

Scottish Land & Estates is a membership organisation that uniquely represents the interests of landowners and land-based businesses in rural Scotland. Our members make a substantial social, economic and environmental contribution to rural Scotland, and landowners and land-based businesses play an instrumental role in the delivery of key national and local government objectives for the benefit of the entire rural economy and the communities of which they are an integral part. We welcome the opportunity to respond to this consultation.

CROFTING ACTS

1. Which Acts listed would benefit from post-legislative scrutiny by the Committee?

Scottish Land & Estates believes that the Crofting Reform etc Act 2007 and the Crofting Reform (Scotland) Act 2010 would benefit from some form of post-legislative scrutiny in order to inform the planned Crofting Bill in this parliament and the proposed future Bill in the next parliament.

We are uncertain about the best way to do this given the plan to bring forward a new Crofting Bill in this parliament. We suspect that it might not be useful to have a stand-alone process of post-legislative scrutiny in addition to the normal scrutiny process involved in that Bill, but would be happy to see it take place if it is possible and worthwhile. There has already been some reflection undertaken by government and the Rural Economy and Connectivity Committee during the recent process of consulting on the appropriate way forward for crofting legislation.

2. Why do you think there is merit in reviewing these Acts?

The policy memorandum relating to the Crofting Reform (Scotland) Act 2010 said that:

‘there is widespread concern that crofting is in decline as a consequence of persistently high levels of absenteeism, growing levels of neglect and the continuing removal and development of land from crofting tenure. Many have argued that the existing governance arrangements and regulatory framework have failed to address this decline. The objectives of this Bill are to put in place a robust regulatory and governance framework for the future of crofting that will reverse this decline and ensure that crofting continues to contribute to sustainable economic growth in some of Scotland’s most remote, rural communities’.

The intention of the legislation was to reverse the decline in crofting and ensure that crofting continues to contribute to sustainable economic growth. We struggle to see how the legislation has achieved this and it would be worth reflecting carefully on why this is the case.

We believe that the number of Crofting Acts with the resultant accretion of layers of complexity underpin this dissatisfaction at present, but more fundamentally, when thinking about future legislation, we believe that there needs to be a clearer vision of what crofting tenure is aiming to achieve. We believe that the wider rural development issues in the crofting counties are key and should be considered alongside crofting specific law and policy i.e. is crofting actually helping rural development in addition to protecting crofter rights?

3. What is the likely benefit/outcome from reviewing this/these Acts?

Given the intention to bring forward a technical Bill in this Parliament that will seek to address some of the issues raised in the final report of the [Crofting Law Sump](#) in 2014, the main benefit would be in informing the planned Bill in the next Parliament.

If we continue to tinker with existing legislation and fail to rethink what we want for crofting in the 21st century and the future, we will continue to see the long, slow decline of crofting. We need to grasp the nettle and think radically if crofting is to have a future in the economic growth/sustainability of the crofting counties.

4. Do the Acts raise any equality or human rights issues?

Not that we are aware of, however the Act could be reviewed in light of the current human rights agenda as promoted via the Land Rights and Responsibilities Statement and also through recent human rights case law.

AGRICULTURAL HOLDINGS (SCOTLAND) ACT 2003

1. Which Acts listed would benefit from post-legislative scrutiny by the Committee?

We believe that the 2003 Agricultural Holdings Act would benefit from post legislative scrutiny.

2. Why do you think there is merit in reviewing these Acts?

The 2003 Act forms part of a suite of legislation dealing with agricultural holdings in Scotland, the other primary pieces of legislation being the Agricultural Holdings (Scotland) Act 1991 (“the 1991 Act”) and the Land Reform (Scotland) Act 2016 (“the 2016 Act”). The 2003 Act brought forward reforms to the 1991 Act and has itself been reformed by the 2016 Act. It could therefore be argued that seeking to scrutinise the 2003 Act in isolation will be of limited value as, in order to scrutinise its provisions comprehensively, it needs to be reviewed in light of the other relevant pieces of legislation.

That being said, the 2003 Act contains a number of measures/processes which can be considered independently from other pieces of legislation. These measures and processes have now been used in practice for almost 15 years. Given the complexity of what is contained in the 2003 Act, we think that it would be useful to scrutinise the legislation and resolve any technical issues which have come to light.

We also think that it is useful to reflect on the policy objectives which were identified for the 2003 Act. As set out in more detail below, in our view, the 2003 Act has failed to meet a number of its policy objectives and there is merit in considering the reasons behind this so that lessons can be learned. This is particularly topical given Jeremy Moody’s recent discussion paper on encouraging the letting of land in Scotland which was commissioned by the Scottish Land Commission. In addition to summarising the key legislative developments in agricultural holdings, Mr Moody also sets out his views on the failings of the legislation and what can be done to reinvigorate the tenanted sectors.

3. What is the likely benefit/outcome from reviewing this/these Acts?

We support the 2003 Act’s stated policy objectives and, as set out below, we do not consider that all of the objectives have been met. Whilst we appreciate that the process of post legislative scrutiny is unlikely to lead to far reaching reforms aimed at meeting the objectives (particularly given the potential overlap with the 2016 Act, much of which has not yet been implemented), we hope that the review will lead to a frank discussion about the reasons for the failure to meet objectives and what can be done to move the industry forward.

