

Supplementary Business and Regulatory Impact Assessment

Title of Proposal: Implementation of the Relinquishment and Assignment provisions contained within the Land Reform (Scotland) Act 2016

Purpose and intended effect of the policy

Background

The Agricultural Holdings (Scotland) Act 1991 (the 1991 Act) sets out provisions regarding payments to be made at the end of a tenancy for tenants improvements (waygo). However, to date there has been no set path setting out specific timescales for those tenants who wish to relinquish their tenancies, or any means by which any value in the tenant's interest other than improvements could be valued.

In practice this has meant that, where relationships between landlords and tenants are difficult, some tenants without successors have felt unable to retire at a point of their choosing for a range of reasons. This has included the inability for them to know how much they would receive in waygo payments and when they would receive any waygo payments due to them which would for some provide them with the economic ability to have somewhere to go. There have also been concerns over the future of the holding they had farmed for decades. In some cases matters reach an impasse with the landlords preventing parties from confirming which fixed equipment belonged to the tenant and the landlord. As a result, some tenant farmers without successors have been unable to retire from farming without greater certainty as to their financial and domestic situation in the future, and have chosen to remain on the farm for the remainder of their days.

There was a demand from the tenant farming sector for legislation to address this issue, highlighted in the final report of the Agricultural Holdings Legislation Review Group (AHLRG)

<https://www.webarchive.org.uk/wayback/archive/20170701144607/http://www.gov.scot/Publications/2015/01/5605/downloads>

The Scottish Government introduced the Land Reform (Scotland) Act 2016 (the 2016 Act) as part of the Scottish Government's focus on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. The main purpose of the Act is to:

- ensure the development of an effective system of land governance and on-going commitment to land reform in Scotland;
- address barriers to further sustainable development in relation to land and improve the transparency and accountability of land ownership; and
- demonstrate commitment to effectively manage land and rights in land for the common good, through modernising and improving specific aspects of land ownership and rights over land

Sections 110 and 111 of Part 10, Chapter 7 of the 2016 Act modify the 1991 Act by adding a new Part 3A which enables secure 1991 Act tenant farmers without successors to seek to relinquish their tenancy to the landlord for value, or, to retire with dignity, where their landlord does not want to take the agricultural tenancy arrangement back in hand, to assign that tenancy for value. This allows tenant farmers with no successors to obtain value from their tenancy in order to support them in their retirement. The provisions enable an eligible tenant farmer to assign their tenancy to a new entrant or a person progressing in farming.

Sections 110 and 111 and the new Part 3A will be brought into force by three SSIs:

- The Land Reform (Scotland) Act 2016 (Commencement No. 12) Regulations 2020
- The Agricultural Holdings (Relinquishment and Assignment) Regulations 2020
- The Agricultural Holdings (Relinquishment and Assignment) (Application to Relevant Partnerships) Regulations 2021.

The Land Reform (Scotland) Act 2016 (Commencement No.12) Regulations 2020 brings into force sections 110 and 111 of the Land Reform (Scotland) Act 2016 enabling a tenant farmer with a secure 1991 Act agricultural tenancy who has no successor who has an eligible successor or assignee who do not wish to take on the tenancy to relinquish their tenancy to their landlord for a sum.

The Agricultural Holdings (Relinquishment and Assignment) Regulations 2020 set out the procedure for relinquishment and provide a definition of a new entrant and person progressing in farming.

The Agricultural Holdings(Relinquishment and Assignment) (Application to Relevant Partnerships) Regulations 2021 modify the application of Part 3A to Limited Partnership tenancies, allowing those tenants to seek to relinquish their tenancy but not assign.

The 2016 Act also provided an amnesty for tenant farmers, through Chapter 8 of Part 10. This enables tenant farmers to agree with their landlord a list of eligible improvements that the tenant has funded themselves. The amnesty period is already in force and was extended for 6 months until 12 Dec 2020, due to the impact of Covid-19 on the ability to conduct on-farm meetings. This extra period has enabled tenant farmers and their landlords to negotiate further and ideally come to an agreement.

