The Committee will meet at 2.00 pm in the Committee Room 1.

1. **Subordinate legislation:** Ross Finnie MSP (Minister for Environment and Rural Development) will move S1M-3497—

   that the Rural Development Committee recommends that the Codes of Recommendations for the Welfare of Livestock: Animal Health and Biosecurity (SE/2002/273) be approved.

2. **Agricultural Holdings (Scotland) Bill:** The Committee will take evidence from—

   Robert Balfour (Scottish Landowners Federation)
   Andrew Hamilton (Royal Institution of Chartered Surveyors)
   Sandy Lewis (Scottish Estates Business Group)
   John Kinnaird (National Farmers Union for Scotland)
   Ian Melrose (National Farmers Union for Scotland)
   Andrew Thin (Scottish Tenant Farmers Action Group)
   Angus McCall (Scottish Tenant Farmers Action Group)
   Stewart Jamieson (Scottish Tenant Farmers Action Group).

3. **Amnesic Shellfish Poisoning:** The Committee will consider correspondence from the Minister for Environment and Rural Development and the Minister for Health and Community Care.

4. **Inquiry into Integrated Rural Development (in private):** The Committee will consider a draft report.

Tracey Hawe
Clerk to the Committee
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REPORT ON THE CONSULTATION PAPER: ANIMAL HEALTH AND BIOSECURITY, PROTECTING SCOTLAND’S INTERESTS

Overview and Summary of Responses

Introduction

1. This report summarises the main points made in the responses to the consultation on the draft Code of Recommendations on Animal Health and Biosecurity.

Background

2. The draft Biosecurity Code was published for consultation on 18 March 2002. It comprised 3 parts: Part 1 for Farmers and Other Owners of Farm Animals; Part 2 for Recreational Users of Farmland; and Part 3 for Utility Workers. The official closing date of the consultation was 7 June 2002, though a number of responses were received after that date and were also taken into account.

3. The Code aims to stress the importance of biosecurity in that it is the responsibility of everybody who lives, works, visits and enjoys the countryside to reduce the risk of disease occurring and spreading among animals. Biosecurity is more than cleansing and disinfecting, it includes, for example, the prudent sourcing of stock, quarantine and testing and vaccination. Animal diseases affect animal welfare, cost time, money and effort to eradicate. The Code recommends measures that can be taken to reduce such risks in Scotland.

Consultation

4. Approximately 600 copies of the consultation paper were sent to representative organisations, professional bodies, local authorities and Scottish based Animal Health Offices. The consultation paper was also available on the Scottish Executive website. The covering letter to the consultation requested that, ideally, comments should be on the respective parts of the Code. Comments were also invited on the detailed aspects of biosecurity and on how best the Executive could ensure that the biosecurity message can be promoted over time.

5. In total, 58 responses were received on the Code: 34 from representative organisations, of which 19 were from organisations representing the farming industry; 4 from veterinary officers; 4 from veterinary surgeries; 2 from specialist veterinary practitioners and one from the British Veterinary Association. 5 responses were from Local Authorities, 2 from Recreational Groups and 5 from individuals. Only one respondent chose to remain anonymous.

6. Out of the 58 responses, 34 were of a general nature. The largest proportion (43 of the 58) were on Part 1 of the Code. There were 31 and 24 comments relating to Parts 2 and 3 of the Code respectively. Ten respondents chose to comment on each Part and also make general comments on the Code. Four representative organisations acknowledged receipt of the Code, but chose to return “no comment” on the paper. Some responses voiced opinions on issues beyond the scope of the consultation, for example, 20 day movement rule, illegal meat imports and Foot and Mouth Disease Inquiries.
Overview of Responses

7. In general, the proposed Code of Recommendations on Biosecurity was welcomed as a common sense approach towards reducing the spread of animal diseases. Three main themes were evident from the comments received. Firstly, there were those concerned that the Code had no legal status; was unenforceable; or who would welcome the Code having further legal power. Secondly, there were those who saw the Code as a form of “repressive legislation”: too restrictive, unrealistic to achieve and, potentially, further “red tape” for farmers. Thirdly, there were some representative organisations that claim to be following stringent biosecurity procedures already and think that the advice could potentially be patronising to farmers who will feel they are being ‘taught’ advice that they already know.

Biosecurity Code Summary – General Comments

8. Within the general responses, some representative organisations consider that certain groups of people had been omitted, for example that deerstalkers and gamekeepers should be included in the Code. In addition, it was noted that horses had not been mentioned within the Code.

9. The best way of “getting the message across” was raised. One respondent said that the majority of countryside users were responsible, but suggested that there was a small sector that were irresponsible and, even if they read the advice, did not think it applied to them. Education was suggested as a useful mechanism for the transferring of information; improved education and training should be offered in the recognition and identification of notifiable diseases. The development of a website was a favoured idea, with further information (for example, clinical signs of animal diseases, lists of approved disinfectant, etc.) and links to related websites.

10. Comments were made on the format of the document. Some organisations argued that it was too long. The Code should be divided into 2 separate, stand-alone codes; one specifically related to farmers and the other encompassing advice for recreational users of the countryside and utility workers. Another representative organisation suggested 3 separate documents for Parts 1, 2 and 3.

11. Responses recognised that some elements of the Code were underpinned by law. Others stated that the Code lacked legal substance and was too “wishy-washy”. Some representative organisations had no objection to the “stiffening” of the Code under the Agriculture (Miscellaneous Provisions) Act 1968. On the other hand, there were those who feared that the Code could develop into cumbersome legislation that would be difficult to control and would add further “red tape” to the farming industry.

12. A notable number of organisations believed there should be consistency and linkage between the Biosecurity Code and other Codes, for example the proposed Scottish Outdoor Access Code and the Prevention of Environmental Pollution From Agricultural Activity Code of Good Practice.
Biosecurity Code Summary - Part 1

General Comments on Part 1

13. There were suggestions for issues that could be included in the Code. Firstly, the danger of animal diseases spreading to humans (zoonotic disease). Secondly, the Code should highlight that animal diseases had the potential to affect environmental quality as a consequence of carcass disposal, disinfection procedures and the disposal of slurry, etc. Thirdly, there was concern that the Code did not include advice on the recommended best practice for the disposal of carcasses on agricultural land.

14. One respondent stated that if a farm immediately raised its standards to those suggested in the Code, the cost implications would be vast.

Comments on “Planning to Avoid Disease”

15. The importance of farmers having a ‘farm specific’ biosecurity plan was highlighted. There should be linkage of quality assurance schemes with the Code. Some such schemes followed (and had been for some time) biosecurity guidelines which were more stringent than those laid out in the Code.

16. The use of signposts was mentioned as a good idea to direct visitors to the farmhouse.

17. Concern was raised about the wording of “Discourage anyone coming onto your farm with dirty clothes or footwear”. A couple of respondents thought this would cause recreational users of the countryside to feel unwelcome.

