Dear Richard,

AGRICULTURAL HOLDINGS LEGISLATION REVIEW

Committee scrutiny

The Committee has been heavily involved in scrutinising developments in agricultural holdings legislation in this session of Parliament. We have considered the Agricultural Holdings (Amendment) (Scotland) Bill; the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014; taken evidence on the Rent Review Working Group; held fact-finding meetings on Bute with landlords and tenants; and monitored the work of the Review group from its conception through to the publication of its final report.

These issues have been subject to review and consultation over a long period of time, and it is easy to lose sight of what the desired outcomes are that we are working to achieve. The Committee, like others engaged in this process, want to see tenanted land being more readily available, both to current farmers and their families and to new entrants; rents which are fair and proportionate to both landlords and tenants; and fair and proportionate compensation terms and waygo arrangements that reflect the investments and improvements made in a holding by either party. We also want to see improved clarity and transparency in all the operations of the tenanted sector, which should help remove some historical conflicts and mistrust and replace it with a new spirit of cooperation and forward-thinking.
We note your confirmation that some of the issues in the report require legislation to be taken forward and some do not, and those that do are likely to be included in the forthcoming land reform bill.

The Committee notes the final report of the Review group and gives its initial views on some of its recommendations in this letter. Given the time remaining in this session of Parliament, and the commonality of some of the issues involved, we can understand the rationale behind bringing forward a single bill which will include both land reform and agricultural holdings issues. However, scrutiny of such a wide ranging and important bill in the time remaining in this session will be a challenge, both for the Committee and for Parliament as a whole. We therefore look forward to the full cooperation of the Scottish Government and its agencies in working with the Committee and Parliament as constructively as possible to ensure that this legislation, so long in the making and so vital to so many people across Scotland, is given appropriately robust and effective scrutiny.

Landlord/tenant relationships

Relationships between landlords and tenants have been at the heart of much of the Committee’s consideration of agricultural holdings issues in this session. It is fitting that this issue is considered first in the Review group’s report because so much of what is to come, and the ultimate success of any measures, hinges on these relationships improving. We have heard, formally and anecdotally, from both landlords and tenants of examples of poor practice and relationships breaking down completely, however, we note that there are also many positive relationships. These good relationships must be encouraged in order to tackle those tenants and landlords who feel that they have a poor relationship.

The report contained two recommendations on this key issue: Government support for industry led self-regulation and other initiatives; and that a new office of Tenant Farming Commissioner should “promote and secure effective landlord/tenant relationships and behaviours across the agricultural tenanted sector underpinned by robust codes of practice.” The report also noted that there may be an issue with the use of professional intermediaries, either caused by a lack of experience or by over-reliance. We subsequently heard from you that an independent adviser was to be appointed soon to work with industry to try to ensure that momentum is not lost and productive working relationships are maintained.

The evidence we took from the main stakeholder groups was supportive of a commissioner, or some form of commission, for tenant farming. However, there was disagreement on the issue of whether the various codes that the commission/commissioner would be enforcing should be voluntary or statutory. You assured us that, as a minimum, the codes would be underpinned by statute, and that consideration will be given as to whether any codes should actually appear on the face of the bill.

There were also differing views on the scope and role of the commission/commissioner, with some thinking it should go further than proposed in the report, and mirror the French SAFER system, where a Government agency has
a role in approving rural land purchases and leases, to ensure that the letting of land takes account of the public interest and benefits communities. There were also differing views on the use of agents as intermediaries, with some feeling it is unhelpful and embodied many of the issues involved in the breakdown of relationships between landlords and tenants, as it prevents trust being able to be developed and sustained.

The fact that such a vital issue was subject to only two recommendations (out of a total of 49) may demonstrate how hard it is to tackle this issue, particularly through legislation. The Committee supports these recommendations and welcomes the forthcoming appointment of an independent advisor and asks that you keep us updated on that appointment and the precise purpose of the role as we intend to take evidence from the independent advisor at an appropriate point in the future. The Committee also calls, as it has done previously, for landlords and tenants, and those representing them, to work to set aside previously held assumptions and any feelings of animosity, and work together with renewed vigour and enthusiasm to help to create the healthy and thriving tenanted sector we all want to see.