Objective

The Regulations provide a mechanism for eligible tenant farmers who wish to relinquish their tenancy to be recompensed for the value of that tenancy enabling them to move forward into retirement in a more structured manner, and provide them with a degree of economic return. This policy also enables secure 1991 Act tenant farmers who do not wish to retirement but who wish to relinquish their tenancy for whatever reason, to do so.

The 2016 Act provides the timescale and structure for eligible tenant farmers to negotiate a relinquishment value for their secure 1991 Act agricultural tenancy through an independent valuation process.

Rational for Government Intervention

It was argued by some stakeholders that in the current system, the landlord has more abilities, resources and power in any negotiation where a farmer wishes to leave their tenancy. Therefore, this creates a level of negative impact in equality between the parties.

The policy aim is to provide a mechanism in legislation to provide tenant farmers with secure 1991 Act agricultural tenancies and no successors or assignees willing to take on a route to retirement with dignity and help release land to new entrants and those progressing in agriculture.

The Land Reform (Scotland) Bill introduced a regulation making power intended to enable the Scottish Ministers to take forward a new provision that will enable a farmer with a 1991 Act tenancy a statutory time frame where they can relinquish their tenancy to the landlord for a monetary value.

The Scottish Government's vision for a Scottish tenant farming sector that is dynamic, gets the best from the land and the people farming it, and provides opportunities for new entrants, forming part of a sustainable future for Scottish farming.

Figures from the June 2020 census show that around 20% of agricultural land in Scotland is tenanted (excluding crofts), and tenant farmers and landlords play an important part in the wider rural community. It is important that the legislative framework governing these arrangements reflects modern farming practice.

The Scottish Government's overarching purpose is "to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth".

The Regulations are part of the aims of the 2016 Act, which identified as contributing to the following Scottish Government National Outcomes:

- We have tackled the significant inequalities in Scottish society.
- We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.
- We value and enjoy our built and natural environment and protect it and enhance it for future generations.
- We live in communities that are inclusive, empowered, resilient and safe: through empowering tenant farmers to make their own decisions about their career and way of life.

- We have thriving and innovative businesses, with quality jobs and fair work for everyone- through promoting inclusive and innovative growth in the agricultural industry through increasing flexibility for those leaving and by providing opportunities for those entering into agriculture.

Consultation

Extensive consultation conducted by the AHLRG, informed the policy provisions for the Agricultural Holdings provisions in the 2016 Act. The AHLRG consultation consisted of:

- first stage during Spring 2014 where the AHLRG members met with the key stakeholder organisations (National Farmers Union of Scotland, Scottish Tenant Farming Association, Scottish Land and Estates, Scottish Agricultural Auctioneers and Valuers Association and Royal Institute of Chartered Surveyors) and conducted over 50 meetings and private sessions with tenant farmers, their landlords and professional intermediaries in Islay, Oban, St Boswells, Dumfries, Turriff, Perth, Inverness, Stranraer, Ayr and Isle of Bute;

- in June 2014, publication of the AHLRG's Interim Report at the Royal Highland Show, where the AHLRG held a further 16 private meetings with tenant farmers, their landlords and land agents;

- second stage during Summer/ Autumn 2014, where the AHLRG sense tested their emerging proposals in 12 meetings held with the main stakeholder organisations, and again, well attended public meetings in Kelso, Inverurie, Bridge of Allan and Dumfries.

In addition to those meetings, the AHLRG received 100 written submissions. 27 of these came from the main stakeholder organisations, and 73 came from individual tenant farmers, landowners and land agents.

In addition to the AHLRG consultation processes, the Consultation on the Future of Land Reform in Scotland, sought views on the proposal for the Scottish Government to take forward some of the recommendations of the AHLRG within the Bill. The majority (64%) of respondents to the question, agreed that the Scottish Government should take forward some of the recommendations of the AHLRG within the Bill. However, 88% of private landowner organisations disagreed. Those supporting the proposal considered that the Bill provided a vehicle for early establishment into statute of very important recommendations, and including changes to agricultural holdings with other land reform measures would result in a more coherent, comprehensive and integrated package of land reform legislation that would foster greater public awareness of land reform issues. Those against were concerned that taking the recommendations through in the Bill could mean potentially rushing what was likely to be complex legislation, risking insufficient scrutiny and poor legislation.

