

We then, if I may say so, added a touch of pantomime to the proceedings, if the Official Report is to be believed—and of course it should be—along the lines that I said that the bill is retrospective, the cabinet secretary said that it is not; I said that it is, and he said that it is not.

My final comment was:

“So there is a retrospective element to it”.

The cabinet secretary responded:

“In respect of the circumstances that lead to the notice to quit, but not in respect of the actual notice to quit.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 9 May 2012; c 922, 924.]

In anybody's language, I think that that is a yes.

I raise that issue not because I intend to oppose the bill, as I do not, but because I think that the bill has a retrospective element to it that has the potential to damage the confidence that is slowly but surely being rebuilt through the TFF's efforts. It would be a pity if that happened.

Time does not allow me to expand at this stage—I am sure that the Presiding Officer is about to remind me of that—but I may return to that topic in my closing speech.

I finish simply by stating that the Scottish Conservatives will support the bill, and that we welcome it and look forward to its passage later on today.

The Deputy Presiding Officer (Elaine Smith): We come to the open debate. Although the debate is short, I can give members speeches of up to five minutes.

16:07

Annabelle Ewing (Mid Scotland and Fife) (SNP): I am pleased to speak in the stage 3 debate on the Agricultural Holdings (Amendment) (Scotland) Bill. As the deputy convener of the Rural Affairs, Climate Change and Environment Committee, I am pleased to have been involved, along with my fellow committee members, in scrutinising and debating the bill as it has gone through the legislative process.

The bill sets forth just three short provisions. However, as members have said, those provisions are important not just in themselves but because they are a signal that all the key players in the sector are prepared to work together via the tenant farming forum and in partnership with the Scottish Government, which is a point that was well made by my committee colleague Alex Fergusson. It is a tribute to the work of the tenant farming forum in particular that we have reached this point. The work of the forum has focused on making progress on a number of issues that are addressed in the bill and will facilitate a greater degree of legislative
protection for tenant farmers. We will therefore, it is hoped, have a more vibrant tenant farming sector as a result.

The bill extends the definition of “near relative” to include grandchildren of the tenant. In practice, that will mean that there is a wider group of people who will enjoy some protection at least on the death of the tenant with regard to the succession to the tenancy. It is hoped that that will assist new—and perhaps younger—entrants to get a start in the tenant farming sector.

As the cabinet secretary mentioned, the Scottish Government lodged an amendment that responded to the committee’s concerns such that the provision will have an impact, notwithstanding the fact that the tenant may have died before the bill comes into effect, in circumstances in which the relevant counter-notice has not been served until after the bill comes into force. I listened carefully to what Alex Fergusson said about retrospection, as I did in the committee at stage 2. I do not think that there is a case of retrospection. That view is shared not just by the cabinet secretary but by Scott Walker, the chief executive of NFUS—I hope that that is of assistance to Alex Fergusson.

Another key element in the bill is the clarification that it provides, further to recent case law, that a variation in VAT will not in itself be deemed to be a variation in rent. That is important, because there could have been a negative impact on the three-yearly rent review cycle. The amendment was sought by the industry and delivered in the bill.

The specific issues that are dealt with in the bill are of great importance and merit our legislative attention but, as members said, during the process it has very much been the case that the elephant has been outside the room, because a parallel debate is going on about a series of significant issues that require to be looked at and resolved. Many such issues were raised in the evidence that the committee took, and it is important that they will be the subject of further deliberation.

I particularly welcome the rent review special ad hoc working group that is to be set up. I commend the efforts of everyone who has been involved in getting to this stage, because the issue is a thorny one, which arises in particular but not exclusively from the difficulties in relation to the recent Moonzie judgment. I also welcome the fact that a series of issues will be considered, many of which have been mentioned in the debate.

We also need to consider dispute resolution. Scotland has set up an excellent arbitration system, which could provide invaluable assistance in the area by negating the need to go to the Scottish Land Court, which is expensive and extremely time consuming.

The bill will do much to improve the position of tenants, while respecting landlords’ rights. There is a real debate ahead of us and I hope that the committee will be able to play a constructive part in the process.

16:12

Margaret McDougall (West Scotland) (Lab): I welcome the opportunity to speak in the debate.

When I spoke in the—fairly recent—stage 1 debate on the bill, I said that the bill’s main aims were 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. I was part of the delegation that visited Bute and I have visited farms on the mainland, so I now have a much better understanding of the issues that face the sector. I have spoken to several tenant farmers, who identified the two main issues arising from the bill as the amendment of the definition of “near relative” and the prevention of certain restrictions in relation to rent reviews in limited duration tenancies.