We also consider that consolidation of agricultural holdings legislation is required. It is difficult for practitioners and almost impossible for landlords/tenants to understand the different pieces of legislation and how they fit together. In his discussion paper, Jeremy Moody highlights that “A consolidated agricultural tenancy statute would be a helpful administrative step, to the extent that it might make the present law clear, it would also tend to highlight the problems within it.” Consolidation is also supported by The Right Honourable Lord Gill, who made the following remarks at the Agricultural Law Association’s annual conference in 2016 (the presentation was later published in the Agricultural Law Association’s magazine): “It is plain to everyone here that we have reached a point where consolidation of the legislation is an urgent priority. The complex and confused cross-referencing between three major statutes is burdensome to advisers and imposes additional costs on clients. There is an overriding public need for legislation that is easily accessible, easily interpreted and easily applied. That can be achieved in the

tenanted sector only by early consolidation of the law.” If the outcome of the review was a call for consolidation, we think that it would be welcomed across the industry.

A review would also hopefully result in some of the technical issues with the 2003 Act being resolved.

4. Do the Acts raise any equality or human right issues?

The 2003 Act impacts landlords’ property rights in numerous ways and therefore engages human rights issues. The case of *Salvesen v Riddell* has been widely publicised and discussed – it highlights the kind of human rights issues which can and have arisen in connection with the 2003 Act. Subsequent changes may also have an impact on the human rights of certain groups of tenants.

Policy Objectives of the 2003 Act

We have reviewed the policy memorandum in respect of the 2003 Act. The policy memorandum states that the 2003 Act would:

- modernise agricultural holdings legislation;
- free up farm tenants and landowners from existing constraints on their business.

Given that these objectives are, by their nature, difficult to measure, we cannot comment from a quantitative standpoint on whether they have been met. We do note, however, that many references to historic terminology remained after implementation of the 2003 Act and neither the definition of “good husbandry” nor the list of tenant’s improvements eligible for compensation at termination of the tenancy were updated (the latter is in the process of being updated by the Tenant Farming Commissioner following the 2016 Act).

However, the policy memorandum also makes reference to the Land Reform Policy Group, which identified the following areas for agricultural holdings reform:

- limited duration tenancies;
- wider opportunities for diversification;
- simpler and cheaper disputes resolution, and
- other measures to protect the interest of tenants.

These points are more specific and provide objectives against which the success of the 2003 Act can be measured.

The discussions leading to the enactment of the 2003 Act also provide detail on the objectives of the legislation. In his speech to the Scottish Parliament to announce the publication of the Scottish Executive’s White Paper on agricultural holdings in May 2000, Ross Finnie set out three objectives for reform:

- diversity of scope for tenancy arrangements;
- opportunities for diversification; and
- cheaper and simpler dispute resolution.

Policy Objective - Fixed Duration Tenancies/Increasing scope of diversity for tenancy arrangements

The 2003 Act introduced the Limited Duration Tenancy (LDT) and the Short Limited Duration Tenancy. The minimum term of the LDT was reformed in 2012 (reduced from 15 years to 10 years) and has now been replaced by the Modern Limited Duration Tenancy (MLDT). We will therefore not comment further on the detailed characteristics of LDTs.

The 2003 Act introduced two new types of tenancies and therefore at face value increased the diversity of scope of tenancy arrangements. However, the Final Reform of the Agricultural Holdings Reform Review Group identified that:

“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."

In our view, this lack of enthusiasm in recent years is the result of actions taken by successive Scottish Governments to make retrospective amendments to existing tenancies which have changed the nature of the contractual agreement between the parties. These actions have significantly reduced confidence which landlords may have had in the letting of land as a business proposition, and increased risk – real or perceived – for those considering letting. Therefore, whilst the scope of arrangements was increased by the 2003 Act, its implementation and subsequent Government approach has acted in a contrary manner.

One of the primary issues which has arisen with the introduction of fixed term tenancies is the lacuna which exists for tenancies between 5 and 10 years. This issue was not resolved by the 2016 Act and we consider that this to have been a missed opportunity. Whilst we fully appreciate that tenants require a duration which supports long term planning and investment, we think that this restriction creates difficulties across the sector. In order to meet commercial terms, we are aware of practitioners resorting to tools such as the "post lease agreement" under section 8(1) of the 2003 Act (which allowed an LDT to be brought to an end early by an agreement provided that it also makes provision for compensation). The practice of immediately entering into a post lease agreement after the lease is signed is likely to be adopted for MLDTs under section 8A in a similar way. Aside from concerns regarding complexity and transparency, this kind of approach involves risks for both parties (as neither party has any guarantee that the other party will sign the post lease agreement, meaning that both landlord and tenant could potentially be held to a lease which is longer than was originally intended and agreed in heads of terms). It is also directly at odds with the move away from post lease agreements (historically used with regard to fixed equipment prior to the enactment of the 2003 Act which rendered them incompetent). In our view, landlords and tenants alike would welcome the flexibility of being able to enter into a lease of between 5 and 10 years.

