



Review of Agricultural Holdings Legislation

Final Report

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Ministerial Foreword



Tenant farming is crucial to Scottish agriculture. It accounts for 23% of all agricultural land and provides a route into farming for new entrants and opportunities for those who don't have the capital resources to buy land. The contribution of the sector is also vital to sustaining our rural communities.

Yet, despite previous reforms to agricultural holdings legislation, there continues to be a decrease in tenanted land in Scotland. In fact, since 1982, there has been a 42% decrease and Scotland now has one of the lowest proportions of tenanted land anywhere in Europe.

This is what this Agricultural Holdings Review has set out to address. The tenanted sector has a long, complex and difficult history often the subject of powerful debate. We need to ensure we address the issues facing existing tenants and, at the same time, ensure a supply of tenanted land that supports new entrants and new investment into agriculture.

The thoroughness of this package of recommendations owes much to the hard work of the members of the Review Group and the transparent, collaborative approach they have taken throughout the last 18 months. It is also down to the important contributions made by tenants, landowners and industry bodies during the 78 private, industry and public meetings that the Review Group have held to give all concerned the opportunity to express their views and raise the issues of importance to them.

What we heard confirms to us that the future of the sector depends on productive relationships between tenants and landlords based on mutual trust, respect and confidence in the sector. It depends on us ensuring older tenants are able to retire with dignity while facilitating opportunities for new entrants. It depends on the provision of a framework for letting vehicles and a structure that's fit for the 21st century.

This Report contains a package of recommendations for Scottish Ministers to consider taking forward, to achieve these three overarching aims, including:

- Creating a Tenant Farming Commissioner;
- Widening succession rights and improving how rent is set;
- Supporting innovation and opportunities for new entrants by creating apprenticeships through share farm arrangements; and
- Providing longer term, more flexible letting vehicles to encourage the release of more land into the sector.

However, as I made clear when I announced this Review at the Royal Highland Show in 2013, it is not possible to have a deep and meaningful discussion on the future of the sector, or to produce an effective set of recommendations, without addressing the issue of the right to buy.

The debate over the last 18 months has enabled all parties to better understand the issues facing the sector, which are behind many tenants calls for a right to buy. Without finding solutions to these underlying issues, it is unlikely the sector would be able to move forward. That is why, in addition to improving the balance of rights and responsibilities between 1991 Act tenant farmers and landlords, the Report recommends Scottish Ministers consider:

- Strengthening the pre-emptive right to buy by removing the requirement to register;
- Enabling 1991 Act tenants, where a landlord does not or is unable to meet their obligations, to apply to the Scottish Land Court to force the sale of the holding; and
- For any proposals taken forward in a Land Reform Bill to address barriers to the sustainable development of communities, how these could assist in addressing issues impacting tenant farming communities.

Life, like tenant farming, is best built on mature compromise. I am confident that this Report can be a road map to a strong and vibrant sector, based on shared endeavour for mutual gain, where landlord and tenant respect and value the contribution that both can bring.

I am indebted to many people for their input to a Review that has produced a landmark Report in which its authors should be very proud.

It has only been possible because of the valuable and constructive input from tenant farmers, landlords and countless others. In particular, I wish to thank the members of the Review Group, all of whom brought their skills and expertise to the table. They travelled round the length and breadth of Scotland taking evidence. They sat round farm kitchen tables and spoke at public meetings in every corner of the country. All showed they care deeply about the future of one of our most valuable sectors.

I thank the Review Group and our team of hard working civil servants who supported them – for the help and guidance that they have given me with leading this challenging but vital task.

I look forward to your continued support and engagement as I work with my Ministerial colleagues to consider how best to respond to this Report and deliver this vision for the future of tenant farming in Scotland.



Richard Lochhead MSP
Cabinet Secretary for Rural Affairs and the Environment
Chair of the Agricultural Holdings Legislation Review Group 2014

Executive Summary

The tenanted sector in Scotland

1. Tenant farming has played a vital role in rural Scotland since the earliest times, partnering capital with agricultural knowhow and enabling innovative talent to contribute to our national economy. In recent decades, however, it has been in decline and since 1982 there has been a 42% decrease in the area of let agricultural land in Scotland.
2. Scotland now has one of the lowest proportions of tenanted land anywhere in Europe.
3. Across the country, there are numerous examples of landlords and tenants working well together for mutual benefit. There is no shortage of demand for tenanted farms when they become available. The challenges facing the sector are complex. Legislation and wider public policy need to keep pace with a rapidly evolving rural economy so that they continue to provide a strong framework for the tenanted sector.
4. Landlords and tenants also have a vital role to play, and while most have adapted well to changing social and economic circumstances a small number have not. It is the actions of this minority that now risks undermining confidence in a manner that threatens the very future of a tenanted sector in Scotland.

Background to this Review

5. The 2011 SNP manifesto recognised the importance of this challenge, and included a commitment to undertake a full Review of agricultural holdings legislation. This Report sets out the final conclusions and recommendations of that Review, and builds on the findings described in the Interim Report published in June 2014.
6. The terms of reference for the Review are broad, and include the possibility of recommendations relating to industry led interventions and regulation. The Cabinet Secretary for Rural Affairs and the Environment, Richard Lochhead MSP, has chaired the Review and has been supported by six individuals each of whom has brought a different set of skills to bear on the issues involved.
7. The Review process has been open and collaborative, involving a great deal of invaluable input by landlords, tenants and other interested parties up and down the country. This constructive response from the sector has had a significant impact on the outcomes of the Review.

Recommendations

8. The recommendations set out in this document are structured around the priorities identified in the Interim Report. They have been developed within a wider context that includes important human rights considerations relating to property rights. In developing these recommendations, we recognise the inherent complexities and the need for further consideration on these issues.

9. Certainly, where the recommendations propose changes to legislation or provision to be made in legislation, the Scottish Ministers will have to ensure the detail of any proposed provisions are within competence. However, the need for fundamental change in order to re-build confidence is emphasised, and the radical nature of some recommendations reflects this.

10. Our tenant farming system is built on solid foundations, and for many landlords and tenants it remains an effective and mutually beneficial one. But it operates within a rapidly evolving context where the norms of the past are often no longer relevant or appropriate.

11. If confidence is to be rebuilt and sustained then the partnerships between landlords and tenants on which the sector is based must reflect 21st century expectations, and the nature of tenancies themselves must be modernised. This places a responsibility on every landlord and tenant in Scotland, and in particular on those whose leadership is so crucial to ensuring confidence within the sector.

Landlord and tenant relationships

12. A successful tenant farming sector has to be rooted in strong and constructive relationships between tenants and landlords. In all parts of the country there are many excellent examples of this to be found, but the Review Group was dismayed by the number of submissions describing relationships that appeared little short of dysfunctional.

13. In particular the Review Group noted a remarkable number of examples where neither landlord nor tenant seemed to be taking any constructive action to address the issue, and several cases where interpersonal interaction between landlord and tenant was more or less absent.

14. The Review Group has concluded that radical action is required, including reassessing the role of professional intermediaries, in order to address this failing. Accordingly, proposals for a new Tenant Farming Commissioner with extensive powers based on formal codes of practice are therefore described. But the Report goes on to highlight the personal responsibility of individuals in this matter, and argues for a strong industry led initiative to back up the efforts of the Scottish Government.

15. The business of determining a fair rent lies at the heart of the landlord/tenant relationship. A landlord must feel that the income received represents an appropriate return on investment in agricultural land when considered against risk, lease obligations, and capital. A tenant must feel that their investment, expertise and labour are similarly rewarded.

16. Moreover because this relates to the use of a finite and important national resource (agricultural land), the Scottish Government also has a responsibility to ensure, in a situation of severe market imbalance such as currently prevails, that rents are controlled in a manner which best serves the national interest.

17. The Review Group has carefully considered how to ensure a system that is fully compatible with the legitimate priorities of all relevant interests, and proposals are described whereby rents on secure 1991 Act tenancies are controlled, at least for the time being, so as to properly reflect the agricultural potential of the holding and ensure a fair sharing of its capacity to generate a financial surplus. Proposals are also included to deal with issues of diversification and co-investment in fixed equipment.

18. Tenant farming is historically based on a partnership between capital and labour, but over recent decades the proportion of capital employed that is provided by the tenant has risen markedly. This has in turn led to challenges to arrangements for compensation at way-go, and issues relating to investment security when tenants seek to raise capital from third party investors (usually banks).

19. The Review Group has explored these issues with landlords, tenants and third party investors. A recommendation is made to give the tenant an ability to grant security over their lease to a lender, recognising the value of the tenant's property right in the tenancy.

20. Proposals are described for a short term amnesty to allow regularisation of past tenant investments that may not have been fully recorded, and consideration is also given to a number of measures designed to reduce the risk of disagreements at way-go in the future.

Facilitating retirement and encouraging New Entrants

21. The demand for tenancies now far outstrips supply, yet the average age of tenants indicates a sector where retirement is rare and occurs at a very late age. While the decision to retire is a matter of personal choice, there are some indications that this ageing demographic is associated with lower than average levels of investment, innovation and productivity. The Review Group has therefore given some attention to mechanisms to facilitate retirement and release land to new tenants.

22. The main proposal is for a right to allow secure 1991 Act tenants to convert their tenancy into a modernised Limited Duration Tenancy (LDT), thereby enabling it to be assigned for value to a new incoming tenant. Alongside this, are proposals to modernise succession and improve access to retirement housing that are designed to be helpful. It is emphasised, however, that all of this sits within a context where landlords, and especially owners of large agricultural estates, will need to play their full part in making new land available for tenancy.

23. Extending a tenant's right to buy from its current pre-emptive status on voluntary sale to one of compulsion has been at the forefront of recent debate. The reasons fuelling calls for such a change are diverse, and many can be traced back to the failure of a small number of landlords to adapt to modern circumstances and social expectations. The extent to which such a measure would be to the personal advantage of some tenants is not in doubt, but the Review has examined the issue in terms of its remit and with regard to the potential impact on the future of tenant farming as a whole.

24. The Review Group has concluded that a general or absolute right to buy should be ruled out by the Scottish Government on the basis that it would not be in the long-term interest of the tenanted sector. The focus of this package of measures is about addressing the underlying demand for the right to buy, but we also recognise the need to address difficult situations faced by some farming communities. We have developed three recommendations to specifically help in such situations.

25. The first recommendation aims to ensure that all 1991 Act tenants have an automatic pre-emptive right to buy their holding if it comes on the market, by removing the current requirement to register an intention to exercise the pre-emptive right.

26. Where best practice is not happening and tenants livelihoods are affected by landlords who are unwilling or unable to fulfil their obligations, the second of these recommendations would provide tenants with the power to apply to the Scottish Land Court for an order to enforce the sale of the holding, triggering the tenants right to buy.

27. The final of the three recommendations takes account of proposals in the current consultation on the future of land reform and recommends further consideration should be given to the potential power for Scottish Ministers to intervene where there is a barrier to a community's sustainable development. This land reform proposal potentially offers a way of addressing isolated situations where the way land is being managed is negatively impacting on tenants and the local community.

28. No industry can thrive if the barriers to new entrants are high. The existence of an effective tenanted sector is particularly crucial in this respect, since it allows the partnering of capital with new ideas and skills to mutual benefit. Yet tenant farming is now all but closed to new entrants, in part because of a lack of supply and in part because of the major shift towards ever higher levels of co-investment being required of the tenant.

29. The Review Group has recognised the scale of the challenge, but also the vital importance of finding effective resolution. A number of proposals are outlined, including enabling phased assignation of LDTs from retiring to apprentice tenants and a major increase in the supply of tenanted starter units. The need for further focussed work in this area is underlined, including encouraging greater recognition among major private agricultural landowners of their responsibilities in this area.

Letting vehicles for the 21st Century

30. At present around 80% tenanted land (excluding seasonal lets) is leased through a 1991 Act tenancy. This provides the tenant with a high level of security, but it is not necessarily the vehicle best suited to a rapidly evolving agricultural economy where flexibility is of critical importance.

31. This in turn has created something of a dilemma for the Review Group. An increase in supply of new flexible letting vehicles is likely to help meet the needs of the 21st century, but in an imbalanced market the creation of flexibility has within it a risk of abuse. Most landlords fully understand the obligations usually associated with the owning land and can be relied upon to behave responsibly, but measures need to be in place (backed up by strong peer pressure from within the landowning community) to ensure that this is invariably so. A number of proposals are outlined, based on a modernised LDT, to guide the operation of this fledgling market in its early stages.

32. A number of measures arising from fiscal and taxation policy have consequences for the tenanted sector. Many of these are broadly neutral in their effect, but a number have been identified by the Review Group as having a negative impact, or having the potential to be more positive if redesigned. Reliefs relating to capital taxation are of particular significance, and proposals are made for their review while recognising the complexities inherent in doing so.

33. Further points are made with regard to Value Added Tax, the new Scottish Land and Buildings Transaction Tax, and the on-going review of non-domestic rates. Detailed proposals are included for adjustments to the operation of the new Common Agricultural Policy (CAP) Direct Payments and the Scotland Rural Development Programme, noting that under current arrangements new entrants and incoming tenants may often find themselves at a disadvantage.

34. The Report concludes with a miscellany of detailed amendments to the 1991 and 2003 Agricultural Holdings Acts that the Review Group considers may be helpful. The possibility of rounding off the process through implementation of appropriate consolidating legislation is also suggested.

Conclusions

35. Tenant farming has a long and honourable history in Scotland, and it has served the rural economy well. It remains vital to our future prosperity, and much of it is still based on the solid ground of constructive tenant/landlord partnerships that have always served it well.

36. But it has also reached something of a crossroads. Some elements in the sector have struggled to keep up with the rapid rate of change that characterises modern Scotland, and as a consequence confidence among tenants and landlords has been seriously dented. This Review must draw a firm line in the sand, and it must signal a profound, robust and radical resolve on the part of everyone to leave this unhappy interlude behind.

Section 1 - Background and Terms of Reference

1.1 Origins of the Review

37. Tenant farming has been a feature of Scottish agriculture for many hundreds of years. It has probably been subject to local rules and customs since the earliest times, and in recent centuries these have been formalised in national legislation. In part the purpose of this legal framework is to provide an appropriate balance of rights between landlord and tenant, and over time this has evolved in line with societal expectations.

38. Equally significant, however, is its wider economic purpose. It underpins the confidence of landlords and tenants in entering into contractual relationships for mutual benefit, and so is of fundamental importance to a vital part of the Scottish agriculture and the rural economy.

39. Twenty first century Scotland inherited an assortment of legislative provisions relating to agricultural holdings legislation, and one of the early priorities post devolution was for this to be reviewed, updated and modernised. A key driver at the time was falling levels of confidence in the system among tenants, and emerging calls for a statutory right to buy so that they could exit and become owner occupiers. A lack of confidence among landlords was also apparent, with few new long-term leases being made available and a rise in alternative arrangements outside the framework of agricultural holdings legislation. The result was the Agricultural Holdings (Scotland) Act 2003.

40. The 2003 Act contained important provisions, and the new Limited Duration Tenancy (LDT) and Short Limited Duration Tenancy (SLDT) letting vehicles, which were a central feature of the legislation, quickly began to be used. Initial optimism was short lived, however. Political uncertainty fuelled by continuing calls for a right to buy, and coupled with uncertainties over CAP reform, soon began to undermine confidence once more. Landlords again sought to reduce their exposure to perceived risks, and this increased tenant unrest and added momentum to a destructive downward spiral.

41. In 2011, the SNP manifesto included a commitment to address immediate shortcomings through amending legislation, and to undertake a review of agricultural holdings legislation within 18 months of this coming into force. This Review fulfils that commitment.

1.2 Context

42. Within the course of less than a generation the farming industry in Scotland has changed almost beyond recognition, and a key feature has been an increase in capital intensification across most types of agriculture. This might be expected to have encouraged more involvement by external investors, including through the development of a more diverse and flexible tenanted sector.

43. While outside equity investment has become commonplace in certain parts of the industry, and use of bank borrowing has certainly grown, a parallel increase in tenancy arrangements has generally not occurred so that Scotland now has one of the lowest proportions of tenanted agricultural land in Europe.
44. Constraints on the supply of tenancies have brought with them significant challenges in relation to the efficient functioning of the market in tenanted holdings. Demand now far outstrips supply, potentially enabling landlords to make unreasonable demands of tenants. Those lucky enough to be in existing tenancies sometimes have little choice but to accede to their landlord's requests, especially where security of tenure is fragile.
45. Aspiring tenants trying to gain access to land often find themselves having to pay high premiums in order to do so, and they sometimes agree lease terms that are far short of ideal. None of this is likely to ensure an efficient market in let land that best serves the public interest, and significant intervention by the Scottish Government is required to rectify this.
46. The significance of access to land and capital is not limited to existing farmers. The barriers to entry for people wishing to establish their own agricultural business for the first time are now very high. Tenancies, even of short-term duration, are in extremely short supply, and most of these go to established operators able to offer high rents and a willingness to co-invest in fixed assets.
47. For the new entrant with skills and good ideas but little capital the prospects are poor, and the inevitable consequence of this is a sector characterised by an ageing demographic and lower levels of industry innovation and competitiveness than might otherwise be the case.
48. This Review therefore takes place against a background that is of serious economic concern to the country. In an industry desperate for capital investment, one of the most obvious mechanisms for partnering capital and labour, tenant farming, is in decline. In an industry where continuous innovation is vital, the barriers to entry for new participants are high, and a key mechanism for reducing them through tenant farming is largely unavailable.
49. A revitalised and confident tenanted sector is not just in the interest of existing landlords and tenants. It is of fundamental importance to the future of Scottish agriculture and the wider economy that depends on it.

1.3 Remit and scope

50. The terms of reference for the Review are broadly based, and respond to the SNP manifesto commitment published in 2011. The overarching remit is to provide policy recommendations that will enable the Scottish Government's vision for tenant farming to be realised.
51. That vision is one of dynamism, vibrancy and sustainability, and it is firmly based on wider Scottish Government economic and land use strategies. It implies that change is needed, in part to correct weaknesses in current policy but also to ensure an adaptive policy framework that remains responsive to changing circumstances well into the future.

52. A number of specific aims and objectives are detailed by way of scoping the Review, most of which reflect areas where feedback to the Scottish Government has indicated a degree of stakeholder dissatisfaction. Particular emphasis is placed on flexibility to enable business growth, fair and reasonable rents, supply of tenanted land, barriers to new entrants, the potential role of a right to buy, and the influence of fiscal measures.

53. Mention is also made of the impact of industry led initiatives and interventions, thereby bringing into scope the possibility of recommendations relating to industry leadership and self-regulation as well as actions by Government.

Section 2 – Review Process

2.1 The Review Group

54. The Review has been chaired by the Cabinet Secretary for Rural Affairs and the Environment, Richard Lochhead MSP. Working with him has been a Review Group comprising six individuals, each of whom has brought a different set of skills and experience to the work involved. They are:

- Sir Crispin Agnew of Lochnaw Bt – Queen’s Counsel with a particular interest in rural land law.
- Barbara Brown – Principal Clerk of the Scottish Land Court.
- Hamish Lean – Practising lawyer and accredited agricultural law specialist.
- Iain Mackay – Tenant farmer and member of the NFUS New Generation Group.
- Professor Jeff Maxwell – Land use expert and past chair of the Tenant Farming Forum.
- Andrew Thin – Scottish Government Non-Executive Director and past Crofters Commissioner.

55. The Review has been ably supported by a small team of civil servants from within the Land Reform and Tenancy Team in the Scottish Government, and by research staff from the wider Rural Directorate. Their combined intellect, hard work and patience have been of immense importance in what has sometimes been a complex and demanding process.

2.2 A two phase Review

56. The Review Group began work in January 2014. The first six months comprised an information gathering and research phase, and ensured that the Review was soundly based and informed by the experiences and insights of countless individuals from around the country. Care was taken to balance anecdotal evidence with robust data gathering and analysis (see Appendix A).

