



SCOTTISH LAND COMMISSION  
COIMISEAN FEARAINN NA H-ALBA

## Tenant Farming Advisory Forum

### Minutes of the Meeting of the Tenant Farming Advisory Forum (TFAF) held at the Scotland Food and Drink Offices, Newbridge, Thursday 11<sup>th</sup> May 2023 at 2pm.

Present:		Actions:
Dr Bob McIntosh	Tenant Farming Commissioner	TFC
David Johnstone	Scottish Land & Estates (SLE)	DJ
Sarah Jane Laing	Scottish Land & Estates (SLE)	SJL
Mark Fogden	Scottish Agric Arbiters & Valuers Assn (SAAVA)	MF
Jon Robertson	Agricultural Law Association (ALA)	JR
Christopher Nicholson	Scottish Tenant Farmers Association (STFA)	CN
Douglas Bell	Scottish Tenant Farmers Association (STFA)	DB
Martin Kennedy	National Farmers Union Scotland (NFUS)	MK
Gemma Cooper	National Farmers Union Scotland (NFUS)	RM
Andrew Wood	Royal Institute of Chartered Surveyors (RICS)	AW
Fiona Leslie	Scottish Government (SG)	FL
Calum Jones	Scottish Government (SG)	CJ
James Muldoon	Scottish Government (SG)	JM
Helen Mooney	Scottish Government (SG)	HM
Bruce Morrison	Scottish Land Commission (SLC)	BM

#### 1. Welcome and Apologies

TFC welcomed everyone to the meeting. TFC noted that Sarah Allen has left the Scottish Land Commission for a new role and will no longer attend TFAF meetings in her capacity as a Commission staff member.

#### 2. Minutes of the last meeting – 3<sup>rd</sup> April 2023

The minutes were approved.

#### 3. Agriculture Bill proposals for agricultural holdings (Fiona Leslie/Calum Jones)

CJ and FL presented revised flowcharts of proposals based on feedback from members, which were discussed in turn.

##### *Diversification*

The revised proposal suggests including any loss of Agricultural Property Relief (APR) as part of undue hardship, one of the grounds for a landlord to object to a diversification. AW and SJL suggested that loss of APR could be included as an example of undue hardship in supplementary documents to the legislation, such as guidance, rather than within the legislation itself. CJ indicated this was a possibility.

TFC asked whether ‘environmental’ in the phrase ‘environmental benefit’ could be removed from the proposal to take into account cases of non-environmental diversification, however FL said that doing so would make benefit more difficult to quantify. JM suggested that the focus should be on intent. The forum agreed that environmental benefit should (only?) be expected in cases of environmental diversification.

CJ asked forum members about the inclusion of mediation as a voluntary or mandatory step as part of the diversification.

There was overall agreement that voluntary mediation should be a step in the process. DB and DJ both suggested that mediation needed both parties to be willing in order for it to be effective, and therefore mandatory mediation would likely be ineffective. DB suggested that there be a requirement for both parties to consider mediation, rather than a requirement for them to engage in mediation. MF suggested that this point could form part of supplementary guidance.

FL said that clarification is needed from the Land Court as to whether mediation would be considered by the Court in decisions related to diversification. TFC said that mediation is already considered in rent review cases that go to the Land Court, and that it can take TFC codes into account, but is not obliged to.

JR noted that the proposal would remove two possible landlord objections to a diversification from the Agriculture (Scotland) Act 2003, which are if the landlord considers that the diversification would: ‘lessen significantly the amenity of the land or the surrounding area’ or ‘be detrimental to the sound management of the estate of which the land consists or forms part’.

JR suggested that the compensation section of the proposal should clarify that payment should be made at waygo.

FL said that though there is a difference in scale between planting woodland as a diversification and planting woodland under schedule 5 improvements, however there are not specific thresholds between shelterbelts, small woodlands, and commercial woodlands.

CN and TFC both suggested that the proposal’s method of valuing compensation as ‘the reduction or increase in market value as a result of the diversification’ risks acting as a barrier to tenants wishing to plant trees. Though the proposal covers all diversification, there was agreement from the forum that this should change in cases of tree planting.

