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Response to Land Reform Review Group's Call for Views

Introduction

The Scottish Tenant Farmers Association (STFA) is the only organisation dedicated to representing the interests of tenant farmers throughout Scotland. Its stated aim is to support and enhance the tenanted sector and in that role welcomes the opportunity to respond to the Land Reform Review Group's call for evidence. The response to the call for evidence is based on an extensive online and postal survey of members. STFA has a strong sectoral interest and will mainly confine comments to issues affecting the tenanted sector.

There are significant problems within the tenanted sector, particularly regard to the operation of tenancy legislation and relationships between landlords and tenants. However, there is a further requirement to consider the bigger picture and conduct a wider examination of the role that the tenanted sector will be expected to play in the future and what contribution it should make to food production, the environment and the economic and social prosperity of local communities. Whilst some of the technical tenancy issues can be tackled by the industry, the Land Reform Review presents an opportunity to carry out a more holistic overview of the future of Scotland's rural communities. We would disagree with the silo approach often proposed which seeks to remove tenancy matters from the land tenure equation and restrict debate to within the industry and the Tenant Farming Forum.

Summary

- Land tenure and tenancy reform must be considered in the wider context of land reform taking account of the role that the tenanted sector will be expected to play in the future and the contribution it can make to food production, the environment and the economic and social prosperity of local communities.
- A Land Reform Strategy should encourage greater diversity of ownership of land and a structure of diverse land based businesses to maintain viable local economies and vibrant rural communities.
- New routes into agriculture must be created through innovative proposals such as share farming and by broadening access opportunities to existing tenancies.
- STFA members have divided views over the extension of right to buy legislation but acknowledge the need to tackle the core issues which provoke such widespread dissatisfaction and frustration.
- The land reform review should consider the creation of a Land Agency with powers to intervene where there is evidence of land abandonment, mismanagement or inappropriate use of land.
- Succession to traditional secure tenancies should be broadened to include a wider class of relative.

- Extending the assignation provision to a wider group of suitably qualified people would assist in the preservation of “secure” tenancies, encourage retirement and provide possible entry for new entrants through share farming or other arrangements

Background

Government statistics on tenanted land show a significant decline in the area of tenanted land in recent years, falling from 2.35m hectares in 1982 (40.5% of agricultural land) to 1.45m hectares in 2011 (25.42%). Although some of the reduction in tenanted land can be accounted for by farm purchase by tenants, most is due to landlords taking land back, either to farm in hand or to pursue other arrangements such as contract farming or seasonal lets, particularly prevalent in arable areas. Generally speaking, landlords will take land out of secure tenure wherever possible.

Statistical evidence from the 2011 has revealed extent of the decline in the tenanted sector over recent years with the total number of holdings with tenancy agreements decreasing steadily by 10% from 7,470 in 2005 to 6,743 in 2011. The decline in traditional tenancies has been greater during the same period with an overall reduction of 16% in holdings with either a 91 Act Tenancy or a 91 Act Limited Partnership agreement, from 7,172 in 2005 to 6,048 in 2011. www.scotland.gov.uk/Publications/2012/01/tenancy0511

However, despite this decline in area, about 25% of Scotland’s agricultural land is still tenanted with tenants making a significant contribution to rural communities and the local economy.

Legislative history

Agricultural tenancy law along with crofting law has evolved over the last 130 years with the first agricultural holdings bill being passed in 1883. Since then there have been a myriad of bills (over 20) and statutory instruments making various changes to the law, generally reflecting the policy intentions and the political colour of the government of the time.

There have been important milestones over the years, the 1883 act, brought forward by the Liberal government was the first to recognise the need to give the tenant the right to claim back compensation for his improvements, manorial values and so on.

The next major milestone in tenancy legislation was the 1949 Acts by the post war Labour government which conferred security of tenure on to agricultural tenants, improved waygo compensation and established rent review provisions. In the post war era, food production was a priority and the government realised that farming was a long term business and that tenant farmers (65% of the farming population) required the confidence of security of tenure to encourage them to carry out the post-war ambition of making two blades of grass grow where one grew before. This policy was extremely successful and almost all long-term tenants and a large population of owner occupiers today owe their farms to the 1949 Act.