57. This phase culminated in the publication of the Interim Report in June 2014. This summarised the work undertaken and the Review Group’s initial conclusions, highlighting key weaknesses inherent in the current system and outlining policy development work to be undertaken in the second half of the year.

58. Over the latter part of the summer and into the autumn the Review moved into a more challenging policy development phase, building on the findings set out in the Interim Report and devising solutions to the challenges that have been identified. This included further dialogue with stakeholders as policy recommendations began to take shape, ensuring as much “sense testing” as possible.

59. The results are the specific policy recommendations set out in this Report. Most of these are for the Scottish Government, but some are for consideration by industry led organisations and professional bodies that the Review Group believes also have important roles to play.

2.3 Collaboration and transparency

60. From the beginning the Review Group was keen to adopt an open and collaborative process designed to maximise input from those with an interest in the outcome of the Review. Members held face to face meetings with stakeholders up and down the country (see Appendix B), including many that were generously hosted by individual tenants and landlords.

61. The main industry organisations, together with a number of individuals, provided over 100 formal written submissions many of which were extremely detailed and involved a great deal of effort. The consequence of all this, was a review process that was participative, well informed and sometimes extremely challenging.

62. The Review Group is indebted to all who contributed.

63. Given the large and diverse range of stakeholders with something to contribute, it would not have been possible to pursue a collaborative process without a high degree of transparency as to what was happening and how thinking was developing.

64. In addition to numerous meetings with stakeholders held at locations around the country, the Review Group decided to issue monthly progress bulletins via the internet. These were designed to be succinct and accessible, and many people used them as a framework for their own contributions to (and engagement with) the Review.

2.4 An outcome based process

65. The Review Group has been very conscious of the background against which it is operating, and of the outcome based approach that now drives all policy making within the Scottish Government. Recognising a need for the Review to result in fundamental change to the tenanted sector and a real reversal in current trends, the Review Group decided to articulate at the outset a number of clear aspirations that, in its view, would describe a successful outcome from the Review.

66. These were published in the February progress bulletin, and created an important basis against which subsequent thinking (within the Review and among stakeholders) was framed. They can be summarised as follows:

- The underlying culture will be forward looking and based on shared endeavour, mutual respect and partnership between owners and tenants.
- A range of flexible tenancy options will be available to suit diverse business needs and evolving economic circumstances.

- People, and especially new entrants to the industry, will be able to move into, through and out of the tenanted sector as their business develops.
- Business investment in the tenanted sector will be subject to equivalent flexibilities and constraints to those that characterise the owner occupied sector.
- Barriers to entry (including those arising from the CAP) will be low so that people, including new entrants, able to farm successfully can establish and develop a business regardless of their background circumstances.
- Rent levels will reflect commercial returns from a well-managed farming business using the tenanted land and associated assets in a manner that accords with the Land Use Strategy.
- The supply of tenanted land will be broadly compatible with demand at these rent levels.
- Risk will be shared between tenant and owner in a manner that encourages innovation and provides inbuilt resilience to unpredictable changes (in markets, fiscal support, etc).

67. Alongside these, the Review Group also agreed three high level principles that it believes should underpin government policy in relation to the tenanted sector in the years ahead, and which therefore guided the Review Group's deliberations:

- Enabling – in that the fundamental purpose of policy will be to facilitate innovation and business development in farming, including through encouraging new entrants.
- Balanced – in that the fundamental characteristic of policy will be to provide for an appropriate mutuality of rights and obligations between those who own land and those who wish to farm it.
- Resilient – in that the fundamental consequence of policy will be the long term underpinning of diverse, vibrant and flexible land use and rural communities.

2.5 Property rights

68. The Review has been carried out within the context of the European Convention on Human Rights (ECHR), and we have considered the balance of both the landlord's and the tenant's rights throughout the review process.

69. The principal right of importance is the property right in Article 1 of the First Protocol, the landlord having a property right in the land and tenancy and the tenant having a property right in the tenancy. The extent of the tenant's right is set by the terms of the tenancy.

70. In practice the value of the tenant's right depends on the terms of the tenancy and on the personal circumstances of the tenant. The Convention respects the right of peaceful enjoyment of property but accepts that the state may deprive a person of their property or control the use of that property in the general or public interest, provided that the state acts proportionally to strike a fair balance has been struck.

71. A fair balance has to be struck between what is in the wider public interest and the protection of the individual's rights. The Convention requires there to be a reasonable relationship of proportionality between the means employed and the aim sought to be realised in order to strike that fair balance. Where a change of policy has a significant effect on the value of the property right, the fair balance generally requires compensation to be paid.

2.6 Research undertaken

72. The open and collaborative nature of the review process resulted in a wide range of submissions from stakeholders. Many of these were extremely thoughtful and detailed, often based on case studies and other forms of anecdotal evidence. In order to provide a sense check for all of this, and to ensure a robust evidential basis for the Review in certain areas of focus, a research programme was undertaken by Scottish Government as listed in Appendix A, all of which are publicly available.

2.7 Structure of this Report

73. This Report sets out the specific recommendations arrived at by the Review Group after careful consideration of all the issues involved. It builds on, but does not repeat the findings set out in the Interim Report, and it is structured so as to reflect the key themes identified in Chapter 9 (What Needs to be Done?) of that document. The recommendations have been developed as an integrated package, and reflect the interlinked nature of the challenges being addressed.

Section 3 – The Need for Fundamental Change

3.1 Solid foundations

74. An important conclusion of the Review Group is that the system of tenant farming in Scotland is not a “broken” one. On the contrary, the Review Group has seen a great deal of evidence to indicate that the majority of tenant farms are operating well on the basis of current legislation. Most landlords and tenants are good people doing an excellent job. There are not, however, any grounds for complacency.

75. The Review Group has also seen evidence of serious failures, not so much in the legislation itself as in the inability of current statute to deal with a minority of landlords, tenants and intermediaries whose actions risk undermining the entire system on which tenant farming is based. No matter how solid the foundations, the risk that they will become so eroded as to collapse is real and requires urgent attention.

3.2 Leadership

76. Any industry going through a process of change needs strong and inclusive leadership from within its own ranks. Government cannot be a substitute for that. The Review Group has noted that, while both tenants and landlords have able and articulate spokespeople, there are not enough people speaking up strongly for the future of agricultural tenancy itself. If the fundamental shifts that are needed in the sector are to happen then this will have to change.

77. During the course of the Review there have been encouraging moves in this direction, and efforts to look for a shared agenda between the National Farmers Union Scotland (NFUS), Scottish Land and Estates (SL&E) and the Scottish Tenant Farmers Association (STFA) represent an important step forward. It is vital that leading individuals now build on this, re-establishing the Tenant Farming Forum (TFF) as a responsible and collaborative leadership body rather than as a setting for contests between partisan interests.

3.3 Partnership

78. The business relationship between tenants and landlords should be one of shared common endeavour, but the baggage of its cultural history can cause behaviours that run counter to modern values, norms and expectations. It demands of landlords and their agents a high level of sensitivity to the fact that their relationship with a tenant is a business one in which social presumptions and pretensions have no place.

79. Equally, it demands of tenants a recognition that landlords are in business for financial return just as much as tenants are, and that the benefit of security of tenure is predicated on the tenant making the best use of the land in their care.

80. As with any other business relationship between investors and managers, this one demands of all parties a genuine sense of partnership for mutual benefit, but the particular circumstances of tenant farming also requires a degree of empathy and emotional intelligence that are too often absent.

81. Landlords must recognise that the tenant's investment in the business frequently has a strong personal dimension forged from working the land sometimes over several generations. Tenants must recognise that many landlords also have long family connections with the land, and that this emotional bond is usually something that landlord and tenant share.

3.4 Confidence

82. In the Interim Report, the Review Group placed a great deal of emphasis on the lack of confidence afflicting tenant farming. No sector of the economy can be expected to thrive unless there are high levels of confidence among those on whose business decisions the sector depends. The Review Group has spent some time exploring the underlying causes of this problem, and has traced much of it back to the actions of a relatively small number of individuals.

83. Certain landlords have been guilty of abusing their power and behaving in a manner inappropriate to a 21st century contractual relationship, and this has been exacerbated by the actions and insensitivities of some intermediaries. Certain tenants have been guilty of exploiting historical and cultural perceptions of landlords to make unreasonable demands.

84. The net result has been significant damage inflicted on the majority by an irresponsible minority, and it is vital that there is now a concerted effort to put a stop to this.

3.5 Modernisation

85. 80% of land let for longer than a year in Scotland is currently leased through what are termed "secure 1991 Act tenancies". These provide a high level of security and what amounts almost to a perpetual term lease that can be passed down the family line. They have been important in helping to sustain a tenanted sector over many years. They do not always fit well, however, with the flexibility that is required if the tenanted sector is to adapt effectively to changing circumstances and meet the needs of growing agricultural businesses.

86. If the sector is to thrive and grow then, while we need to hold on as far as possible to the existing supply of secure 1991 Act tenancies for the time being, we must also substantially increase the supply of new long term LDT type vehicles. In time, the proportion of secure 1991 Act tenancies in the overall picture will gradually reduce, leading to a more diverse and flexible overall structure better suited to modern circumstances. Given their highly dominant position in the supply of tenanted land, major owners of agricultural land have a particular responsibility to help ensure that this increase in and rebalancing of supply occurs.

3.6 Managing change

87. The conclusions of the Review imply a need for fundamental change across the sector in a number of areas. Achieving the Scottish Government's vision for tenant farming will take several years and will require a sustained process of managing change under the joint leadership of government and industry bodies. That process will not happen by accident.

88. While this Report will provide the core ingredients of an effective programme of managed change, this will be most effective if it is formalised under the leadership of an inclusive governance structure that can monitor progress and instigate corrective actions as the need for these becomes apparent. A constructive and collaborative approach should be sought and expected from a reinvigorated and re-focussed TFF.

3.7 Significance of this Report

89. A number of people have remarked on the scale of challenge being tackled by this Review. Several landlords have indicated a wish to exit the tenanted sector, while many tenants have argued that a right to buy (and thus exit from the tenanted sector) is their preferred ambition. All have made it clear, however, that if the Review can indeed deliver what the Scottish Government intends, then they will want to be part of that vision.

90. Yet there are no panaceas available here. In the sections of this Report that follow the Review Group sets out a number of detailed recommendations that it believes will be helpful. They comprise an integrated package rather than a pick and mix selection, and they collectively seek to address the key issues that need to be resolved.

91. Ultimately, however, government can only do so much. The future of tenant farming rests primarily with landlords and tenants up and down the country, each and every one of whom holds the key to, and responsibility for, the future.

Section 4 – Recommendations on Landlord/Tenant Relationships

4.1 Pivotal significance

92. Tenant farming is by definition a relationship between landlord and tenant. The Review Group has encountered numerous situations where these relationships are working extremely well. But the Review Group has also had reported to it many examples, from up and down the country, where tenant and landlord are either afraid of each other, dislike each other, or communicate only through intermediaries.

93. This is not a sound basis on which to build, and it is one where there are severe limits on the capacity of government to intervene. Yet the issue of landlord/tenant relationships is pivotal to the future of tenant farming, and the failing relationships of some cannot be allowed to damage the interests of the rest. Mechanisms to promote good relationships and deal with failing ones are therefore essential.

4.2 Industry led initiatives

94. The Review Group has been heartened by recent industry led initiatives to promote more effective and balanced tenant/landlord relationships, and in particular by the Joint Memorandum on Rents published in late summer 2014 by the NFUS, SL&E and STFA. The fact that there is now recognition across the industry of the need for action is most encouraging, and there is little doubt that strong personal leadership by opinion formers from within the landlord and tenant communities can exert influence in a way that is not open to government.

95. Anecdotal evidence suggests that the joint initiative on rents has already had a beneficial impact, and there is general agreement among industry leaders that further joint efforts of this nature should be pursued.

Recommendation 1 - The Scottish Government should facilitate, support and strongly encourage the efforts of industry leaders to improve landlord/tenant relationships through effective self-regulation and other industry led initiatives.

4.3 Tenant Farming Commissioner

96. In order to deal with the actions of a damaging miscreant minority, it is not uncommon in other sectors of the economy (and in certain areas of public life) for some sort of ombudsman to be created for the specific purpose of establishing formal codes of practice and ensuring that these are adhered to.

97. A number of different models exist, some led by government and some by industry. Most operate on the basis of published codes, against which parties can then refer alleged breaches to someone with the authority to adjudicate accordingly. Usually that person has associated powers to levy fines and/or other appropriate penalties where such a complaint is upheld.

98. Persuasive proposals for some sort of neutral Tenant Farming Commissioner (TFC) to deal with tenant farming issues have been made in a great many submissions to the Review, and widespread industry support for such a concept. Some stakeholders have argued for this to be a statutory function, while others have suggested that it be introduced on a non-statutory basis subject to review. In a few submissions, it has been proposed that the powers might be extended as an authority to resolve disputes more normally dealt with by the Scottish Land Court, although such powers would render the functions closer to those of an arbitrator or court of law.

99. The Review Group has considered the options that might be available, and in particular has reflected carefully on the importance of promoting good practice alongside the need to resolve disputes and discourage unhelpful behaviours. The potential complexities and costs that might be associated with a statutory function as against a non-statutory alternative have been noted, as has the possibility of paying for this through charges and penalties.

100. Underpinning the thinking is a need for urgent and robust action to deal with the behaviours of an unhelpful minority. Firm action taken now might render the function less necessary in the longer term.

101. The Review Group has been anxious to distinguish clearly between the role of a TFC and that of the Scottish Land Court, recognising the ultimate entitlement of all parties under ECHR to have issues relating to legal rights determined in a court of law (see background note in Appendix C).

102. On balance, the Review Group has concluded that a strong TFC is needed, with a remit to promote and encourage good practice underpinned by robust codes of practice, and a power to impose substantial but proportionate penalties as a measure of last resort.

4.4 Codes of Practice

103. The remit of the TFC should include establishing a system of codes of practice, with the TFC empowered to investigate any alleged breaches of these codes. The costs and benefits of giving the TFC powers to impose penalties in respect of breaches to the codes should also be considered.

104. The effective operation of a TFC will depend crucially on there being appropriate codes of practice in place that cover the full range of issues where guidance (and potentially intervention) may be required. Such codes will need to be written in a clear and unambiguous manner so that everyone covered by them understands fully what is expected of them, and so that the TFC is able to effectively consider any complaint that may be raised.

105. The Review Group has considered the codes that may be required, and has concluded that it will be important to keep open the possibility that the TFC may wish to bring forward codes on matters that the Review Group has either not thought of or which may not be areas of current concern. The Review Group does, however, believe there to be an immediate and urgent need for codes in a number of core areas:

- Negotiating rent reviews
- Agreeing and recording tenant's improvements
- Negotiating fulfilment of landlords' and tenants' obligations
- Enabling succession and assignation
- Determining way-go compensation
- Negotiating the terms of a modern LDT
- Sporting relationships and game management

4.5 Professional intermediaries

106. Professional intermediaries play a vital role in almost all sectors of the economy. In tenant farming their expertise can be invaluable in helping landlords and tenants through the complexities that may be involved in their relationship. Where a landlord owns a number of tenanted farms, professional intermediaries may be essential in order to ensure that sufficient time is devoted to the landlord's relationship with each and every tenant on an individual basis.

107. The Review has, however, received an unexpectedly high number of submissions (from both landlords and tenants) that have been negative about the role of such intermediaries. Many submissions have alleged that inexperienced or insensitive intermediaries at times cause a souring of landlord/tenant relationships that is both unhelpful and unnecessary. Others have suggested that there may be what amounts to an excessive use of professional intermediaries to the exclusion of any personal contact between landlord and tenant, and in that regard the number of landlords who have chosen to contribute to the Review itself through a professional intermediary has been notable.

108. The Review Group has given some attention to this issue, recognising that the valuable work done by many intermediaries should not be put in jeopardy by the actions of a minority. Relevant professional bodies already have in place their own codes of practice, but confidence in the application of these appears to be low so that a focus on the role of intermediaries by the TFC is considered important.

109. Recognising that relevant professional bodies already have in place their own codes of practice and arrangements for ensuring their enforcement, the TFC should assess whether in addition there may be a need for one or more TFC established codes specifically addressing issues relating to the use, roles and behaviours of professional intermediaries.

Recommendation 2 - A new office of Tenant Farming Commissioner should be established to promote and secure effective landlord/tenant relationships and behaviours across the agricultural tenanted sector underpinned by robust codes of practice.

Section 5 – Recommendations on Rent and Rent Reviews

5.1 Rents and the public interest

110. Demand for agricultural tenancies far exceeds supply. In the absence of rent controls this would tend to push up rents to levels well above those in a more balanced market where rents would normally reflect the productive capacity of the land in question. Rents on secure 1991 Act tenancies are already subject to statutory controls, reflecting the fact that agricultural land is a finite resource of national importance, and one where public policy priorities in relation to the agricultural economy and security of national food supply are of significance.

111. The Review has received a number of submissions concerning rents, and in particular about the future of rent controls relating to secure 1991 Act tenancies. The Review Group has also taken note of the findings of a recent ECHR case¹ that is of relevance. The Review Group recognises the key incentivising role which the level of rent plays in determining the actions of landlords, and notes the need to balance the landlord's wish to maximise their income against the wider public interest in holding rents to levels compatible with land use for agricultural production.

112. While landlords have an entirely legitimate right to seek a fair return on their investment in agricultural land, government has an obligation to ensure that the rents charged do not conflict with public interest priorities in relation to agricultural land use. At present the majority of tenanted land (around 80%) is under secure 1991 Act tenancies that are already subject to rent controls. For the time being, the Review Group believes that it is reasonable to continue to control the rents on these holdings, and in a manner that is closely linked to their use for agricultural production.

113. In contrast, the Review Group believes that rents on new letting vehicles (see Section 9 of this Report) should in the main be set by the market, with the aim of stimulating an increase in the supply of tenanted land. In time this will reduce scarcity pressures on rent levels, and in the long term this may allow statutory controls to be relaxed. The Review Group has therefore considered the issue of rents on secure 1991 Act tenancies in a manner distinct from that of LDTs, and on the basis of securing the public interest through a period of demand/supply imbalance that needs some time to resolve itself.

¹ *Bittó and Others v. Slovakia*, European Court of Human Rights, Application no. [30255/09](#)

5.2 Setting of rents

114. The public interest focus referred to above has led the Review Group to conclude that rents for secure 1991 Act tenancies should for the time being, be controlled to reflect the potential agricultural productivity of the land, taking account of the landlord's and tenant's obligations under the lease. It is neither in the public interest for rents to be set too high (rendering genuine agricultural use uneconomic) or too low (reducing the incentive to maximise sustainable agricultural production and discouraging landowners from letting land).

115. The current statutory formula for fixing rents for secure 1991 Act tenancies does not achieve this, as it is based on factors not directly related to agricultural productivity. There is in reality no open market in secure 1991 Act tenancies so that the necessity to use as comparators rents obtained for LDTs in a market distorted by scarcity, and the difficulties in adjusting for that distortion, have led to some unusually large rent increases in recent times. The Review Group has therefore concluded that, for the time being at least, statutory arrangements relating to the setting of rents for secure 1991 Act tenancies need to be fundamentally changed so as to fully reflect the underlying public interest in productive use of agricultural land. This includes a requirement to remove reference to open market comparisons, scarcity and marriage value, and to ensure full transparency and objectivity relevant to the purpose of the lease.

116. The Review Group has, based on its detailed considerations on this issue, set out a suggested process in Appendices D and E for the setting of rents on all secure 1991 Act tenancies. Any new process should also be the default rent setting process for LDTs where no alternative provision has been agreed by the landlord and tenant for rent review.

117. It is also suggested that the amended provisions on rent should be kept under review in relation to supply and demand pressures in the market, and the potential need to amend the arrangements further in future in order to respond to changes in the market on agricultural tenancies.