18. The provision of cleansing and disinfectant materials was strongly emphasised. Farm premises should have a place where water, pipes, brushes and chemicals, etc. were available, where it was easy to cleanse and disinfect yourself, equipment, vehicles, etc. The importance of cleansing and disinfecting footwear between farm visits was emphasised. If cleansing and disinfecting facilities were not readily available and easy to use, people would not bother with the appropriate procedures.

19. A respondent said that the advice regarding clothing / washing was more suited to an “intensive-care ward” than for animals living outdoors where wildlife roams.

20. The risk of dirty transport vehicles spreading animal disease was highlighted by many organisations. Although cleansing and disinfecting rules do vary for farmers and commercial vehicles, the ultimate aim was the same and the guidelines in the Code should be the minimum. In addition, several organisations commented on the importance of cleansing and disinfecting hired or borrowed equipment.

21. Quad bikes should be mentioned because they are a regular mode of transport for farmers. Farmers might often travel to nearby farms using quad bikes for ease. This could be a source of disease spread if such vehicles are muddy. In addition, it was stressed that quad bikes were hard to cleanse thoroughly and disinfect and this point needed to be stressed.

22. Several comments supported the advice to maintain stock proof boundaries. Avoiding nose to nose contact was a sensible precaution, but was hard to achieve in practice, for example, poor quality fencing on some rented land and farms.
Comments on “New Animals to Farm”

23. Buying from a single source (for example, tups) could restrict breeding programmes because of a limited gene pool. Rewording to “obtain stock replacements with as high a health status as possible” would be better. The Code should make it clear to purchasers of replacement stock that obtaining new animals from sources known to be free of diseases would greatly reduce the risks and the subsequent cost of controlling disease. Replacement animals should be bought from flocks with some degree of accreditation.

24. Advice on some “High Risk Activities” was thought to be unrealistic because, for example, it is believed to be common practice in remote crofting communities to share the use of bulls and rams. It was suggested that such animals should only be acquired if there was no realistic alternative. Another comment said that the use of hired animals should be discouraged.

25. The suggestion that foster animals and shared animals should be isolated and checked by a vet was deemed to be impractical and over cautious. A notable number said that foster animals should only be acquired if there was no realistic alternative. Such animals should be tested for specific diseases by a vet.

26. Farmers should belong to an approved livestock producers’ health scheme. A call was made for the availability of animal health certificates, giving the health details of a recently acquired animal for those buying and selling animals.

27. Many highlighted the importance of worming animals on arrival to a farm. A good medication programme should be in place on farms to administer to new animals on arrival. The treatment of external parasites should be included.

Comments on “Feed and Water”

28. The advice was thought to identify the risk areas, but did not give advice on prevention, for example piped water and keeping feedstores vermin free. In addition, dogs and cats should not have access to main field bins and troughs.

Comments on “Slurry and Manure”

29. A number believed that the advice to store slurry and manure for at least 6 months would be hard to meet; but the results of the forthcoming Nitrate Vulnerable Zones Regulations were awaited. It was recognised by many that sharing equipment was common place and a potential source of disease spread. Suggestions included a contractor’s code of good practice to clean equipment between farms.

Comments on “Records and Traceability”

30. Several organisations agreed that keeping accurate and up to date records of visitors and vehicles was a good form of register that could be useful in the event of disease surveillance and/or epidemiological investigations.
Comments on “Notifiable Disease”

31. Some respondents stated that farmers and stock keepers were already aware of the legal obligation to inform a local Animal Health Office (AHO) if a notifiable disease was suspected. Others suggested adding a supplementary list of notifiable diseases and, in an annex, a list of contact addresses and telephone numbers for Divisional AHOs.

Biosecurity Code Summary – Part 2

32. It was suggested that Part 2 should be omitted and readers referred to the proposed Scottish Outdoor Access Code. Recreational users of the countryside would be less likely to know about the Biosecurity Code, but there was a greater likelihood that they would be aware of the Access Code and would consult this for information.

33. A comment was received which suggested that Part 2 start with an explanation of how disease was spread. In addition, it should mention that stray young animals should be left alone. If stray animals were seen it would be best to report the matter to the nearest farm.

34. An addition of “respect signposting and ensure gates are left as they are found” was recommended. A notable number of comments emphasised that animals should never be fed and litter / left over food should never be dropped.

Biosecurity Code Summary - Part 3

35. There could be confusion over the meaning of the term “utility workers”, referring just to those who work for the gas, power, water and telecom industries. This would exclude others who may visit farms such as agricultural representatives (who will move from farm to farm), agricultural contractors (who may not necessarily come into contact with livestock, so do not fall under Part 1), etc.

36. Contacting the farmer prior to a visit was a good idea, but not always possible, for example in the case of emergency visits.

37. The importance of signposting, at the end of a farm road / drive, was highlighted. The bullet point stressing the danger of feeding animals and discarding unwanted sandwiches and litter was commended.

Next Steps

38. Consultation responses have been considered and further discussion with stakeholders has occurred. The draft Code has now been revised and is currently before the Scottish Parliament.

Scottish Executive Environment and Rural Affairs Department
Animal Health and Welfare Division
October 2002
Introduction

The Scottish Landowners’ Federation welcomes the publication of the Agricultural Holdings (Scotland) Bill, and the opportunity to provide comment on the principles of the Bill as it begins its legislative process.

Members of the SLF are major stakeholders in the agricultural landlord and tenant sector in Scotland. As the recognised representative body for those who own land in rural Scotland, our 3000-plus membership spans the full spectrum of size of landholding, from large estate to house and paddock; type of property, from residential property to farms, woodland, sporting and crofting estates, and ownership objective, including owner occupation through traditional let estates to investment properties.

The perception that we only represent "lairds" and large landed estates is incorrect. Our membership statistics demonstrate that half of our landowning membership own less than 450 acres (c 180 hectares). One third of our landowning members have land let on "full tenancies" governed by the Agricultural Holdings (Scotland) Act 1991 (hereafter referred to as the 1991 Act) and one third let land on a seasonal basis. Of those members letting land, half have commercial farming activities of their own. Our "landlord" members include traditional estate owners; private investors and institutional owners; retired farmers and their widows, and more recently new "lifestyle" owners of rural properties.

The SLF emphasises that the proposed legislation will impact upon every corner of the agricultural industry in Scotland, and will have a significant influence upon how the industry moves forward into the 21st century. This influence could, with appropriate measures, significantly re-vitalise the sector, creating opportunities through new lettings for new entrants to the industry and for existing farming businesses to develop. It could create opportunities for existing farmers to step back from active farming, whilst not leaving their properties, and allow others to farm their land.

