



SCOTTISH LAND COMMISSION  
COIMISEAN FEARAINN NA H-ALBA

### Tenant Farming Advisory Forum

#### Minutes of the Meeting of the Tenant Farming Advisory Forum (TFAF) held at NFUS Offices, Ingliston Wednesday 6 July 2022 at 2pm

Present:		Actions:
Dr Bob McIntosh	Tenant Farming Commissioner	TFC
David Johnstone	Scottish Land & Estates (SLE)	DJ
Stephen Young	Scottish Land & Estates (SLE)	SY
Christopher Nicholson	Scottish Tenant Farming Association (STFA)	CN
Gemma Cooper	National Farmers Union Scotland (NFUS)	GC
Mark Fogden	Scottish Agric Arbiters & Valuers Assn (SAAVA)	MF
Jon Robertson	Agricultural Law Association (ALA)	JR
Euan Ryan	Royal Institution of Chartered Surveyors (RICS)	ER
Francis Ogilvy	Royal Institution of Chartered Surveyors (RICS)	FO
Fiona Leslie	Scottish Government (SG)	FL
Alan Barclay	Scottish Government (SG)	AB
Sarah Allen	Scottish Land Commission (SLC)	SA

#### 1. Welcome and Apologies

Apologies were noted from Sarah-Jane Laing, Andrew Wood and Douglas Bell. TFC welcomed everyone to the meeting and noted Stephen Young was standing in for SJ Laing and Francis Ogilvy and Euan Rollo for Andrew Wood. Christopher Nicholson joined the meeting remotely.

#### 2. Minutes of the last meeting – 22nd January 2021

The minutes were agreed. Regarding Action 7 - *SJL to raise issues regarding agricultural tenancies at RELM and Aim to Sustain meetings* - SY advised that SLE had a meeting with Aim to Sustain next week and SJL could update TFAF at the next meeting.

#### 3. Legislative Proposals

FL explained the legislative proposals outlined in the paper that had been circulated to members.

##### 3.1. Land Use Tenancy (LUT)

This proposal sits within the recently published [consultation](#) on a new Land Reform Bill. FL informed members that she would circulate a proposed outline framework for LUT before the consultation closes on 25 September.

FL explained that the purpose of the proposed LUT is to provide opportunities for land management in relation to the climate change agenda, enabling tenants to carry out activities currently difficult to undertake or prohibitive under the terms of agricultural tenancies e.g. peatland management, tree

planting and other environmental activities. It is envisaged that LUTs would be available for new tenancies and for existing tenants to move into. The leases were likely to be long-term given the nature of the land uses they sought to enable.

Members discussed the use and perception of commercial leases as they can and do currently provide for non-agricultural activities. FL explained that feedback suggested that many do not want to enter a commercial lease and providing a government framework for leases to enable non-agricultural land use might be welcomed. It was suggested that there might be a branding issue around commercial leases and TFC questioned why commercial leases are not being used if they could do all that the LUT proposal covered. The LUT would provide a single lease for all activity on a holding rather than having an agricultural lease with separate commercial leases for each alternative activity; some landlords may find this attractive and so be encouraged to provide land for leasing.

MF suggested that the proposed LUT essentially provided freedom of contract yet was routed in agriculture which would be good thing, although it might be a challenge to get people to convert from an existing tenancy. FO agreed that if the proposed LUT provided a template that could be varied to provide freedom of contract it should be welcomed.

CN asked whether the LUT might sit alongside an existing tenancy, similar to a sporting lease.

It was agreed that the devil would be in the detail and in balancing the rights of landlords and tenants. FL noted that she was meeting Jeremy Moody (CAAV) next week to discuss taxation issues.

Action 1	FL to circulate a paper in September with further details on the LUT proposal.
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### 3.2. Small Landholders – Modernisation of tenancies

FL explained that this proposal related to 59 tenants and 5 (known) landlords (including CES) who have small landholders tenancies, half of these are on Arran with some in Ayrshire. All known parties are to be issued with a letter asking them to engage in the consultation. GC suggested that TFAF members be copied into the consultation details so that they could promote within their own memberships and encourage those with an interest to respond.

Action 2	FL to circulate details of Small Landholders consultation.
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### 3.3. Powers for the TFC

FL asked for feedback from members on whether the TFC should have the authority to sanction and impose financial penalties on anyone found to be in breach of TFC Codes of Practice. This would be in line with recommendations proposed within the [Tenant Farming Commissioner functions: review - gov.scot \(www.gov.scot\)](http://www.gov.scot) and mirror the proposals in the Land Reform Bill consultation for a Commissioner to investigate and report on breaches relating to the Land Rights and Responsibilities Statement.

Action 3	All to email FL directly with comments on new powers for the TFC by 31 <sup>st</sup> August.
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### 3.4. Game/Deer Damage

FL advised members that colleagues are looking at future legislation for deer and game. Game damage arising from the activities of sporting tenants had been discussed at the January TFAF meeting, but any further evidence would be helpful.