Recommendation 3 - Legislative provisions on rents for secure 1991 Act agricultural tenancies should be amended so that rents are determined on the basis of the productive capacity of the holding, farmed by a hypothetical tenant (who is an efficient and experienced farmer of adequate resources who will make best use of the land) using the fixed equipment provided by the landlord, taking account of the budget for the holding, and including the contribution from non-agricultural diversified activity.

5.3 Non-agricultural diversification

118. In recent times, it has become increasingly common for tenant farmers to include within their business a non-agricultural diversification that makes some use of assets belonging to the landlord and forming part of the holding. Such diversifications have been encouraged as a matter of public policy, and it is important that rent and associated consenting arrangements are supportive of this. It is, however, entirely reasonable that the landlord should receive an additional rental return on non-agricultural activity taking place on the holding, and that this should reflect an open market rental for the assets being utilised for this purpose.

119. The Review Group recognises the public interest case for encouraging both tenant and landlord to invest in non-agricultural diversification activity, and the significance of a fair rent in so doing. But the Review Group has also noted that current legislation enables a landlord to object to a diversification, even where it has received local democratic consent through the planning process. The Review Group considers that the landlord's right to prevent a diversification from proceeding should be very limited where planning consent has been granted.

Recommendation 4 - Legislative provisions for regulating rent reviews and determinations of rent for agricultural holdings should enable rent to be paid for non-agricultural activity on a holding that reflect a fair market rate for the landlord's assets being used for the activity.

Recommendation 5 - If objecting to a diversified activity on a tenanted holding, the process should be limited to only one notice of objection by the landlord and to create a presumption that if planning permission has been granted for the diversified activity, that the activity is allowed unless the landlord can demonstrate that objections under section 40 subsection 9 of the 2003 Act apply.

5.4 Housing provision

120. Many tenanted farms have within them a level of housing provision that was designed for a time when labour productivity in relation to agricultural land use was very different from today. A consequence of this is that on some tenanted farms a house is provided, or houses, and included in the agricultural tenancy and within the rent that are well beyond the labour requirement of the holding. At times, this leads to conflict between a landlord who wishes to see a fair return from housing in their ownership, and a tenant who may wish to use or sublet housing that they consider to be integral to the lease and already paid for through rent on the holding.

121. The Review Group has considered the issues involved, and recognises the public interest in ensuring that housing supply in rural Scotland is used to optimal effect. If this is to happen, then the landlord and tenant must have an incentive to invest in and maintain the housing in question, and housing in excess of that required for the labour requirement of the holding should have associated with it (if retained by the tenant) an appropriate rental charge. This should apply even where the holding is, on its own, no longer able to support a full labour unit.

Recommendation 6 - In considering the appropriate rent for an agricultural holding, provision should be made for any housing provided on a holding in excess of that reasonably required for the labour requirements associated with that holding.

5.5 Rent review periods

122. Implicit in the need for rents to reflect potential agricultural productivity is a need for flexibility so that rents can adapt quickly to changing circumstances. Current legislation provides opportunities for both tenants and landlords to initiate rent reviews at intervals of not less than three years, thereby giving flexibility while ensuring a degree of medium term certainty for both parties.

123. The Review Group has considered suggestions that rent reviews should be made mandatory, either at three year intervals or an alternative term, and it has also noted a significant number of cases where lengthy intervals between rent reviews have led to large and potentially destabilising rent increases when eventually conducted. The evidence presented suggests that while existing statutory provision is sufficient to empower both parties, failure to use that power has been relatively common.

124. The proposed amendments to legislation recommended above mean that rents for secure 1991 Act tenancies will be set in an historical economic context, thereby creating a built-in incentive to review rents on a regular basis. The Review Group has therefore concluded that no legislative change is needed, although it recognises the importance of strongly encouraging tenants and landlords (through industry bodies and otherwise) to utilise the legislative provisions already available to them.

5.6 Rents register

125. A number of submissions to the Review noted that many landlords have greater access to comparative rents data than do individual tenants, and suggested the need for a publicly available rents register. An amended rent setting system based on budgets as recommended above makes no use of “comparables”, and is based on objective and transparent data relating to the agricultural productivity of the holding in question. This should render a rents register unnecessary.

126. However the Review Group recognises that during a rent review early negotiations (Appendix D – Stage I), rent demands and offers could benefit from information on the rents of other farms as a form of “sense check”.

127. Where differences arise this might help the parties to reach an agreed position more quickly, and avoid entering into a period of protracted negotiation (Appendix D – Stages II and III). The Review Group has therefore concluded that while no legislative change is needed, relevant industry bodies should be encouraged to compile and make available this kind of information.

Recommendation 7 - The Government should encourage and support industry bodies, including those representing professional intermediaries, to maintain publicly available information on model budgets and rent calculations to assist where relevant with the negotiated settlement of rents within the tenant farming sector.

5.7 Rents dispute resolution

128. A guide to conducting rent reviews has been published by the TFF, and rents are normally agreed between tenants and landlords without recourse to mediation, arbitration or statutory dispute resolution. However, evidence presented to the Review suggested that some tenants agree to rent settlements as a result of what amounts to a form of subtle duress, because the legal costs involved in any formal dispute are potentially ruinous if the tenant concerned has no effective insurance.

129. While it is not possible to remove ultimate recourse to the courts to resolve disputes of this nature, the three leading industry bodies (NFUS, SL&E, STFA) have already demonstrated that voluntary arrangements can be put in place to reduce this likelihood. A number of submissions to the Review suggested a need for alternative statutory mechanisms for resolving rent disputes, and in particular mechanisms that would be less costly for the parties involved. Suggestions included compulsory use of mediation or arbitration, both of which are recommended (on a voluntary basis) in the TFF guide.

130. The Review Group has considered the options available, recognising the ultimate right of both parties to take their dispute to a court of law if they wish. On balance, it has concluded that the recommendations in the TFF guide provide a good basis for a staged rent review process, while still protecting the rights of both parties. The provisions of the TFF guide could, however, be given additional weight if incorporated into a code of practice under the oversight of the TFC.

5.8 Modelling the new system

131. Any rent control system, unless based on unusually simplistic criteria, will have inherent in it the potential for dispute. Recent history has seen a number of such cases in the Scottish Land Court, some costing those involved exceptionally large sums to cover the costs of legal representation. The Review Group has been anxious to do all that it can to minimise this likelihood, while recognising the rights of both landlords and tenants to have a disagreement settled in a court of law if all else has failed.

132. A number of submissions to the Review have emphasised the need, in devising any changes to the current rent control system, for robust modelling and “road testing” ahead of formal implementation in order to reduce the risk of unresolved/unpredicted complexities having to be resolved in the Scottish Land Court at a later date.

Recommendation 8 - The Government should consider how to test the detail of the Review’s proposals on rent review, in order to ensure that the provisions work effectively in practice, potentially in association with industry bodies.

Section 6 – Recommendations on Investment, Improvements, Compensation and Way-go

6.1 Adapting to evolving investment patterns

133. Tenant farming traditionally comprises a partnership between a landlord and tenant where the former contributes the fixed capital and the latter provides the working capital, management and labour. The development of capital intensity of farming over many decades has increased the proportion of working capital in the overall capital employed (excluding land value), and in addition a trend among landlords to limit their investment in fixed equipment, often as a response to low rents, means that most tenants now provide a significant fixed capital element as well.

134. The net result of this has been a growing requirement for tenants to raise investment capital from external sources (usually bank borrowing), and an intense focus on way-go compensation arrangements by tenants anxious to ensure that their capital and property rights are secure. Both of these have considerable significance for the Review, not least because unless both tenants and their sources of investment capital have confidence that compensation at way-go will be fair then they are unlikely to invest in the business to an optimal level.

6.2 Security and collateral

135. A number of submissions to the Review noted the difficulties encountered by tenants in providing collateral for bank borrowing, and drew comparisons with the relatively favourable position enjoyed by some owner occupiers who may be in a position to offer lenders a standard security over the land that they own. While some machinery and livestock can provide a degree of collateral, in general the cost of borrowing for the tenant is (other things being equal) likely to be higher than for the owner occupier able to offer greater security. The Review Group has considered this issue in the light of the growing levels of capital being provided by tenants, and against the fact that a secure 1991 Act tenancy may have some significant inherent security potential within it.

Recommendation 9 – Allowing the registration of secure 1991 Act agricultural tenancies in the Land Register, should be considered further to determine what impact this would have on a tenant’s ability to offer the lease for the purpose of granting a standard security over it.

6.3 Amnesty on tenant's improvements

136. Effective recording of, and agreement on, a tenant's investment in improvements is central to fair and predictable compensation at way-go. Despite this, many secure 1991 Act (and some LDT) tenants do not have an agreed and up to date record of their improvements, and several submissions to the Review suggested a need for some sort of amnesty process whereby this could be rectified.

137. The Review Group has considered the issue and the range of complexities that are potentially involved. On balance, it has concluded that a time limited amnesty process would be helpful, with the added provision that where complexities cannot be otherwise resolved there is an opportunity for referral to the Scottish Land Court. An amnesty lasting for three years is felt to be appropriate, covering as it does the normal rent review cycle.

138. Sections 33A and 38(2A) of the 1991 Act give tenants a right to claim compensation for improvements where no notice has been given, but which involve equipment that the landlord should have provided at the commencement of the lease. This has given rise to disputes as to which items come under this provision, and the Review Group has concluded that any amnesty should require tenants to claim such improvements as part of the amnesty to draw a line under the matter.

139. Following a tenant serving a notice on the landlord for a specified item to be treated as a tenant's improvement on way-go, the landlord should have a period of two months to object on one or more of the following grounds:

- The improvement was not carried out during the present tenancy and it does not come within the provisions of section 34(5) of the 1991 Act;
- The improvement is not required in order to maintain efficient production on the holding, having regard to the terms of the lease;
- The improvement was carried out in a way which is not in keeping with the character of the holding or which is detrimental to other parts of the holding;
- The improvement was carried out by the landlord;
- The landlord or their predecessor contributed to the cost of the improvement or gave consideration to the tenant in some other way.

140. The tenant should be able to refer the matter to the Scottish Land Court within a period of two months from receipt of the objection if the tenant is unable to resolve the matter through discussion or mediation and wishes to take the dispute further, and the Scottish Land Court in determining the application should have the powers provided in section 39(2) of the 1991 Act.

141. After the end of the amnesty period all improvements not agreed as the tenant's should be assumed to belong to the landlord, and consideration given to whether sections 33A and 38(2A) of the 1991 Act could then be repealed.

142. All tenant's improvements agreed as such should be potentially eligible for compensation at way-go, but as an alternative the tenant should be free to take them with them (where practicable) subject to putting right any damage involved in doing so.

Recommendation 10 - Provision should be made for a three year amnesty during which a tenant farmer may serve formal notice on the landlord to the effect that specified items not previously agreed may be treated as tenant's improvements at way-go, including any claim that might be made under existing provisions for improvements where no notice has been given, but which involve equipment that the landlord should have provided at the commencement of the lease.

6.4 Post Lease Agreements

143. Many 1991 Act tenancies were let on the basis that the tenant entered into a Post Lease Agreement (PLA) taking on the landlord's responsibilities in relation to the fixed equipment on the holding. In some the tenant undertook to provide fixed equipment that the landlord should have provided at the outset of the lease, or to put the fixed equipment into a thorough state of repair and thereafter to renew or replace fixed equipment worn out by natural decay and fair wear and tear. Generally a tenant who had entered into a PLA paid a lower rent for taking on those obligations, and sometimes was given some other benefit at the outset of the lease.

144. A number of submissions to the Review suggested that further legislation is required in order that tenants who have agreed to a PLA may be able to participate fully in the amnesty recommended above. The Review Group has considered this and concluded that current legislation is sufficient to address the issues involved. Any tenant currently party to a PLA can put it away under the terms of section 5 of the 1991 Act as amended (Part 5 section 60 of the 2003 Act). If any of the work done under the PLA qualifies under sections 33A and 38(2A) of the 1991 Act then the tenant will be able to make a claim under the amnesty to have any qualifying improvements recorded as eligible for compensation at the end of the lease. A landlord's right to object to any such claim is also preserved within the provisions for the amnesty as set out in Recommendation 10.

6.5 Compulsory recording of fixed equipment

145. Current legislation requires a record of fixed equipment to be made at the start of a secure 1991 Act tenancy, and allows either party to require such a record to be made at any time during the tenancy. Similar provisions relate to LDTs and SLDTs. A number of submissions to the Review suggested that these provisions should be strengthened, and that failure to maintain a record of fixed equipment should be made an offence. The grounds were primarily that this would reduce the scope for future disagreement and make other disputes (for example in relation to rent calculations) less likely.

146. The Review Group has considered the merits of this, and has concluded that such provisions should be unnecessary and would in any case be difficult to enforce. The Review Group has noted, however, that in the event of either party taking a rent dispute to the Scottish Land Court then an agreed record of improvements would have to be submitted in order for a rent to be determined. In such an event, therefore, the party might have to trigger their right to require the other to make such a record.

6.6 Right to object to landlord's improvements

147. Under current legislative provisions a landlord has the right to object on certain grounds to a proposed tenant's improvement, but there is no reciprocal right available to the tenant. In rare circumstances this can lead to tenants having imposed on them improvements that they do not require, with the possibility of an associated rent increase. The Review Group has concluded that this imbalance of rights should be rectified, and has noted that landlords and tenants are already free to agree additional landlord investment in equipment not otherwise required as a renewal or replacement, subject to a separate agreement on rent for the item(s) in question.

148. Where a landlord is proposing to carry out any improvement on the holding, a landlord should be required give the tenant notice in writing specifying what they propose to do, the costs involved and the expected rental consequences.

149. The tenant should be able to object in writing within two months of receiving the notice, and the landlord should be able to apply to the Scottish Land Court for consent to the work if they still so desire within two months of receiving the objection.

150. In order to be given consent by the Scottish Land Court, the landlord should be required to show that the improvement is necessary for the maintenance of efficient agricultural production on the holding, and the Scottish Land Court should have powers to impose conditions on any consent.

Recommendation 11 – Provision should be made to require a landlord to notify a tenant farmer of any proposed improvement to the holding and the tenant should be able to object, if the improvement is not necessary for the maintenance of efficient agricultural production on the holding.

6.7 Schedule 5 list of improvements

151. Current legislation specifies improvements that can be eligible for compensation. A number of submissions to the Review suggested that these require updating to reflect modern circumstances, and after considering the matter the Review Group has concurred with this. Wording similar to that in paragraph 11 of Schedule 3 of the Crofters (Scotland) Act 1993 could be included in any revised schedule.

Recommendation 12 – Further work should be undertaken, with relevant industry bodies, to revise the current list of improvements that can be eligible for compensation set out in Schedule 5 and section 17 of the 1991 Act.

6.8 Compensation at way-go

152. A number of submissions to the Review from tenants, expressed a degree of bitterness in relation to current arrangements for waygoing where a tenant, whether or not they have an eligible successor, chooses voluntarily to give up their tenancy to the landlord. Two particular causes of this ill-feeling were identified by the Review Group.

153. The first relates to the fact that the tenant has a property right in the tenancy (but not in the land – see Section 2.5 of this Report) for which a valuation mechanism exists in statute (section 55 of the 2003 Act). There is, however, no compulsion on the landlord to enter into an agreement with the tenant in terms of section 55. Where a landlord is aware that a tenant wishes to retire and either has no eligible successor or does not wish to transfer the tenancy to an eligible successor, the landlord may simply decline to enter into an agreement. This in effect forces the tenant who wishes to retire to give up the tenancy for no compensation, other than their way-go claim, thereby losing whatever was the value of their property right in the tenancy.

154. The second relates to timing, and to the fact that many landlords allegedly require tenants to enter into an irreversible agreement to give up the tenancy in advance of confirming the final valuation for compensation to be paid for any tenant's improvements at way-go. The Review Group has considered both these concerns.

155. The tenant's property right in the tenancy comprises the tenancy with all its terms and conditions, and its value varies according to (in particular) the age of the tenant and whether they have any eligible successors. Some submissions misunderstood the valuation method in section 55 of the 2003 Act, which takes account of the actual security of the particular tenant, so that the tenant with no successors has a less valuable tenancy than a tenant with a secure succession. Recommendations elsewhere in this Report introduce greater flexibility into provisions for succession within the family, and enable tenants to convert their tenancy into an LDT and assign it for value. This will allow a tenant who cannot reach an agreement with their landlord under section 55 of the 2003 Act a mechanism whereby they can still realise value from their property right, and at the same time this will keep the land in tenancy. Taken together, the Review Group considers that these recommendations are more likely to result in land remaining in tenancy than introducing mandatory compensation at way-go, and so are more likely to deliver the public interest aims of the Review.

156. Unless the agreement to give up a tenancy is under section 55 of the 2003 Act, in which case provisions already exist in relation to compensation for the tenant's property right in the tenancy, any agreement to give up a tenancy is unenforceable unless the tenant actually vacates the holding. The tenant is already therefore in a strong bargaining position and may decline to give up the tenancy (and if the Review Group's recommendations are accepted) and instead convert it to an LDT if they conclude that the value of compensation being offered is inadequate. Given this provision, the Review Group has concluded that no further change is required other than for relevant industry bodies to ensure that tenants are well informed as to their rights in this matter.

Section 7 – Recommendations on Retirement, Succession and Assignment

7.1 Releasing land to tenancy

157. Tenanted land is in short supply, yet almost a third of tenant farmers are over the statutory pensionable age and a significant number of older tenants in secure 1991 Act tenancies have told the Review Group that they would like to retire if circumstances were different. Some have insufficient pension provision, having invested their spare cash directly into the holding. Many also have a deep sense of personal commitment to the farm and to the local community. The Review Group was told of a number of holdings that have been farmed continuously by the same family since the 19th century.

158. For many tenants, giving up the tenancy therefore has both financial and emotional implications that may discourage retirement and work against the wider interests of a sector in need of more land released to newcomers. In circumstances of significant under supply of tenanted land, it is in the public interest as well as that of older tenants, that they should be encouraged to retire with dignity and confidence so as to release land to younger tenant farmers.

7.2 Succession planning and lifetime assignment rights

159. Current legislation enables tenants in secure 1991 Act tenancies and LDTs to pass the farm down the family line either by bequest if that is permitted under the lease or by transfer by the executors. It does so, however, in a manner that is based on social assumptions that are long outdated. The order in which family members are entitled to succeed to a tenancy is set out in legislation, so that for example if there is a spouse and children who may not want to farm, then the tenancy cannot be passed to a niece or nephew who might want to take over the tenancy. Lifetime assignments under section 10A of the 1991 Act are likewise restricted.

160. The Review received many submissions proposing that these provisions should be modernised, highlighting that changing social norms were in effect preventing family farms from passing to a close relative who might otherwise wish to take up the tenancy. A number of submissions also noted that current arrangements can have discriminatory consequences, and proposed that spouses should always have equal rights to their partner. In addition, some submissions argued for an extension of succession and assignment rights, including the right to assign the lease to anyone in the open market.

161. The Review Group has considered the issues involved with care, the focus being on modernising succession arrangements to encourage timely retirement through efficient transfer of the tenancy through the family to younger more active members, but also recognising that any significant widening of the class of persons who can succeed to or be assigned a tenancy may impact negatively on the landlord's property right and have ECHR implications.

162. Current legislation has different classes of relatives entitled to succeed by bequest or transfer by the executors, and there are also different provisions for lifetime transfers. The Review Group has concluded that these provisions should be brought into line and provide for the same rights of succession by bequest, transfer or assignation.

163. The Review Group has further concluded that significant simplification of current legislation is required in order to ensure that, within the group of persons who can already reasonably expect to succeed or be assigned to, there is a high level of flexibility to reflect 21st century circumstances. The Review Group does not consider that a significant widening of this class is justified because of the potential impact on the landlord's rights, but it does consider that the lease should be capable of passing to any parent of the tenant or their spouse/civil partner or to any descendant or their spouse/civil partner of those parents.