Unfortunately, if legislation is passed in such a way as to erode the confidence of those who would otherwise wish to let land, or invest further in land they have let, then the influence could be such that the existing tenanted sector continues to decline. Far from fulfilling the Scottish Executive's Land Reform objective of greater diversity of land tenure, the outcome may be such that only those with sufficient capital to purchase land will be able to farm, and given the move towards world-market prices, very significant resources will be necessary to farm on any viable scale.

Part 1- New Tenancy Vehicles

The SLF fully supports the Scottish Executive's proposals for Short Limited- and Limited-Duration tenancies as detailed in the Bill. The proposals represent a loyal translation into legislation of the agreement reached between the Federation and the NFU of Scotland following publication of the Minister's White Paper in May 2000. Whilst not de-regulating the letting of land as extensively as legislation in the commercial sector, the opportunities thereby created to let land for agreed periods of time represent a major step forward from the restrictions of the present legislation, and the penal consequences of procedural errors.

Members of the SLF do want to let land, and look to legislators to provide a framework within which they can do so, fairly and with confidence that they can recover possession of their land at the end of the agreed period. Their reasons for letting land are many and varied, but they are
never through loss of interest in, nor responsibility for, their property and in no way should the letting of land be considered to be the first step towards disposing of it altogether.

The security of tenure presently afforded to full tenants under the 1991 Act has created an obvious barrier to the creation of new tenancies. By creating a network of secure tenancies across an estate, it has also prevented restructuring in such a way as to provide tenants, inevitably in smaller number, with more viable holdings as economic circumstances require. Although some regard the use of Limited Partnership tenancies within the 1991 Act as a device to circumvent the indefinite security of tenure provisions, their legal validity has been upheld (McFarlane v Falfield Investments Ltd 1997) and it must be recognised that the practice has created a significant number of new tenancies which would never otherwise have been created. By allowing owners to let for defined periods they have created opportunities, and are now allowing restructuring within estates.

The SLF welcomes the fundamental shift of policy implied by the new vehicles…that letting can be for more than annual grazing or mowing purposes but with realisation in legislation that a let is not indefinite. All other matters being equal, a non-bureaucratic and easily understood basis for letting on either short- or longer duration can only be to the benefit of all parties, and to the industry and rural economy alike.

**Part 2- Creation of Tenant's Right to Buy Farms**

The SLF notes, with some disappointment, the Minister's decision to proceed with this provision following consultation included within the draft Bill. We recognise the Minister's objective, to prevent tenanted land being sold without the tenant being given a reasonable opportunity to purchase it, but equally believe that in creating a tenancy it is never an owner's intention to restrict his or her opportunities to realise the value of the property on anything less than genuine market terms.

When an owner creates a tenancy, the value of the property is reduced…unlike the commercial sector where a tenanted property commands an enhanced value. The extent of the reduction is determined by when the owner might reasonably expect the lease to come to an end, and the extent of other, non-agricultural interests, in that land. Typically it may extend to 50%...ie that a single farm sold subject to an agricultural lease may sell for half the value it might realise with vacant possession.

Any third-party purchaser of a let farm acquires a property subject to tenancy, and the position of the tenant in such circumstances is unaffected...a change of landlord, but still protected by the 1991 Act. The perceived "uncertainty" in such circumstances, as partly used to justify this legislative provision, is in practice small if the tenant understands his legal position under the Act. Arguably other provisions in this legislation, on diversification and dispute resolution, fully address the only areas in which a new owner might be unreasonable.

In practice, most owners wishing to sell land subject to tenancy do offer it to the tenant, and it is not unusual for parties to willingly reach agreements between 65 and 80 percent of vacant possession value. In these circumstances the acquiring party can set aside his own tenanted interest in the property, and is willing to pay more than might be paid by any other buyer, to share the vacant possession uplift with the vendor. At this level, the proposals to allow the parties to voluntarily reach agreement, before the legal process applies, does not differ significantly from current practice.

Beyond this simple position, difficulties do arise. Even in the simple example referred to, the existence of statutory clauses will provide a distortion of voluntary negotiations...if one party has a legally enforceable fall-back position, no deal between parties can be entirely voluntary. Real difficulties arise however where the property being sold comprises let land and other property assets...a principal residence, woodland, sporting interests and/or other let farms. In these circumstances the right of any tenant to purchase the subjects of his lease amounts to a right to fragment a larger management unit or asset. Although the valuation principles in the Bill recognise these matters, the so called willing-vendor will be obliged to accept values for his property based upon assessed values rather than a properly derived market price. Valuation issues apart, many
owners will resent being forced to break up management units they have developed and having to
dispense with the services of staff such as gamekeepers and craftsmen employed across the unit as a
whole.

In the SLF response to the draft Bill, we detailed alternative proposals which would create a statutory
duty on owners to notify any 1991 Act tenant of intention to sell, and provide them with the
opportunity of making a realistic offer for the subjects of their lease, but reserving the right of the
owner to look for the market value of the whole property if he so wished. No let farm could be sold
without the tenant being able to make an offer… a position we believe is better than the proposals for
prior-registration of interest, which in any case we believe are unnecessary given the ability of proper
conveyancing practice to prevent transfers in breach of the legislation.

A pre-emptive right for agricultural tenants under the 1991 Act to purchase farms when their owners
choose to sell cannot be imposed upon the industry in an inert way…ie with no detrimental effect. It
may reflect current practice in some, indeed many, circumstances, but it cannot avoid impacting
elsewhere. Per se it will not prevent any owner from creating new tenancies under Part 1 of this
Bill, but by its very nature it will diminish their propensity to do so because of the uncertainty it
creates over their rights of ownership. Will such rights be extended to LDT tenants in the short or
longer term? Will valuation practice accurately reflect the value of fragmented properties? If an
owner has a tenancy fall vacant on a farm close to a principal residence, or part of a sporting asset, it
can only be expected that he will act to maintain the integrity of his property and its value…even if
he really would like to let someone else have the opportunity to farm it.

The SLF emphasises that its members do want to let land, but they must be given the
confidence to allow them to do so. Concern that politicians might, at some stage, extend pre-
emptive rights to an absolute right to buy wholly militates against such confidence…potentially
to the loss of everyone in the industry other than the very few such a situation would favour.

Part 3 Diversification of the Use of Agricultural Land

Many agricultural landlords already pursue policies of allowing tenants to diversify activities within
their agricultural leases, recognising the need for tenants to develop their businesses. It is important
to them, however, that tenants venturing away from traditional agricultural practice do not do so in a
way which jeopardises their capital, their core farming business, and ultimately their care of the
rented holding. Diversification is a much-promoted saviour of farming businesses, but practical
experience shows that the opportunities are more limited than imagined, and the success rate
disappointing unless appropriate skills and finance are available.