In 1958 the Tory government introduced legislation to swing the balance in favour of the landlord by restricting succession and by introducing the concept of open market comparables for assessing rent. 1983 saw changes to rent reviews followed by a consolidating Act in 1991 to tidy up all the various pieces of legislation and to clarify some of the drafting of the 1949 Act. Most tenancies are traditional heritable secure tenancies and are popularly referred to as “1991 Act” tenancies.

From the 1980s the tenanted sector had been in decline and stagnating with very little land being let out except under Limited Partnerships, a device created to avoid security of tenure. Most tenancies were let on that basis for 10-12 years and thereafter annually. The landlord had the comfort of knowing he could get the land back at any time, whereas the tenant, after the initial lease period, was back to square one with his security dependent on the landlord's goodwill.

The 2003 Act

The 2003 Agricultural Holdings Act was part of the Land reform suite following the recommendations of the Land Reform Policy Group and had the stated aim of reinvigorating the tenanted sector.

The 2003 Act created two new types of tenancy, the Short Limited Duration Tenancy under which land was let for a maximum of 5 years and Limited Duration Tenancies with a minimum term of 15 years. The Act also allowed tenants to diversify, did away with statutory arbitration and introduced a pre-emptive right to buy although there was a strong campaign for an absolute right to buy similar to that enjoyed by crofters since 1976. The 2003 Act also delivered a number of reforms to improve conditions for tenant farmers but, although well intentioned, many of the reforms have failed to materialise due mainly to legal challenges and unclear drafting of legislation.

The 2003 Act was subsequently modified in 2011 by the Agricultural Holdings Order which made minor amendments and again in 2012 by a short Holdings Act which broadened succession rights by allowing grandchildren to inherit a tenancy.

Although well intentioned, the 2003 Act has failed to deliver many of its objectives. The Act was seen by the landlord sector as swinging the balance of power too far towards the tenant, as a consequence there has been limited use of the new limited duration tenancies and legal challenges to many of the reforms brought forward by the act. This has resulted in some high profile legal battles, notably the Moonzie rent review case and the Salvesen v Riddell case which ruled that part of the 2003 Act was in breach of ECHR, this case is currently subject to appeal to the UK Supreme Court.

Small Landholdings

Small Landholdings as defined under the 1911 Small Landholders Act are the Cinderella of the tenancy system. They were excluded from the 2003 Act but are now included in the Crofting Reform Act of 2010 which confers on them the right to convert to crofting status in the newly designated areas of Arran, Bute, Greater and Little Cumbrae and the Moray Council. However the process of conversion has proved to be a long, expensive and tortuous journey, especially when faced with a hostile landlord. STFA believes that if the Scottish Government wants to encourage Small Landholders to convert to crofting status the conversion process should be reviewed with a view to introducing a fast track procedure.

Land Reform Review

STFA notes the LRRG's original remit to:

“enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;

assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;

generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland”.

STFA further notes that this remit has been widened to encompass a much broader range of issues:

1. Expand community ownership of land, housing and other assets in both town and country and in all parts of Scotland.

Tenant farmers are broadly in favour of the expansion of community ownership particularly in the case of under-utilisation or land abandonment and where the public interest overrides that of a private landowner. This may well be achieved by a compulsory requirement to let out the land or asset rather than by depriving the landowner of his property. Alternatively compulsory acquisition powers may be considered similar to those proposed in the Community Empowerment Bill. The charitable status of landowning trusts and companies should also be scrutinised to ensure that their stated aims are being realised and that they are not merely a tax avoidance mechanism.

Community interest in buying land will override the tenant farmer’s interest, but there is evidence that a community landownership can work well with tenant farmers as can be seen on Gigha and Eigg. Opportunities for new entrants and new tenancies may arise from the transfer of public land to community ownership and the availability of such an opportunity should play a part in the decision to grant such a transfer.

