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 *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 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

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

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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 LOT 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.