The Bill proposes to reverse the present position, allowing all 1991 Act tenants, and those under new
LDTs, to diversify unless the landlord objects. The owner cannot veto proposals, except for planting
of trees, and objections can be considered by the Scottish Land Court if difficulties cannot be
resolved. Against the background that the holding remains an agricultural holding, even if used for
other purposes, the provisions seem reasonable. The SLF however retains concern about the extent to
which a tenanted holding could be progressively changed in nature, such that it remained within the
scope of 1991 Act legislation when to all intents and purposes it harboured a predominantly
commercial operation. Is it the intention to allow agricultural tenants to carry out commercial
operations on preferential terms to those under commercial leases?

It is important that the process is seen to be fair to both parties under the legislation.. It will not be
possible to let agricultural land for solely agricultural purposes in other than the short term!

Part 4-Compensation under Agricultural Tenancies

Existing clauses within the 1991 Act address the extent to which agricultural tenants are entitled to
compensation for notified improvements to holdings when they leave, and moreover provide remedy
against pressure from factors and agents to agree other terms. We believe that this is an area of the
legislation where greater awareness of current rights is needed, rather than change to these rights.
Nevertheless we recognise that many tenants willingly enter into agreements which put compensation for improvements onto an accountancy basis, i.e. written off over a period of time instead of value to an incoming tenant. Our perception is that these agreements are entered into often as part of a wider agreement with their landlords, and where tenants believe that they are unlikely to quit the holding for some considerable time after carrying out the improvement, and that they expect to derive satisfactory return on their investment during that time. Clearly, the downturn in agricultural incomes in recent years has fore-shortened horizons, and perhaps proved certain investments uneconomic. Residual value has therefore emerged as an issue, when in better times it might not have done so.

Relief for the predicament in which tenant farmers who now wish to retire find themselves, would require retrospective legislation to over-turn write-down agreements voluntarily entered into. This would be wholly unfair on landlords who will have made no provision for such events, and for whom meeting cash payments at a time the tenant chooses to quit may be impossible. Perhaps the only fair solution would be for incoming tenants to be permitted to take over any residual value from the outgoing tenant, where the improvement is of value to the management of the holding. As such the assets would not then attract rental consideration under the new lease.

Part 5- Amendments to the 1991 Act

The SLF notes arguments promoted for changes to other clauses of the 1991 Act, for example on rent review and post lease agreements on maintenance and repairs. As stated earlier, provisions to simplify dispute resolution, included in the Bill, should be capable of addressing many of these concerns, allowing tenants easier and cheaper access to arbitration processes.

These issues would, we believe, benefit from open and honest discussion within the industry, rather than being subject of immediate legislative change. The SLF has given its backing to proposals for a Tenant Farming Forum within which these, and other issues, can be discussed and practical solutions developed before they become points of division. We hope the Scottish Executive will develop and implement these ideas.

Part 6-Rights where a Tenant is a Partnership

Our understanding had been that the Minister sought to address what he perceived to be the use of legal devices to circumvent provisions of both the 1991 Act, and this legislation, in future leases. We do not support the Minister's analysis, and would point to the opportunities which have been created under Limited Partnership arrangements.

We are extremely concerned at the scope and extent of the clauses in this Part of the Bill, reaching far beyond limited partnership arrangements and causing major complications for widely used conventional partnerships as agricultural tenants, particularly within families. They appear to challenge the integrity of a Scottish partnership as a legal entity separate from those comprising it, giving for example any member of the partnership, however minor in stake, the rights of de-facto tenant when any attempt is made to determine the partnership. Where would the present wording of this clause leave a family partnership on dissolution of a marriage within the partnership?

Part 7- Dispute Resolution and Land Court Jurisdiction

These proposals have the full support of the SLF, and we look forward to the Scottish Land Court developing appropriate procedures to implement the proposals and deliver the benefits which both sides of the landlord and tenant sector seek.

Representatives of the SLF will be happy to expand upon, and develop these comments as part of oral evidence, or through direct communication. (E-mail slfinfo@slf.org.uk)
A response from the Royal Institution of Chartered Surveyors in Scotland
23 October 2002

Jake Thomas
Assistant Clerk to the Rural Development Committee
Scottish Parliament
Room 3.7, Committee Chambers
George IV Bridge
EDINBURGH EH99 1SP

Dear Mr Thomas

Agribusiness (Scotland) Bill

The Royal Institution of Chartered Surveyors in Scotland (RICS Scotland) welcomes the opportunity to submit written evidence on the Agricultural Holdings (Scotland) Bill. RICS Scotland represents some 9,000 members: 7,000 chartered surveyors, 200 technical members and 1,800 students and probationers. They practise in sixteen land, property and construction markets. Members of the Institution’s Rural Faculty are responsible for the management of the vast majority of Scotland’s land resource, acting for landowners and tenants alike, both in the private and public sectors.

RICS Scotland represents neither the interests of landlords nor the interests of tenants. Our contribution throughout the ongoing consultation process on the reform of agricultural holdings has focused on the practical implications of change and the impact on the tenanted sector and the agricultural industry as a whole. We believe a healthy tenanted sector is vital to the success of Scotland’s agricultural industry and the wider rural economy and the interests of this sector at the heart of our response.

On behalf of RICS Scotland, I hope the attached written evidence will be of interest and assistance. Should you wish clarification on any of the points or should you seek further information at this point, please do not hesitate to contact me.

Yours sincerely

LYNNE RAESIDE
Head of Public Policy
PART 1: AGRICULTURAL TENANCIES

Types of Tenancy

RICS Scotland acknowledges that SLDTs and LDTs represent an important step forward in terms of providing more flexible letting arrangements. However, we fear that an opportunity has been lost to revitalise the tenanted sector more radically. We believe that freedom of contract, particularly in respect of lease lengths, is required to provide landlords and tenants with the flexibility they require to operate in constantly changing circumstances. We consider it completely illogical to prevent two informed and willing parties from entering into an agreement to let land for a period of between 5 and 15 years, e.g. for ten years, the period often required for fruit rotation, and we suggest that the 5 and 15 year restrictions on SLDTs and LDTs respectively are artificial and a hindrance to the industry as a whole. Importantly, flexibility would also address the changing nature of landlord/tenant relationships. In this respect, RICS Scotland believes that traditional landlord/tenant relationships, which have dominated the tenanted sector for hundreds of years, will become less important in the future. Instead, the farmer to farmer market is likely to become increasingly important: as the industry re-structures in order to meet the challenges which face it, farmers will wish to expand their holdings in order to improve economies of scale. We envisage existing farmers renting additional land from neighbouring farmers; for example, those who are on the point of retirement, but do not wish to leave their land, might let land to those wishing to benefit from economies of scale. Improving economies of scale will be essential to the future success of Scotland’s agricultural industry. Parties to these kinds of agreements will be looking for simple arrangements without the need for excessive professional advice. Yet, the new arrangements introduce unnecessary complexity which will result in parties to leases requiring detailed advice before proceeding.