2. Diversify and broaden ownership of land in Scotland, where more land is owned by fewer people than anywhere else in Europe

The STFA survey revealed that over 80% of respondents believed rural communities would benefit from greater diversity of landownership and as a consequence greater investment by individuals. This is apparent in areas where estates have been broken up and sold, such as Panmure Estate in Angus or Rosehaugh Estate on the Black Isle where many of the tenants were given the opportunity and have purchased their farms and none of whom would turn the clock and revert to being tenants.

The effects of a lack of diversity of ownership are most strongly felt in isolated communities where almost all the land is under the control of a handful of landowners. This is most apparent in the Highlands and on many islands such as Arran, Bute and Islay. Frequently these communities suffer from a lack of inward investment and a stifling of local private enterprise.

A Land Reform Strategy should encourage greater diversity of ownership of land and a structure of diverse land based businesses to maintain viable local economies and vibrant rural communities.

3. Encourage (or oblige legislatively) owners of land to give local communities a greater say in how land is managed and used

As land managers tenants are generally supportive of community involvement in land management and land use and welcome the opportunity to work with communities towards developing a greater understanding of each other’s needs and a collaborative approach towards carrying forward projects for mutual benefit.

4. Make it easier and cheaper for Forestry Commission land and other land in public ownership to be transferred to others

STFA believes that approximately 12% of Scotland's land is in public ownership and should be managed for the public good in particular with regard to the best use of land. STFA recognises the Scottish Government's aspirations for woodland expansion and has been involved in the WEAG in making recommendations to the Government. However, we remain concerned that the Commission's policy of purchasing some potentially productive agricultural units has created an extensive land bank at the expense of agricultural production. Some 50 or so farms have been bought in the last six years and, to date, 31 remain unplanted. STFA would like to see an assessment made of the Forestry Estate to determine the best use of land in public ownership.

We welcome the Commission's creation of starter units for agricultural new entrants and we also acknowledge the Commission's intention to reassess its land use policy on the Forestry Estate. We would recommend that particular attention be paid to the future of new entrants once they have come to the end of their 10 year tenancy agreements.

There may be some opportunities to create larger and more sustainable units on the public estates which could be rented out initially with a view to purchase. Unless there is a step change in the availability of let land there may well be fewer opportunities in an over-heated open rental market except for the expansion of existing farming businesses.

5. Improve the supply and lower the price of land for affordable and other housing in both town and country

Tenant farmers would welcome any measures that would result in a lowering of the price of land for housing. The availability of affordable housing is one reason for the reluctance of tenants to retire and make way for the next generation of farmers.

The housing stock on many tenanted farms is a cause for major concern with standards lagging far behind the rest of the private sector. Landlords should be encouraged to invest in housing stock or sell to tenants to allow them to make improvements.

6. Help create new pathways, for younger people especially, into farming and crofting

There is a clear need to create new routes into farming for the next generation. The aging population of farmers and the need for new blood to enter the industry are both accepted and well documented. 87% of respondents to the STFA survey recommended that new routes be found to encourage new entrants into agriculture

Numerous barriers have been identified preventing new entrants gaining access to the agricultural industry such as:

- Availability of land; the largest barrier for new entrants. Landlords are reluctant to release land for let to new entrants, usually preferring to either rent to existing tenants selling houses and steadings. New entrants competing for tenancies on the open market are usually out bid by existing farmers or contractors seeking to expand their businesses and spread overheads. Possible solutions are dedicated started units as offered by the Forestry Commission, retirement packages linking a new entrant with a retiring farmer or share farming arrangements. Large estates in Scotland must be encouraged to support a new generation of farmers by making land available to new tenants on long term tenancies wherever possible.
- Access to finance; Banks are unwilling to provide unsecured loans for new entrants unless especially on a short term lease. Longer leases and security are essential and future RDPs should include provisions to assist new entrants. A

new Rural Development Plan must make provision for term loans as part of a new entrants policy as well as priority access to grant schemes.

- Access to Single Farm Payment; Provision of SFP for new entrants must be one of the pre-requisites of CAP reform.
- Political concerns; Perceptions of political uncertainties, such as relating to an extension of the right to buy are frequently used as an excuse by landlords' advisers to caution against the letting of land. In reality taxation, land values, CAP reform and the availability of other arrangements such as contract farming have greater influence in the decision whether or not to let land.
- Taxation; Taxation policy, negative and positive can play a large part in deciding whether or not to rent out land. The Scottish Government should examine possible options to influence the letting of land using existing taxation powers.