Whilst current legislation enables a tenant to make a claim against a landlord for game damage, there was a discussion about how it is rarely, if ever, used. The following points were raised:

- damage assessments used to be carried out by farm arbiters and skills have now been lost.
- It is difficult to assess the extent and value of damage and the cost of assessment is prohibitive to pursuing a claim.
- A methodology for assessment of damage should be created – based on evidence for different crops/game; or could the assessment be made along similar lines to assessing damage for installation of pipelines.
- Problems may be exacerbated by tree planting displacing deer. Agreeing appropriate action can require different landowners, sporting tenants and agricultural tenants to address problems collectively.
- deer are not such a problem as there is a balancing measure in being able to control them, there should be a similar balancing measure for game birds.
- TFC advised that NatureScot had been helpful in conducting counts and taking action in some cases he had been involved in.
- Disturbance from shooting activities is also a problem where the frequency of shoots has increased.
- Although current statutory provisions require the Land Court to determine the figure for damage, TFC suggested that a landlord and tenant could agree to appoint an arbiter to set a value, notwithstanding the statutory provision.

Action 4	All to email FL directly with any additional comments on game/deer damage by 1 <sup>st</sup> August.
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### 3.5. Storm damage to fixed equipment

If alternative provisions for replacement/repair of storm damaged fixed equipment are to be taken forward, FL advised that evidence is required regarding acceptable notice periods and information to be included in notices. JR advised that there is no provision at the moment for storm damage as it is not included in provisions relating to “fair wear and tear” and “natural decay”. At the moment no one is responsible, and it would require legislation to require a landlord to replace or make good damage by storms.

TFC suggested that most problems occur where there is no insurance. CN advised that S38 (?) Notice with a 3 month response period meant that works were being delayed. TFC suggested that a clause in Schedule 5 could be added to remove notice periods in emergency situations. FL cautioned that any proposals would need to align with planning legislation.

FL invited further comments and advised that, following comments, she would provide a further paper on this in the Autumn.

Action 5	All to email FL directly with any additional comments on storm damage to fixed equipment by 31 <sup>st</sup> August.
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### 3.6. Waygo

FL explained that issues around the lack of legally binding timescales for waygo were causing problems for both landlords and tenants.

DJ suggested that the quality of information also needs to be addressed alongside timescales. CN suggested that tenant's claims could be made before the end of the tenancy, with the aim of having everything completed before a tenant vacates the holding with payment to be made on the term date. FO suggested that claims for dilapidations may be difficult to assess prior to a tenant vacating the holding. FL suggested that, given the experience of the amnesty, 18 months rather than 12 months might be appropriate timescale to begin waygo negotiations.

Action 6	All to email FL directly with comments on waygo timescales by 31 <sup>st</sup> August.
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### 3.7. Amendment to rules of good husbandry and good estate management - 1948 Act

FL advised that SG intends to amend the rules of good husbandry and estate management to enable tenants and landlords to meet future land use challenges such as climate change measures. DJ asked if the good husbandry rules are changed how would this relate to the LUT proposal? FL said that she would share the views of ARIOB in relation to this – they next meet at the end of August but this may not be on their agenda. She invited members to consider any unintended consequences of this proposal.

Action 7	FL to provide a paper for members on proposed amendments of good husbandry rules by 31 <sup>st</sup> October.
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### 3.8. Schedule 5

FL advised that Schedule 5 needed revisiting to enable future proofing and to provide tenant farmers with same opportunities as other farmers in mitigating or adapting to climate change. She also suggested that some activities included in the Schedule are no longer applicable.

Action 8	FL to provide a paper for members on proposed Schedule 5 amendments by November.
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### 3.9. Diversification

FL advised that provisions for diversification require review to enable climate change/biodiversity activities to be included. DJ asked how this would relate to the LUT, in a similar vein to his point raised at 3.7. FL advised that LUTs and agricultural tenancies might sit side by side in which case there was still need for renewed diversification procedures for agricultural tenancies.

Action 9	FL to provide a paper for members on proposed amendments to Diversification provisions by November.
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### 3.10. Rent Reviews

FL advised that the 2016 Act provisions and some 1991/2003 Act provisions require revoking before new provisions could be introduced. DJ suggested that provisions with regard to housing needed to be fleshed out.

Action 10	FL to provide a paper for members on proposed rent reviews by November.
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### 3.11. Resumption

FL advised that compensation provisions for resumption were to be revised mainly so that resumption for development was fairly compensated for. She suggested that this would likely be for whole farm and partial resumptions and cover all tenancies, but provisions would need to be balanced on the basis of ECHR.

Action 11	FL to provide a paper for members on proposed compensation provisions for resumption by January 2023.
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FL explained that the process of developing proposals was to be very intense for her team up until Christmas. Time would be tight to develop all proposals and members could be called upon to provide evidence to Parliamentary Committees during their development.

Members agreed to try to prevent the process being damaging to the sector, citing that 127 tenant farming amendments were put forward during development of the last Bill. TFC advised that the sector should try to agree proposals before they pass through Parliament, and the more members could do collectively in advance the better. TFC suggested that members do what they can to assist SG's Ag Holdings Team by responding to calls for comments and TFC and TFAF would do what they could to help reach consensus on the proposed provisions.