Turning to existing tenancies, RICS Scotland agrees that parties should still be permitted to enter into 1991 Act leases subject to the proviso that the decision to enter into such a tenancy must be explicit. In this respect, we further agree that there should be no possibility of a tenancy converting into a 1991 Act tenancy by default. Where a 1991 Act tenancy is converted to an LDT, we do not agree that a minimum period of 25 years is required. It should be borne in mind that a tenancy will only be converted by agreement and the tenant will therefore have consented to forego security of tenure. The length of the lease following conversion should be a matter of agreement between the parties.

Notice to Quit

RICS Scotland does not agree that there should be no notice to quit for SLDTs. A notice to quit would bring certainty and would assist in preventing SLDTs converting to LDTs in error. This risk may be equal to either the landlord or the tenant – it should not always be assumed that the tenant will wish to continue with the tenancy and that the landlord will always be the party who wishes to terminate it. In addition, the serving of a notice to quit would be an important test in determining whether an SLDT had continued past a five year period. Without such a test, it could be extremely difficult to determine whether an SLDT had extended beyond the five year period and whether it should therefore convert to an LDT.

Turning to LDTs, we do not agree that there should be a requirement on landlords to serve two notices to quit. We believe this is overly complex and bureaucratic and the increased complexity will bring with it no corresponding benefits. We recommend that the existing notice to quit provisions, i.e. the notice should be served no earlier than 24 months and no later than 12 months before the end of the tenancy, should be retained. To mirror this timescale, we also suggest that tacit relocation should be amended to two years. We appreciate that the three year period of tacit relocation is intended to provide the tenant with sufficient certainty to invest. However, in reality, an additional year will have no impact on a tenant’s investment decisions.
It is disappointing to note that, despite previous representations, the Bill still does not contain a notice to quit procedure for tenants. It is impractical to suggest that a tenant should not be required to give any more than 24 hours' notice in writing of his/her intention to quit. As outlined above, it must be acknowledged that the landlord will not always be the one who wishes to terminate the tenancy and it is only fair that the tenant should be required to give sufficient notice of his/her intention to quit. Not only might continued rental income be important to the landlord in terms of cash flow for his/her business, but also continuity of occupation is important to preserve the quality of the land. To redress the imbalance, RICS Scotland would therefore recommend that a formal notice to quit procedure should be introduced for tenants, in the same form as that we recommend for landlords.

Early Termination and Extension of LDTs

We fully support the provision which allows landlords and tenants to extend, by agreement, the term of an LDT for any duration. We further agree that the parties to the lease should be permitted to bring a lease to an end if they are both in agreement.

PART 2: TENANT’S RIGHT TO BUY LAND

General Principle

RICS Scotland has grave reservations about the tenant’s right to buy land. While we acknowledge that a pre-emptive right will simply formalise what generally occurs in practice, we are concerned that confidence in the letting market will be seriously harmed. Already we are aware of landlords who are reviewing their letting policies and we fear that the introduction of a right to buy might have serious consequences in respect of the availability of land to let. We believe that a healthy tenanted sector is vital to the success of the agricultural sector as it offers opportunities for those who do not wish to or cannot afford to tie up capital in land, either to enter into the industry or to expand existing businesses. We understand that such opportunities are less readily available in countries where the market is dominated by owner-occupation as land prices are extremely high. If new entrants are unable to find a way into the market, it will be difficult to attract new blood and fresh ideas and also to maintain a vibrant local community.

Notwithstanding these concerns, RICS Scotland acknowledges that some problems have been experienced by some tenant farmers; problems which have led to calls for an absolute right to buy. We understand that such concerns include write-down agreements, which are perceived as disadvantaging tenants at waygo; post-lease agreements, which have passed responsibility for repairs and maintenance to tenants; and rent review formulae, which do not fully take into account the economic conditions pertaining at the time. Rather than introducing an absolute right to buy, which we believe will have dire consequences for the tenanted sector, RICS Scotland would welcome discussion on these matters to identify solutions which will address the concerns expressed by some tenants.

Ultimately, RICS Scotland believes that it is the interests of the tenanted sector that should benefit from this legislation, not the interests of individuals. In this respect, we would draw attention to research published by RICS Scotland earlier this year which concluded that the although the farm tenant right to buy will bring opportunities to individual tenant farmers, it is likely to have a damaging effect on the tenanted sector and thus on the wider rural economy. We therefore recommend that, rather than a pre-emptive right to buy, an obligation should be introduced for landlords to inform tenants of a proposed sale and to give tenants a chance to bid. We believe that much of the damage to the confidence in letting land could be avoided if such an amendment were made to the Bill.
Applicability

If a right to buy is introduced, we firmly recommend that it should be restricted to a pre-emptive right and that, as far as possible, it should mirror current practice whereby a landlord will generally offer a sitting tenant the opportunity to buy before marketing a tenanted property. We also believe it should be restricted to existing secure tenants who have a long-term interest in the land.

Pre-registration

We do not agree that pre-registration of interest is required as a landlord will know exactly who the tenants are and will therefore be in a position to notify them if he/she decides to sell. We fear that registration will be bureaucratic and costly for tenants, particularly given that they are required to re-register their interest after five years. There is also a danger that tenants may forget to re-register their interest after five years, thus losing the opportunity to exercise their right.

Exemptions

With regard to those transfers which will be exempt from the right to buy, we do not agree that Ministers should have the scope to modify the list by Order. We believe modifications should be the subject of primary legislation.

Valuation Procedure

We agree that it would be preferable for the parties to conclude a bargain voluntarily instead of relying on the statutory process. If, however, there is no agreement by the parties, it should be explicitly clear that they can ask a third party, either an individual or an appointing body, to appoint a valuer on their behalf. It is important that the Land Court is not the only vehicle for appointment as this may be off-putting to many tenants.

Turning to the basis of the valuation itself, we support the proposed mechanism and agree that the basis of valuation should reflect, as far as possible, current practice. This will ensure that there is no need for additional claims for compensation from landlords. In addition, we welcome the inclusion of an appeal against the valuation which we believe is required to comply with the ECHR. We understand the right of appeal is open to both the landlord and the tenant.

PART 3: DIVERSIFICATION

RICS Scotland supports proposals which will allow tenant farmers to diversify. We remain concerned, however, about the implications of allowing non-agricultural activities to be carried out within the terms of agricultural tenancies. We would therefore argue that where non-agricultural activities become the primary use of the holding, the land on which the activity takes place should be resumed from the agricultural lease and should form part of a separate agreement; otherwise tenants of agricultural holdings will benefit from greater protection than their counterparts who have ordinary commercial tenancies. This could be considered anti-competitive. We would further suggest that subletting should be confined to a subtenant business in which the head tenant has an interest. The Bill seems to open the door to, as an example, a holiday centre chain taking over a farm on sub-tenancy and developing a theme park, yet all the landlord would receive is the agricultural rent.

We support the notification procedures set out in the Bill and agree that positive consent should be required only in respect of planting and cropping of trees. In respect of other forms of diversification, we welcome the obligation on the part of the tenant to provide sufficient information to allow the landlord to decide whether or not there are grounds for
objection. The landlord will, of course, have to demonstrate that the grounds for objection are valid.