164. The Review Group also considers that the landlord should continue to be able to object to the lifetime assignation or succeeding of a tenancy on the grounds that the tenant is not able to efficiently farm the holdings or that the tenant has a separate viable holding already should be retained.

Recommendation 13 – Current legislation should be amended to allow secure 1991 Act tenancies and LDTs to be: assigned by the tenant farmer in their lifetime; bequeathed where this is permitted in the lease; or transferred by a tenant's executors on death, to any living parent, or any living descendant of a parent, or spouse or civil partner of any living descendant of a parent of the tenant or of the tenant's spouse or civil partner.

7.3 Viable unit test

165. The landlord currently has certain statutory grounds for objection to a near relative successor tenant who has acquired a 1991 Act tenancy on succession. The provisions are complex, but in general terms the landlord can object on the grounds that the new tenant does not have sufficient financial resources or training/experience in agriculture to farm the holding efficiently, that the holding is not a viable unit and the landlord intends to amalgamate it with other land that they own, or that the new tenant is already the tenant or owner of another viable holding.

166. The Review Group considers that it is reasonable to allow termination on the grounds that the tenant is not able to farm the holding efficiently. The ground of objection allowing the landlord to terminate the tenancy on the basis that the holding is not viable was introduced at a time when government policy encouraged amalgamation for improved efficiency.

167. More recent attitudes to continued amalgamation have changed, and this ground for objection now runs counter to a policy of retaining a supply of starter or part-time units suitable for new entrants. Where such a smaller unit includes residential accommodation that is in excess of the labour requirement of the unit, the new rent arrangements proposed in Section 5 of this Report, will allow the landlord to derive a fair rent from it.

168. Where a tenant already farms a viable unit, the Review Group considers that there should be a reasonable ground of objection to prevent that tenant from accumulating tenancies and so keeping the holding available for re-letting to another tenant.

169. As indicated above, the provisions allowing termination on the basis that the tenant is not able to efficiently farm the holding, or that they have a separate viable holding already, should be retained.

Recommendation 14 - Current legislation should be amended to remove a landlord's ability to object to the lifetime assignation or the succession of a tenancy on the grounds that the agricultural holding is not a "viable unit" and the landlord intends to amalgamate it with another holding.

7.4 Conversion of secure 1991 Act tenancies to LDTs

170. According to research conducted for the Review, around 20% of secure 1991 Act tenants expect to give up their tenancies and retire rather than assign their tenancy to a family member. Most of these individuals will have eligible successors, but in some cases and for a variety of reasons the tenant does not desire a normal family succession.

171. In these circumstances and under current legislation, unless the tenant can come to an amicable agreement with their landlord under section 55 of the 2003 Act, they may end up giving up their property right in the tenancy to the landlord for no compensation, although their right may be of some value if they have eligible successors. They will only receive compensation for way-going claims and any eligible improvements.

172. The Review has received a number of submissions arguing that tenants in these circumstances are in an unfair position, involving as it may a transfer of significant value from the tenant to the landlord for no payment. Other submissions have noted that this perceived inequity acts as a strong disincentive to retirement for many tenants who would otherwise do so. The Review Group has been particularly exercised about this latter concern, and the impact that it has on the important public interest objective of encouraging timely release of holdings to new and younger tenants.

173. Given the current imbalance between supply and demand for tenanted land, the Review Group has examined this issue with a view to retaining land in tenancy as far as is possible. The Review Group has also noted that the value of a tenant's property right in the tenancy will vary considerably according to their personal circumstances. The Review Group has therefore concluded that, in the interests of maintaining the supply of tenanted land and of fairness, all secure 1991 tenants should be able to convert their secure 1991 tenancy into a long term LDT, and that they should then be free to assign this on the open market.

174. It is proposed that the terms of the LDT should be defined in statute, with a duration of at least 35 years and the rent being subject to the rent provisions recommended for 1991 Act tenancies and as the default for other LDTs, as described in Section 5 of this Report. Any tenant's improvements should transfer to the LDT on conversion.

175. A tenant should be required to give the landlord three months' notice of the intention to convert. This would also enable a landlord to make the tenant an alternative offer if the landlord wishes to take the land in hand.

176. It is proposed that conversion should not be able to take place in circumstances where there are outstanding demands to remedy or notices to quit, including those served after receipt of the tenant's notice to convert. Any notice to convert should be suspended until after any notices to remedy or notices to quit have been resolved.

177. The landlord should have restricted grounds for objection to the assignation on the basis that the tenant is not able to efficiently farm the holding, or that he already has a separate viable holding already.

Recommendation 15 - Provision should be made to enable any secure 1991 Act tenant to convert the tenancy into a new long duration modern LDT with a minimum term of 35 years and then be able to transfer that agricultural tenancy to anyone on the open market for value.

7.5 Open market assignation

178. A number of submissions to the Review proposed that tenants in secure 1991 Act tenancies should be given the right to assign their lease in the open market for value. The arguments advanced for this included a need to incentivise retirement (see above), but also an aspiration to ring-fence land currently under secure 1991 Act tenancies in much the same way as is already the case for land under crofting tenure. The Review Group considered the merits of both arguments with great care.

179. Allowing open market assignation would very probably help to incentivise retirement, but the Review Group was not persuaded that any marginal additional incentive would be significant over that arising from a right to convert as proposed in Section 7.4 above. The merits of the case for ring-fencing land under secure 1991 Act tenancies were unclear.

180. Those proposing such a change noted that this might be the only way to protect the existing supply of long-term tenancies. Those against, indicated that such a change would create significant long-term inflexibility, and would be likely to reduce the confidence of landlords in making land available in the future (and so would be self-defeating). On balance the Review Group has concluded that the public interest case for such a change has not been made.

7.6 Access to housing

181. Many secure 1991 Act tenants who have felt able to retire appear to have done so in part because of having reached agreement with the landowner enabling them to obtain (for rent or purchase) housing or a house site on or near the farm as part of negotiations prior to way-go. This enables them to remain within the local community, which is a key factor for many. A number of submissions to the Review urged an increase in the supply of affordable housing available to retiring tenants.

182. A number of landowners have indicated that they would be willing to make housing available in this way, but that under current planning policy most consents for new houses on or near agricultural land include a planning condition requiring that they be used by people actively engaged in agriculture, usually on the holding in question. This condition may be unhelpfully narrow if, as a result, it acts to prevent houses from being made available to retiring tenants and therefore discourages the occupants of tenanted farmhouses from retiring and vacating them.

Recommendation 16 – Further consideration should be given to ensuring national planning policy and guidelines and allow where possible for measures designed to encourage landlords to provide, on a lifetime lease, nearby retirement housing for outgoing agricultural tenants.

Section 8 – Recommendations on the Role of a Right to Buy

8.1 Relevance to tenancy

183. Calls for a right to buy from secure 1991 Act tenants wishing to exit the sector were a dominant early feature of the Review. For the most part they appear to represent a cry of desperation from people who have lost confidence in the system, but they also came from tenants who (often over several generations) have invested so heavily in their farm as to feel that they have a moral right to formalise the sense of “ownership” that they already experience.

184. Some of those promoting the idea are not tenant farmers, but are people concerned about the power that a single large landowner can exert over a community. Others are concerned with issues relating to social cohesion and community self-confidence. For the Review, the focus has been on the potential significance of a right to buy for the future of tenant farming, building on the analysis already set out in the Interim Report.

8.2 Pre-emptive Right to Buy

185. The Scottish Parliament has already decided that secure 1991 Act tenants should have a pre-emptive right to buy in circumstances where the landlord chooses to sell the farm. At present that requires the tenant to register an interest in advance, and a number of submissions to the Review argued that this runs the risk of souring the landlord/tenant relationship unnecessarily. The Review Group also noted questions as to the definition of when a sale can be said to have formally commenced, and what should happen when the landlord is a limited company and only some of the shares are sold.

186. The Review Group has considered these points, and in particular the practical effects that any impact on good landlord/tenant relationships may have. In so far as tenants have been afraid to register an interest, the intentions of the Scottish Parliament have not been fulfilled. In circumstances where an interest has been registered and has damaged a landlord/tenant relationship, then this is likely to have wider negative repercussions. For these reasons, the Review Group has concluded that the intention behind the existing pre-emptive right would be better served by making it automatic.

187. It is suggested that relevant industry bodies should publish guidance for their members advising tenants and landlords to mutually confirm the status and accuracy of their 1991 Act leases.

Recommendation 17 – Existing provisions on the pre-emptive right to buy for 1991 Act tenants should be amended to remove the need to register a notice of interest so that all 1991 Act tenants have an automatic statutory pre-emptive right to buy their agricultural holding, should it come up for sale.

Recommendation 18 – Further consideration should be given to when the pre-emptive right to buy the agricultural holding should be triggered, for example when the land is advertised or otherwise exposed for sale, or (if not previously advertised or otherwise exposed) when negotiations are successfully concluded with another person with a view to the transfer of the land.

8.3 Sale of shares in a landowning company

188. The Review Group has taken note of a small number of cases where the owner of a tenanted farm is a limited company, so that a question may arise as to when a sale of that landowner's interest is being advertised or has taken place.

189. It is suggested that any open market sale of any proportion of the company's shares for value should in principle trigger the tenant's right to buy the holding but not where shares are transferred for nil value, such as between relatives or through other arrangements relating to inheritance. How this can be achieved in legislation needs to be looked at in further detail.

Recommendation 19 – Further consideration should be given to ways to ensure the effectiveness of a 1991 Act tenant's pre-emptive right to buy in circumstances where a company owns a farm tenanted on a secure 1991 Act tenancy, and a transfer of the interest in a holding can be effected through the transfer of some or all of the shares in the company rather than the sale of the land.

8.4 Interposed leases

190. It is competent for a landowner who is the landlord of a number of agricultural holdings to grant an interposed lease of his estate, making his head tenant of the estate the landlord of the agricultural holdings so that the tenants of the agricultural holdings then become sub-tenants. In these circumstances it is unclear whether or not the 1991 Act tenant, as a sub-tenant, still has a right to buy.

191. Provision is made in section 16(5) of the Crofters (Scotland) Act 1993 for such a situation in relation to a crofter's right to buy his croft, and the Review Group has concluded that similar arrangements should be made in relation to the pre-emptive right of secure 1991 Act tenants.

Recommendation 20 - Further consideration should be given to the potential need to introduce an amendment to Part 2 of the 2003 Act to make clear that where there is an interposed lease and the landowner takes steps to transfer the land, the pre-emptive right to buy for any 1991 Act tenant sitting under the interposed lease is still triggered.

8.5 Conditional right to enforce sale

192. Under current legislation a landlord, having served a demand to remedy a breach of a term of the lease that has not been complied with, may serve an incontestable notice to quit on the tenant. No such reciprocal provision exists that would enable a tenant to 'dispossess' a landlord. A number of submissions to the Review alleged that failures by landlords to fulfil lease obligations are relatively common. Particular reference was made to renewal and replacement obligations relating to fixed equipment, and to inappropriate game management that conflicts unreasonably with the purpose of the lease.

193. The Review Group has considered this matter carefully, and the lack of a fair balance in the landlord/tenant relationship that it implies. They have concluded that provision in legislation is needed to discourage any such failure to fulfil lease obligations and to provide equivalent recourse for the tenant. The expectation of the Review Group is that, as with the landlord's right mentioned above, the circumstances where a tenant might reasonably seek to 'dispossess' a landlord will be rare. The Review Group recognises, however, that where there is genuine and persistent failure by a landlord the tenant must have access to effective and speedy remedy including ultimately enforcing the sale of the holding.

194. Further consideration should be made to providing a tenant the right to serve notice on their landlord for any material breach of contract regarding the landlord's obligations under the tenancy and the required timescale for remedy. The process should as far as is practicable mirror the rights available to a landlord where a tenant fails to fulfil their obligations under the tenancy.

195. If the landlord disputes the matter it could then be referred to the Scottish Land Court who should issue directions as to what is to be done and by when. The potential for such a direction to be recorded in the Land Register as a charge on the property should be considered further.

196. If the work is not undertaken as ordered then the tenant should be able to apply to the Scottish Land Court to order the holding to be sold. This would then trigger the tenant's pre-emptive right to buy.

197. If the tenant did not wish to buy, the holding should be sold on the open market (if necessary under the authority of the Scottish Land Court) with the value reflecting the fact there is a sitting tenant and the need to remedy the outstanding breaches.

198. The process should be designed so that, while the rights of both parties are properly protected, the risk of prevarication and delays that might be damaging to the tenant's business should be minimised.

Recommendation 21 – Provision should be made to enable a 1991 Act tenant to request the Scottish Land Court to order the sale of a holding where the landlord has persistently failed to fulfil their obligations under the tenancy, triggering the tenant's right to buy. The Scottish Land Court will have discretion to order the sale, taking into consideration the respective rights and interests of both parties.

8.6 General or absolute right to buy

199. A significant number of submissions to the Review argued for a general or absolute right to buy for secure 1991 Act tenants. These came from all over the country, and for the most part reflected circumstances where relationships between a landlord and one or more tenants had seriously broken down. The arguments presented related to issues concerning agricultural productivity, diversity of ownership in the rural economy, and the need to address seemingly intractable issues around particular landlord/tenant relationships.

200. The case for an absolute right to buy in order to benefit agricultural productivity is predicated primarily on the view that an owner occupier, as a result of a greater freedom and ability to invest in the holding, is likely to be more productive than an equivalent tenant. It assumes that other sources of capital (retained profits, banks, external equity investors) would make up the shortfall withdrawn by landlords, and it assumes that by virtue of there being fewer tenanted farms, average productivity would therefore increase. The Review Group has seen no clear evidence to support the contention that this would necessarily be the outcome.

201. The case for an absolute right to buy to achieve more diverse land ownership sees greater diversity as an end in itself, as well as a means of stimulating more non-agricultural diversification through taking away the power of landlords to discourage social and economic development for reasons relating to their own amenity or sporting interests. The Review Group considers that this would also most probably lead to a decline in the amount of tenanted land and a smaller tenanted sector, and that there are more effective ways to facilitate diversification on tenanted holdings, see Section 5.3 of this Report.

202. The case for an absolute right to buy to address intractable landlord/tenant relationship issues assumes that owner occupation would free tenants to make the most of their farming and business abilities, including in relation to non-agricultural diversification, unencumbered by an uncooperative landlord. It assumes that the purchasing tenant would be able to access investment capital on terms to fit with his proposed business model. The Review Group considers that this would also, over time, result in a decline in tenanted land other than short term leases. The Review Group has seen no evidence to suggest that owner occupiers are likely to release land on to the long-term letting market rather than sell to another owner occupier.

203. Alongside submissions in support of an absolute right to buy were many that opposed it. These came from landlords unhappy about an infringement of their property rights, and from tenants and owner occupiers concerned about the impact on the supply of long term tenancies. 29% of tenants surveyed were opposed to an absolute right to buy, as against 46% who were in favour. More or less all of those opposed, claimed that the threat of a right to buy had already discouraged long-term letting of land, and that the Review needed to address this issue definitively so as to provide certainty for future potential investors.

204. The case against an absolute right to buy in relation to a landlord's property rights is a simple one. Such a right would involve compulsory purchase of the landlord's property interest in the land and the tenancy. As such, and even if a public interest justification for this were to exist, consideration would have to be given to whether compensation would be payable to landlord for any reduction in the value of their property rights that might result, and who would be required to pay this. None of the submissions received suggested how this might be funded.

205. The case against an absolute right to buy on the grounds of a negative impact on long-term letting is difficult to prove, even if intuitively plausible. Several landlords have told the Review Group that they are already trying to reduce their exposure to long-term tenancies as a result of this threat, and some told the Review Group that they would cease letting altogether if an absolute right to buy were introduced. Long-term letting of land has declined in Scotland over many years and for a variety of reasons, and it is difficult to separate the effect of a possible right to buy from that of other causes.

206. The Review Group has considered the issue with a great deal of care, and fully recognises the benefit to individual tenants that such a right might convey. The wider arguments relating to the unequal balance of power in some areas of the countryside dominated by large agricultural estates are also noted, as is the contention that a poor landlord/tenant relationship can act to inhibit development of the holding. But the Review Group has not been persuaded of an overwhelming public interest argument that would justify an intervention of this nature in property rights, and it has heard some very persuasive arguments calling for the idea to be set firmly aside in order to help bring confidence back into the market.

207. Against this background, the Review Group has sought to carefully assess the factors that have caused such an upsurge in demand for an absolute right to buy, and to address those concerns effectively in order to put the matter to rest. This Report includes several recommendations that are designed to ensure that there is no disincentive to investment in a tenanted holding over an owner occupied one, or any unreasonable obstacle to diversification. It also carefully considers issues relating to compensation, way-go, succession and assignation, and it does so against a background of recommending the creation of a statutory Tenant Farming Commissioner to deal with circumstances where behaviours fall short of good practice.

208. The aspiration of many tenant farmers to be owner occupiers is one that is fully understood. That should be encouraged through the normal route of raising investment capital and purchasing a farm that is for sale, including use of the pre-emptive right to buy when the opportunity arises. But the concept of an absolute right to buy, through its potential impact on the supply of tenanted land and on the wider confidence of investors in rural Scotland, is one that the Review Group believes is not and would not be helpful in seeking to further the Scottish Government's vision for tenant farming.

8.7 Right for Ministers to intervene

209. While the majority of landlords work well with their tenants and take careful account of the impact of their decisions on local people, the Review Group has been dismayed at evidence submitted indicating that a number of circumstances exist where this may be far from the case. Such examples are not only damaging and highly regrettable in their own right, but they also impact on all tenants and landlords in Scotland through their detrimental effect on wider relations and confidence within the sector.

210. Many of the recommendations in the Review are intended to address this kind of failing and reduce the likelihood of them being possible. This includes the conditional right to enforce sale, see Section 8.5 above, which the Review Group believes will act as a powerful disincentive to landlords who might otherwise be minded to shirk their responsibilities.

211. But the Review Group has also taken note of a number of submissions, which suggest that, in certain localised regional circumstances, the actions and attitudes of a landlord can have a serious detrimental impact on the tenant farming community as a whole, leading to significant social and economic harm.

212. The Review Group has taken note of the Scottish Government's current consultation, The Consultation on the Future of Land Reform in Scotland, to introduce new powers for Scottish Ministers to intervene where the scale of land ownership and land management decisions are a barrier to local sustainable development.

213. These proposals could potentially offer a way of addressing isolated situations where the way land is being managed is impacting negatively on tenant farming and the wider local community.

214. In developing such proposals, the Review Group would suggest that Scottish Ministers consider how any powers might usefully be extended to take account of situations where the interests of agriculture and of the tenant farming community are suffering detrimental impact. The Review Group has in particular taken note of powers included in Part 2 of the Agriculture (Scotland) Act 1948 (now largely repealed), and which it considers may have still some relevance today.

Recommendation 22 – The potential for proposals in the current consultation on Land Reform to address situations where the way land is being managed is impacting upon tenant farming communities and agricultural productivity, creating a barrier to local sustainable development, should be considered further.

8.8 Special circumstances of Small Landholdings

215. Land tenanted under the various Small Landholders Acts 1886 to 1931 offers similar long-term security of tenure to that provided to secure 1991 Act tenants. In the light of this, the Review received a number of submissions suggesting that, in the same way as was being suggested for secure 1991 Act tenancies, a right to buy should also be made available to small landholders.

216. The Review Group has considered this, and has taken note of the conclusion of the Land Reform Review Group to the effect that small landholders should be given a general or absolute right to buy.

217. At present there are issues with identifying the extent of small landholdings throughout Scotland, with many tenants and landlords not knowing whether they have a tenancy that falls under the Small Landholders Acts.

218. The Review Group recognises and agrees with the need for change to modernise the legislative framework for small landholders and to look to bring them more in line with 1991 Act tenants. Further work needs to be done with industry bodies to help fully understand the extent of small landholdings across Scotland and the potential impact of any further changes.

219. However, the Review Group feels there is a sufficient understanding of the issues facing the sector that as a first step further consideration should be given to providing small landholders with the same pre-emptive right to buy as 1991 Act tenants. Small landholders in the designated areas should still retain their right to convert to become a croft under relevant legislation.