7. Enhance the position of tenant farmers by giving them a right (similar to the right enjoyed by crofting tenants since 1976) to buy their farms

The extension of right to buy legislation, introduced in 2003 for heritable "secure" tenancies held under the 1991 Act has been a controversial issue over the last decade. STFA has a broad spectrum of membership holding a variety of different views over a range of topics including the right to buy. The right to buy question has been discussed frequently and in depth over the years and STFA has concluded that with respect to the diversity of opinion held within the membership, the association should neither support nor oppose calls for the extension of RTB provisions. The recent survey conducted by STFA has confirmed a continuing difference in opinion amongst tenants with 61% opposed to the extension of the right to buy and 39% in favour.

Most tenant farmers aspire to become owner occupiers and would like to see a land market which is not restricted to the super-rich. Tenant farmers are subject to a pre-emptive right to buy should the landowner decide to sell and providing the tenant has registered his interest in acquiring the land. However, the requirement to register an interest in buying land has often soured relationships between landlords and tenants. Many tenants have been inhibited from registering their interest for this reason and indeed, some tenants in limited partnership tenancies have had their tenancies terminated as a consequence.

Respondents to the survey have questioned the requirement to register an interest in buying land, 1148 tenants have a current registration of interest but this does not reflect the number of tenants who would take advantage of a statutory right to buy. STFA therefore recommends the removal of the requirement to register an interest to create an automatic pre-emptive right to buy should the landowner decide to sell the land.

However, calls for an extension of the right to buy by 39% of respondents are understandable and cannot be ignored. They are usually symptomatic of the frustrations and disillusionment being felt by many of those who find themselves in a difficult situation with an unsympathetic, disinterested and often absentee landlord. The root causes of this dissatisfaction are largely the same as in 2003 and frequently relate to estate management, the conduct of estate agents and the unwillingness to consent to diversified activities. Although tenancy law is highly regulated there are no formal codes of practice, no objective practitioner guidelines and no industry adjudicator or ombudsman. The Scottish Land Court is the main avenue for dispute resolution and this has proved to be a costly exercise. Moreover, frustrated tenants have limited means to express their views as they are usually unwilling to speak out in public for fear of recrimination. Recent surveys have demonstrated levels of dissatisfaction and concern.

The industry, through the Tenant Farming Forum, has been engaged for some time in trying to find solutions to a range of problems as such as rent reviews, the lack of investment in tenanted holdings, dispute resolution, end of tenancy compensation and succession with limited success. However, it is likely that any agreement to emerge from the TFF will be, of necessity, a compromise. Therefore, it must be the responsibility of government to step back from the sectoral interests of stakeholders and assess the future direction of the tenanted sector in context of the broader interest of rural Scotland.

There is merit in the consideration of the establishment of a Land Agency, as proposed by Community Land Scotland, with powers to intercede in the public interest where there is evidence of mismanagement or inappropriate use of land

There are indications that the agricultural industry is heading towards the growth of large scale farming enterprises as large units expand creating economies of scale at the expense of smaller farms and to the detriment of potential new entrants. This can only be exacerbated by the current rent review system which will cause escalating rents, inhibit capital investment and affect the viability of smaller units.

This move towards a corporate agricultural structure and economies of scale may help meet food production objectives, but it may well do so at the expense of rural communities and the downstream benefits of a well populated rural landscape. **STFA would recommend that the Land Reform Review should set out a vision for rural Scotland which includes a varied and diverse land holding system which helps to retain family farming businesses in the countryside and land laws should be geared to meet this ambition.**

8. Replace Council Tax and Business Rates with a tax on land values

STFA is not qualified to make detailed comment on the effect implementing a tax on land values, however, it would appear that such a tax could be used to deliver desired outcomes. For instance fiscal rules could be amended to encourage the use of longer tenancies and discourage the use of contract farming and other short term arrangements.