#### **4. Housing in the Agricultural Holdings Sector**

TFC referred the paper circulated following the stakeholder meeting in June with the Minister for Zero Carbon Buildings, Active Travel and Tenants' Rights. The Minister is now aware of the sector's concerns around implementing new building standards and energy efficiency targets, but discussions hadn't yet been had on how rental values are (to be) ascertained for houses held within an agricultural holding. Members recognised that there is a risk that housing issues will impinge on rent review proposals.

FL advised that the Minister would like another meeting(s) with stakeholders.

DJ advised that housing in agricultural holdings should not be shoehorned into regulation around the private rented sector (PRS). All agreed that working to the same standards as proposed for the PRS is appropriate, but issues around who is responsible, who pays, acceptable timescales and if/how improvements are reflected in rent require consideration as these are different to the PRS, and the starting point is different than in the PRS due to prior landlord and tenants improvements. FL advised that the length of time to bring housing in ag holdings in line with the PRS should be fair and be sufficient to enable implementation.

Members discussed whether housing should come out of the agricultural lease and what the consequences might be of leaving housing in the lease. MF suggested the consequences of leaving housing within the tenancy may result in houses being taken out of the tenancy at a change of lease. He suggested that the first step is to establish who is responsible for implementing the new standards. DJ acknowledged that implementation of the standards should be fair and equitable for both landlords and tenants.

CN explained that in 1991 Act tenancies the house is considered as fixed equipment and the tenant pays rent for the house within the farm rent. He suggested that it is irrelevant to consider an open market rent for the farmhouse as the tenant is not able to choose alternative accommodation. The house may be larger than the tenant requires and there may be strong demand in the PRS but comparable rents in the PRS are not relevant as a potential PRS tenant is not stepping into the shoes

of an agricultural tenant. CN estimated that 25% of tenants (STFA members) have PLAs so costs will fall on the tenant, but these would be black patched and eligible as tenant's improvements. CN suggested Fraser Barraclough's 2002 book *A Practical Guide to Rent Review of Agricultural Holdings in Scotland* is still relevant today.

TFC suggested convening a working group to discuss the issues fully and draw up an agreed approach. All TFAF members would be invited to join.

Action 12	TFC to convene a housing working group
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## 5. Regional Land Use Partnership Pilot Update

In relation to the paper circulated, GC advised that NFUS has been engaging in RLUPs at a national and regional level. Development of governance structures had been slow in areas outwith the National Parks, with some local authorities more engaged than others and limited funding may be curtailing development. The RLUPs are currently piloting governance structures and members thought that piloting delivery was some way off.

Action 13	TFAF (SA) to ask SG how much funding is going towards piloting RLUPs
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## 6. Update from TFC

The paper circulated was taken as read.

## 7. Member updates/AOB

FO suggested that the TFC's paper on the future of agricultural tenancies (circulated for information) had noteworthy conclusions and reflections. DJ asked how these could be taken forward and fed into development of LUTs, noting the importance of joining policy up and citing the example of CES looking to end tenancies rather than creating them.

It was suggested that the TFC's paper be lodged with SPICe, published on SLC website, sent to Ministers and included in response to the consultation on LUTs.

Action 14	SA to publish and circulate TFC's paper on future of agricultural tenancies.
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CN informed members that following the work done by CES on promoting tree planting, CES is seeking 50% of carbon income where tenants are planting trees on agricultural holdings. CN suggested that this would ultimately deter tenants from considering tree planting. TFC advised that he was aware of the situation and negotiations were ongoing with 50% not yet agreed.

CN also advised of a case of a tenant adjacent to a 15-20y old windfarm where fencing and road repairs were required. As the windfarm contract is with the landowner the tenant has no direct contact. TFC suggested that the tenant write to him to see how he might be able to help.

## 8. Date of Next Meeting

Members agreed to next meet in October.

### List of Actions

Action 1	FL to circulate a paper in September with further details on the LUT proposal
Action 2	FL to circulate details of Small Landholders consultation
Action 3	All to email FL directly with comments on new powers for the TFC by 31 <sup>st</sup> August
Action 4	All to email FL directly with any additional comments on game/deer damage by 1 <sup>st</sup> August
Action 5	All to email FL directly with any additional comments on storm damage to fixed equipment by 31 <sup>st</sup> August
Action 6	All to email FL directly with comments on waygo timescales by 31 <sup>st</sup> August
Action 7	FL to provide a paper for members on proposed amendments of good husbandry rules by 31 <sup>st</sup> October
Action 8	FL to provide a paper for members on proposed Schedule 5 amendments by November
Action 9	FL to provide a paper for members on proposed amendments to Diversification provisions by November
Action 10	FL to provide a paper for members on proposed rent reviews by November
Action 11	FL to provide a paper for members on proposed compensation provisions for resumption by January 2023
Action 12	TFC to convene a housing working group
Action 13	TFAF to ask SG how much funding is going towards piloting RLUPs
Action 14	SA to publish and circulate TFC's paper on future of agricultural tenancies