Recommendation 23 – Further consideration should be given to providing small landholders with an automatic pre-emptive right to buy their holdings, should they come up for sale.

Section 9 – Recommendations on Letting Vehicles for the 21st Century

9.1 Flexibility and modernisation

220. Secure 1991 Act tenancies have served the industry well. They have provided a high level of security within a relatively prescriptive and regulated framework, and they have struck a balance between the interests of landlord and tenant that was appropriate at the time they were introduced. They do not, however, provide a particularly flexible letting vehicle, and almost no new tenancies have been let on this basis for several years. Landlords in particular no longer regard them as providing a suitable framework for the long term letting of land, and the 2003 Act introduced two new letting vehicles (the LDT and SLDT) in order to provide an alternative model better suited to modern circumstances.

221. In the years immediately following the 2003 Act, landlords took up the new vehicles with a reasonable degree of enthusiasm. Many landlords and tenants have told the Review Group that they regard the LDT as an effective model that is broadly fit for 21st century requirements. Despite this, very few new LDTs have been created in recent years, and as a consequence almost no new land has been brought into long-term tenure anywhere in Scotland. It is therefore vital that, within the wider context of the package of recommendations arising from this Review, there is put in place an effective system of modern flexible letting vehicles that is fit for the 21st century.

9.2 Freedom of contract

222. In other areas of the economy, and in particular for the letting of commercial property, freedom of contract is regarded as an effective and fair basis for agreement. It operates within the framework of contract law, and has been applied to a variety of contract farming and short term letting arrangements. It has the huge advantage of potentially allowing the two parties to agree contract terms that suit them both best, but it is almost by definition a compromise between two parties each of whom brings to the table a set of aspirations and a degree of leverage over the other.

223. A number of submissions to the Review argued that freedom of contract for long term letting of land would result in a significant increase in supply, because it would give landlords the confidence that they had available to them a model which would give them the returns that they wish to achieve. Other submissions expressed deep misgivings about such a change however, noting that in a highly imbalanced market aspiring tenants desperate for access to land might agree terms that were not at all in their or the public interest. None of the three main industry bodies supported such a move.

224. The Review Group has considered the issue carefully, recognising that freedom of contract would work well in circumstances where both parties are negotiating as business equals within a balanced market.

225. However, the Review Group has concluded that in current circumstances freedom of contract for long term letting of agricultural land would probably result in contracts being agreed to the significant disadvantage of the tenant. In practice the effect of this on political and industry stability would be no more in the public interest than it would be in the interest of landlords and tenants.

9.3 Modifications to the LDT model

226. While there is no doubt about the strength of the demand for long-term tenancies, the central challenge in designing a new vehicle well suited to modern circumstances is that of understanding the supply side, and the reasons that have caused it to dry up.

227. Many of the issues involved are addressed elsewhere in this Report, but underlying these is a general unease and lack of trust on the part of landlords that makes them cautious about entering into any long-term contract over their land in current circumstances. An effective new vehicle must therefore help to address that fear.

228. Submissions to the Review have, in general, been relatively supportive of the current LDT model. The central issue for most landlords is that of risk, and therefore the length of term involved has been a matter of some discussion. While the tenant needs a length of term sufficient to support his long-term planning and investment, landlords are for the moment more likely to lease land if they can agree a relatively short duration subject to renewal at their discretion.

229. Enabling that sort of “toe in the water” creation of new tenancies by landlords may therefore be sensible, recognising that as confidence returns the market will tend to drive up average lengths of term anyway. The complicated continuation provisions for a LDT also have the potential to discourage landlords from allowing those tenancies to continue by tacit relocation (see Section 12.2 of this Report)

230. Of particular concern to landlords are the risks associated with untested new entrants. While almost all submissions to the Review were highly supportive of the need to encourage new entrants and make land available to them, most also recognised that agreeing a long-term business contract with someone who has no track record is not something that would be wise for either party.

231. The Review Group has therefore recognised a need for specific duration arrangements relating to new entrants, in effect creating built in break clauses to protect both the landlord’s and the new entrant’s interests.

232. The shift towards greater investment in the holding by tenants has encouraged some landlords to propose the creation of full repairing leases over certain types of holdings. The Review Group has considered this and recognises the merits of such a model in modern circumstances. In order to ensure an effective incentive for the tenant to invest heavily, however, and to support his ability to use the tenancy as collateral, the Review Group considers that such leases should only be available on a longer term basis.

233. The Review Group proposes that a modern LDT be created that encompasses the main elements of current SLDT and LDT provisions so that the duration of a modern LDT should be set at no less than ten years, with the additional provision that where the tenant is a bona fide new entrant and first time tenant then a break clause at five years may also be included. The Government should consider linking this to appropriate tax incentives (see Section 11 of this Report).

Recommendation 24 – A new “modern LDT” with a minimum 10 year term should be developed to enable landlords and tenants greater freedom in agreeing terms relevant to the type, duration and purpose of the holding and lease. An optional break at 5 years should be available where the tenant is a new entrant.

Recommendation 25 – Provision should be made to allow for a modern “full repairing” LDT, where a tenant takes full responsibility for all repair, renewal and replacement of fixed equipment on the holding in return for a minimum term of 35 years and mandatory application of the new rent review provisions recommended in Section 5 of this Report.

9.4 Rents

234. The rent control arrangements recommended in Section 5 of this Report in relation to secure 1991 Act tenancies are a particular response to the current severe supply/demand imbalance in the market. Without such controls rents would tend to rise to levels in excess of the agricultural productivity potential of the land in question. The Review Group recognises, however, that if supply is to be increased and the market is to be allowed to work effectively, then rents offer one of the tools whereby that increase in supply can be stimulated in a context where landlord confidence is low.

235. For new modern LDTs, therefore, the Review Group is of the view that the parties should be free to agree their own rent levels and rent review arrangements if they wish, but where they do not do so, the same controls should apply as are recommended for secure 1991 Act tenancies. This will enable high productivity tenants to access land that might not otherwise be available, it will enable ambitious landlords to enter the market early and be rewarded for doing so, and it will enable the market to gradually equilibrate to a point where all rents have settled to a level close to that which reflects the agricultural productivity of the land, which is the controlled level recommended in Section 5 of this Report.

Recommendation 26 - Rent provisions in relation to a new modern LDT should be agreed at the start of the lease by the contracting parties, taking into consideration the provisions of a new statutory code on negotiating rent reviews, or if the lease is silent on the issue then the rent provisions should be as set out in Section 5 of this Report for 1991 Act tenancies. In the case of a full repairing lease the rent controls set out in Section 5 should apply in all cases.

9.5 Fixed equipment

236. In today's circumstances many tenants have become accustomed to providing a much higher proportion of the capital involved in a farming enterprise than was normal in the past, including provision of a significant proportion of fixed equipment. Where the landlord either cannot or does not wish to finance these assets this enables farms to be let at a relatively low rent but without much fixed equipment provision. The Review Group has recognised the value of such arrangements in modern circumstances, and the importance of enabling this to happen.

237. It should be noted that in the case of a full repairing lease as referred to in Recommendation 25, the landlord will have no obligation to provide any fixed equipment.

Recommendation 27: Parties to a "modernised LDT" should be able to negotiate fixed equipment arrangements subject to the provisos that fixed equipment provided by the landlord is sufficient to allow the tenant to farm for the purposes set out in the lease, details are specified in the lease along with a record of condition, and responsibility for maintenance is clearly stated.

9.6 Assignment, succession and subletting

238. An important issue for many tenants, especially in relation to longer-term leases, is their ability to assign their interest in the tenancy at market value (or leave it to successors) in the event that they no longer require it themselves. This type of flexibility is important in giving the tenant confidence to invest. Similarly, where the tenant may wish for business reasons to sublet the holding for a period, this flexibility should be available subject to the terms of the lease continuing to be met.

Recommendation 28 – Modern LDTs should be assignable within the duration of the lease at market value, subject to the landlord having the same grounds for objection as in the 1991 and 2003 Acts (finance, ability, character, etc).

239. For the avoidance of doubt this should include the right to assign via executors in a will where the tenant dies before the end of the lease. Tenants of modern LDTs should be able to sub-let subject to the landlord having the same grounds for objection as for assignment.

9.7 Termination

240. While it is implicit in a fixed term lease that it may end when the term has expired, in a stable and confident market most landlords will wish to extend or renew leases as they become due. Equally, the tenant will very often wish to extend or renew, and will need to know if that is not going to be the case well in advance of the due date. In order to ensure that tenants are able to plan accordingly, the Review Group is therefore of the view that landlords should have to give formal notice if they intend not to renew or extend a LDT lease when its term expires.

Recommendation 29 – Modern LDTs should include a requirement for landlords to give written notice of intent to terminate not less than two and not more than three years before the expiry of a modern LDT, failing which the lease will continue on tacit relocation for one year at a time subject to termination on the same notice period. (See Section 12.2 of this Report)

9.8 Compensation and way-go

241. Effective arrangements for compensation and way-go are central to ensuring that tenants have the confidence to invest in the holding, secure in the knowledge that if the lease is not extended then their property rights and capital will be fully protected. This is particularly important where landlords lack confidence and so may choose to offer relatively short-term leases in the first instance. The more confidence tenants have in compensation and way-go provisions the less they will need to be concerned about the length of term of the lease.

242. The Review Group has considered allowing greater freedom for parties to agree way-go arrangements at the start of the lease, but is concerned that in the current imbalanced market prospective tenants might find themselves being persuaded to agree terms that were not conducive to the security of their own capital. On balance, therefore, the Review Group believes that something similar to existing arrangements in the 2003 Act for LDT compensation and way-go should be retained.

Recommendation 30 - Modern LDTs should include robust arrangements for compensation and way-go in order to give tenants the confidence to invest on what are (potentially) quite short duration terms. These should be modelled on those in the 2003 Act with some simplification of process where practicable. The overriding aim should be to ensure that tenants are able to invest with confidence in this type of tenancy.

Recommendation 31 - The option of allowing such leases to be extended by the landlord and then sold with improvements on the open market by the tenant (thereby avoiding formal way-go) should also be considered, especially with regard to full repairing leases.

9.9 Irritancy

243. While it is important for the confidence of landlords that there should be provision for the removal of a tenant on the grounds of irritancy, those grounds should not be so flexible as to create a lack of security from the tenant's perspective. The Review Group has recognised the need for some flexibility on this, subject to any irritancy clause being agreed and recorded in the lease.

244. Modern LDTs should enable the contracting parties to agree their own irritancy clause if they wish, but excluding non-residence as a ground for irritancy, good husbandry to include conservation and diversification activities, and no irritancy clause to be exercisable without the tenant having due opportunity to put right the alleged breach.

9.10 Seasonal grazing, mowing and cropping leases

245. Current seasonal lease arrangements do not include cropping, which is therefore normally undertaken through a SLDT. Under Recommendation 24, SLDTs will no longer be available, and provision will need to be made to enable short term cropping leases to continue.

246. Concern was expressed to the Review Group that, while recognising the helpful flexibility that arises from availability of short term lets, there was a need for some measure to ensure that soil fertility is not allowed to decline in areas where these are commonplace.

Recommendation 32 – Provision should be made to enable land to be let for a period of up to one year, which will end without notice, for the purpose of grazing, mowing or cropping. Such leases should include a requirement for a declaration to be made to the incoming seasonal tenant to the effect that defined minimum soil nutrient and organic matter status are met, and by the outgoing seasonal tenant confirming that this has been maintained.

9.11 Conservation leases

247. A number of environmental charities have said that they have land that they would be willing to let on agricultural tenancies if they could include environmental conditions as to the management of the land in the lease, which are probably not compatible with a tenant's rights of freedom of cropping. It is noted that under the Title Conditions (Scotland) Act 2003 it is competent for a real burden to be created in favour of a conservation body approved by the Scottish Ministers.

248. The Review Group sees no reason why this right should not be extended to agricultural leases granted by a conservation body approved by the Scottish Ministers. This would be likely to free up land for tenancies and at the same time provide for specific environmental protection. Any environmental constraint will be reflected in the productive capacity of the holding and thus be a restriction on the rent to be paid (see Section 5.2 of this Report).

Recommendation 33 – Further consideration should be given to allowing an approved environmental charity to let land under the modern LDT arrangements which include reasonable environmental conditions as to the management of the land.

9.12 Limited Partnerships

249. Limited Partnerships were, in effect, an early form of LDT, and many are still in existence. Most can be terminated by the landlord effectively on four years notice, and so do not provide long-term security of tenure. The majority of Limited Partnerships that still exist have gone through their original contracting period, and are likely to be continuing on a year to year basis. Many general partners do not feel that this provides an effective level of security.

250. The Review received a number of submissions on this issue, some proposing legislation to provide general partners with longer-term security of tenure within existing arrangements. Other submissions suggested that such arrangements might be automatically converted by legislation into an alternative and more secure letting vehicle such as a new LDT.

251. The Review Group has considered the options available, and has concluded that retrospective legislative actions of this nature are unlikely to be helpful in relation to wider confidence within the sector. The Review Group considers, however, that landlords should be given every encouragement to convert any remaining Limited Partnership arrangements into modern LDTs, and that this is an area where strong leadership from industry bodies and major landowners would be extremely helpful.

Recommendation 34 - Every encouragement and support should be given to the NFUS, SL&E and STFA to develop a new Joint Initiative on Limited Partnerships setting out clear guidelines as to how and on what basis those landlords and general partners remaining in these arrangements should negotiate their conversion into a modern LDT on appropriate terms.

Section 10 – Recommendations on New Entrants and Reducing Barriers to Entry

10.1 Innovation and competitiveness

252. Some of the most worrying features of Scottish agriculture today are the high barriers to entry for new entrants wishing to begin farming on their own account for the first time. In addition the low level of employed labour involved in farming means that, for individuals not otherwise engaged through family involvement, the industry is in many respects also closed to people wishing to enter through an employed route.

253. The Scottish Government and industry bodies have been grappling with these issues for some time, and it is clear that the obstacles to be overcome are considerable. The Review Group has looked them with specific reference to the role of tenancy, recognising that this forms only one element in a vital industry wide effort to bring in some of the people on whom future innovation and competitiveness will depend.

10.2 Tenancy apprenticeships

254. Prospective new entrants to almost any sector of the economy usually gain their first access through some sort of apprenticeship. This may be formal or informal, paid or unpaid. It enables the new entrant to gain skills and experience, and it allows others to judge the likely capacity of that individual to succeed over the longer term.

255. Opportunities to become an apprentice tenant farmer are few and far between. There is no formalised route, and very few existing tenant farms offer such a provision. The Review Group has identified this as a significant gap, and one which has the potential to link closely with the issue of retirement covered in Section 7 of this Report. The Review Group recognises, however, the significant risks to both the outgoing tenant and the landlord in any arrangement that does not enable timely reviews with associated break clauses where apprentices fail to meet reasonable performance criteria.

256. A number of older tenants have told the Review Group that they would be willing to provide what amounts to an informal apprenticeship to a new entrant if they were also able to assign their tenancy to the individual concerned. This might be achieved in a number of ways, including the new entrant effectively working their way into the tenancy on a progressive basis through share farming. Landlords therefore have an important role in both encouraging and facilitating such arrangements.

Recommendation 35 – Provision should be made to allow tenants who wish to assign an LDT (including one arising from converting a secure 1991 Act tenancy) to a new entrant to do so through a contractually based staged assignation process that facilitates appropriate apprenticeship arrangements and includes effective protection for the assignor, the assignee and the landlord.

10.3 Starter units

257. Other sectors of the economy that are successful at enabling new entrants to become established usually have within them some sort of mechanism whereby the new entrant can start operating on his own account on a part time basis. Many successful manufacturing businesses commence on this basis, and several larger universities and economic development agencies provide starter facilities in order that this can happen more easily.

258. In recent years, the Scottish Government has provided a small number of starter farms to let with exactly this kind of thinking in mind, and the Review Group has concluded that a significant increase in such units is required if the best innovators are to be attracted into the sector. While there is no doubt that some of this provision could and should come from the private sector, the Scottish Government has an important role to play in its own right, either directly or by ownership through a public body such as the Forestry Commission – and potentially in the future through the Crown Estate.

259. As part of the development of proposals for the potential Land Reform Bill, further consideration should be given as to whether Scottish Ministers and public bodies have sufficient powers to acquire land for the purpose of providing starter farms.

Recommendation 36 – The Scottish Government should further consider the potential capacity to provide starter units on publicly owned land, including through the acquisition of additional land where practicable.

Recommendation 37 – The Scottish Government should also enter into direct dialogue with the larger private owners of agricultural land in Scotland with a view to encouraging them to provide starter units. The Scottish Government should also consider future opportunities to encourage the provision of starter farms through appropriate financial and any available tax incentives.

10.4 Financial barriers

260. Farming is a capital intensive business. Even where a landlord provides a significant capital element in the form of land and fixed equipment, most tenants must themselves source sizeable sums to meet working capital requirements. In other sectors of the economy where financial barriers to entry are high, informal equity investment is frequently the route through which new entrants finance their initial establishment and growth. Such options exist in farming but they are rare, and the Review Group has identified a need for this to be given more systematic consideration.

Recommendation 38 – Existing financial incentives available to agriculture, and more generally to business through other parts of Government, should be reviewed in order to facilitate effective financial support for new entrants. This should include, where possible, measures to cap the level of incentives made to larger established operators so that funds can be targeted to optimal effect.

10.5 Controlling multiple tenancies

261. Associated with financial barriers relating to capital requirements (see Section 10.4) there are barriers created by the economies of scale that can be achieved when established operators merge holdings and share infrastructure costs across what are sometimes sizeable areas of agricultural land.

262. While the Review Group recognises the importance of economic efficiency in any industry, in relation to the use of a finite national resource (agricultural land) the Review Group is concerned that economies of scale should not be pursued at the expense of effective access to land for new entrants.

263. The Review Group believes the issue requires to be considered further in relation to wider land reform, the need to increase diversity into the innovative capacity of the agricultural industry, and potentially add to the sustainable development of rural Scotland.

Section 11 – Recommendations on Taxation, the CAP and Other Fiscal Incentives

11.1 Fiscal leverage

264. Considerations relating to taxation and access to fiscal incentives affect management decision making in most industries, but the nature of reliefs and incentives available in relation to land use makes this a particularly significant factor for this Review.

265. At present, taxation, subsidies and other fiscal incentives are designed for wider outcomes than specifically the tenant sector. Any recommendations arising from this Review need to take full account of their potential for collateral consequences. Nonetheless the potential to bring strong fiscal leverage to bear on the tenanted sector is one that deserves careful consideration.

11.2 Reliefs affecting Inheritance Tax and Capital Gains Tax

266. Inheritance Tax and Capital Gains Tax are reserved taxes, meaning responsibility for these rests with the UK Government. Agricultural Property Relief, Business Property Relief, and Entrepreneurs' Relief are all structured in a way that favours landowning businesses actively using the land themselves over leasing land. The current terms of all three reliefs are discouraging the letting of land. The Review Group identified no circumstances where any of these reliefs actively encourages the letting of land, and the Review Group has noted that such reliefs could potentially be deployed more favourably to those landlords who commit to long term leases, rent to new entrants or apprentice tenants.

Recommendation 39 – Scottish Government should work with the UK Government on any future review of the terms of Agricultural Property Relief, Business Property Relief, and Entrepreneurs' Relief, to consider whether disincentives to the letting of land might be removed. Consideration should also be given to the potential to structure reliefs to deliberately incentivise the letting of land on larger agricultural estates by capping the availability of reliefs for land farmed in hand.

11.3 Income Tax and Value Added Tax

267. Income Tax and Value Added Tax are reserved taxes, meaning responsibility for policy for these taxes rests with the UK Government. Most landlords operate integrated business models comprising trading and investment activities within one corporate structure. However, income from let land is generally treated as investment rather than as trading income, thereby making it difficult to set income from let land against expenditures on land or in other parts of the business. This can act as a disincentive to the letting of land, especially for smaller landlords where this inflexibility can have a significant impact on tax efficiency.