The majority of the Committee\textsuperscript{1} believes it is essential that the commissioner has statutory codes to enforce rather than voluntary ones. Whilst welcoming your assurance that, at a minimum, the codes will be underpinned by statute, the Committee is not clear on what this would mean in practice. The Committee therefore seeks clarity on exactly how the codes could be underpinned by statute and what practical difference there would be between this and having the codes on the face of the legislation.

The Committee seeks clarity on whether the commissioner will have a role in intervening in situations where there has been a breakdown in relationships between landlords and tenants and, if so, how such a function could operate in practice. The Committee believes that there is the potential for such a role to have a positive impact on the recourse of either party to the courts.

Rent and rent reviews

The Committee previously took evidence on the work of the Rent Review Working Group which did not propose altering the formula for calculating farm rents in the way the most recent Review group has done. The final report calls for 1991 Act tenancy rents to be set by reference to the agricultural productivity of the land. The same call is made for Limited Duration Tenancies (LDTs), unless both parties have agreed otherwise. Pleasingly, there seemed to be some consensus on this issue, with most witnesses either supportive, or willing to look at this suggestion in more detail, however there were some concerns expressed that this could lead to further disputes between parties. You told us that modelling is currently underway on how setting rents using an assessment of productive capacity may work in practice, with various example scenarios being worked up. It was also interesting to hear Andrew Thin speak of a possible return to using the market to dictate rents should a fair and balanced rental market in Scotland ever be realised.

\textsuperscript{1} Alex Fergusson MSP dissents from this sentence.
The report also looks at diversification and recommends that rent be paid for non-agricultural activity that reflects a fair market rate for the landlord's assets being used for the activity, and that a landlord should only be able to issue one notice of objection to a diversification and that there should be a presumption in favour of diversification where planning permission has been granted. Again, there seemed to be an encouraging breadth of consensus on this issue with both the Scottish Tenant Farmers Association (STFA) and Scottish Land and Estates (SLaE) supporting the recommendations in the report relating to diversification.

The issue of rent setting and review has probably caused more tensions in the industry than any other, due to the high demand and under supply of land for rent in Scotland. It was therefore extremely pleasing to hear landlord and tenant representatives agree on many of the fundamental principles of the report’s recommendations on this area. It is essential that any legislative changes result in a system of rent setting and review which is balanced, fair and proportionate, and accepted by both sides as the basis for going forward.

The Committee supports the recommendations in the report, in principle, that rents are set by an assessment of productive capacity rather than by a market which in effect does not exist. We are pleased to hear that modelling work is currently underway as the success of these proposals relies on any new system being fully tested to ensure that new measures do not prove to be flawed, or unworkable in practice, and do not lead to further disputes between parties. The Committee asks that you provide us with an update on the modelling work when it is available.

Investment, improvements, compensation and waygo

As we stated in the introduction to this letter, the Committee has always wished to see fair and proportionate compensation for investment and improvement made by either party to a tenancy. If a landlord invests heavily in a holding, then we would expect that to be reflected in the rent. Likewise, if tenants make investments and improvements which add value to the holding, we expect those to be appropriately compensated when a tenancy ends. What we must deliver from this process is a framework that all can support to enable that to happen.

The principle of the proposal in the report for an amnesty where a tenant can make claims for improvements to be taken into account at waygo which had not been previously agreed was supported by stakeholders in evidence. They did, however, disagree on the length of the amnesty, with most agreeing with the three years as outlined in the report, but SLaE feeling that a year may be more appropriate. The STFA disagreed with the principle of any improvements not notified in any amnesty period reverting to the landlord and also felt that an amnesty process could give further cause for disputes and may need its own resolution process, as the process envisaged by the Review group is that any disputes would be resolved by the Land Court, which may inhibit tenants from making use of the amnesty.

There were more mixed views on the likely effectiveness of allowing secure 1991 Act tenancies to be recorded on the land register and the impact that may have on a tenant's ability to offer the lease for the purpose of granting a standard security over
it. Whilst there appeared to be little outright opposition, some, such as the National Farmers Union Scotland (NFUS), felt that is was not likely to make much difference in improving a tenant’s access to finance for investment and improvement. SLaE said it has spoken to lenders and the message coming back was that security was not such a big issue for banks, compared to the financial track-record of applicants. In contrast, we heard from you, Andrew Thin, and Hamish Lean that your discussions with lenders had confirmed that security was one of a number of factors that they would take into account in lending decisions.