PART 4: COMPENSATION UNDER AGRICULTURAL TENANCIES

Although RICS Scotland agrees that compensation for improvements should be paid, we suggest that in respect of SLDTs, compensation should be a matter for agreement between the parties. Statutory provision for compensation in short term leases will make SLDTs unnecessarily complex.

We are disappointed to note that, despite previous representations to the Scottish Executive, the Bill still does not include a statutory term providing for compensation for dilapidations. The non-inclusion of a statutory term results, in our view, in an imbalance in the landlord and tenant relationship. Ideally, we would prefer compensation to be a matter of agreement between the parties to the lease, both in terms of improvements and in terms of dilapidations. If, however, compensation for improvements is to be provided for in the Bill, we believe that similar provision should be made in respect of compensation for dilapidations.

PART 5: MISCELLANEOUS AMENDMENTS TO THE 1991 ACT

RICS Scotland welcomes the fact that Scottish Ministers will no longer be required to appoint Recorders. We also agree that the Record should no longer need to be in statutory form.

PART 6: RIGHTS OF CERTAIN PERSONS WHERE TENANT IS A PARTNERSHIP

RICS Scotland is concerned that the provision to give certain partners in partnership a right to have the tenancy transferred into their individual names in certain circumstances will create difficulties in family situations. It must be borne in mind that many Limited Partnerships have been entered into for genuine reasons, in particular to suit family circumstances.

PART 7: JURISDICTION OF THE LAND COURT AND THE RESOLUTION OF DISPUTES

We agree that the Land Court should have universal jurisdiction over agricultural holdings law. We also welcome the change which allows either party to apply rather than relying on joint application.

However, we believe that arbitration by a single arbiter still has a vital role to play. Recourse to the Land Court should be considered as a last resort and ideally disputes should be settled by arbitration, with the arbiter being appointed by agreement between the two parties. Where agreement cannot be reached, the parties should have the option of asking a third party appointing body to appoint an arbiter on their behalf. We note that the Bill does allow for the appointment of an arbiter, either by agreement or by a third party, and we hope this method of dispute resolution will be encouraged.

With regard to the arbitration process itself, we welcome the repeal of Schedule 7 to the 1991 Act and we agree that parties should have discretion to determine the procedure by which the arbitration is to be conducted. Turning to appointment of an oversman, we would suggest, in the event of disagreement, that it would be more practical for applications to be made to the Land Court rather than to the Sheriff or the Court of Session. In making this recommendation, we acknowledge that the Arbitration (Scotland) Act 1894 would have to be amended accordingly.

Finally, we agree wholeheartedly that existing rights of appeal against an arbiter’s determination should be repealed and that the right of appeal should be restricted to questions of law only.
SCOTTISH ESTATES BUSINESS GROUP
WRITTEN STATEMENT OF EVIDENCE
AGRICULTURAL HOLDINGS (SCOTLAND) BILL

The Scottish Estates Business Group (SEBG) was developed as an information network among a number of progressive rural businesses and its membership includes estates both large and small. The group is committed to developing links with the wider business community, the Scottish Executive, Scottish Enterprise, HIE and the enterprise network to ensure the rural agenda is reflected in mainstream business activity.

SEBG businesses adopt a modern business approach to integrated land management and are committed to best practice in the industry. We subscribe to a Code of Good Practice and have an established track record, on which we are keen to build, of working in partnership with others to help maintain a vibrant rural economy.

SEBG supports the aims and ambitions of legislation that will help revitalise the tenanted sector. We endorse the Minister’s view that this is a Bill about “issues of letting land and not issues of landownership”. The SEBG is keen to see a modern, vibrant, tenanted farm sector fit for 21st century Scotland.

- SEBG fully endorses the Scottish Executive’s drive to introduce new and flexible tenancy arrangements. SEBG recognises the agreement between the SLF and NFUS on new tenancy arrangements. Our members accept the need to work within that framework.

- SEBG believes that there should be statutory provision for a Farm Purchase Scheme as outlined in our response to the Draft Bill consultation

- We endorse the view of the other industry organisations, NFUS, RICS, SLF in opposing an absolute right to buy.

- SEBG recommends the establishment of a Tenant Farming Forum. This proposal has received widespread support across the political parties and from the industry stakeholder organisations, SEBG, SLF, NFUS and RICS.

PART 1 NEW TENANCY ARRANGEMENTS

SEBG fully endorses the Scottish Executive’s drive to introduce new and flexible tenancy arrangements and recognises the SLF/NFUS agreement on Part 1. Our members accept the need to work within that framework.

SEBG would like to have seen greater flexibility to negotiate a lease for land on a timescale that was appropriate for individual business needs. We hope that the SLF/NFUS agreement may at some stage in the future offer a basis for more flexibility.

The need for flexibility is illustrated by a recent survey of SEBG members covering about 500 tenant farms which showed that over a ten year period 62 farmers had retired. Their holdings had been re-let or amalgamated with neighbouring holdings to facilitate farm business expansion. The use of 5 or 15 year terms in many of these cases would not offer sufficient flexibility particularly where tenants were expanding businesses or retirement planning.

SEBG supports the measures that allow both parties to extend an LDT. This should be for a duration to be agreed by negotiation. Again this would allow flexibility to meet individual farm and estates’ business needs.

PART 2 TENANTS’ RIGHT TO BUY
SEBG is very concerned about the provisions for a pre-emptive right to buy set out in part 2 of the Bill. We continue to believe that there is a real danger of the stated objective of the Bill – to stimulate the tenanted sector – being jeopardised by these provisions for reasons that we set out in our response to the consultation paper.

SEBG genuinely fears that the entire Bill as published will be distorted by those advocating an absolute right to buy for all farm tenancies. We believe the extension of the right in this way, or even the prospect of it being introduced at some later date would fundamentally undermine confidence in Scottish agriculture and irreparably damage the industry by decimating the tenanted sector.

SEBG supports and recommends the introduction of a statutory provision requiring landowners to notify tenants covered by Agricultural Holdings (Scotland) Act 1991 if a farm is to be sold on the open market. Further, SEBG believes that there should be a statutory provision for a Farm Purchase Scheme as outlined in our response to the Draft Bill consultation.

We endorse the view of the other industry organisations, NFUS, RICS, SLF in opposing an absolute right to buy.

Some of the perceived difficulties in the tenant farm sector are aggravated by the general state of the agricultural industry. Some of these issues may have a relevance to the right to buy debate for example the management of farm investment cycles, balancing good times against bad. Some issues however, for example modernising rent review procedures are not central to right to buy. These latter issues which we believe can help restore a climate of partnership and confidence in the sector SEBG has addressed in Other Matters.

