



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Tenant Farming Advisory Forum

Minutes of the Meeting of the Tenant Farming Advisory Forum (TFAF) held online, Friday 10th March 2023 at 2pm.

Present:		Actions:
Dr Bob McIntosh	Tenant Farming Commissioner	TFC
Sarah Jane Laing	Scottish Land & Estates (SLE)	SJL
Stuart Young	Scottish Land & Estates (SLE)	SY
Christopher Nicholson	Scottish Tenant Farming Association (STFA)	CN
Douglas Bell	Scottish Tenant Farming Association (STFA)	DB
Martin Kennedy	National Farmers Union Scotland (NFUS)	MK
Rhianna Montgomery	National Farmers Union Scotland (NFUS)	RM
Jane Mitchell	Scottish Agric Arbiters & Valuers Assn (SAAVA)	JMi
Jon Robertson	Agricultural Law Association (ALA)	JR
Andrew Wood	RICS	AW
Fiona Leslie	Scottish Government (SG)	FL
Calum Jones	Scottish Government (SG)	CJ
Tom Stroud	Scottish Government (SG)	TS
Craig Denham	Scottish Government (SG)	CD
Alice Ashmore	Scottish Government (SG)	AA
Sarah Allen	Scottish Land Commission (SLC)	SA
David Stewart	Scottish Land Commission (SLC)	DS
Bruce Morrison	Scottish Land Commission (SLC)	BM

1. Welcome and Apologies

TFC welcomed everyone to the meeting, and apologies were noted from Gemma Cooper, Mark Fogden and David Johnstone.

2. Minutes of the last meeting – 11th October 2022

The minutes were agreed.

3. Heat in Buildings Strategy presentation

Craig Denham and Thomas Stroud gave a presentation on the Scottish Government's [Heat in Buildings Strategy](#). The strategy, published at the end of 2021, aims to ensure that Scotland's homes and buildings no longer contribute to climate change by 2045, as well as committing to tackling fuel poverty.

CD explained that his team are separate from SG's housing team, though interlink their work and align policy. Some key points from the presentation were:

- The strategy intends to remove 20% of greenhouse emissions from Scotland through decarbonising homes.
- The strategy sets targets for minimum energy efficiency standards:
 - Energy Performance Certificate (EPC) C rating or equivalent in private rented homes by 2028.
 - EPC C or equivalent in owner occupied homes by 2033.
 - EPC B in social rented homes by 2032 (to be achieved through a non-legislative route).
- Direct Emissions Heating Systems (DEHS) are defined in the strategy as systems (other than a heat network) by which during normal operation produces greenhouse gas emissions at the point of production.
- DEHS will be end-use warranted from 2024 and end use in all tenures of existing domestic housing from 2025 and by 2045.

CD explained that the caveat of 'or equivalent' for some of the targets addresses concerns expressed by stakeholders on the limitations of EPCs as an effective energy efficiency measurement for all types of homes.

In circumstances in which it is not technically feasible for a property to achieve the equivalent to an EPC C rating, the SG strategy says that a minimum level of improvements to walls, roofs, floor, and windows would still need to be achieved. CD also explained that the specifics of cost-effective exemptions will be considered and set out by SG prior to the consultation phase.

JMi noted that it was good to see the strategy show awareness of different building types, as it is not always feasible to install non-DEHS heating options like heat pumps in traditional buildings. JMi suggested that in some cases, electric heaters powered with solar panels can be a viable non-DEHS option, but it is not always clear in current practice what the preferred option should be.

AW said that the majority of housing stock in the tenant farming sector (and agri sector more broadly) is made up of pre-1900 stone and slate buildings, which do not lend themselves to heat pump systems. Double glazing and loft insulation to provide minimum fabric energy performance are options but AW cautioned that these measures alone are unlikely to be enough to ensure housing stock contributes to net zero and heating efficiency aims.

The forum also discussed practical challenges to implementing the strategy and suggested that a bespoke approach may be needed to take account of buildings which are designated as listed or in conservation areas. Cost and timelines were noted as key concerns from members. MK suggested that a substantial system of support from the government would be required for implementation within the given timeframe. CD noted that these concerns show the need for SG and TFAF to continue working together and engaging in dialogue.