We also explored, in relation to the proposals made in the section of the report on retirement, succession and assignation, whether the length of a converted secure 1991 Act tenancy, or open assignation, would impact on a banks consideration of a security as part of a decision to lend. Hamish Lean said that the review had heard no evidence that those issues would make a material difference.

After the issue of fair rents, the issue of being motivated to make investments and improvements in a tenancy, and then being fairly compensated for those at the end of a tenancy, has caused much bitterness and disagreement in the sector and, as we stated above, any legislative changes brought forward must deal with this head-on. A healthy tenant farming sector can only be achieved if both landlords and tenants are clear on the rights and responsibilities involved in investments and improvements from the outset, throughout the length of a tenancy, and, vitally, at the end of that tenancy.

The Committee was pleased to note a broad consensus around the principle of establishing an amnesty for tenants to claim for improvements not previously agreed and we hope this can be taken forward further, working with stakeholder groups. We are supportive of the period of the amnesty being three years. We also recommend that the Scottish Government ensures that any new arrangements are clearly and effectively communicated to all landlords and tenants so that people are fully aware of their rights and responsibilities.

We note that whilst there were no objections to the principle of secure 1991 Act tenants being able to note their holdings on the land register to then use as security, there was no compelling evidence that this would make a significant difference to banks when they are considering whether to lend to tenants or not. At present, with the evidence available to us, it seems that this option may be worth considering as it may help some tenants, depending on their circumstances, but should not be considered as a panacea for tenants that currently have difficulty raising finance.

Retirement, succession and assignation

Currently tenants can assign or bequeath tenancies to certain specified family members and the Review clearly considered that this process is now out of date. It makes recommendations to modernise it so that tenancies can be assigned/bequeathed to a much wider group of family members, free of the current limitations of the order of successors. The landlord’s current right to object to this, if it
is felt that the new prospective tenant had no link to the holding or ability to farm effectively, would be retained.

This issue was probably the most hotly contested in evidence to us, with clear differences of view, and few signs of the spirit of consensus which was clear on other issues. SLaE felt very strongly that the proposals were not balanced and would erode landlord’s rights and perhaps contravene the European Convention on Human Rights, potentially leading to large compensation claims against the Scottish Government as happened as a result of the Salvesen v Riddell ruling in the Supreme Court. SLaE was of the view that the proposals could remove a landlord’s right to decide what happens to the holding which they own. The Royal Institute of Chartered Surveyors also disagreed with these proposals as they believed they could have a negative effect on the letting of land and on opportunities for new entrants. Others, such as the STFA and NFUS were very supportive of the proposals, and felt that landlord’s rights remained protected by the retention of their ability to challenge the successor or assignee on the same grounds as they can now.

The STFA told us that, at an earlier stage in this process, consideration was given to establishing a pre-emptive right for landlords to buy assignations that were on the open market, and added that this proposal should be reconsidered if open assignations were permissible, as a way of achieving a fair and appropriate balance of landlord’s and tenant’s rights. SLaE added that it would be better to have such a pre-emptive right than not to have it.

We were also concerned to understand and examine the situation for retiring tenants and any current disincentives there may be currently for those wishing to retire. The review makes several recommendations to address this, such as that 1991 Act tenants are able to convert to a new minimum 35 year LDT which could be assigned on the open market. This was another very contentious issue with stakeholders. SLaE had a large number of objections to it, while others were more supportive but disagreed on the minimum length of the LDT and with other details of the proposal. Also, it was not clear from the Report what assignation would be permissible for other types of tenancy, such as for some of the new letting arrangements being proposed (and which are discussed in more detail below).

A further recommendation in the report is that landlords be encouraged to provide nearby retirement housing where there is a lifetime lease. You told us that you are continuing to explore this issue and how the recommendation could best be realised.

It is important when considering the recommendations in this section to keep in mind the overall objectives of this process, which are to retain and increase the amount of tenanted land, whilst increasing the confidence of both landlords and tenants to allow that to happen. To achieve that, we must try and make it easier for tenants to retire with dignity and not block the path of new entrants, and we must consider assignation and succession arrangements to ensure that land is continued in tenure where possible and that new entrants have routes into the sector.