I note that there was no change in the definition of “near relative” at stage 2. The definition still includes grandchildren as well as a surviving spouse, civil partner or natural or adopted child, but it has not been widened. I still agree with the Scottish Tenant Farmers Association and NFU Scotland, which want the definition to be widened. The STFA said in evidence to the committee that it wanted the definition “to be extended beyond a grandchild to include nephews and nieces”, and the NFUS noted:

“It seems a little bit strange that, during your lifetime, you can assign a tenancy to a wider class of people, yet, at the point of your death, it is restricted to certain categories.”—[Official Report, Rural Affairs, Climate Change and Environment Committee, 18 January 2012; c 520, 522.]

Scottish Land & Estates expressed fear that extending the definition could destabilise the balance of rights between landlords and tenants and reduce the flexibility of the landlord. That is a valid point.

One farmer I spoke to recently took over the farm from his uncle as none of the uncle’s close family members wanted to take up the reins. It seems unfortunate that, if the farmer had died without assigning the farm to his nephew, the family would have lost out although it was clear that the nephew wanted to take over the farm and had a genuine interest in it. The nephew would not have been able to succeed to the farm and he would have lost out on that opportunity—and the farming community would have lost out on a new young entrant to the industry.
Richard Lochhead: That is an important theme and the tenant farming forum has agreed to look at extending the definition of "near relative". I remind the member that this bill is about extra protection for near relatives. In theory, anyone can inherit or be assigned a tenancy. The point here is that there will be extra protection should a notice be served by a landlord.

Margaret McDougall: It seems odd that the farm can be assigned to anyone while the farmer is alive, yet at the point of death it can be passed only to a select few who might not have any interest in continuing the business, with the result that the farm reverts to the landlord.

There was also widespread support for the provision on rent reviews. The STFA argued in its written evidence that "This proposal will remove the disadvantage felt by tenants finding themselves in a position of weakness when negotiating the terms of a lease in a sellers market and having to agree to such conditions."

Tenants expressed many concerns about the current process for conducting rent reviews—including the formula for calculating the appropriate rental levels for farms. Many thought that, even though the process was set out well in legislation and guidance, in practice it did not always work out that way. Others considered that further work was required—including an agreed process for conducting reviews and the establishment of a set formula for calculating rent reviews to remove the uncertainty and stress over when reviews will take place. This amendment will go some way towards tackling that issue, but there is still work to be done.

I welcome the cabinet secretary’s announcement that a working group will be set up to look at rent reviews. Ideally, landlords need to be confident to let and tenants need to be confident to invest. There are still many issues to be addressed if we are to improve the relationship between landlords and tenants, to ensure that farmers and landlords can go about their essential business, and attract new entrants into the farming sector.

16:17

Rob Gibson (Caithness, Sutherland and Ross) (SNP): Other members have detailed the modest achievements of this small bill. It brings to an end a series of reforms that could be delivered through secondary legislation, but the points that we are debating are being delivered through this bill. I hope that it gets passed.

The committee believes that the bill makes necessary—albeit modest—changes to agricultural tenancy law. However, as the evidence from stakeholders and the Scottish Government has demonstrated, there is still much work to be done to improve the law further and to address the recent trend of the decline in the number of agricultural tenancies in order to make more land available for rent and to encourage a greater number of new and younger entrants into farming.

The figures show a drop in the number of secure tenancies from a 2005 figure of 7,172 to a 2011 figure of 6,048. The numbers of short limited duration tenancies and limited duration tenancies increased in the same period. The fact that land is now being let for shorter lengths of time will be detrimental to farming in the long term, because tenants will not invest as they can if they have a longer lease. We will investigate the reasons for that further. When we take evidence on the ground, we may find that there are many farmers who wish to invest as tenants but who find certain barriers in place.

We should take into account the fact that tenant farming has now reached the point of having the European convention on human rights used to determine a case, as in Salvesen v Riddell. That expresses the right of people to enjoy their right to private property, but it also expresses the general interest to have land and other property used well. At the next stage in the process, we have to consider the general interest in Scotland to have more secure and sustainable farms of a tenanted and owned nature. Unless we are able to move to that position, through the application of the ECHR, that argument will be used against the development of farming in Scotland, as the case of Salvesen v Riddell shows. We await the outcome of the case in the Supreme Court, when the Lord Advocate takes it there next year.

