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), not withstanding:

(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 Annex 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.