Policy Objective - Opportunities for Diversification

The process for diversification was introduced by the 2003 Act and amended by the 2016 Act. We do not have any specific comments other than that the statutory procedure allows tenants to diversify into non-agricultural use, and therefore appears to have achieved the policy objective.

Policy Objective - Cheaper and Simpler Dispute Resolution

The 2003 Act significantly changed the process of dispute resolution in agricultural tenancies and moved disputes from arbitration to the Land Court. Whilst we are aware of the policy reasons behind this, we suspect that few landlords or tenants would agree that the focus on the Land Court has resulted in "simpler and cheaper" dispute resolution. In recent years, there have been 2 high profile rent review cases which have been held in the Land Court - *RW Morrison-Low v. The Exec. Of the Late TH Paterson (known as the "Moonzie case")* and *Capital Investment Corporation of Montreal Limited v Elliot* (known as the "Roxburgh Mains case"). Whilst we cannot comment on the timeframe or cost of dealing with those cases at arbitration and therefore compare the different methods of dispute resolution, these protracted cases mean that it would be difficult to conclude that the Land Court provides a cheap or simple method of dispute resolution.

That being said, it is not clear that further legislative reform would assist matters. The industry continues to show support for alternative dispute resolution, the most recent example of this being the Guide to Alternative Dispute Resolution published by the Tenant Farming Commissioner on 17 April 2018. The Codes of Practice issued by the Tenant Farming Commissioner also encourage the parties to consider alternative dispute resolution and use court procedure as a last resort. Therefore, we query whether it would be helpful to introduce further reforms to this area which are likely to result in confusion across the sector, particularly when guidance and codes of practice can be a useful tool in this area.

Policy Objective - Other Measures to Protect the Interests of Tenants

Right to buy - One of the key measures which was introduced by the 2003 Act was the pre-emptive right to buy. Since the 2003 Act came into force, there has been uncertainty about what actions by the landlord "trigger" the tenant's pre-emptive right to buy. The consequences of such uncertainty can often be landowners who are reluctant to consider any proposal for tenanted land, which can result in lost

opportunities for both landlords and tenants and stifle development in rural areas. The uncertainty around the right to buy can also have a detrimental effect on the landlord/tenant relationship as the parties are not clear on the extent of their rights. Recommendation 18 of the Review Group's Final Report on Agricultural Holdings Legislation stated that further consideration should be given to when the right to buy might be triggered. This recommendation has not been implemented and we think that scrutiny in this area would be helpful.

We also think some scrutiny should, in particular, be given to section 29(2) of the 2003 Act. Section 29(1) provides that the right to buy can be exercised where notice is given under section 29(2). Section 29(2) provides that "Notice is given under this subsection if the tenant, within 28 days of receipt of the notice under section 26....". However, the right to buy can be triggered in cases where notice was not given under section 26 (where an action with a view to a transfer has been taken but no notice was given). In these cases, no provision seems to be made for the right to buy to be exercised. If the transaction completes and there is a transfer of land, the tenant can take action against the new owner within 3 years (section 29(3)). However, where the transaction does not complete, it seems that the right to buy may have been triggered but there is no provision for the right to buy to be exercised.

Fixed Equipment - The 2003 Act also reformed the law relating to fixed equipment. In particular, the 2003 Act made it incompetent to enter into a post lease agreement which imposed the obligations for repair and renewal on the tenant. In addition, it allowed tenants to seek to nullify existing post lease agreements in specified circumstances. The complexities of these provisions when applied in practice can be seen from the series of decisions by the Land Court (*Telfer v Buccleuch Estates Limited*). It is interesting to note that the 2003 Act has tried to move away from post lease agreements in the context of fixed equipment but leaves parties with no option but to enter into a post lease agreement in order to agree a tenancy between 5 and 10 years.

Limited Partnerships - The other key reform brought into force by the 2003 Act related to limited partnerships. Given the volume of litigation on the subject of limited partnerships since 2003, the provisions relating to limited partnerships have been under substantial scrutiny since their enactment. We anticipate that there will not be any scope for reform in this area (either relating to technical matters or wider policy) and further scrutiny may be of limited value.

OTHER ACTS NOT LISTED

Land Reform (Scotland) Act 2016, Part 6

While this Act is very recent, we would urge the REC Committee to scrutinise the reintroduction of non-domestic rates on shootings and deer forests in the Land Reform (Scotland) Act 2016. This measure was introduced despite serious committee concerns which were never addressed. The commitment from the Minister at Stage 2 to return to the Committee with more evidence after valuations and before implementation appears to have been forgotten. Impact assessments were incomplete, Assessors were given an impossible task, and rural businesses have been left to work through a chaotic system and pick up the bill.

While we appreciate this is particularly new legislation, the procedural issues are fully apparent and can be learnt from. There can also be analysis completed to produce a post legislative financial memorandum at this stage in order to gain an informed understanding of the measure. We would welcome a repeat of this exercise once the appeals process has completed.

Having been engaged in this reintroduction process from the beginning, SLE would be happy to provide the Committee with a more detailed critique of the process.