That raises the issue that it takes a great deal of time to reach decisions. It has taken more than seven years to reach the point at which we have this modest bill. There are many things to be done, and I welcome the timetable that the cabinet secretary has laid out for rent reviews and suggest that, if we are going to enable tenants to move forward, the tenant farming forum must achieve answers far more quickly.

I mentioned the needs of young entrants into farming. There was some argument about whether 40 was a reasonable age for someone to be considered a new entrant, given that people are living longer. We think that new entrants could be older than that.

The Rural Affairs, Climate Change and Environment Committee has just received a response to a submission that we made on the future of the common agricultural policy. Commissioner Dacian Cioloş wrote:
The Commission is mindful of your concerns about new entrants and the 2011 eligibility rule. The legal proposal limits access to entitlements in 2014 to beneficiaries of the Single Payment Scheme or the Single Area Payment Scheme in respect of claim year 2011 to avoid potential negative distortions of the land markets. Nevertheless, the Commission believes that young farmers are a priority group of new entrants. That is why support during the early years is proposed through the young farmers’ scheme and to allocate entitlements from the national reserve to this group as a priority. If Scotland considers that the allocation of entitlements to all new entrants is important in areas where there is a risk of land abandonment or in areas with specific disadvantages, it could consider using the national reserve.

I very much welcome that debate being firmed up. At the moment, the offers of land that are made by landlords to tenants are often of a five-year nature—the short limited duration tenancy. I do not believe that new entrants can make a start in farming if that is the only option that they have. We must consider those issues.

I welcome the bill, but I suggest that there is much more work to do.

16:23

Graeme Pearson (South Scotland) (Lab): I thank Rob Gibson for setting the scene for my speech. The use of, access to and ownership of land are subjects that are bound to generate substantial interest and concern. I am supportive of the measures in the bill. I recognise, like others, that the bill ties up some loose ends that were created by the 1991 and 2003 acts, which is to be welcomed.

The cabinet secretary has already covered what the bill is designed to do, so I will avoid going over the same ground. The scope of the bill is extremely narrow and it does not impact on some of the issues that continue to affect tenant farmers—certainly those to whom I have spoken in the south of Scotland. Issues such as dispute resolution, waygo payments and the establishment of a code of conduct are yet to be resolved. The issues of investment in holdings and waygo payments are important ones.

In its report, the Rural Affairs, Climate Change and Environment Committee urged the Scottish Government to re-examine the issue of investment in holdings so that tenant farmers and landowners could have clarity about their responsibilities with regard to what they should be paying for and when such payments should be made. The committee also reported that clarity is urgently needed regarding the compensation that is paid to outgoing or retiring tenants in recognition of the investment that they have made to their holding during their tenancy.

Moves to establish a code of conduct for land agents would be a welcome step. During the evidence gathering for the bill, the committee heard concerns about inconsistencies in the behaviour and conduct of some land agents. Although the Royal Institution of Chartered Surveyors Scotland issued rigorous guidance for its agents, not all land agents are members of the RICS. The committee recognised the tension and conflict that can arise in relationships between land agents and tenants and, as a consequence, recommended that a code of practice for the industry be developed and that the Scottish Government should monitor the development of the code to ensure that it is fit for purpose.

When there is conflict, effective dispute resolution is required. Although I agree with Alex Fergusson’s point about “jaw-jaw”, time is of the essence and, given the age profile of those who currently engage in farming, we need to attract young people to the industry now. Many organisations that gave evidence to the committee testified that alternatives are needed to the Scottish Land Court as a means of resolving disputes. As a consequence, the committee recommended that the Scottish Government work with the tenant farming forum to introduce proposals for improving dispute resolution as a matter of urgency.

Much of the best practice in Scotland in the arena of land ownership relies on personal relationships and good people doing the right thing by one another, rather than well-considered structures and systems. Such systems are designed to support people who do a difficult job in an important industry on which Scotland relies. The absence of dependability in the area ensures that those who engage in financing and supporting farming in Scotland—the banks and other institutions—find it difficult to provide finance for prospective tenants who are interested in developing farming for the future.

I welcome the bill and the cabinet secretary’s announcement this morning of the creation of a new group on rent reviews that will report to the tenant farming forum. I urge the Scottish Government to introduce additional measures as soon as possible to address the significant remaining challenges that face tenant farmers and the industry in general. Until we can attract young people into the industry and prove that it has a future, we will always find it difficult to support those who work so hard on our behalf, day and night for 52 weeks of the year.