268. There are currently on-going discussions on devolving power to the Scottish Parliament to set the rates and thresholds for non-savings, non-dividend Income Tax, following the recent Report by the Smith Commission. However, the definition of income for tax purposes would remain reserved to Westminster and so the Scottish Government would not have the ability to address the issues highlighted here on its own.

269. More significantly, the letting of land is usually exempt from VAT and so cannot be recovered from input costs unless the landlord opts in to VAT for their letting income. In a mixed landholding business this may act to discourage the letting of parts of the land and should also review whether there remains any strong justification for the current exemption from VAT that applies to the letting of land.

Recommendation 40 – In any future review of Income Tax or Value Added Tax, the Scottish Government should work with the UK Government to consider the case for re-categorising income from let land as trading income for tax purposes, particularly if it is reinvested in that land, and whether the current exemption from VAT that applies to the letting of land should remain.

11.4 Local taxation

270. Due to the exemption for agricultural land, there is almost no effective difference in the way non-domestic rates affects tenanted land and land farmed in hand. The Review Group has noted the recommendation of the Land Reform Review Group, that there should be a full review of the public interest justifications for taxation reliefs in relation to land, and within that context recognises a particular opportunity to review policy in relation to non-domestic rates that is already under the control of Scottish Ministers.

Recommendation 41 - The Review Group has noted the on-going review of non-domestic rates ahead of the 2017 revaluation and the recommendation of the Land Reform Review Group in relation to Land Value Taxation. Any further deliberation of these issues should consider the potential to provide an incentive for the long term letting of agricultural land.

11.5 Other relevant taxes

271. Stamp Duty Land Tax usually applies to tenants on the granting of a new lease, and so may act to marginally discourage new leasing arrangements over alternative arrangements that do not involve an agricultural lease such as share or contract farming. The new Scottish Land and Buildings Transaction Tax, replaces the Stamp Duty Land Tax in Scotland from April 2015 and applies to tenants in a similar way to Stamp Duty Land Tax.

Recommendation 42 – When reviewing the impact of the new Land and Buildings Transaction Tax, the impact, if any, on the decisions by landowners and tenants to let land or enter into share farming agreements should be considered.

11.7 Common Agricultural Policy (CAP) Direct Payments

272. Access to CAP Direct Payments has been and remains an important factor in the economic viability of many tenant farms. For potential new entrants to tenant farming, and for smaller tenant farmers with limited access to affordable Direct Payments who want to establish or expand a business, this can create an additional barrier to entry leading to a potential competitive disadvantage. Under the previous CAP this was exacerbated by the use of “naked acres” by “slipper farmers” (those who claimed Single Farm Payment (SFP) while carrying out little or no agricultural activity).

273. Within the new CAP reform and in consultation with stakeholders, many of the issues regarding access to the new area based entitlements and problems created by the SFP have now been addressed. In particular, the Review Group welcomes the Scottish Government proposals for a CAP which should over time result in a fairer playing field for new entrants while rewarding activity.

274. The Review Group received very few submissions in relation to CAP. This may be because challenges relating to obtaining payments are usually experienced by young farmers and new entrants who were not directly surveyed. To ensure that tenant farmers are not financially disadvantaged by the application of CAP, the Review Group has identified a number of areas where helpful measures could be undertaken. Of particular concern to the Review Group has been the way in which the lack of effective capping mechanisms within CAP may have previously acted to discourage the long term letting of land by enabling landlords to claim SFP payments on large areas of land so long as these are managed in hand.

Recommendation 43 – In order to facilitate fair rent reviews, the values of each of the regional step changes arising from convergence should be published in advance so that landlords and tenants are able to take account of the revised value of Basic Payments. In addition, the following issues should be considered in relation to any relevant review during the new programme period of CAP:

- **The ability to cap the amount of Basic Payments that any one individual can claim in order to discourage landowners from taking tenanted land back in hand or simply holding land to increase their Basic Payment claim;**
- **To enable more funding to be available to all active Scottish farmers and to be sufficient funds available to meet new and expanded tenant farms there may be a need to tighten the negative list;**
- **Address any funding anomalies regarding access to Direct Payments arising from the latest CAP reform in consultation with stakeholders;**
- **Assessing the impact upon smaller tenant farmers, including any impact from insufficient Direct Payments to cover all their eligible acres;**

- **Ensure sufficient budget allocation should be retained, possibly by top slicing the revised ceiling budget, so as to ensure that new entrants to tenant farming are not placed at a fiscal disadvantage;**
- **Assess the costs and benefits of the siphon on entitlements without land, and consider including exemptions for new entrants to tenant farming.**

11.8 Scotland Rural Development Programme (SRDP)

275. The Scottish Government is currently revising implementation rules for the new SRDP, and there is an opportunity for the Review Group to suggest measures that might be helpful to its aims. As with CAP, very few submissions to the Review referred to SRDP, but the Review Group has concluded that a small number of opportunities exist for actions that would be helpful.

Recommendation 44 – Government should consider making the following provisions in relation to the new SRDP:

- **Sufficient funding should be made available in each year to ensure that new entrants are not disadvantaged by lack of budget availability;**
- **If funding for the Small Farm Scheme is constrained, mechanisms should be developed to ensure new entrants and tenant farmers are not disadvantaged;**
- **The Whole Farm Review Scheme and its successor; the integrated land management scheme and the one to one advisory service, should give prioritisation to new entrants and be available to small tenant farmers;**
- **Business development plans submitted as part of a SRDP application should take full account of costs specifically associated with tenant farming, including rents;**
- **If funding becomes constrained within SRDP, priority should if possible be given to new entrants to tenant farming whether via a LDT, repairing lease or other suitable lease.**

Section 12 – Recommendations on Miscellaneous Legislative Amendments

12.1 General

276. During the course of consultations and meetings with stakeholders, it has become apparent that there are a number of ambiguities and inconsistencies in the Agricultural Holdings (Scotland) Acts 1991 and 2003 which would benefit from amendment. This section sets out recommendations for legislative amendments to clear up these ambiguities or inconsistencies.

12.2 Notices to quit or to terminate tenancies

277. There are different forms for notices to quit or notices to terminate 1991 Act tenancies, SLDT and LDT tenancies under the 2003 Act and terminations of former Limited Partnerships under section 73 of the 2003 Act. Notice provisions will be required for the recommended new letting vehicle (Section 9 of this Report). In addition 1991 Act tenancies can be terminated on a notice of not less than one year and not more than two years, whereas LDTs and former Limited Partnership tenancies both require to be terminated by a complicated notice of intention to terminate the tenancy followed by a notice to terminate the tenancy, which effectively both give at least two years notice to the termination.

278. It is not clear if SLDTs terminate automatically or require a notice to quit at 40 days' notice. Furthermore LDTs have a complicated continuation procedure where if the tenancy is not terminated at the end of ten years it continues for a further three years, then a further three years, and then for a further 10 years. It is considered that this whole regime should be simplified to the effect that the termination of all tenancies, except short term grazing, mowing or cropping tenancies which should terminate automatically, should be terminated by the same form of notice to quit and procedure and by one notice giving not less than two years notice and not more than three years notice.

279. The continuation cycle for LDTs in section 8 of the 2003 Act should be abolished. Thus, if a landlord does not serve a notice to quit at the end of the lease then the lease will continue by tacit relocation from year to year and can only be terminated with at least two years notice.

Recommendation 45 - Further consideration should be given to ensuring that any agricultural tenancy under the 1991 and 2003 Acts going forward, except a short term grazing or cropping tenancy, can only be terminated at their end date or, when they are running on tacit relocation, at the anniversary thereof by a notice to quit given not less than two years nor more than three years before the end date of the lease or any anniversary thereof.

12.3 Succession and assignation of leases

280. Section 7.2 of this Report recommends that rights of succession to a 1991 Act lease should be made more flexible. The 2003 Act makes provision for succession to SLDTs and LDTs that is similar to the current provisions for 1991 Act leases. There will have to be succession rights to the new letting vehicle. It is considered that succession rights, whether by bequest or transfer by the executors to, and assignation rights of, all agricultural leases except short term leases should be the same.

Recommendation 46 - Consideration should be given to amending the current provisions for succession, or assignation of, existing SLDTs and LDTs to more closely match those being proposed for the new letting vehicles.

12.4 Sporting rights

281. At present, section 52 of the 1991 Act allows a tenant to claim compensation for damage to his crops by game defined as deer, pheasants, partridges, grouse and black game. Where the right to kill and take game is leased to some other person the landlord is entitled to be indemnified by the sporting tenant. The claim for damages is settled by the Scottish Land Court, to which the third party can be convened. Section 52 does not cover other loss and damage that might be caused by the exercise of sporting rights on a stock or hill sheep farm.

282. In a recent Scottish Land Court case, the court held that the landlord's right to the sporting rights required to be exercised in the manner that was in the contemplation of the parties at the outset of the lease and that any exercise of the sporting rights beyond that contemplation could give rise to a claim to interdict the excess exercise of the right or to claim damages.

283. Further at common law, the landlord has no recourse against the sporting tenant unless it was provided for in the sporting lease. Accordingly, it would put the common law position on a clearer footing if section 52 was amended, to allow for all claims for damages arising from game or from the exercise of sporting rights in a manner that was not in the contemplation of the parties at the commencement of the lease. This should also be replicated by amendments to the 2003 Act for SLDTs and LDTs, and be reflected in the legislation setting up the new letting vehicles.

284. As most shooting seasons are over by the end of March, to simplify the procedure a tenant should be required to make a claim in writing by 30 June in any year setting out details of the claim and the evidence to be relied upon.

285. The tenant should still be required to notify the person who has the sporting rights in writing as soon as practical after the tenant becomes aware of loss or damage so that there is an opportunity either to inspect the damage or to put right the problem. It would also make sense that the tenant's claim should be directed against the person entitled to exercise the sporting rights, rather than have to have a claim against the landlord with a sub-claim then being placed against the person entitled to exercise the sporting rights.

286. Where the landlord intimates in writing to the tenant that someone else is entitled to exercise the sporting rights then the tenant's claim should be against that person.

Recommendation 47 - Further consideration should be given to amending the 2003 Act, so that in any agricultural tenancy, with the exception of short grazing or cropping leases, a claim can be made by a tenant for loss and damage arising from the exercise of the sporting rights in a manner that was not in the contemplation of the parties at the commencement of the lease.

12.5 Service of notices

287. Section 84(4) of the 1991 Act provides that where the tenant has not been informed of a change of landlord, the tenant is entitled to serve effective notices on the original landlord. This applies only to the tenant so that, for example, a person who acquires the lease on succession following the death of the tenant cannot rely on this section even though they will probably get the information about who was the landlord from working with the original tenant or their executors.

288. It would be fairer if this provision relates to anyone who required to serve a notice on the landlord. Further, section 85(5) of the 1991 Act allows anything that can be done under the 1991 Act, which includes serving notices in respect of the landlord or tenant may be done on an agent of the landlord and tenant. This provision is not replicated in the 2003 Act.

Recommendation 48 - Further consideration should be given to amending current provisions on the service of notices for 1991 Act tenancies, SLDTs, LDTs and make provision for new letting vehicles so that any notice that requires to be served by anyone under the Acts on the landlord may be served on the original landlord unless notice was given to the tenant of the new landlord and to provide that anything that is required or authorised to be done by, to or in respect of the landlord or tenant may be done by, or to or in respect of any agent of the landlord or tenant.

12.6 Miscellaneous amendments proposed to the 1991 and 2003 Acts

289. A number of potential miscellaneous amendments to address perceived issues with some of the current provisions of the 1991 and 2003 Acts have been highlighted for further consideration. Potential amendments to the 1991 Act are set out in Appendix F and potential amendments to the 2003 Act are set out in Appendix G.

12.7 Consolidation of the Agricultural Holdings (Scotland) Acts

290. As the 2003 Act introduced substantial amendments to the 1991 Act and there have since been further amendments to both Acts it is difficult for landlords and tenants to get access to an accurate and up to date version of both Acts. Any amending Act following on from this Review will make further difficulties in this respect. Once any amending legislation has been passed, the Acts should be consolidated into one Agricultural Holdings (Scotland) Act.

Recommendation 49 – Further consideration should be given to incorporating the miscellaneous changes set out in Appendix F and G of this Report and consideration should be given to consolidating the Agricultural Holdings (Scotland) Acts, though it is not anticipated this should be done within this Parliamentary term.

Appendix A – List of Major Research Sources Used

The Review, as part of the overall process, commissioned a programme of research into tenant farming which greatly enhanced our understanding of the range of key issues facing the sector. The following are the main research sources, including those specifically commissioned, used to inform this Report. The Review Group anticipates that the Scottish Government will wish to continue exploring ways in which data on tenant farming could be further enhanced through existing collection mechanisms such as those listed, and through future research undertaken to assess the impacts on the sector of any changes to legislation.

Survey of Agricultural Tenant Farmers

<http://www.scotland.gov.uk/Resource/0045/00454514.pdf>

Renting-Out Agricultural Land in Scotland Survey

<http://www.scotland.gov.uk/Resource/0045/00454570.pdf>

Scottish Agricultural Tenure Evidence Review

<http://www.scotland.gov.uk/Resource/0045/00454210.pdf>

Survey of the Views of Owner Occupier Farmers on Current Issues for Tenant Farmers

<http://www.scotland.gov.uk/Resource/0046/00462658.pdf>

Views of Tenant Farmers and Agricultural Landlords on Aspects of the Agricultural Tenancy System

<http://www.scotland.gov.uk/Resource/0046/00462696.pdf>

Percentage of Tenanted Agricultural Land by Parish in 2013 (excluding tenanted croft land)

<http://www.scotland.gov.uk/Resource/0045/00457523.pdf>

Results from June Agricultural Census 2014

<http://www.scotland.gov.uk/Resource/0046/00462146.pdf>

Results from December Agricultural Survey 2013

<http://www.scotland.gov.uk/Resource/0045/00451284.pdf>

Appendix B – List of Main Stakeholder Meetings

Following a Call for Evidence in February 2014, the Review Group conducted an extensive stakeholder engagement programme. As part of it, Review Group members met with the key stakeholder organisations (NFUS, STFA, SL&E, SAAVA and RICS) and conducted over 50 meetings, including open meetings and private sessions with tenant farmers, landlords and professional intermediaries in the following locations across the country:

Isle of Islay	02 April 2014	Perth	01 May 2014
Oban	03 April 2014	Inverness	07 May 2014
St Boswells	16 April 2014	Stranraer	29 May 2014
Dumfries	17 April 2014	Ayr	30 May 2014
Turriff	24 April 2014	Isle of Bute	26 June 2014

Coinciding with the launch of the Review Group's Interim Report at the Royal Highland Show, the Review Group members held a further 16 private meetings with individuals who had not had the opportunity to meet with Review Group members during their visits across the country.

Building on the Interim Report, the Review Group developed their thinking over the summer and began to outline their emerging provisional recommendations. The draft proposals were sense tested with stakeholders in the second round of the Review Group's stakeholder engagement programme, including 12 meetings held with the main stakeholder organisations and well attended public meetings in:

Kelso	09 October 2014
Inverurie	27 October 2014
Bridge of Allan	28 October 2014
Dumfries	29 October 2014

Appendix C - Background Note on Forms of Dispute Resolution

Mediation

Mediation is a process in which a neutral person assists parties to work towards a negotiated solution of a dispute. The parties retain control of the decision to settle and the terms of resolution. It has to be entered into voluntarily, but if an agreement is reached and is put into writing it will be legally binding. Parties can mediate at any stage before or during court proceedings and the process is confidential.

It can be arranged quickly and the mediation session will usually only last one or two days. Compared with going to court or using arbitration, mediation will usually be a less expensive way to resolve a dispute. The process can be varied to suit parties' needs and any settlement agreement can cover a variety of matters that would not be dealt with by a court process. Where parties are in a continuing business relationship, mediation may allow that relationship to be maintained much more effectively than litigation.

Arbitration

Arbitration is a process in which an independent third party is appointed to decide the outcome of a dispute between two or more parties. Like mediation, it is a confidential process in which the parties choose the arbitrator, but in contrast to mediation, the parties agree that the decision is to be made by the arbitrator. The arbitrators' decision (usually known as the "award") is final and binding on the parties.

Arbitration in Scotland is now governed by the Arbitration (Scotland) Act 2010, which has given Scotland one of the most modern systems of arbitration in the world. As compared with litigation in court, arbitration can be faster, cheaper and more flexible, more commercial and less formal. There are very limited avenues for appeal of an arbitral award. Where the arbitration is between two parties based in Scotland, the parties can exclude 'legal error' appeals by agreement.

Early Neutral Evaluation

Early neutral evaluation is a private process by which a neutral person provides parties with a preliminary assessment of facts, evidence or legal merits in a dispute. The neutral person provides an unbiased evaluation of the parties' relative positions and a view as to the likely outcome if the case were to be heard in court. The aim is to provide a basis for further negotiations between the parties or to help them avoid unnecessary litigation.

Expert Determination

Expert determination is a private process involving an independent expert who makes a binding decision on technical rather than legal issues. The expert would be appointed by agreement between the parties. He or she would have the power to ask questions of the parties and also to make investigations independently of the parties, before giving his or her decision. The expert's decision is binding unless the parties have agreed at the outset that it will not be. It is a process that can be very suitable to disputes involving valuation or specialist knowledge in a particular sector. It can be a shortcut to a binding decision, because, unlike in a court case or arbitration, there is no need to prepare written pleadings, cross-examine witnesses or conduct hearings.

The Scottish Land Court

The Scottish Land Court is a court of law. The role of any court is to resolve disputes by determining the facts of a case, if they are in dispute, and by interpreting and applying the relevant law to the facts. The Scottish Land Court is an expert court in the sense that it is familiar with agricultural matters and valuation principles. But as a court of law it has to make its decisions on the basis of the evidence and legal arguments put before it, rather than making any investigations of its own.

Litigation in Scotland is an adversarial process. This means that each party has an opportunity to put their own evidence and legal arguments before the court, and an opportunity to challenge the evidence and arguments put forward by the other party. Because the court is determining a party's civil rights (i.e. their rights or obligations under the law applying to the case) it is bound by Article 6 of the European Convention on Human Rights to ensure that each party has sufficient time to prepare their case and that they receive a fair hearing. In order to ensure that the process is fair the Rules of Court prescribe an orderly procedure for dealing with cases. The overarching purpose of the Rules is "to enable the court, with the assistance of parties, to reach a just result fairly in any case with due regard to economy, proportionality and efficient use of the resources of parties and the court".

The length of time a case takes to reach a conclusion varies considerably. Much depends on the extent to which the parties and their professional advisers are willing to co-operate with one another in refining what are the real matters in dispute, so that time (and money) is not wasted in arguing about things that are not of real significance. The Scottish Land Court has strong case management powers, and expects the parties to co-operate with it to progress applications to a conclusion as efficiently as possible. The Scottish Land Court has issued Guidance on its approach to Rent Review applications, which can be seen at www.scottish-land-court.org.uk/using/guidance-note-on-rent-reviews

Appendix D – Recommended Standard Procedure for the Determination of Rents based on the Productive Capacity of the Holding and the Requirements for Making an Application to the Scottish Land Court

It is envisaged that this will be a three-staged process, the timing of each stage being determined by a code of practice regulating rent review procedures, as follows:

- I. The person initiating the rent review will require to send the rent review notice to the other party based on an assumption that a hypothetical tenant using only the fixed equipment provided by the landlord will farm the holding with a statement of the rent proposed.
- II. If the parties fail to agree following negotiation the person initiating the rent review will set out the initiating party's understanding of
 - (i) the purpose of the let,
 - (ii) the landlord's fixed equipment with details of any Post Lease Agreement obligations and of the tenant's fittings, fixtures and improvements,
 - (iii) the enterprises to be included in the budget, and present
 - (iv) a proposed budget for the agricultural activity of the holding prepared according to a standardised format noting paragraphs 4-7 below
 - (v) details of any non-agricultural diversification project and any land or buildings used in that diversification (see paragraph 8 below);
 - (vi) a proposed rent for the holding as a whole, which would include rent for the agricultural activity, and in addition, the rent for the diversified non-agricultural activity.
- III. If no agreement is reached by the date set out in the notice, then either party can make an application to the Scottish Land Court no later than the date stated in the notice to have the Scottish Land Court determine the rent.