On the issue of retirement, the Committee supports measures designed to help tenants retire with dignity, including exploration of allowing secure 1991
Act tenants to convert to a LDT, and the provision of nearby retirement housing. We will consider the merits of the details of these proposals further should they be included in the forthcoming bill.

The Committee believes it is appropriate to reconsider the current legislation governing succession and assignation arrangements to ensure that they are fit for the 21st century, and supports the policy objectives of maintaining and increasing the amount of tenanted agricultural land in Scotland. We believe this should include consideration of how assignations could be targeted at new entrants.

The Committee wishes to see further consideration of the merits of additional flexibility of assignation. The Committee also notes the support from some stakeholders for landlords to be given a pre-emptive right-to-buy assignations placed on the open market. We think that further flexibility of assignation should take place in order to provide a fair and appropriate balance of landlord's and tenant's rights which would be in the public interest and we therefore ask you to give the introduction of such a right further consideration. The Committee believes that the same flexibility of assignation should be permissible for different types of tenancy, whether they be 1991 Act tenants; tenants that have converted those tenancies to LDTs; or tenants who take up newly created modern or repairing LDTs, and therefore recommends that you take account of this when finalising legislative proposals.

Whilst disappointed with some of the unhelpful evidence we received predicting the potential for very large compensation claims against the Scottish Government if certain proposals were taken forward, we stress the importance of ensuring that landlord’s and tenant’s rights are appropriately balanced in any measures which are brought forward.

The role of a right-to-buy

Many of the recommendations in the report on this issue propose changes to the pre-emptive right-to-buy, such as removing the need for 1991 Act tenants to register an interest; tightening up issues relating to land being transferred through transfer of shares and where a landlord interposes a lease; and extending the pre-emptive right-to-buy to smallholders. Some agreed with the removal of the need to register whilst others felt the existing process was straightforward and unproblematic.

The Review also considered the merits of introducing an absolute right-to-buy for 1991 Act tenants, stating that the pros and cons were considered in an attempt to “put the matter to rest” and concludes that it “would not be helpful” to go down that route. The STFA noted that the report’s dismissal of an absolute right-to-buy was its biggest weakness, whilst others supported the position of the Review group, and felt it was consistent with the spirit of other legislation such as the recent Community Empowerment (Scotland) Bill.

The report recommends that where a landlord has persistently failed to meet their obligations the tenant should be able to apply to the Scottish Land Court to be able to force a sale of the holding and there was broad consensus on this amongst
stakeholders. Stakeholders did note, however, that it was difficult to come to a view on the proposal for ministerial intervention if the way land is being managed is having a detrimental effect on sustainable development without more detailed information on the proposal.

As has been said many times during this process, much depends on confidence being increased on all sides and the role of an absolute right-to-buy has been a dominant factor affecting that confidence. We hope that the forthcoming legislative changes will deal with these issues in such a way that the sector as a whole can move on without the right-to-buy issue continuing to damage relationships. As noted when you appeared before us, we seek further information from you on research into the different levels of investment in tenanted farms compared to owner-occupied farms.

The Committee is supportive of the proposal to remove the need for 1991 Act tenants to register an interest as part of the pre-emptive right-to-buy process, and is also supportive of the reconsideration of the trigger points for the pre-emptive right.

The Committee welcomes the broad consensus for the proposal that 1991 Act tenants can request that the Scottish Land Court order the sale of a holding where the landlord has persistently failed to fulfil their obligations under the tenancy, triggering the tenant's right-to-buy. We agree that responsible landlords (which are the vast majority) have nothing to fear from this proposal.

However, whilst understanding the motives behind establishing the power of Ministerial intervention for situations where the way land is being managed is considered to be a barrier to local sustainable development, it is important, especially given the Committee’s considerations of similar issues in the Community Empowerment (Scotland) Bill, that any proposals are clearly set out in legislation. The Committee will consider this matter further when it sees the details of proposals if they are included in the forthcoming bill.