There are two groups calling for an absolute right to buy, tenant farmers and others who see this as a part of a wider Land Reform agenda. In a Bill about the letting of land it is important to maintain a healthy balance between tenancies and owner occupation. In Scottish agriculture the owner occupied sector is currently greater at about 70% of the industry. All the key industry stakeholder organisations along with the Scottish Executive still believe in the value of a tenanted sector.

SEBG is committed to working with other key stakeholders to maintain a balance in this complex patchwork of rural businesses. We believe that the perception of industry stereotypes may be unhelpful in the shaping of legislation. For example, the landlord/tenant axis is a more complex picture in that there are tenants who occupy one holding as a tenant and another as a land owner and there are owners of holdings who also choose to rent another holding in addition. The reality is that people adopt individual solutions to meet their individual business needs.

Tenant farms are managed as a part of a business portfolio, as business assets by owner occupiers and estates. Tenanted farms are sold and almost without exception to the sitting tenant. However the existence of tenant farms does allow families to continue farming without undertaking the commitment of farm purchase and gives the choice to use their capital for other farm business investment. The availability of farms to rent also allows much needed new blood to come into the industry.

As an indication of the benefit to someone getting the first foot on the farming ladder, a typical SEBG dairy farm of 100ha. has a value for land and buildings of about £300 000. This represents a formidable capital investment for anyone new to the industry. They can, however, rent the farm for about £8900 per year. This level of rent would only service a loan equivalent of about £150 000 over 25 years. It is generally accepted within farming that the differential between rent and purchase is wide.

**PART 3 DIVERSIFICATION**
SEBG recognises and supports the important role non-agricultural income has had, and will continue to have, in enhancing and maintaining the viability of farm tenants’ businesses. It is, however, essential for landlords to have comprehensive rights of objection over whether the diversification proposal proceeds.

SEBG stresses that diversification takes place on the rented property and there must be adequate protection in the legislation to ensure the landlord does not suffer loss as a consequence of the activity. The grounds of objection in the Bill are not sufficiently comprehensive, particularly to protect situations where the diversification will have a negative impact on another tenant with a lease over the area of land affected.

SEGB endorses the measures in the Bill requiring the tenant to detail how the diversification is to be financed and managed. SEGB argues that this requirement should be expanded to oblige tenants to produce a business plan showing the business to be viable and that it has adequate financial support.

Tree planting represents a fundamental and often irreversible change in the land use. It is essential that measures in the Bill ensure that tree planting cannot proceed without the landlords’ consent.

**PART 4 COMPENSATION UNDER AGRICULTURAL TENANCIES**

Section 38 gives a tenant to a SLDT or LDT a statutory entitlement to compensation for improvements made to the holding. While this is inconsistent with SEBG’s belief that freedom of contract should be adopted as the way ahead for a vibrant tenanted sector, it is acknowledged that the Bill treats SLDT and LDT improvements similarly to 1991 Act improvements with Schedule 5 applying. If there has to be statutory control, SEBG welcomes the proposed consistency among tenancy types which will be of administrative benefit.

SEBG supports the compensation proposal set out in Section 40, with the amount payable to the outgoing tenant to be the value of the improvement to an incoming tenant. SEBG stresses that it is imperative for this to be the test. The incoming tenant must consider the improvement of value, increasing the productive capacity of the holding. Landlords must not be obliged to pay compensation for improvements which do not enhance the rental value of the farm. SEBG highlights that it is not uncommon for buildings to be erected for the benefit of an agricultural business of which the tenanted farm forms only part with their capacity excessive in relation to the size of the holding itself.

SEBG believes it correct to allow landlord and tenant to reach agreement on compensation (Sections 41 and 42) payable. This opportunity should be viewed as a business tool and will only be used if attractive to both parties who may want to avoid debate over consent/notice or reference to the Land Court.

Section 43 has the effect of removing the limit on disturbance compensation payable under the 1991 Act. SEBG believes that if this change is enacted it should be accompanied by clear provision that the onus lies with the tenant to prove loss. SEBG also suggests that this change could lead to conflict with wider rural development. At present, small resumptions relating to areas of land for road improvements, sale of additional ground to adjacent property owners, the extension of the village school car park, etc. can be concluded swiftly with reference to the current formulas. If this is no longer available delays are a realistic possibility.

SEBG supports the provision in Section 44 giving landlords a right to compensation for loss of value as a consequence of a tenant’s involvement in diversification or a conservation scheme.

**PART 5 AMMENDMENTS OF THE 1991 ACT.**
SEBG has no additional comments to make on this part of the Bill.

PART 6 RIGHTS WHERE A TENANT IS A PARTNERSHIP.

SEBG is concerned that Part 6 of the Bill, in seeking to clarify rights for the tenant in farming Limited Partnerships, has significant impact on other forms of partnership and potentially discriminates against partners by bestowing rights on the non-landowner partner as if they were a tenant. SEBG is concerned at the impact on future tenants wishing to define themselves as a partnership but who also have common interests with the landlord. We believe that the measures to outlaw Limited Partnerships cannot be retrospective. SEBG asks the Committee to note that many owners do not see the proposed fixed term tenancies as a replacement for Ltd. Partnership leases due to their inflexible durations.

PART 7 DISPUTE RESOLUTION AND JURISDICTION OF THE LAND COURT.

SEBG welcomes and looks forward to the implementation of the measures that offer a simple and cost effective route to dispute resolution. We welcome the proposed roles of both the Scottish Land Court and of arbitration as a route to dispute resolution. The option to pursue other alternative competent methods of dispute resolution is welcomed.

OTHER MATTERS

As in most industries, the ability to rent rather than buy is an important facility that brings flexibility to the market and allows farming businesses to be run without the need to find capital to finance ownership of the land.

Whatever legislation is proposed, the Scottish agricultural sector will still face significant difficulties and challenges threatening the future state of Scottish agriculture. Some of these will be addressed by the CAP Mid Term Review and by general industry re-structuring.

There are however, significant problems faced on the ground in everyday farm business activities. Of particular relevance to this Bill on Agricultural Holdings is the modernising of the landlord/tenant relationship.

SEBG, in reflecting the progressive views of its member Estates, recommends the establishment of a Tenant Farming Forum. Our recommendation is not put forward to supplant the variety of suggestions put forward on Right to Buy. We see this as a genuine way forward on continuing modernisation, to develop long term solutions for the industry and to sort out many of the difficulties encountered on a day to day basis.

TENANT FARMING FORUM

SEBG has recommended, in its response to the Draft Bill the establishment of a Scottish Tenant Farming Forum to carefully address many of the issues affecting tenants and landlords, some of which arise from and go beyond the scope of the Bill.