There was also discussion on how biomass fits into the strategy. CD explained that the Climate Change Committee recommends only niche use of biomass in meeting net zero targets, and the approach from SG on the implications of biomass heating options for the Heat in Buildings strategy will be set out at a later date.

MK and CN both made the point that climate implications of industrial-scale biomass power stations and small-scale biomass boilers or stoves used in the farming sector to provide direct household heating are significantly different, and the two types of biomass energy should not be conflated. CD emphasised the consultation as the point which specific issues on biomass could be addressed.

Forum members also asked what approach SG was taking to ensure that the public do not face higher energy bills as DEHS systems are phased out. TS explained that the Heat in Buildings Strategy is set within the context of SG's Just Transition approach, which ensures that nobody will be left behind in the transition to net zero. A set of guiding principles exist to underpin this commitment, and a framework of support will sit behind the regulations that come out of the strategy.

The presentation also covered the interaction between the strategy and housing standards. Housing standards are contained in the Housing (Scotland) Act 2006 and ensure minimum level of repair for privately rented accommodation. The standards were updated in 2019. TS explained that the key link between the standards and the strategy is that repairing standards are a prerequisite to energy efficiency and net zero standards. The Heat in Building standard, outlined in the presentation, will be tenure-neutral and will apply to all homes, although SG acknowledges there are unique challenges for housing in agricultural tenure.

SJL suggested that SG should take existing holdings legislation into account ahead of the consultation phase. This will avoid repetition of previous situations where TFAF members have had to explain the specifics of holdings rules to government.

TFC asked for any further information ahead of the consultation, as well as a copy of their presentation, to be shared with TFAF members.

CD and TS also signposted to further sources of information:

- The [Heat in Buildings: Green Finance Taskforce](#) has been set up by government to examine different finance options.
- Domestic.regulations@gov.scot is the primary email contact for member queries on the discussed proposals ahead of the consultation.
- CD flagged Historic Environment Scotland's guidance and case studies on energy efficient retrofits of heritage buildings.

CD, TS and DS left the meeting.

Action 1	SA to circulate presentation to members
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4. Tree Planting by Tenants of Agricultural Holdings

TFC presented a paper on what agricultural tenants currently can and can't do when it comes to tree planting. The current legislation generally disincentivises tenant farmers to plant trees.

One challenge identified in the paper is a lack of an accurate system of calculating carbon sequestration for woodlands. Agrecalc is limited as it is arguably better at recording emissions rather than sequestrations.

SY suggested that the rights and interests of landlords had not been adequately taken into account in the paper, specifically in recommendation 4.4 which suggested treating woodland creation as an agricultural activity and including it in the Schedule 5 list of tenant's improvements. TFC responded that, as under current rules for tenant's improvements, landlords would be able to object to woodland at scale.

JR and SJL highlighted the need for clarity. JR was supportive of recommendation 4.3a in the report, which seeks clarification on the ambiguity between planting trees for agricultural purposes (such as shelterbelts) and outright diversification, as well as clarification on the status of agroforestry.

5. Agriculture Reform – List of Measures

FL presented a paper on the list of agricultural reform measures currently being appraised by SG. TFC highlighted that this paper presented TFAF with a good opportunity to feed into changes to legislation. TFC also emphasised that building consensus on the measures would help the legislation pass through parliament more easily.

FL provided a spreadsheet of the list of measures. The spreadsheet contains rows describing land-based activity proposals, a R.A.G labelling system and a column for commentary. FL encouraged members to add commentary in the relevant column and label each row red, amber, or green.

Members indicated that this was a helpful mechanism to analyse the possible measures set out. AW asked FL for clarification on what weight the spreadsheet responses would be given as part of the legislative process, and compared it to previous instances of consultation where he felt stakeholder recommendations were ignored. FL explained that SG is now more outward focused, and the structure of its directorates have been altered to facilitate a consultative approach to reform.

TFC committed to working with SG to help collate responses to the spreadsheet.

Action 2	Members to submit comments on the spreadsheet to FL and TFC
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6. Agriculture Bill proposals for agricultural holdings

FL presented a series of flowcharts describing proposals for: rent reviews, resumption, compensation for damage by game, storm damage and emergency rectification, and waygo timeframes. Members discussed each flowchart individually.