Letting vehicles for the 21st century

The Review considered the case for allowing freedom of contract between landlords and tenants and concluded that the demand for land was such that it would probably result in contracts being agreed to the disadvantage of the tenant, which would not be in the public interest. At present we have a variety of tenancy agreements – from grazing, mowing and cropping lets of less than a year; Short Limited Duration Tenancies (SLDTs, which are up to 5 years); and LDTs (which are a minimum of 10 years) created by the 2003 Act; limited partnerships to 1991 Act secure tenancies; through to full secure tenancies under the 1991 Act. The report makes eleven recommendations on this issue, the most in any part of the report, calling for a new modern LDT of minimum 10 years (with a 5 year break point for new entrants), and for a new “full repairing” minimum 35 year LDT. In oral evidence to us stakeholders seemed to broadly support the new proposed letting arrangements (albeit with some disagreement on details, such as whether the minimum term of the repairing LDT should be 25 or 35 years) but noted that they did not see many problems with the current arrangements and that the issues were more about trust and confidence to
let land than the letting terms for doing so. There was also some consensus around concerns about abolishing SLDTs and therefore leaving no letting arrangement for lets between one and ten years so it was good to hear that you have an open mind on this point and will consider all views before coming to any final decisions on how to proceed.

These new proposed LDTs are subject to further recommendations, such as “full repairing” LDTs having rent set by the proposed productive capacity of the holding method, whereas “modern” LDTs could have rent set by the market or else by the productive capacity method. Compensation arrangements would be based on those in the 2003 Act but consideration should be given to the landlord being able to grant an extension to a tenancy, which the tenant could assign on the open market. Other recommendations included fixed equipment responsibilities being set out in the lease; leases must include requirement of written notice of intent to terminate not less than two and not more than three years before the expiry; seasonal let arrangements which include having to meet soil standards; approved environmental charities allowed to let land on LDTs with environmental conditions attached; and that the NFUS, SLaE and STFA develop a new Joint Initiative on Limited Partnerships.

On the latter issue of limited partnerships, an issue the Committee has some notable recent experience in, the STFA called for remaining limited partnerships to be able to be converted to LDTs. You, and Andrew Thin, both told us that the Review agreed with this principle and the desired outcome but decided not to recommend that this be made compulsory through statute due to the very particular circumstances of each limited partnership and the negative effect such a move may have on confidence between parties.

The fact that this section of the report contained more individual recommendations than any other perhaps highlights the need for the tenant farming sector to consider other letting arrangements and develop a variety of flexible arrangements for all parties to come to agreement, against the backdrop of a set of basic, and fundamental, principles. We remain open minded on the extent of that flexibility providing that there is an agreement between parties regarding the length of a tenancy, and that there had been no coercion involved in the negotiating process. Also, as stated above, we are also keen to see the same flexibility of assignation applied to any new tenancy arrangements.

The Committee supports the principles of both a new modern LDT of a minimum of ten years, with a possible five year break, and a repairing LDT where the onus for providing the fixed equipment rests solely with the tenant. With regard to the length of term of the latter, we consider a balance needs to be struck between maximising confidence and the likelihood of such tenancies being offered, with the fact that the holding will have little or no fixed equipment.

We note the concerns raised with us regarding the abolition of SLDTs and the call for lease arrangements between one and ten years, rather than recurring one year leases, to be made available. We note your comments to us that you
have an open mind on this issue and will listen to views before bringing forward any proposals. The Committee asks you to take into consideration our comments on flexibility above when giving urgent thought to this issue.

The Committee notes the views of the STFA that existing limited partnerships should be converted to LDTs. We also note your comments that the Scottish Government shares the principle of this view but does not think that making such a move compulsory through statute would be helpful or productive for a variety of reasons. Having had recent experience of scrutinising limited partnerships, the Committee understands that such agreements are often complex and subject to individual and particular circumstances and that it may therefore not be appropriate to deal with all of these on a catch-all basis through legislation. We therefore hope, as you do, that the consequences of other measures contained in the review may lessen the demand for limited partnerships and that many of those currently in such an arrangement may be able to convert to an LDT.

New entrants and reducing barriers to entry

The issue of attracting and sustaining new entrants into tenant farming is a long-standing and complex one, and one for which there is unlikely ever to be a quick fix. Many factors are at play, such as the amount of available tenanted land; the desire of new people, including younger people, to come into the industry; and then the ability of those people to raise enough funds to move up the rungs of the ladder from starter units to established farms. The review makes some interesting suggestions to address this issue. These include allowing a tenant to assign an LDT on a staged basis to new entrants with support (essentially creating an informal apprenticeship arrangement) and several recommendations regarding starter farms. These include calling for starter units to be created on publically owned land and within large private land holdings; tax incentives for starter farms; and looking at directing Common Agricultural Policy (CAP) and Scottish Rural Development Programme (SRDP) funds to starter units.