There were also some respondents who considered agricultural holdings to be a distinct issue from other land reform measures and there some concern that

provisions would be scattered across different legislative vehicles rather than part of a cohesive framework. Given the level of consultation and engagement by the AHLRG with numerous agricultural and landowning businesses during their review and given the views of those businesses were taken into account when developing the policies contained in Bill no further interviews with firms were carried out as part of the BRIA for the Bill.

In the Land Reform Bill as introduced, section 79, in Part 10 of the Bill, enabled the conversion of 1991 Act tenancies into Modern Limited Duration Tenancies, providing regulation making powers to allow Scottish Ministers to make provision for a 1991 Act tenant farmer to convert their 1991 Act tenancy into a Modern Limited Duration Tenancy and for it to be assigned on the open market.

During Stage 1 of the Bill it became necessary for further consideration to be given to these provisions by the Scottish Government. Accordingly, alternative approaches were considered. Between the 4th December 2015 and the 22 December 2015, Scottish Government officials consulted with key tenant farming stakeholders to refine and revise the policy aims and objectives of the revised proposals. A revised policy note was issued by the Scottish Government on the 22 December 2015, setting out our intentions to amend the approach. The policy note built on discussions with, and feedback from stakeholder groups.

Following the provision of this note, an amendment was lodged at Stage 2 of the Bill. During Stage 2 of the Bill, officials also analysed the views of 20 national and individual tenant farming stakeholders on the revised provisions. These provisions were enacted as sections 110 and 111 of the 2016 Act.

After the Land Reform (Scotland) Act 2016 came into force on 22 April 2016, the Scottish Government started commencement of the provisions relating to tenant farming. In January 2019, officials engaged with national tenant farming stakeholders on sections 110 and 111 within the 2016 Act. Two tenant farming stakeholder meetings were held on 14 & 15 January 2019, consisted of representatives from NFUS, STFA, SLE, SAAVA, RICS, Scottish Land Commission, Central Association of Agricultural Valuers, Forestry Enterprise Scotland (FES) and the Tenant Farming Commissioner (TFC).

The stakeholder discussion concentrated on four topics: Definition of new entrant and person progressing in farming; consideration of the European Convention of Human Rights, exploration of the consequences of including a person progressing in farming in rather than solely new entrants and the form and content of notice required as part of the intention to relinquish and notice of acceptance.

Written consultation was undertaken in July 2019 when views were sought from the stakeholders on the content of forms, definition of person progressing in agriculture and timescale for TFC to appoint a valuer. These views were evaluated and incorporated into the development of this set of SSIs and accompanying documents. Throughout this process particular attention was paid to the rights of both tenant and landlord under the European Convention of Human Rights.

In recognition of the extensive consultation work already undertaken in 2014, the further consultation work undertaken in 2019 and the support for this industry-led amendment, and in line with the approach taken for the BRIA for the 2016 Act, further interviews with firms have not been carried out as part of this BRIA.

Going forward the Scottish Government will continue to keep Chapter 7 under review as farming practice continues to evolve, and will consider further amendments in future years if the sector advise that this is required.

Sectors and groups affected

Tenant farming is a private arrangement between landlords and their tenant farmers not covered by the provisions of crofting law. Therefore, those primarily affected by this Order are landlords and tenant farmers of agricultural holdings.

In 2020, there are approximately 4,000 1991 Act tenancies and 294 1991 Act limited partnerships, covering an area of around 620,000 ha and 120,000 ha respectively. Since 2013, the number of 1991 Act tenancies and partnerships has been decreasing year on year, to an average of around 180 tenancies and 25 partnerships annually.

Proportionally, this is a decrease of around 5% annually, higher than the average annual reduction in agricultural tenancies overall, which is around 1%. This could suggest that up to 200 tenancies a year could be affected by this change. However, the real number will be significantly lower due to the personal circumstance of tenant farmers many may wish to negotiate private arrangements to purchase their tenancies rather than relinquish.