9. Change the way in which fresh water resources are owned and managed in order to secure wider community benefit from these resources

We have no comment to make

10. Change the law of succession as it affects ownership of land

Great care should be taken in consideration of changing the law of succession as it affects ownership of land to avoid damaging the fabric of owner occupied agricultural businesses. Most landed estates are incorporated in companies or trusts and thus will be unaffected by changes to the law of succession. However, there is merit in changing succession law in relation to tenanted land.

Scotland has a two tier system of tenancies. Heritable “secure”1991 tenancies and short limited duration tenancies created in 2003. By and large, traditional secure tenancies provide succession opportunities, bring stability to the sector and encourage an ongoing commitment to capital investment by tenants.

STFA sees merit in retaining a two tier tenancy system comprising a nucleus of long term secure tenancies which will provide stability and continuity to balance market driven short term tenancies. Limited Duration tenancies will remain the main route into farming for new entrants and for the expansion of existing farming businesses, but provision should be made to create a “bridge” allowing movement from shorter duration tenancies to longer secure tenancies.

Preservation of the secure tenancy sector should be a priority with provision made to allow broader access to the secure sector. Succession law should be changed to permit a wider class of relative to succeed into 1991 tenancies and avenues be explored to create access opportunities to these tenancies for a wider group of people. Survey results show 78% of respondents wishing to preserve the number of secure tenancies and 82% thought this should be achieved by widening succession provisions to include a wider class of relative, at present succession is limited to suitable “near relatives” – spouse, children or adopted children, civil partner and since 2012 grandchildren.

The 2003 Act introduced the tenants right to assign a “secure” 1991 tenancy to any relative who would be entitled to ordinarily inherit from the tenant should he die intestate. Extending the assignation provision to a wider group of suitably qualified people would assist in the preservation of “secure” tenancies, encourage retirement and provide possible entry for new entrants through share farming or other arrangements with retiring tenants a solution favoured by many tenants.

LAND REFORM SURVEY

1. Do you think that landownership in Scotland is concentrated in the hands of too few people?

(a)	Yes	85%
(b)	No	12%

2. If there was greater diversity of landownership would:

(a)	Rural communities benefit from greater investment by individuals?	81%
(b)	Rural communities suffer without the contribution of large estates?	6%
(c)	Make no difference	9%

3. Do you think the number of tenant farmers in your area is declining?

(a)	Yes	89%
(b)	No	8%

4. If you answered "Yes" to the above question: Do you agree that the increasing size of farm businesses and the reduction of farming families in the countryside will be damaging to rural communities?

(a)	Yes	83%
(b)	No	8%

5. Numbers of "secure" 1991 tenancies are declining. Should:

(a)	Steps be taken to preserve secure tenancies?	78%
(b)	Numbers of secure tenancies be allowed to naturally decline over time?	17%

6. Succession to 1991 tenancies is restricted. Should succession law be relaxed and extended to a wider range of relative?

(a)	Yes	82%
(b)	No	16%

7. With landlord's agreement, tenants may assign a tenancy during their lifetime to a wider range of relative under certain conditions. Should assignation of a 1991 tenancy be extended to:

- | | | |
|-----|---------------------------------------|-----|
| (a) | Any suitably qualified family members | 60% |
| (b) | Any suitably qualified person | 39% |

8. Tenants of 1991 tenancies have a pre-emptive right to buy their farms providing they have first registered their interest in doing so. Do you believe:

- | | | |
|-----|---|-----|
| (a) | The right to buy should be automatic when the landowner decides to sell (i.e. no requirement to register) | 42% |
| (b) | Tenants should have an absolute right to buy at any time | 39% |
| (c) | The existing pre-emptive right to buy is adequate | 20% |

9. Should new routes be found to encourage new entrants into tenancies?

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|-----|-----|-----|
| (a) | Yes | 87% |
| (b) | No | 8% |

10. The Forestry Commission has created some starter farms for new entrants. Should more of the Commission's unplanted land be made more widely available for agricultural tenancies?

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|-----|-----|-----|
| (a) | Yes | 93% |
| (b) | No | 2% |

11. Do you agree with the proposal to replace the community charge and business tax with a land value tax?

- | | | |
|-----|-----|-----|
| (a) | Yes | 20% |
| (b) | No | 76% |