Stakeholders were supportive of the need to attract new blood into the sector and were supportive of some of the principles of the proposals, but the STFA raised the issue of where new entrants would go after a starter unit. It was hoped that one of the consequences of the implementation of other recommendations in the report would be an increase in new entrants and a better environment for them to thrive in.

The issue of how to best encourage and sustain new entrants in farming has been a perennial one in this session of Parliament and one the Committee has grappled with on several occasions. Again, both in the report and in much of the evidence we received, the need was stressed to find ways of reducing any barriers which are preventing new entrants coming into farming in Scotland and, although there are no magic bullets to solve this issue, it is important that innovative ideas are developed to try and improve the situation.

The Committee welcomes the recommendations in the report in principle, particularly the concept of developing an apprenticeship scheme in tenant farming, and also the exploration of how to develop more starter units on both
publically and privately owned land. We would welcome your consideration of whether a more coordinated regional approach to developing starter units could be beneficial.

Taxation, the CAP and other fiscal incentives

The report highlighted the influence that a number of different taxes may have on decisions to let land and found that certain tax reliefs which are in place may be acting as a barrier to letting land. Therefore it recommended reconsidering the terms of Agricultural Property Relief, Business Property Relief, and Entrepreneurs' Relief, to consider whether disincentives to the letting of land could be removed. The Review also considered that other disincentives could exist, such as the way rent is treated as investment income rather than trading income for income tax purposes, and the VAT exemption for letting land which prevents landlords from recovering VAT from inputs, and that these must be looked at.

The impacts of devolved taxes on the letting of land were also considered. Agriculture is exempt from non-domestic rates so they are not paid on rented land. The group noted the ongoing review of non-domestic rates and land value taxation, and recommended that these should consider the potential to provide an incentive for long-term letting of land. It also called for a review of the impact of the new Land and Buildings Transaction Tax in terms of letting land. We note that you have raised this issue with the Scottish Fiscal Commission which has been established to scrutinise the Scottish Government’s forecasts of devolved tax income.

CAP and SRDP funding impacts were also considered and, to help fair rent reviews, the group called for the values of each of the regional step changes arising from convergence to be published in advance so that landlords and tenants are able to take account of the revised value of basic payments. A wide range of other CAP and SRDP measures aimed at helping the tenanted sector were also discussed.

You told us that you have raised taxation and fiscal issues relating to tenant farming in Scotland with the UK Government but that it is has not yet been receptive to further discussions on these matters.

The recommendations relating to fiscal measures, including the CAP and SRDP, need to be considered against the desired outcomes of the review: which of these recommendations would help improve the health of the tenant sector; encourage new entrants; and encourage the right environment for the letting of land?

We note your comment that discussions on this issue with the UK Government have not been well received to date, and ask you to bring this issue to the attention of the new UK Government once that administration is in place.

We also note that you have raised some of the domestic taxation issues with the Scottish Fiscal Commission and request an update from you in due course of progress on those issues.
Conclusion

Throughout our scrutiny of agricultural holdings issues in this session, the Committee has been unanimous in seeking to help establish the best environment for a healthy tenant farming sector to thrive in, so tenant farming can maximise its contribution to rural communities across Scotland, economically, socially, and environmentally. For that to happen confidence must be improved and sustained amongst all involved.

The evidence we took on the Review group’s report was heartening in many ways, given the degree of consensus there seemed to be on some very important issues. However, on other issues, there were clearly still differing views which remind us of the difficult job that is ahead of us all, not just in passing the best legislation we can, but in trying to restore the trust and confidence of all those involved in tenant farming.

I fully expect that we will continue to be engaged in many of these issues as we scrutinise legislation later this year. Should that be the case, the Committee will apply the most considered and robust examination possible to help ensure that the Parliament gets this right. Ahead of that process beginning, the Committee would appreciate a response from you on the comments made in this letter.

Yours sincerely

Rob Gibson MSP
Convener