16:28

Graeme Dey (Angus South) (SNP): Four and a half months ago, the Rural Affairs, Climate Change and Environment Committee held a stakeholder event as part of its consideration of the bill. In the main, it was a fairly consensual
meeting, until the latter stages, when the convener—innocently, it should be said—invited brief closing comments from participants. That kicked off a debate on the issue of dispute resolution that, well, kicked off. There was a clear fault line running through the apparent consensus on the bill.

Although there appeared to be majority support for implementing the succession provision in the bill immediately, the majority of stakeholders were prepared to let that go in the interests of keeping Scottish Land & Estates on side. It was clear from the evidence that the STFA and the NFUS favoured further widening the definition of the term "near relative" but, again, in the interests of keeping the peace, SLE’s opposition, which was based on a fear that such a move might destabilise the balance of rights between landlords and tenants, was respected.

The fact that SLE subsequently accepted that its fears about setting a retrospective precedent were unfounded, which led to the Scottish Government amending the original proposal, might have led one to think that a relative calm would descend on the agriculture industry—or as calm as it gets with the CAP renewal process under way. After all, there had been give and take on both sides. However, then came the Moonzie ruling, and for agriculture, we could read agro-culture, or so it seemed.

Among other things, the Moonzie ruling brought back into focus the thorny issue of dispute resolution. Over the past few months, long-standing underlying tensions have come to the fore, with claim and counterclaim—not to mention bulging e-mail inboxes for Rural Affairs, Climate Change and Environment Committee members, and even more so for the cabinet secretary, I suspect.

Today’s news, which others have referred to, that the TFF has established an independent specialist short-life working group to consider agricultural rent review procedures in Scotland is therefore extremely welcome. It was particularly encouraging to read in the press release that the STFA issued on the matter that its chairman Angus McCall has hailed the four-member rent review working group as having "a wide range of technical knowledge and practical experience".

I hope that Scottish Land & Estates will be as welcoming of the development. I am sure that it will be, as that offers the possibility that a way out of the present situation will be found.

The progress that this Parliament is making to furnish Scotland with a legislatively protected and vibrant tenanted sector, while safeguarding the rights of the landowning sector, has been achieved only by Government working closely with the industry. The fact that the cabinet secretary has formally endorsed the setting up of, and provided funding for, the RRWG is further evidence that governmental commitment remains as strong as ever. However, if the industry becomes riven by internal dispute, it becomes difficult to maintain the momentum that has been created or to tackle important associated issues.

From an objective standpoint, it strikes me that neither side is entirely wrong or right in the situation that has developed. For example, it is nonsense to suggest, as some have, that there is little or no evidence of landowners seeking to capitalise on the Moonzie judgment. Equally, claims of demands for massive percentage increases in rent, while perhaps factually accurate, do not always tell the full story. At face value, demands for rent rises of up to 50 per cent are excessive, if not outrageous, but the facts behind the headline claim can paint a different picture.

While attending an industry event the other week, I met a land agent who told me of a call that he took from an estate-owning client, who advised him of his intention to demand a 50 per cent hike in rent from one of his tenant farmers. The agent was a little disquieted by the plan, owing to the controversy and adverse publicity that such increases had been attracting. However, it emerged from the discussion that the estate owner had not increased the rent for the best part of two decades, and at £3,300 per annum the tenant farmer was paying less for their 100 acres and associated buildings than the amount for which individual cottages elsewhere on the estate were being rented out. I highlight that case not as a defence of landowners per se but simply to illustrate my point.

The bill is a step in the right direction as we seek to secure a fairer, better balanced farming sector. I welcome the commitment of the Government to consider, within 18 months of the legislation coming into force, the impact of the changes in it and, in particular, how effective they have been in attracting new entrants and in helping the tenant sector.

The bill was born of consensus being secured, and it was successfully progressed by there being respect for proceeding in a manner that would not risk unintended consequences. I hope that that sets a trend for further development of land legislation because, as the cabinet secretary indicated, this is not the final chapter in the story.

16:33

Jim Hume (South Scotland) (LD): I start by declaring a farming interest and by noting that I
am a past director of the NFUS. I therefore welcome the chance to speak in the debate.