TFC noted that current ways of valuing diversifications such as farm shops don’t take into account the loss of agricultural land, so the same principle could be applied to tree planting.

SJL asked for more information on different types of valuation. MF agreed to contact SJL following the proposal with details of different types of valuation.

Action 1	MF to contact SJL with details of valuation types.
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### *Schedule 5 Improvements*

CJ highlighted that Part 1 of the revised flowchart, which outlines the process of proposing and seeking approval for long-term or major improvements, asks whether a landlord should be required to explain their reasons and whether a tenant could object through mediation or otherwise take the matter further if a landlord objects to a proposed improvement. CJ explained that the current

schedule 5 exhaustive list would remain under part 3 (short term or minor improvements) of the revised proposal.

JR noted that the current schedule 5 exhaustive list contains improvements that are now rarely used, such as the planting of osier beds.

FL explained that under the proposal, major changes and changes to capital infrastructure, such as shelterbelts under part 1, and structures under part 2, would require consent from the landlord. In the case of part 1, this would mean positive consent in writing, and under part 2, this would only require the tenant to give the landlord notice, but the landlord would still be able to object within one month of receiving notice. TFC said that this would be a big change from the current system, in which tenants do not require permission for the planting of shelterbelts.

CN suggested that as at least 5% of calculated arable area on a holding must be used to create ecological focus areas, 5% of a holding may also be a reasonable threshold between a shelterbelt under part 1 and a diversification. MK noted that 5% would be a significant amount of land. 2% was floated in discussion as a possible alternative. FL said that SG would examine relevant data following the meeting to get more clarity on the issue.

CJ asked members for their views on clarifying objections to improvements under part 2 of the proposal, such as through a reasonable test, a set of objection grounds, or mediation. The principle of including this was agreed by most members however preferred specifics were not determined.

TFC observed that whilst some specifics of the proposal still need to be determined, members were mostly favourable to the three-part proposal.

#### *Game Damage*

CJ asked members for input on the issue of measuring and evidencing damage, and whether damage should extend beyond damage to include other types of agricultural damage.

Members discussed some practicalities in documenting evidence of damage. CN said that documenting evidence of deer damage to fences and dykes is normally easier than evidencing damage to crops. FL and DJ both agreed that though crop damage can be identified and documented, it is often difficult to quantify.

FL also said evidence has been gathered on damage caused by deer in relation to ticks and disease on livestock but less on other types of game damage, such as pheasants. MK suggested that issues of pheasant causing damage can be dealt with through arbitration.

The relationships between farming and sporting tenants were also discussed. CN said that it should be made clear that a tenant farmer should go directly to the landlord before speaking to a sporting tenant in instances where game may be causing damage, however DB noted that when there is a good relationship between the two tenants, they should already be communicating. Discussion suggested that this point could be included in guidance supplementary to the legislation.

CJ and FL asked members for input on some of the timescales in the flowchart. For instance, defining the 'soon as practicable' period in which the tenant should provide written notice to the landlord, set out in S.52(2)(a) of the 1991 Act. CN clarified that the written notice refers to notice for a compensation claim, rather than notification simply that damage has been caused, and also suggested that it can be difficult to quantify damage in a short period. For instance, the full cost of crop damage that occurs in winter wouldn't be measurable until harvest.

The proposal suggests clarifying the 'reasonable opportunity' for the landlord to inspect damage to be a period of 24 hours. AW, DJ, SJL and MF all said this was too short. CJ suggested 48 hours as a possible alternative.

#### *Rent Review*

The revised flowchart was presented. Two main points were highlighted – that the current 3-year rent review period should be altered, and that the proposal may be affected by future housing legislation.

The forum discussed the potential to alter the 3-year review period, but agreed only that 'current economic conditions' should remain a consideration as part of the rent review process.