Rent reviews:

FL highlighted the influence of the work of the TFC and the need for a flexible hybrid system for rent reviews.

FL highlighted global price fluctuations and the invasion of Ukraine as issues for consideration when discussing the rent review process.

CN pointed out that global price fluctuations are nothing new, which is why the ability to review rent every few years is useful. SJL made a similar point that the general economic climate is already considered in the current rent review process.

Members discussed the 3-year period for rent reviews in the proposal flowchart. SY, JM and AW questioned whether it was necessary to specify a 3-year period. AW pointed out that there have been instances where rent reviews have not taken place for far longer periods, often for good reasons, but this has positive and negative implications.

CN said he was not worried about the 3-year period and removing it would not be a problem. He said that regardless, tenants will focus on the period that rent is set for.

AW and TFC agreed that the term 'prevailing economic conditions' gave broad scope for interpretation in the context of rent reviews, which was beneficial and allowed parties to look both backwards and forwards.

There was a discussion on how tree-planting activities would factor into rent reviews, and whether they were part of 'productive capacity and related economic potential'. CN suggested that if tree-planting constituted a tenant's improvements, it would not factor into rent reviews. FL said that a tenant would have to make a decision about how many trees and for what purpose they are planted (agricultural,

timber, carbon, or biodiversity) and said that SG was working with Scottish Forestry on the valuation process for this.

MK cautioned against separating tree-planting from agricultural tenancies as it might affect how a farm's contribution to both climate and biodiversity benefits is counted.

Overall, forum members agreed with the proposed flexible method set out in the flowchart for the rent reviews.

Resumption:

FL explained that the aim of this proposal is to provide fairness and transparency for both tenant and landlord in the resumption process.

JR asked for clarification on whether the proposal would only affect secure tenancies under the Agricultural Holdings (Scotland) Act 1991. FL confirmed that was the case although indicated openness to discuss Modern Limited Duration Tenancies (MLDTs) and other types of tenancies. AW and SY cautioned against retrofitting the resumption proposals to MLDTs.

JR and TFC noted that the compensation for loss of the land and for future losses may result in double counting. TFC suggested that it would be helpful for SAAVA and RICS to provide some analysis of the compensation proposals.

AW explained that valuers often calculate agricultural loss over a 10-year period, and it is unlikely that there would ever be a loss claim made for a longer period.

Forum members also identified the need for clarification on the specific meaning of 'market value of the agricultural loss', including whether it constitutes crops and the investment in those crops, or the value of the whole holding itself. CN suggested that defining market value as only crops and investment in crops in a theoretical 100-acre partial resumption would not provide enough compensation for a tenant to regain or absorb their loss, even if they gained a new 100 acres from another landowner.

TFC concluded that further discussion was needed on the resumption proposal.

Compensation for damage by game:

TFC introduced the discussion by highlighting the current difficulty in dealing with game damage claims. FL further contextualised the proposal by describing instances where deer fencing has funnelled deer down to agricultural land, affecting grass and silage. She also highlighted the disease risk to poultry posed by rearing of pheasants.

FL explained that NatureScot are going to provide SG with clarification on the definition of 'black game', as current definitions of game include protected species such as capercaillie, which is unhelpful.

TFC highlighted the difficulty of quantifying damage as a potential disincentive for a tenant to pursue a claim. Members discussed other challenges, such as farming interests conflicting with sporting interests and a difficulty in finding who was responsible in cases of birds spreading disease.

TFC said that there were examples where NatureScot's local deer officers had been helpful in tracking and counting deer at night, using powers outwith ag holdings legislation to provide information to a tenant on game damage. Members also highlighted veterinary evidence as a good source of independent evidence for game damage claims.

SY said that issues of game damage are often already factored into current rent review processes.

FL said that there remains an issue about what timescale is 'practicable' (as worded in the proposal) for a tenant to give written notice to the landlord on when they have identified crop damage from game.

Storm damage and emergency rectification:

FL explained that this proposal is a new provision which would enable a tenant to carry out emergency works on fixed equipment that the landlord is responsible for, in cases of storms or other natural emergencies, without the consent or notice of the landlord required (if the landlord does not execute repairs within a reasonable time after receiving notice).