Much has been said about encouraging new entrants and young people into farming. It is clear from evidence, and it is my experience, that we need a vibrant tenancy market to give access to the limited supply of farming land. As is often said, they are just not making land anymore. New entrants to farming would find it very difficult to find the capital to buy land, so the only real gateway into agriculture is via land that is let.

The bill goes a small but significant way towards addressing some anomalies, and I hope that, through the work of the tenant farming forum, we will go a long way towards addressing the question of the trust that needs to be injected back into the letting market. Indeed, as Rob Gibson said, from 2005 to 2011 there was a 10 per cent drop in the number of holdings. That was due perhaps to holdings getting bigger or perhaps to more landlords taking more land in hand to manage, and therein lies one problem—as we found out in committee, we are data deficient. It would be good if the minister addressed that point.

The trust that I am talking about is addressed in section 1. It extends the rights of succession, which will now cover surviving spouse, civil partner, child or grandchild. An issue that was much debated was who else rights of succession could be extended to—for example, could they be extended to the father or a cousin of a deceased tenant? The relevant provision had been agreed on by the tenant farming forum, with the Scottish Tenant Farmers Association, the NFUS and Scottish Land & Estates agreeing that it was the way forward. Therefore, I think that it was wise, for the sake of maintaining trust and because of the willingness that existed to address other issues in Scottish land tenancies, to move ahead on the basis of the TFF’s agreed recommendation.

The committee agreed that the Government should look at further extending succession rights in the future. I agree that that should be done, but it is essential that we bring the whole industry—which includes landlords, tenants and potential future tenants—with us on the issue.

As an aside, I believe that some remarks that have been made on an absolute right to buy have not been helpful, and I would welcome an assurance from the cabinet secretary on the matter when he sums up.

The position of the committee on section 3, on VAT, was fully consensual.

In committee, I found it surprising that upward-only rent reviews and landlord-only rent reviews existed, but I was assured that they were not common. Nevertheless, I welcome the bill’s tidying up of the existing legislation.

Transitional provisions have been a matter of concern. Unfortunately, there will be winners and losers, as always happens when a change in the law is made, depending on which side of the set dates someone falls. There was a willingness to look at retrospective legislation, but it was clear from legal advice that that could create legal difficulties. The Government’s amendment to section 4 has gone a little way towards addressing that within the existing legal framework.

Although the bill is small, it is extremely important. It has been designed to tidy up existing legislation, and I hope that it goes a long way towards developing trust in the letting market in Scotland, which, as I mentioned, is much needed. There is still work to be done—I am committed to helping with that process—if we are to see a vibrant letting market that will benefit tenants and those who wish to enter the farming industry, which is the backbone of rural Scotland.

We support the bill and we support further work on tenancies. We should recognise the hard work of everyone who is involved in the TFF, and we should wish it well with the rent review group that it announced this morning.

The Deputy Presiding Officer: We come to the closing speeches. I remind the chamber that members who have participated in a debate should be in the chamber for the closing speeches.

16:37

Alex Fergusson: I am not sure that I am capable of making my closing speech, because I am still in shock at Annabelle Ewing’s making an entirely consensual speech. That is a wonderful landmark for the chamber, and I encourage her to follow up on it in the future. I hope that she and I are in as much agreement the next time we discuss agricultural holdings as we are this afternoon.

Annabelle Ewing: All that I can suggest is that perhaps the member has not been in the chamber often enough when I have spoken in the past.

Alex Fergusson: I am delighted to hear that it is not a first.

Having listened carefully to the content of the debate, I seek to remember that we are debating the Agricultural Holdings (Amendment) (Scotland) Bill, the purpose of which is to do exactly what it says on the tin—to amend the Agricultural Holdings (Scotland) Act 1991.

It is worth noting, as the cabinet secretary and Rob Gibson have done, that the bill would not have come before us at all if it had been possible for the tenant farming forum’s agreed proposals to be dealt with in their entirety through secondary
legislation. Most of them were but, for the legal reasons that we now know about, the changes to the definition of "near relative" and to the provisions relating to rent review required primary legislation. In addition, the opportunity was taken—very sensibly, in my view—to introduce a third technical change, to ensure that a VAT change should not count as a variation of rent.

The Scottish Conservatives welcome the bill, as I made clear in my opening speech, when I also made plain my reservations about its retrospective element, on which I guess that we will simply not agree. I hear what Annabelle Ewing said, and I very much respect her views as a member of the legal profession, but I must hold firm to the view that there is a strong argument to be made that the whole bill is retrospective in nature.