Other secondary groups will also be affected, such as land agents, agricultural valuers and surveyors, where the landlord or tenant chooses to engage their services as part of the relinquishment & assignation process.

Option 1 – do nothing

A potential cost to the agriculture industry and rural economy through a loss of productivity. This is because currently some farmers are remaining in tenancies where they do not want to farm and have reached an age where farming is physically more difficult, but are trapped financially by a lack of capital which would enable them to leave their tenancy as their assets are tied up in the fixed equipment they have invested in their tenancy. This could be keeping less productive farming businesses in the industry, while also blocking new entrants. New entrants tend to be more productive due to motivation as well as potential introduction of new technologies.

Option 2 – adopt the Implementation of the Relinquishment and Assignment provisions contained within the Land Reform (Scotland) Act 2016

Benefits:-Introduction of relinquishment and assignment provisions for tenant farmers with secure 1991 Act agricultural tenancies. The provisions provide a mechanism for eligible tenant farmers who wish to relinquish their tenancy to be recompensed for the value of that tenancy enabling them to move forward into retirement in a more structured manner, and provide them with a return. This policy will also enable secure 1991 Act tenant farmers who do not wish to retire but who wish to relinquish their tenancy for whatever reason, to do so.

The 2016 Act provides the timescale and structure for eligible tenant farmers to negotiate a relinquishment value for their secure 1991 Act agricultural tenancy through an independent valuation process.

This policy has the potential benefit to landlords of the opportunity to take back in hand land sooner than expected should the tenant decide to retire and relinquish. It also has the potential benefit of opening up another avenue to new entrants and people progressing in agriculture to get a secure 1991 act agricultural tenancy. The benefit this is to the industry is bringing in new or progressing farmers with innovative ideas and renewed enthusiasm. It has the potential to improve output invigorate the community and help reduce the overall age structure within the industry.

Costs: -

A Business and Regulatory Impact Assessment (BRIA) was published for the Land Reform (Scotland) Act 2016 at the introduction of the Bill and can be found here: <https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/0048/00481018.pdf>

At the introduction of the Bill, it was not anticipated that there would be any significant direct costs to landlords or tenants resulting from the provisions to be introduced under the regulation making power taken in section 79 to allow for the conversion of 1991 Act tenancies into a MLDT that can be assigned on the open market. It was considered that a proportion of tenants without a successor may have chosen to convert it to a MLDT, and assign at open market value. Tenants and landlords would still able to choose to agree to terminate the tenancy and agree compensation for way-go. In these instances the value of vacant possession would be balanced by the landlord against the cost of meeting the tenant's claims for compensation at way go and the loss of the rental return on the tenancy. The BRIA noted that there were a range of potential decisions that could be taken by parties within the statutory framework that would effect when a tenancy came to an end. Until those decisions are taken, or certain events happen to bring the tenancy to an end, rights to compensation on way-go and rights to regain vacant possession would not crystallise.

Following Stage 2 the financial memorandum was revised [Explanatory Notes \(parliament.scot\)](#) and the impacts of the stage 2 amendments inserting section 89A were assessed, and it was found that there would be no additional costs to the Scottish Administration resulting from the provisions inserted at Stage 2 by section 89A of the Bill, as amended. However, there would still be additional costs to the

Tenant Farming Commissioner arising from processing papers. The Tenant Farming Commissioner would also be responsible for the procurement and appointment of valuers on behalf of the tenant farmer wishing to relinquish their 1991 Act tenancy. They will also require to recover valuation costs from the tenant farmer following completion of the valuation and process associated forms and paperwork for each relinquishment and assignation.

Subsequently, we have reassessed the BRIA for the purposes of the suite of relinquishment and assignation SSIs to ensure that business impacts have been considered, this refreshed version was published on 11 December 2020.

The cost to landlords is represented by the price they would have to pay to the tenant on relinquishment of the tenancy as determined by the valuer under Section 32J. However, this is counterbalanced by their regaining vacant possession with the release of the attendant vacant possession premium which accrues to them. Accordingly, the landlord, as well as the tenant, would benefit from the transaction. In any event landlords are not obliged to accept the notice of relinquishment from their tenants and so they cannot find themselves in a worse financial position.