For the purposes of determining the rent the Scottish Land Court will require submissions to be made by both parties as to the following:

1. The purpose of the let.
2. The details of the relative investments in fixed equipment noting whether the landlord's investments are under the obligation of the tenancy or otherwise and clarifying those items of fixed equipment that are subject to a Post Lease Agreement and are the responsibility of the tenant.
3. The enterprises that will be included in the budget to meet the agricultural purposes of the let (see paragraphs 4-5 below) and details of any non-agricultural diversification activity taking place on the holding (see paragraph 8 below)

4. A budget prepared (according to a standardised format) on the basis of the enterprises that reflect the agricultural productive capacity of the holding in question as of the date of the review:
 - a. The budget will exclude rent but include income derived from public sources where appropriate. It will also include additional expenditure related to the obligations that the tenant has under a Post Lease Agreement.
 - b. The budget will be prepared using a run of historic data relative to costs and prices of not less than three years. Until the convergence of SFP is complete in 2019, the budget will also take account of changes that will occur up to the next rent review.
 - c. The Scottish Land Court will use the Scottish Government's Farm Accounts Survey Data to sense test the validity of the budget analysis.
5. A statement of the rent demand or offer being made on the assumption that 50% of the budget surplus would be rent to the landlord but taking account of potential adjustments arising from paragraphs 6 and 7.
6. In cases where the productive capacity of the holding would not give the landlord a reasonable return on his investment and adequately cover the reasonable costs to the landlord of fulfilling his statutory responsibilities for replacement and renewal of the fixed equipment, the landlord would have the right to apply to the Scottish Land Court to have his statutory obligations modified, including the exclusion of fixed equipment no longer required.
7. Where the residential accommodation included in the agricultural holding lease is greater than is justified in terms of the Standard Labour Requirements of the holding, the rent for this surplus residential accommodation (including the farm house where the Full Time Equivalent is less than 1 (<1900 hours) should reflect the potential rent that could be obtained if such accommodation were to be rented on the open market or sublet. Adjustment to the rent for such accommodation will be made to reflect the differing repairing and maintenance obligations that exist as between private residential tenancies and houses that are let within an agricultural holding.
8. Where there is a non-agricultural (diversification) activity on the holding a separate assessment of rent will be prepared for that activity following agreement as to the landlord's land and fixed equipment to be used (which will be excluded from the agricultural budget while remaining within the secure agricultural tenancy throughout the lifetime of the diversified enterprise) according to an amended section 13 (7A) of the 1991 Act as follows:
 - a. The rent will be assessed on what it is the landlord is providing which allows the tenant to pursue the diversified activity and be based on the commercial rental value of the bare land or the site only of the buildings used.

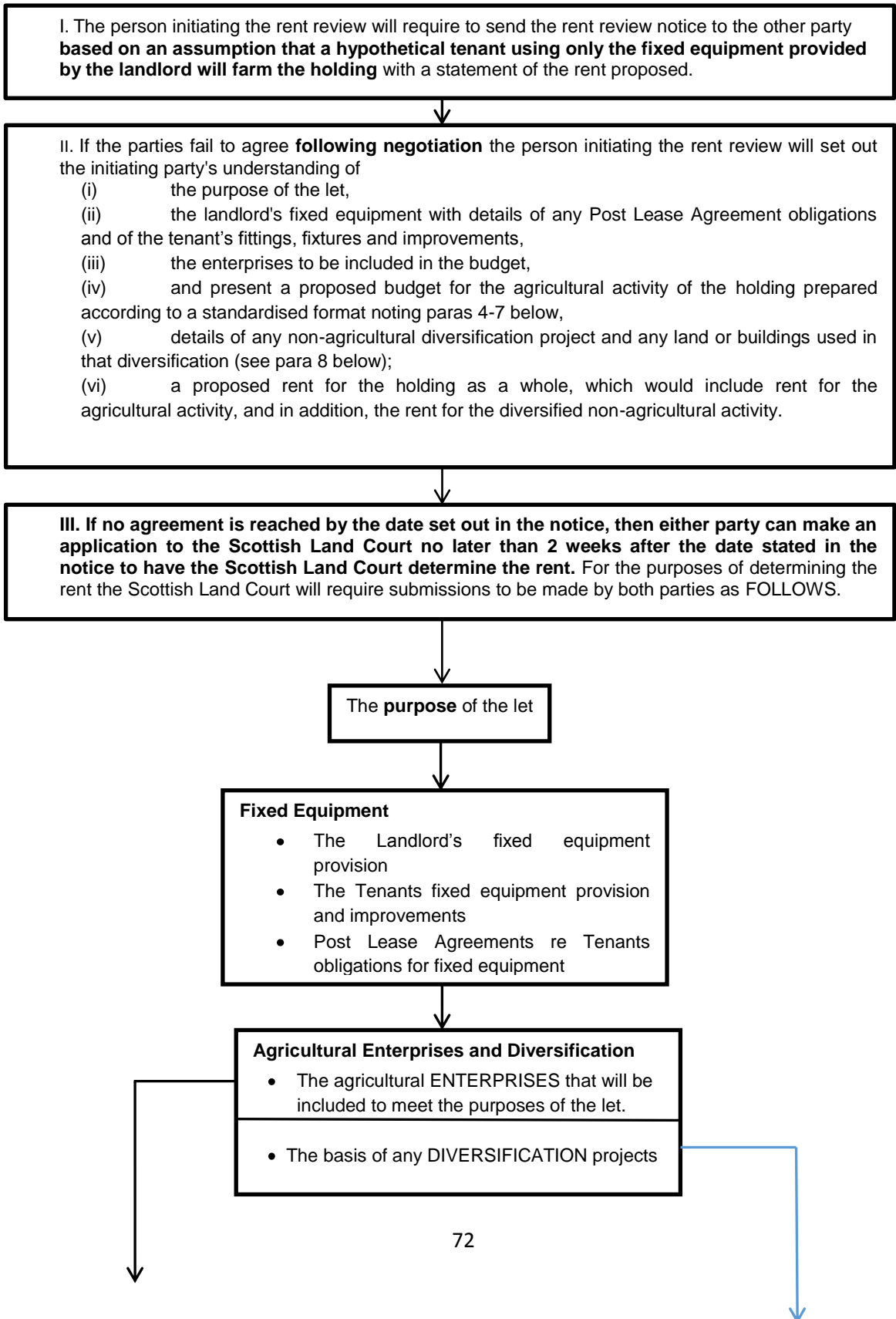
- b. Where the diversified activity is taking place in a landlord's building or a building, which is partially owned by landlord and tenant then the commercial value of the rent would be either the whole value of that building or an appropriate amount reflecting the respective ownership shares.
9. The rent for the holding as a whole will comprise the rent assessed for the agricultural activity and where applicable the rent assessed for the diversified activity.

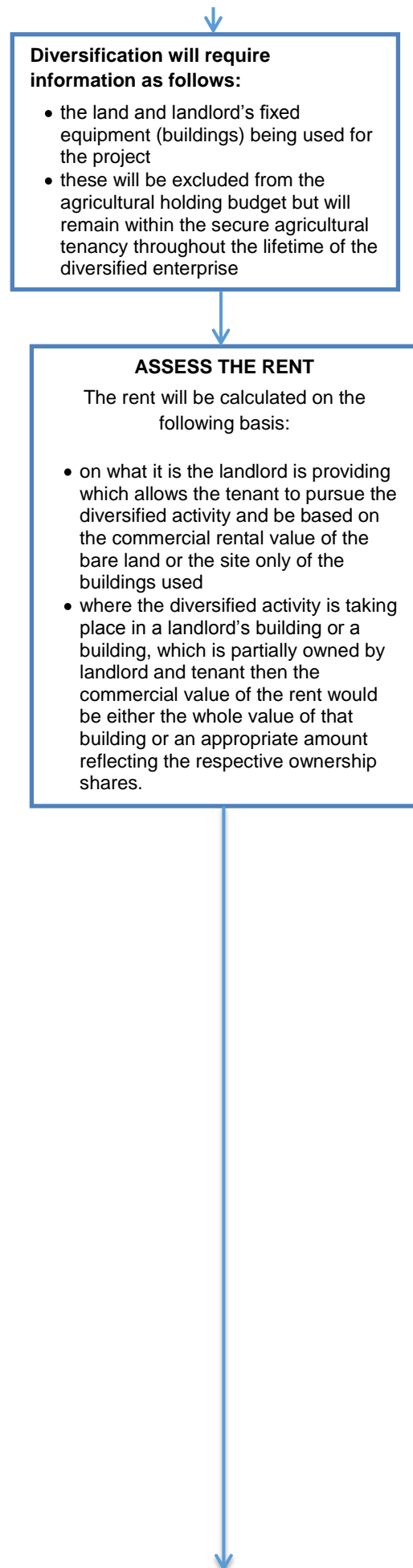
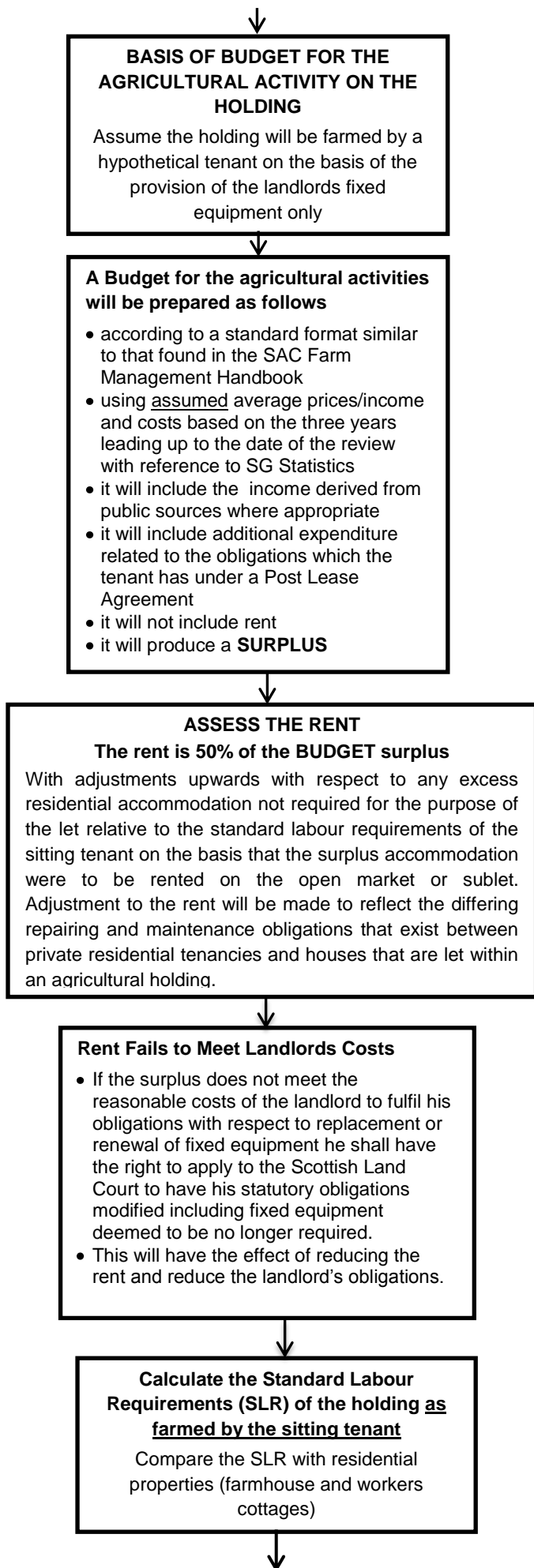
It should be noted that:

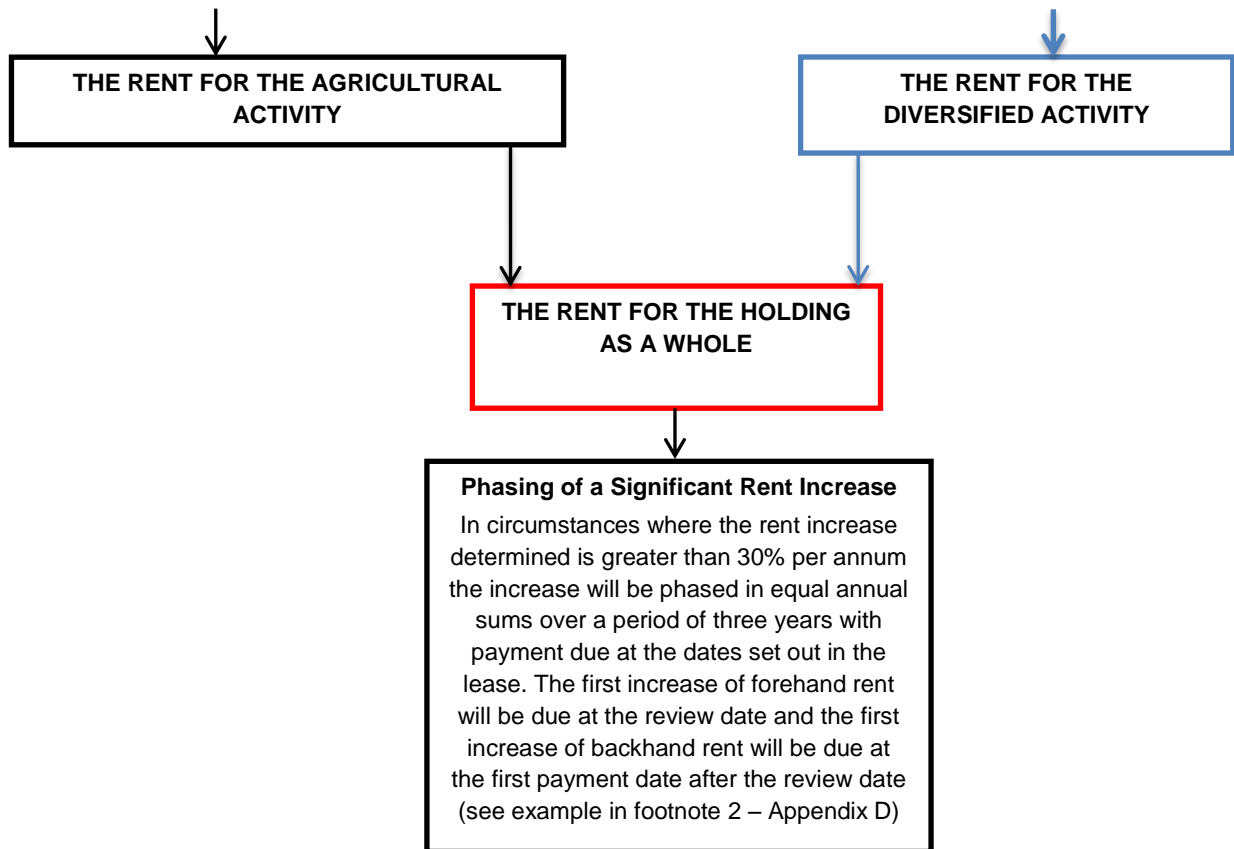
10. It will be open to the parties to agree the setting of a rent by an expert appointed by the Scottish Land Court.
11. In circumstances where the rent increase determined is greater than 30% per annum the increase will be phased in equal annual sums over a period of three years with payment due at the dates set out in the lease. The first increase of forehand rent will be due at the review date and the first increase of backhand rent will be due at the first payment date after the review date (see example in footnote)²

² For example where the review date is the 28th of November and the existing rent is increased from £12000 to £18000 (a difference of 50%), presuming that the rent is paid half yearly in arrears, the next rent payment falling due on the 28th of May after the review will be £7000 and the same again on the following 28th of November, £8000 on the following 28th May and the same again on the following 28th November, £9000 on the following 28th of May and the same again on the following 28th November i.e. the tenant pays a total of £14000 in year one, £16000 in year two and £18000 in year three. If rent is payable half yearly in advance, the first payment of £7000 would be on the review date of 28th November and the final payment of £9000 would be on the 28th of May of year three.

Appendix E - Decision tree for rent review and determination of rents and requirements for making an application to the Scottish Land Court for a 1991 Act Agricultural Holding (and any other statutory holding in which the parties have not determined within the lease how rents should be set)







Appendix F – Miscellaneous Amendments Proposed in Relation to the 1991 Act

Section 8	<p>The 2003 Act amended section 8 (3) so that the Record of Condition could be prepared by a person appointed by agreement between the parties whom failing by the Scottish Ministers on the application of either party. Previously the Record had to be made by a person appointed for that purpose by the Secretary of State. This has led to a certain amount of uncertainty with regard to whether or not Records which were made by a person mutually agreed between the parties but not appointed by the Secretary of State prior to the coming into force of the 2003 Act on the 27th November 2003 are valid Records.</p> <p><i>F1 - Further consideration should be given to amending section 8 (3) so that for the avoidance of doubt where a Record was made by agreement of the parties prior to the 27th November 2003, notwithstanding that it has not been made in accordance with the statutory provisions then in force, it should be accepted as a valid Record made under this section.</i></p>
Section 10	<p>This section gives the landlord certain rights of access on to the agricultural holding but does not expressly reserve access in favour of the landlord for rights reserved within the lease not related to the narrow purposes set out in sub paragraphs a, b and c.</p> <p><i>F2 – further consideration should be given to adding the following lines to sub paragraph (d): “for any reasonable purpose including carrying out activities for the benefit of the estate, which activities do not materially interfere with the exercise of the tenant’s rights under the Lease.”</i></p>
Section 13	<p>Recommendation 1 will require substantial amendment to section 13. However, section 13(9) should be amended to make clear that a variation of rent following the addition of land to the tenancy or a resumption of land from the tenancy should be disregarded for the purposes of calculating the 3 years.</p> <p><i>F3 – further consideration should be given to a new subsection 13(9)(d) to the effect that a variation of rent following an addition of land to the tenancy or a resumption of land from the tenancy will be disregarded.</i></p>
Section 17	<p><i>F4 – further consideration should be given to, in accordance with</i></p>

	<i>modern agricultural practice, expanding this section to include slurry and silage.</i>
Section 18	<p>On occasion relatively minor and inconsequential breaches of the tenant's obligations are argued by landlords to bring into play the operation of section 18 (2) (a) where the tenant is prevented from exercising his rights in relation to fixtures if he has not performed or satisfied all his other obligations to the landlord in respect of the holding.</p> <p><i>F5 – further consideration should be given to amending this section so that the landlord is only able to prevent the tenant exercising his rights in respect of fixed equipment where material breaches of the tenant's obligations have been notified to him by the landlord prior to the service of the tenant's section 18 notice and the tenant has failed to rectify them.</i></p>
Section 21	<i>F6 – in order to simplify the process for the service of notices to quit, further consideration should be given to deleting section 21(5)(a) relating to notices of removal under section 6 of the Removal Terms (Scotland) Act 1886. (see Section 12.2)</i>
Section 24(5)(a) & (6)	<p>The definition of "postcode unit" is unclear; eg is it "EH", EH1 or EH1 AB1. Where a holding has no building it does not have a postcode and so there is no postcode unit "pertaining to the holding". What is meant by postcode units "pertaining to ... the vicinity of the holding is unclear.</p> <p><i>F7 – further consideration should be given to whether this provision requires further clarified. It might be simpler to refer to a circle of a particular radius from the centre of the holding to define community.</i></p>
Section 31	<p>A difficulty of interpretation arises in respect of the operation of section 31 and section 13 (8). The latter provides that rent reviews shall not take place more frequently than the expiry of three years from the last variation of rent. Section 31 provides that where a landlord is entitled to resume land from a tenancy a tenant is able to have the Scottish Land Court specify the amount by which the rent should be reduced as a result. Section 13 (9) specifically excludes a variation under section 31 from being a variation which prevents a further change in rent for a period of three years. However, it is not clear whether or not an agreed variation of rent on resumption triggers the three year cycle.</p> <p><i>F8 – Further consideration should be given to amending section</i></p>