When the bill is enacted it will change the contractual terms that were agreed between two parties when they entered into a lease agreement at some point in the past—full stop. I am sorry but if that is not retrospective, I do not know what is. No matter—as I said, I do not seek to oppose the bill. I fully accept on this occasion that it will impact on only a very few people. For that reason, I am more than content not to seek to oppose it, just as I was at stage 2. However, I repeat my reservation that, in principle, retrospective legislation—no matter how it is dressed up—can undermine confidence in any sector and so should be avoided whenever possible.

Other than that, the bill is eminently sensible. I repeat my commendation of those who might have wanted to broaden its impact but chose not to do so at this stage. I hope that that is the message that, with the passing of the bill, will go out to all sides in the debate. I think that Annabelle Ewing referred to that in her speech. Our message should be: "Keep working together and keep making progress together, and the Parliament will fully support your endeavours."

Much of the debate has been about what remains to be done to address outstanding issues. I argue that that is a debate for the future, although given some of the comments that have been made this afternoon, I foresee a rather more robust debate next time around.

I end by again following the example of my colleague Jamie McGrigor, so I will quote myself when I wound up in the stage 1 debate, when I finished by saying:

"The way to success is surely through agreement in and through the tenant farming forum. Anything that is imposed from outside, be it by Government, by Parliament, by committee or by any other body, will simply extend the current difficult situation. Frankly, that would do nobody any good at all."—[Official Report, 28 March 2012; c 7787.]

At this stage, I very much welcome the bill.
Last November, the NFUS held a briefing for MSPs in which many of the issues that members have highlighted were discussed. Since then, greater pressure has been applied by the outcome of the Moonzie case, which has led to uncertainty over rent reviews. The decision left the sector feeling vulnerable.

Along with other members, I welcome the cabinet secretary’s announcement today on the membership of the independent expert working group on rent reviews. It is heartening that the tenant farming forum is, as a wide group, showing willingness to deal with the problem, and that it is supporting the four members of the group. We cannot underestimate the challenge that the group faces in exploring the determining factors of a rent review, and it will do that against a backdrop of a legal decision that has moved the goal posts.

There is a pressing need to provide clarity and stability to the process, as it can be ill-defined and can lead to disputes, which ultimately sour relationships and make tenancies untenable. The group is dealing with complex problems and it is working to tight timescales. I wish it well in its work and I look forward to the outcome with interest.

Members have highlighted a number of other areas that the tenant farming forum is proceeding with as an agreed set of priorities. Annabelle Ewing highlighted the call for an arbitration system. Although the Scottish Land Court plays a valuable role, there is a need for a simpler, cheaper option that offers dispute resolution. The issue is about building and increasing trust in the system.

The forum will also look at the practicalities of a code of practice. That will address some of the issues that Graeme Pearson raised. Many landowners employ an agent to act on their behalf when dealing with tenants. That is an example of the shifting nature of tenant and landowner relationships—they are moving away from the more personal towards the increasingly professional. In that context, there is an argument that a robust code of practice is needed. The code could include the period of a rent review and what it would cover, which would cross over with some of the work that is being undertaken by the expert group.

A few members raised the issue of waygo compensation. That is often an area of dispute and the uncertainty about what will be recognised leads to a reluctance to invest, which, ultimately, is not good for the tenant or the landlord. There needs to be greater transparency and a better understanding of expectations in relation to how decisions will be made on apportioning assets that may have deteriorated, or assets that may have improved the tenancy.

As Claudia Beamish highlighted at stage 1, we also received representation from RSPB Scotland on its proposals for conservation tenancies. Such tenancies could help it to let more land and overcome some of the obstacles that it and other non-governmental organisations face in trying to let land. The cabinet secretary may want to respond to those points in his closing speech.

It is crucial that we promote an environment that supports long-term letting and gives confidence to the sector. As Rob Gibson highlighted, the current situation is leading to reports of increasingly short-term letting due to uncertainty. That can only mean less investment in farming by tenants and landowners, which will lead to less productivity in and less security for the Scottish farming sector.

The bill will make a small contribution towards resolving those issues, but, in some ways, it has been overtaken by events. The work of the independent expert working group and the tenant farming forum is crucial in pointing to the way forward, but over the next few months we cannot underestimate the challenging questions that there will be for the forum and its partners to answer, nor the complexity of the Parliament’s response. Today’s work may be finished, but we still have a task ahead of us.