FL responded to a question from CN by clarifying that this proposal would cover the emergency rectification of crop storage facilities.

JR explained that landlords are generally responsible for repairing fixed equipment due to wear and tear, but he is not aware of any current obligations on storm damage. He said that the storm damage proposal would put a new obligation on landlords, though currently tenant farmers can make repairs as tenant's improvements. JR also suggested that if the proposal is pursued, it will have to be applied retrospectively.

Forum members discussed how the proposal might interact with insurance policies. MK pointed out that insurance cover should dictate how fixed equipment is repaired or replaced in instances of storm damage. AW approved of the flowchart and said it generally reflects what is happening in practice already, but as the proposal raises questions about insurance policies it would be useful to have insurers in the room for conversations around the proposals.

Waygo:

CJ explained that the purpose of this proposal is to bring landowners and tenants together before the end of the tenancy to begin evaluation of compensation due at waygo.

TFC explained that an issue with the existing waygo process is that it takes too long, and often the end of the tenancy comes before the end of waygo, which makes the proposal in the flowchart a valuable aim.

CN pointed out that when a tenancy ends but the waygo process does not, tenants don't have access to their former farm for collecting evidence if a claim or dispute needs to be addressed.

JR cautioned against extending tenancies as part of the waygo process, arguing that it should only be used in emergencies.

Due to time constraints it was agreed that the flowcharts on diversification, schedule 5 improvements, and sustainable good husbandry and estate management would be discussed at a future meeting of TFAF. Members also noted that the other flowcharts may also need to be discussed in more detail at a future meeting.

TFC concluded the discussion by noting that the proposals are generally supported by forum members. Thanks were given to FL and CJ for presenting the flowcharts and allowing TFAF input at an early stage.

7. TFC's use of Section 38

TFC referenced a paper circulated prior to the meeting which described TFC'S activities in seeking determination by the Scottish Land Court over uncertainty regarding resumptions under the Agricultural Holdings (Scotland) Act 2003. The Land Court declined to accept the TFC's application, which has raised questions about the function of section 38 of the Land Reform (Scotland) Act 2016.

The paper sets out three potential options for next steps, including appealing the Land Court's decision. However, TFC indicated he was disinclined to pursue this option, and is investigating the original intent of

s.38 with SG. Once the intent is clear, TFC said that it might be possible to clarify the function of s.38 through regulations added to the forthcoming Agriculture Bill.

8. TFC Update

TFC summarised the paper, providing an overview of TFC activities for calendar year 2022. SA provided the updated amnesty figures from the Land Court:

44 cases are now closed or pending closure, 20 cases are sisted, or held informally for more information or to await further adjustments, 5 cases are waiting for final orders or other direction from the court, 2 are waiting for the appointment of new legal representatives and 1 case has a hearing fixed but the earliest date that suited all parties was in December 2023.

9. Update on Small Landholdings Consultation

CJ provided an update on the Small Landholdings Modernisation consultation. The consultation closed on 14th of January - 40 written responses were received, and 20 people attended an in-person event on Arran. The proposals SG has set out in the consultation include an absolute right to buy, enabling small landholders to diversify their activities (SG are looking to ensure this has commonality with diversification proposal in the Agriculture Bill), as well as a proposal for an umbrella body.

10. Member updates and AOB

CN asked the forum about the rights of tenant farmers to shoot feral pigs, and referenced a particular case where a tenant farmer felt that they were prevented from doing this by their landlord. CN explained that tenants don't seem to be able to make game damage claims either. SJL agreed to share SLE advice notes on invasive non-native species with CN and correspond separately. SJL also noted that SLE advice notes are similar to NatureScot guidance.

CN asked whether the land reform consultation which asked about the class of people who could raise a complaint would apply to alleged breaches of TFC Codes. TFC and FL confirmed that there would be no changes to who could report an alleged breach to the TFC and that the proposals in the consultation related to breaches of the Land Rights and Responsibilities Statement.

11. Date of next meeting

It was agreed that TFAF should reconvene for an additional meeting to discuss the outstanding agricultural bill proposals mentioned above. This will take place in the coming weeks, ideally in April.

Action 3	SA to arrange a TFAF meeting in April/May
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