The forum also discussed the proposal to include the step of the TFC appointing a mediator in circumstances where parties do not agree the payable rent. JR said that the involvement of the Land Court or a process of arbitration should remain as ways to determine the final outcome of a rent review dispute, however there was no reason that mediation could not be included as a step beforehand.

AW suggested that arbitration used to be an effective and affordable dispute resolution process, but became too expensive over time, resulting in parties going to the Land Court instead. CN noted that the form of arbitration AW described is essentially expert determination, a form of alternative dispute resolution.

Discussion concluded that, through codes and guidance, encouragement should be made for parties to pursue alternative dispute resolution of some kind, rather than going to the Land Court in the first instance.

#### *Sustainable Rules of Good Husbandry and Estate Management*

CJ explained the intention of the proposal is to move to a more principle-based approach.

AW argued that whilst the general principles of good husbandry are agreed, in practice under the current system it is hard to deal with instances of bad husbandry and neglect. AW maintained that clear definitions are needed for enforcement.

DB said that problems arise with good husbandry rules when they are different to the requirements of environmental schemes, such as if a tenant decided to deliberately block drains as part of an environmental scheme.

There was agreement from TFC, JM, DJ and CN that language on climate and conservation should be included and strengthened in the proposal.

TFC asked that members submit their views on the flowchart's outline of the rules and process to Scottish Government as soon as possible.

#### *Waygo Timeframe*

CJ noted that written feedback had been received from TFAF members, including NFUS.

The forum was content with the revisions to the proposal.

#### *Emergency Rectification*

The revised proposal was presented to the forum, which sets out a provision for a tenant to carry out emergency works on fixed equipment that the landlord has an insurable claim against, in circumstances where equipment is damaged by storms or other acts of God.

Members discussed several issues related to the proposal and insurance issues more broadly. It was identified that under current circumstances, replacing an old roof damaged by a storm is still defined as an 'improvement'.

The flowchart asks about the possible timescale in which repairs should be carried out in circumstances where the tenant and landlord agree rectification is necessary, and the landlord notifying the insurance company. JR suggested one month may be a reasonable period to allow time for a statement of loss to be provided by loss adjusters.

AW and JR identified that current legislation puts certain insurance obligations on the landlord for buildings, but only in cases of fire damage.

AW said that tenants are not always necessarily aware of the type of insurance their landlord has on buildings on the holding, which can lead to problems.

The forum agreed that in principle, landlords should be responsible for insurance on landlords' buildings and tenant responsible for insurance on tenants' buildings. There was also consensus that, following notification from a tenant, the landlord should act on emergency rectification as soon as is reasonably practicable.

TFC noted that further discussion was needed on the proposal. TFC also encouraged members to consider potential solutions to the issues raised and submit these to SG in writing.

#### *Resumption*

Time constraints prevented a full discussion on resumption, and it was agreed that an additional online TFAF meeting would be arranged as soon as possible to discuss the proposal.

FL clarified that the proposal documents shared with members should be treated as discussion starters, rather than finalised policy positions. The proposals can be shared internally with TFAF member organisations, for instance to board members, but not shared beyond that.

Action 2	TFAF members to submit further comments on revised flowcharts to Scottish Government in writing.
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#### **4. TFAF response to Treasury consultation on Taxation of environmental land management and ecosystem service markets**

TFC presented the paper and asked for comments. AW said he would provide comments in writing, and SJL said that she would share the paper internally with SLE taxation group.

Action 3	TFAF members to submit any further comments on paper to TFC before it is submitted to Scottish Government.
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#### **5. Member updates/AOB (All)**

CN raised an issue related to the Crown Estate Scotland tenant farming working group to be discussed separately with TFC.

Action 4	TFC and CN to follow up on Crown Estate tenant farming working group via email.
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#### **6. Date of next meeting**

It was agreed that a short online meeting should be held on the week of Monday 15<sup>th</sup> May, to discuss the resumption flowchart. BM to arrange a suitable time.

Action 5	BM to circulate poll and arrange online Resumption meeting for week beginning Monday 15 <sup>th</sup> May, 2023.
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