	<p>13 (9) by adding a subsection (d) to the effect that an agreed variation following upon a resumption of land from the tenancy does not constitute a variation of rent for the purposes of section 13 (8).</p>
<p>Section 37 (2) and 38 (5)</p>	<p>These subsections were repealed by the 2003 Act but it is not clear if the amendment has retrospective effect or only applies to write down agreement that have not yet reached their termination date.</p> <p><i>F9 – further consideration should be made as to whether a further amendment requires to be made to the 1991 Act to clarify and make clear that the effect of the repeal of these subsections is that the tenant is entitled to compensation for the improvement calculated according to the Act.</i></p>
<p>Section 44</p>	<p>There appears to be a general consensus that this section which deals with compensation for the continuous adoption of a special standard of farming (“high farming”) serves no useful purpose and indeed has not been invoked for decades.</p> <p><i>F10 – further consideration should be given to repealing section 44 should be repealed.</i></p>
<p>Section 52</p>	<p>Sporting Rights; see Section 12.5 of this Report</p>
<p>Section 61A</p>	<p>There is some uncertainty about whether or not the Arbitration (Scotland) Act 2010 applies to arbitrations conducted under section 61A. There is a strong argument that the 2010 Act has no application.</p> <p><i>F11 – Further consideration should be given to making amendments to section 61A of the 1991 Act to provide that arbitrations should be conducted under the Rules in the 2010 Act subject to references to appeals to the Court of Session being taken as appeals to the Scottish Land Court. This should potentially be replicated by amendments to the 2003 Act for SLDTs and LDTs and be reflected in the legislation setting up the new letting vehicles</i></p>
<p>Section 66</p>	<p>This requires to be amended so that the heading relates to a reference to the Scottish Land Court and not to arbitration.</p> <p><i>F12 – further consideration should be given to amending the heading</i></p>

Section 77	<p>This section is no longer required because of other legislation dealing with guardianship of children and adults with incapacity.</p> <p><i>F13 – further consideration should be given to repealing this section.</i></p>
Section 78	<p>This now serves no useful purpose following upon the requirements of Writing (Scotland) Act 1995 and should be repealed.</p> <p><i>F14 – further consideration should be given to repealing this section 78.</i></p>
Section 79	<p>Subsection 2 requires to be amended by deletion of Government Department and substitution of the Scottish Ministers.</p> <p><i>F15 – further consideration should be given to making the relevant amendment.</i></p>
Section 84	<p>Service of notices on landlord – see Section 12.4</p>
Schedule 2	<p>Section 7.2 of this Report recommends modernising succession rights to increase flexibility. This will required an amendment to the definition of “near relative successor”.</p> <p>The 2003 Act substituted “viable unit” for “two man unit” in Cases 2, 3, 6 & 7 and provided a definition of “viable unit”. Our Section 7.3 of this Report recommends to the effect that the viable unit test should be repealed so far as it applies to a holding that is being inherited. However the test remains relevant where the successor is already the tenant of a distinct unit elsewhere which is being farmed as a separate unit from the holding which is being inherited.</p> <p><i>F16 – in line with the Review Group’s recommendations further consideration should be given to amending Case 7 of Schedule 2 so that it is in identical terms to Case 3 of Schedule 2 and the definition of the viable unit should be amended to make clear that “full time employment and the means to pay” should take into account all relevant income which can be taken into account in a rent review.</i></p>
Schedule 5 Part II	<p>List of improvements – see Section 6.7 of this Report.</p>

Appendix G – Miscellaneous Amendments Proposed in Relation to the 2003 Act

Section 1(2)	<p>The section allows parties to enter into a lease which will be regulated by the 1991 Act so long as it is entered into in writing prior to the commencement of the lease itself and expressly states that the 1991 Act is to apply to the lease. A view has been expressed that the need to have the lease signed prior to the date of entry is unnecessary.</p> <p><i>F17 – further consideration should be given to amending section 1(2) by deleting section 1(2)(b).</i></p>
Section 4 and para 1 of the Schedule	<p>The disapplication of the Sheriff Court (Scotland) Act 1907 to SLDTs has engendered a view that pre 1907 Act notice to remove is required to terminate an SLDT.</p> <p><i>F18 – further consideration should be given to amending section 4 to make clear that a SLDT terminates automatically without the need for any notice.</i></p>
Sections 28 & 29	<p>Section 28(1) requires notice to be given to the tenant of an intended transfer of land which triggers the right to buy, but if the owner “takes any action with a view to transfer of land” [ie advertising the land for sale or entering into negotiations etc – section 28(3)] no notice needs to be given. However, under section 29(2) only gives the tenant the right to give notice of his intention to buy the land upon receipt of a notice from the landlord so the tenant appears to have no right to give notice when an action is taken with a view to a transfer of land, which triggers the right under section 28(1)(b). Recommendation 18 recommends an amendment to the meaning of “takes any action with a view to transfer of land”, but an amendment will still be required to section 28.</p> <p><i>F19 – further consideration should be given to amending section 28(1)(b) to provide that when the landowner or creditor “takes any action with a view to transfer of land” that notice also requires to be given to the tenant.</i></p>
Section 79	<p>Arbitration Procedure – see comments and recommendation under section 61A of 1991 Act regarding application of Arbitration (Scotland) Act 2010.</p>
Section 84	<p>The Scottish Land Court has no power to regulate the interim possession of a holding where there is a dispute about whether or not there is a lease.</p> <p><i>F20 – further consideration should be given to providing the Scottish Land Court with a power to regulate the interim possession of the holding pending the resolution of any application before the court.</i></p>

APPENDIX H – List of Recommendations of the Agricultural Holding Legislation Review Group

Recommendations on Landlord/Tenant Relationships

Recommendation 1 - The Scottish Government should facilitate, support and strongly encourage the efforts of industry leaders to improve landlord/tenant relationships through effective self-regulation and other industry led initiatives.

Recommendation 2 - A new office of Tenant Farming Commissioner should be established to promote and secure effective landlord/tenant relationships and behaviours across the agricultural tenanted sector underpinned by robust codes of practice.

Recommendations on Rent and Rent Reviews

Recommendation 3 – Legislative provisions on rents for secure 1991 Act agricultural tenancies should be amended so that rents are determined on the basis of the productive capacity of the holding, farmed by a hypothetical tenant (who is an efficient and experienced farmer of adequate resources who will make best use of the land) using the fixed equipment provided by the landlord, taking account of the budget for the holding, and including the contribution from non-agricultural diversified activity.

Recommendation 4 – Legislative provisions for regulating rent reviews and determinations of rent for agricultural holdings should enable rent to be paid for non-agricultural activity on a holding that reflect a fair market rate for the landlord's assets being used for the activity.

Recommendation 5 – If objecting to a diversified activity on a tenanted holding, the process should be limited to only one notice of objection by the landlord and to create a presumption that if planning permission has been granted for the diversified activity, that the activity is allowed unless the landlord can demonstrate that objections under section 40 subsection 9 of the 2003 Act apply.

Recommendation 6 – In considering the appropriate rent for an agricultural holding, provision should be made for any housing provided on a holding in excess of that reasonably required for the labour requirements associated with that holding.

Recommendation 7 – The Government should encourage and support industry bodies, including those representing professional intermediaries, to maintain publicly available information on model budgets and rent calculations to assist where relevant with the negotiated settlement of rents within the tenant farming sector.

Recommendations on Investment, Improvements, Compensation and Way-go

Recommendation 8 – The Government should consider how to test the detail of the Review’s proposals on rent review, in order to ensure that the provisions work effectively in practice, potentially in association with industry bodies.

Recommendation 9 – Allowing the registration of secure 1991 Act agricultural tenancies in the Land Register, should be considered further to determine what impact this would have on a tenant’s ability to offer the lease for the purpose of granting a standard security over it.

Recommendation 10 – Provision should be made for a three year amnesty during which a tenant farmer may serve formal notice on the landlord to the effect that specified items not previously agreed may be treated as tenant’s improvements at way-go, including any claim that might be made under existing provisions for improvements where no notice has been given, but which involve equipment that the landlord should have provided at the commencement of the lease.

Recommendation 11 – Provision should be made to require a landlord to notify a tenant farmer of any proposed improvement to the holding and the tenant should be able to object, if the improvement is not necessary for the maintenance of efficient agricultural production on the holding.

Recommendation 12 – Further work should be undertaken, with relevant industry bodies, to revise the current list of improvements that can be eligible for compensation set out in Schedule 5 and section 17 of the 1991 Act.

Recommendations on Retirement, Succession and Assignment

Recommendation 13 – Current legislation should be amended to allow secure 1991 Act tenancies and LDTs to be: assigned by the tenant farmer in their lifetime; bequeathed where this is permitted in the lease; or transferred by a tenant’s executors on death, to any living parent, or any living descendant of a parent, or spouse or civil partner of any living descendant of a parent of the tenant or of the tenant’s spouse or civil partner.

Recommendation 14 - Current legislation should be amended to remove a landlord’s ability to object to the lifetime assignment or the succession of a tenancy on the grounds that that the agricultural holding is not a “viable unit” and the landlord intends to amalgamate it with another holding.

Recommendation 15 - Provision should be made to enable any secure 1991 Act tenant to convert the tenancy into a new long duration modern LDT with a minimum term of 35 years and then be able to transfer that agricultural tenancy to anyone on the open market for value.

Recommendation 16 – Further consideration should be given to ensuring national planning policy and guidelines and allow where possible for measures designed to encourage landlords to provide, on a lifetime lease, nearby retirement housing for outgoing agricultural tenants.

Recommendations on the Role of a Right to Buy

Recommendation 17 – Existing provisions on the pre-emptive right to buy for 1991 Act tenants should be amended to remove the need to register a notice of interest so that all 1991 Act tenants have an automatic statutory pre-emptive right to buy their agricultural holding, should it come up for sale.

Recommendation 18 – Further consideration should be given to when the pre-emptive right to buy the agricultural holding should be triggered, for example when the land is advertised or otherwise exposed for sale, or (if not previously advertised or otherwise exposed) when negotiations are successfully concluded with another person with a view to the transfer of the land.

Recommendation 19 – Further consideration should be given to ways to ensure the effectiveness of a 1991 Act tenant's pre-emptive right to buy in circumstances where a company owns a farm tenanted on a secure 1991 Act tenancy, and a transfer of the interest in a holding can be effected through the transfer of some or all of the shares in the company rather than the sale of the land.

Recommendation 20 - Further consideration should be given to the potential need to introduce an amendment to Part 2 of the 2003 Act to make clear that where there is an interposed lease and the landowner takes steps to transfer the land, the pre-emptive right to buy for any 1991 Act tenant sitting under the interposed lease is still triggered.

Recommendation 21 – Provision should be made to enable a 1991 Act tenant to request the Scottish Land Court to order the sale of a holding where the landlord has persistently failed to fulfil their obligations under the tenancy, triggering the tenant's right to buy. The Scottish Land Court will have discretion to order the sale, taking into consideration the respective rights and interests of both parties.

Recommendation 22 – The potential for proposals in the current consultation on Land Reform to address situations where the way land is being managed is impacting upon tenant farming communities and agricultural productivity, creating a barrier to local sustainable development, should be considered further.

Recommendation 23 – Further consideration should be given to providing small landholders with an automatic pre-emptive right to buy their holdings, should they come up for sale.

Recommendations on Letting Vehicles for the 21st Century

Recommendation 24 – A new “modern LDT” with a minimum 10 year term should be developed to enable landlords and tenants greater freedom in agreeing terms relevant to the type, duration and purpose of the holding and lease. An optional break at 5 years should be available where the tenant is a new entrant.

Recommendation 25 – Provision should be made to allow for a modern “full repairing” LDT, where a tenant takes full responsibility for all repair, renewal and replacement of fixed equipment on the holding in return for a minimum term of 35 years and mandatory application of the new rent review provisions recommended in Section 5 of this Report.

Recommendation 26 - Rent provisions in relation to a new modern LDT should be agreed at the start of the lease by the contracting parties, taking into consideration the provisions of a new statutory code on negotiating rent reviews, or if the lease is silent on the issue then the rent provisions should be as set out in Section 5 of this Report for 1991 Act tenancies. In the case of a full repairing lease the rent controls set out in Section 5 should apply in all cases.

Recommendation 27 - Parties to a “modernised LDT” should be able to negotiate fixed equipment arrangements subject to the provisos that fixed equipment provided by the landlord is sufficient to allow the tenant to farm for the purposes set out in the lease, details are specified in the lease along with a record of condition, and responsibility for maintenance is clearly stated.

Recommendation 28 – Modern LDTs should be assignable within the duration of the lease at market value, subject to the landlord having the same grounds for objection as in the 1991 and 2003 Acts (finance, ability, character, etc).

Recommendation 29 – Modern LDTs should include a requirement for landlords to give written notice of intent to terminate not less than two and not more than three years before the expiry of a modern LDT, failing which the lease will continue on tacit relocation for one year at a time subject to termination on the same notice period. (Section 12.2 of this Report).

Recommendation 30 - Modern LDTs should include robust arrangements for compensation and way-go in order to give tenants the confidence to invest on what are (potentially) quite short duration terms. These should be modelled on those in the 2003 Act with some simplification of process where practicable. The overriding aim should be to ensure that tenants are able to invest with confidence in this type of tenancy.

Recommendation 31 - The option of allowing such leases to be extended by the landlord and then sold with improvements on the open market by the tenant (thereby avoiding formal way-go) should also be considered, especially with regard to full repairing leases.

Recommendation 32 – Provision should be made to enable land to be let for a period of up to one year, which will end without notice, for the purpose of grazing, mowing or cropping. Such leases should include a requirement for a declaration to be made to the incoming seasonal tenant to the effect that defined minimum soil nutrient and organic matter status are met, and by the outgoing seasonal tenant confirming that this has been maintained.

Recommendation 33 – Further consideration should be given to allowing an approved environmental charity to let land under the modern LDT arrangements which include reasonable environmental conditions as to the management of the land.

Recommendation 34 - Every encouragement and support should be given to the NFUS, SL&E and STFA to develop a new Joint Initiative on Limited Partnerships setting out clear guidelines as to how and on what basis those landlords and general partners remaining in these arrangements should negotiate their conversion into a modern LDT on appropriate terms.

Recommendations on New Entrants and Reducing Barriers to Entry

Recommendation 35 – Provision should be made to allow tenants who wish to assign an LDT (including one arising from converting a secure 1991 Act tenancy) to a new entrant to do so through a contractually based staged assignation process that facilitates appropriate apprenticeship arrangements and includes effective protection for the assignor, the assignee and the landlord.

Recommendation 36 – The Scottish Government should further consider the potential capacity to provide starter units on publicly owned land, including through the acquisition of additional land where practicable.

Recommendation 37 – The Scottish Government should also enter into direct dialogue with the larger private owners of agricultural land in Scotland with a view to encouraging them to provide starter units. The Scottish Government should also consider future opportunities to encourage the provision of starter farms through appropriate financial and any available tax incentives.

Recommendation 38 – Existing financial incentives available to agriculture, and more generally to business through other parts of Government, should be reviewed in order to facilitate effective financial support for new entrants. This should include, where possible, measures to cap the level of incentives made to larger established operators so that funds can be targeted to optimal effect.

Recommendations on Taxation, the CAP and Other Fiscal Incentives

Recommendation 39 – Scottish Government should work with the UK Government on any future review of the terms of Agricultural Property Relief, Business Property Relief, and Entrepreneurs' Relief, to consider whether disincentives to the letting of land might be removed. Consideration should also be given to the potential to structure reliefs to deliberately incentivise the letting of land on larger agricultural estates by capping the availability of reliefs for land farmed in hand.

Recommendation 40 – In any future review of Income Tax or Value Added Tax, the Scottish Government should work with the UK Government to consider the case for re-categorising income from let land as trading income for tax purposes, particularly if it is reinvested in that land, and whether the current exemption from VAT that applies to the letting of land should remain.

Recommendation 41 - The Review Group has noted the on-going review of non-domestic rates ahead of the 2017 revaluation and the recommendation of the Land Reform Review Group in relation to Land Value Taxation. Any further deliberation of these issues should consider the potential to provide an incentive for the long term letting of agricultural land.

Recommendation 42 – When reviewing the impact of the new Land and Buildings Transaction Tax, the impact, if any, on the decisions by landowners and tenants to let land or enter into share farming agreements should be considered.

Recommendation 43 – In order to facilitate fair rent reviews, the values of each of the regional step changes arising from convergence should be published in advance so that landlords and tenants are able to take account of the revised value of Basic Payments. In addition, the following issues should be considered in relation to any relevant review during the new programme period of CAP:

- The ability to cap the amount of Basic Payments that any one individual can claim in order to discourage landowners from taking tenanted land back in hand or simply holding land to increase their Basic Payment claim;
- To enable more funding to be available to all active Scottish farmers and to be sufficient funds available to meet new and expanded tenant farms there may be a need to tighten the negative list;
- Address any funding anomalies regarding access to Direct Payments arising from the latest CAP reform in consultation with stakeholders;
- Assessing the impact upon smaller tenant farmers, including any impact from insufficient Direct Payments to cover all their eligible acres;
- Ensure sufficient budget allocation should be retained, possibly by top slicing the revised ceiling budget, so as to ensure that new entrants to tenant farming are not placed at a fiscal disadvantage;
- Assess the costs and benefits of the siphon on entitlements without land, and consider including exemptions for new entrants to tenant farming.

Recommendation 44 – Government should consider making the following provisions in relation to the new SRDP:

- Sufficient funding should be made available in each year to ensure that new entrants are not disadvantaged by lack of budget availability;
- If funding for the Small Farm Scheme is constrained, mechanisms should be developed to ensure new entrants and tenant farmers are not disadvantaged;
- The Whole Farm Review Scheme and its successor; the integrated land management scheme and the one to one advisory service, should give prioritisation to new entrants and be available to small tenant farmers;
- Business development plans submitted as part of a SRDP application should take full account of costs specifically associated with tenant farming, including rents;
- If funding becomes constrained within SRDP, priority should if possible be given to new entrants to tenant farming whether via a LDT, repairing lease or other suitable lease.

Recommendations on Miscellaneous Legislative Amendments

Recommendation 45 - Further consideration should be given to ensuring that any agricultural tenancy under the 1991 and 2003 Acts going forward, except a short term grazing or cropping tenancy, can only be terminated at their end date or, when they are running on tacit relocation, at the anniversary thereof by a notice to quit given not less than two years nor more than three years before the end date of the lease or any anniversary thereof.

Recommendation 46 - Consideration should be given to amending the current provisions for succession, or assignation of, existing SLDTs and LDTs to more closely match those being proposed for the new letting vehicles.

Recommendation 47 - Further consideration should be given to amending the 2003 Act, so that in any agricultural tenancy, with the exception of short grazing or cropping leases, a claim can be made by a tenant for loss and damage arising from the exercise of the sporting rights in a manner that was not in the contemplation of the parties at the commencement of the lease.

Recommendation 48 - Further consideration should be given to amending current provisions on the service of notices for 1991 Act tenancies, SLDTs, LDTs and make provision for new letting vehicles so that any notice that requires to be served by anyone under the Acts on the landlord may be served on the original landlord unless notice was given to the tenant of the new landlord and to provide that anything that is required or authorised to be done by, to or in respect of the landlord or tenant may be done by, or to or in respect of any agent of the landlord or tenant.

Recommendation 49 – Further consideration should be given to incorporating the miscellaneous changes set out in Appendix F and G of this Report and consideration should be given to consolidating the Agricultural Holdings (Scotland) Acts, though it is not anticipated this should be done within this Parliamentary term.



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