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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