The Deputy Presiding Officer: I call Richard Lochhead to wind up the debate. You have until 5 o’clock, cabinet secretary.

16:48

Richard Lochhead: Thank you very much, Presiding Officer—you are very generous.

It has been an honour to pilot bills through Parliament previously, but this is the first stage 3 debate in which I have had no amendments to deal with. In that regard, it has been an unusual day. However, I expect that one of the reasons why there have not been stage 3 amendments is—as has been acknowledged by many members—the complexity and sensitivity of some of the issues that we are discussing. I have certainly discovered that this particular aspect of my portfolio is a very difficult one to deal with.

We are dealing with many different circumstances right across the tenancy sector in Scotland, and what may appear to be solutions to some of the genuine struggles, difficulties and challenges in some sectors of tenant farming can cause other problems for other parts of the same sector. I therefore welcome the fact that all parties have recognised the clear challenges. I think that we all have, ultimately, the same objective, which is to create a healthy tenanted sector that offers protection to tenants and security of tenure, while acknowledging that there are two contracting parties in every commercial agreement. However,
because we are dealing with land there are extra challenges and sensitivities, and we have to be wary of where the power lies in that relationship, which is why so much regulation applies to tenant farming and agricultural holdings.

We have to recognise that not all landowners in Scotland are as benign and cuddly as Alex Fergusson claims to be; we have a number of unscrupulous and immoral landlords. We are not saying that all landlords are unscrupulous and immoral, but we need legislation that copes with extreme circumstances if we are to prevent a very empowered but unbalanced relationship in tenancy arrangements in some parts of Scotland. We all know from harrowing cases that our constituents have brought to us— I say this as an MSP who has had to deal with a number of such cases, as, I am sure, many other members have— that there are extreme cases in Scotland.

Unfortunately, some landowners do not see their role as being to ensure that their land is producing food or to ensure that there is environmental protection to safeguard biodiversity, and nor do they see that they have a role in relation to the people who live on their land. They do not go out of their way to attract new blood into agriculture. As Mr Pearson and many other members said, it is a national interest; we must attract people into agriculture in order to secure the nation’s future. There are people out there who are not doing that and who could do a lot more. It is important to recognise that.

I am proud that the Government has taken the issue seriously. Since 2007, we have, of course, recognised that to attract new entrants into agriculture, there must be access to land. We were, for example, the first Administration to introduce a dedicated new entrant scheme to help people to deal with some of the challenges that new entrants face. Some 65 new entrants have benefited from support to the tune of over £1 million that has been available under the SRDP.

The Administration tasked the tenant farming forum with identifying the barriers to entry, and asked it to propose solutions to help new blood to get into agriculture. In the previous session, we legislated on five of the TFF’s recommendations; today, of course, we are legislating on the remainder of them. That means that we have acted on all the recommendations for required legislation that the TFF brought forward two or three years ago.

We have done more, of course: we have worked with the Forestry Commission Scotland to create new tenancies. That initiative has been very successful, and I am looking forward to handing over the keys, so to speak, to new tenants in a couple of weeks. A number of people from right across Scotland applied for the few tenancies that were available. Therefore, there is demand out there, and we have to investigate new opportunities.

I am interested in how the RSPB and other large landowners in Scotland can create new tenancies, whether they are conservation tenancies, which Claudia Beamish mentioned, or other tenancies. I am happy to investigate what we can do to support the NGOs and other landowners in going down that road.

We have also introduced new advisory services and higher rates of support for new entrants who apply to take part in some existing schemes elsewhere in the rural development programme, and we will, of course, do much more. We will establish a new entrants panel, host a new entrants summit and work with the TFF on its workstream, which will address dispute resolution, waygo compensation and other issues that many members have addressed. We gave a commitment in our manifesto to review all agricultural holdings legislation within 18 months of the bill’s being passed.

We must recognise that the number of tenancies in Scotland is in decline, but that is a common problem throughout these islands and, indeed, throughout the whole of Europe. The problem is not Scotland specific, but we must find Scottish solutions to some of the challenges that we face.

On the scale of the challenge, I think that I inadvertently said in my opening remarks that the European commissioner said that 17 per cent of farmers in Europe are under the age of 35. I should have said 7 per cent. That shows the scale of the problem that we face right across Europe in attracting a new generation of farmers to be active in our respective countries.