Scottish Firms Impact Test

Agricultural and landholding businesses were key contributors to the AHLRG report which informed this policy proposal and others in the 2016 Act. The original provision was revised during stage 2 of the Bill and officials also analysed the views of 20 national and individual tenant farming stakeholders on the revised provision.

As the circumstance of each agricultural tenancy are unique and subject to private contractual arrangements, it is not possible to estimate the future cost to parties.

However, the Regulations give clarity and a structure for those wishing to retire from the industry, whilst providing an opportunity for new entrants and those progressing in agriculture. It is thought that this could lead to a small increase in overall productivity within the tenant farming sector as more innovative, younger and progressive tenants move into the industry. Where tenancies are relinquished in favour of the landlord any potential cost to them should be at least offset by the increase in capital value of the land which could now be sold with vacant possession

Competition Assessment

Agricultural tenancies are managed through private contractual arrangements between landlords and tenants. Impact is likely to be quite small, due to the relatively small number of tenancies, with the potential for:-

- a small increase in tenancies available for new entrants and progressing

- a small increase in non-1991 tenancies available on the wider market, if landlords re-let the holdings
- a slight increase in overall competition, and a slight decrease in land prices as there is more available

As well as older tenants exiting the sector the Regulations are intended to enable a small number of new entrants to take over farms bringing with them new energy, skills and ideas which will hopefully lead to both improved sustainability and increased productivity.

Development of business forms

As part of the consultation process prior to bringing forward the SSIs tenant farming stakeholders were consulted on the draft forms to be used as in the process to ensure they provide the right information for tenant farming businesses and landlords in the least bureaucratic way possible. The Schedules to the [2020 regs – negative] set out the form and content of notice of intention to relinquish, and landlords' acceptance of notice of intention to relinquish.

Legal Aid Impact Test

The Order should clarify matters around what is eligible for compensation at Relinquishment and Assignment. The provisions of the 2016 Act were assessed by the legal aid team as having minimal impact on the legal aid fund. These Regulations do not change this.

Enforcement, sanctions and monitoring

The Regulations are concerned with private leasing arrangements between agricultural landlords and tenants. These arrangements are enforceable contractually between the parties. The Tenant Farming Commissioner can provide advice on the resolution of any issues and parties have recourse to the Scottish Land Court in event of dispute.

The impact of any increase in land made available to let on the agricultural lettings market resulting from the relinquishment and assignment changes will be monitored through analysis of any changes in numbers of farm tenancies or total land area let shown in the Scottish Government annual June Agricultural Census. The Scottish Farm Business Survey will also be used as a way to monitor any changes.

Implementation and delivery plan

The Regulations will be laid in Parliament, and come into force 28 February 2021. As part of the implementation and process, when the Tenant Farming Commissioner receives a copy of a notice of intention to relinquish, they are required to appoint an independent, experienced and qualified person within 28 days of receiving the notice. That person is known as the valuer and their role is to assess the value of

compensation that may be payable for the tenancy being assessed. To allow the Tenant Farming Commissioner to deliver this requirement they will appoint a suitable valuer utilising fair and open procurement.

Post-implementation review

It is intended that the Scottish Government will ask the Tenant Farming Commissioner to review the workings of Chapter 7 on a regular basis, to ensure it is still in line with modern farming practices and the changes that could arise as part of future agricultural policies.

Summary and recommendation

The policy options that the Scottish Government take forward as laid out in the three SSIs are set out in the Objective section of this impact assessment. Taking these forward feeds into The Scottish Government's overarching purpose "to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth and help contribute to the National Outcomes listed in this assessment.

Declaration and publication

The Cabinet Secretary or Minister responsible for the policy (or the Chief Executive of non-departmental public bodies and other agencies if appropriate) is required to sign off all BRIAs prior to publication:

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Graeme Dey

Date: Wednesday 9 December 2020

**Graeme Dey
Minister for Parliamentary Business and Veterans**

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