The debate has demonstrated, as previous parliamentary consideration of the bill did, that the issue is only one part of a much bigger jigsaw. More work will need to be undertaken if we are to make progress on the journey for Scotland to have a vibrant tenant farming sector. Nevertheless, the bill’s successful passage through Parliament demonstrates that we are making progress. There is widespread recognition that it is in everybody’s interests that tenant farmers and their landlords succeed.

I enjoyed working on the bill with the parliamentary committee at stages 1 and 2 and am grateful for its smooth transition through stage 3. I also thank my officials. The bill is short, but, given its complexities, the mental challenge that is involved with it is equivalent to that for a much larger bill.
We all know that, on its own, the bill will not change the world, but it is part of a bigger picture that will enable the Scottish tenant farming sector to become more sustainable, progressive and fit for the future. The passage of the bill lays the foundations on which we can build a new future. We can then move on to tackle other issues that could stand in the way of our securing a vibrant tenant farming sector: many members have highlighted such issues. We all know what they are and they have been rehearsed in the chamber today and in recent months and years.

Rent reviews are a crucial area, as are repair or replacement of equipment, investment holdings, waygo, diversification, assignation, and succession. There is no doubt that they are tricky issues, but I am confident that the planned workstreams will deliver on time and will feed into the future review of agricultural holdings legislation that we have committed to in our manifesto.

I take this opportunity to thank the members of the TFF and the other stakeholders for the interest that they have shown in helping us to get the bill through the parliamentary stages. Everyone is in a better place as a result, and it allows us to draw a line in the sand and move on to deal with other issues.

As I have said, the bill is part of a bigger picture of supporting the future of Scottish agriculture. Scotland has been shaped by agriculture for centuries. We owe the vibrancy of our rural communities, the unparalleled beauty of our landscapes, the food that is on our plates and the wildlife that is in our countryside to our farmers. For centuries, tenant farming has played an irreplaceable role in that rich farming tapestry.

To be a farmer today, a person needs many things. They need access to capital. Unless someone is lucky enough to be a millionaire, that probably means access to a combination of loans and Government support. They need to have the right training and skills for their chosen enterprise, whether it be traditional shepherding in the hills or high-tech precision farming with the most modern equipment. They need to have a policy framework that puts them on a level playing field with all other farmers. That has been a hard thing to deliver recently. However, progress is finally being made with the CAP negotiations that are now in full swing in Brussels. I have said time and again that a big priority for Scotland is to stop basing support today for what people are doing on what they were doing 10 years ago when new entrants or active people might not get any support whatever. We must move on from that system to a better system that rewards active farmers and new entrants.

A farmer needs to have the business acumen to succeed in an increasingly competitive commercial environment. They also need the determination and grit to make a go of it against the odds in one of the toughest jobs anywhere in the world.

The most fundamental need for a farmer is access to land. Land is, quite simply, the key to the entire farming sector. It always has been and, no doubt, it always will be. That is why tenant farming legislation is not some obscure backwater legislation: it is crucial to the farming industry today and it will be in the future. It is the key to the door of an entire sector of our nation’s economy. Tenant farmers represent one third of the farming sector and tenant farming allows thousands of families to play their part in rural life. It is the glue that holds rural Scotland together, and I am glad to be able to say that Parliament can be proud of the role that it has played during the past few years to support such a vital sector and Scottish institution.

We all appreciate that regulating arrangements between individuals or businesses is fraught with difficulty, as we have discussed today, but the stakeholders, meeting as the tenant farming forum, have found much consensus. The Government, working with the TFF, has found ways of implementing its recommendations, and Parliament has played its part by putting together a modern legislative framework for the 21st century. I therefore ask Parliament to join me in thanking the TFF for all that has been achieved so far and I urge the TFF to spare no effort in addressing, in the coming months, the issues I mentioned earlier.

Scottish agriculture is at the heart of our nation and tenant farming is at the heart of agriculture. I ask all members to value our land, our countryside and our way of life, and to join me in helping tenant farming towards a brighter future. With the bill, we can pass an important milestone on that important journey. I commend the bill to Parliament.

The Presiding Officer (Tricia Marwick): Before we come to decision time, I remind members that we have the business in the Parliament event tonight. I look forward to welcoming as many MSPs as possible to the event tonight, which promises to be a fantastic dinner. I have just seen the garden lobby and it is looking absolutely spectacular.

We then have the business in the Parliament conference tomorrow, and I look forward to welcoming as many members to that as wish to take part.

That concludes our consideration of the Agricultural Holdings (Amendment) (Scotland) Bill.