This proposal has now received widespread support from across the political parties and from the industry stakeholder organisations, SEBG, SLF, NFUS and RICS. We believe this proposal will expand the previous collaboration of the NFUS and SLF in modernising the tenanted farm sector.
AGRICULTURAL HOLDINGS (SCOTLAND) BILL

1. INTRODUCTION

NFU Scotland has a membership of some 10,500 representing around 70% of Scotland’s farmers, crofters and growers. More than 25% of NFUS members are tenant farmers. A wide consultation of the membership was undertaken on various aspects of the LRPG Landlord and Tenant Consultative Panel’s consideration of land reform in so far as they related to agricultural holdings legislation and subsequently the White Paper proposals published in May 2000.

The Bill gives substantial effect to the agreement between NFUS and the Scottish Landowners Federation on Limited Duration Tenancies (LDTs) and Short LDTs. In addition, the Bill makes provision for tenants’ right to diversify, tenants’ right to timber and new provisions for compensation. We will comment on these in the context of Parts 4 and 5 of the Bill as well as making comment on proposals for a pre-emptive right for secure agricultural tenants to purchase their holdings. We also wish to comment on other aspects of reform of agricultural holding legislation, which we believe, should be addressed.

2. SUMMARY OF NFUS POSITION

- NFUS welcomes the introduction of new forms of agricultural holding. Landlords will have flexibility in letting land coupled with confidence that they will be able to get the land back in hand at the expiry of the stipulated period.

- Provisions for Tenants to diversify are welcome but the grounds upon which Landlords may withhold consent are too extensive.

- NFUS welcomes the incorporation in the Bill of the detailed proposals from the Scottish Law Commission conferring a virtually universal jurisdiction in agricultural disputes to the Scottish Land Court, together with the consequent abolition of compulsory arbitration.

- NFUS supports the Minister’s proposal to introduce a tenant’s right of pre-emption when his holding is exposed on the market for sale. Measures should be introduced to prevent Landlords from frustrating the exercise of this right to buy. Valuation should be open market involving a willing seller and a willing buyer.
In view of the fact that there may be little or no opportunity for further reform of agricultural tenancy law in the near future, NFUS believes that other issues in relation to the 1991 Act should be addressed now. These include:

- variation of rent and a radical amendment to Section 13 of the 1991 Act to have rental determinations based on economic viability of the holding and the current economic conditions in the relevant sector of agriculture.
- restriction on the operation of notices to quit to modify the power of a landlord given in section 22 of the 1991 Act to issue an incontestable notice to quit.
- compensation at waygo should include compensation for improvements made to the holding notwithstanding post-lease contracting-out provisions or writing-down of the value of improvements over a relatively brief period.

3. RESPONSE TO CONSULTATION ON THE DRAFT BILL (CHAPTER 5)

• TENANCY ARRANGEMENTS

Purpose and Key features

NFUS welcomes the introduction of LDTs and SLDTs for the reasons identified in the Consultation. Where there is a conversion from a secure 1991 Act tenancy to a LDT, full statutory compensation should be available in respect of improvements undertaken during the currency of the original 1991 Act tenancy. We believe the conversion is tantamount to way go. The Bill’s compensation provisions in respect of LDT’s should be determined separately to reflect any improvements made under the new form of letting. Improvements should be valued according to their intrinsic value and not by reference to the value to the hypothetical incoming tenant.

Provision for conversion of SLDT by default to a 15 year LDT, commencing from the date of conversion is important in preventing continual roll-over of 5 year SLDTs and undermining the integrity of the LDT. Short-term letting of Farm Business Tenancies in England and Wales resulted in ratcheting-up of rents. Again, the possible unlimited use of consecutive short-term tenancies would not be consistent with good land management.

Writing, stamping and recording

In our agreement with SLF, stress was put on the need for compulsory minimum contents of both SLDTs and LDTs. We proposed that the new Act would have schedules giving pro-forma clauses for both SLDTs and LDTs to import legal certainty in the new landlord/tenant relationship. Failure to comply with these requirements should render the lease voidable. In that context, stamping and recording may be necessary if the document is to be founded upon. Stamping and recording dues should not be ad valorem but a modest standard fee shared between the parties.

Rent review arrangements

It is not appropriate to have elaborate statutory rent review provisions to apply to LDTs. Section 9 of the Bill must have legal certainty and avoid contracting out. The fall-back provision emulating section 13 of the 1991 Act is likely to be unworkable. (Indeed we would wish to see that section reviewed for secure tenancies in the light of recent bad experience involving rental determinations. This is addressed later in this submission.). The appropriate basis should be the economic viability of the holding, bearing in mind the purpose of the let, together with the current economic conditions in the relevant sector of
agriculture.

Statutory compensation rights

Extension of the 1991 Act compensation provisions to SLDTs and LDTs is appropriate. Consideration should be made to amending section 37 to make an agreement to write down a tenant’s improvements null and void rather than replying on an interpretation of the words “any agreement”. As far as compensation for disturbance is concerned, the lifting of the 2 years rent maximum limit is welcome. This provision does, however, beg the question as to whether consideration should be given to compensation for reorganisation in relation to a tenant’s quitting a LDT along the lines of section 54 of the 1991 Act.

Irritancy

Irritancy provisions reflect the NFUS/SLF agreement but we would welcome the views of the Scottish Law Commission before finalising policy in this area.

NFUS recommend that the Scottish Land Court’s proposed statutory protection against the effects of irritancy should be extended to all leases of agricultural holdings. It is appropriate that a pre-irritancy notice procedure be instituted giving a tenant a reasonable period within which to comply with his obligations having regard to the nature of the breach in question.

The opportunity should be taken of removing the undue hardship caused by the residency clause and the threat of irritancy involved.

In the light of the re-orientation of agricultural support towards agri-environment measures, the amendment of the definition of “good husbandry” will go some way to accommodating change and avoid putting tenants at risk. We would, however, encourage positive action in extending the scope of the definition to include “management agreements” and “schemes” as well as grants. Any change in the rules or the extent of section 26(2) of the 1991 Act disregard provision must be sufficient to give tenants the confidence to participate in schemes on an equal footing with owner/occupiers.

Conversion of a SLDT to a LDT and Notice to Quit

Provision to avoid a probationary device is welcome. No notice to quit process is required for SLDTs especially in view of the purpose of let for such a short-term arrangement. The provisions aimed at ensuring the integrity of the LDT are welcome, while recognising that circumstances may arise in which the parties may agree to terminate a LDT early and assign the lease. In view of the fact that sections 6 and 7 envisage the possibility of early termination by agreement, provision should be made for appeal should a party withhold agreement unreasonably. In addition to these provisions, there is a strong case for specific arrangements – in limited and extreme circumstances – for ending limited duration tenancies sooner than the agreed term available only to the tenant in the event that he needs to get out sooner, for example, because of financial difficulties or ill health. One year’s notice is suggested.

Anti-avoidance

The anti-avoidance provisions for de facto tenants in limited partnership tenancies are welcome as protection for new LDTs while allowing limited partnership tenancies to continue where appropriate.
• DIVERSIFICATION

Because of the economic situation faced by the industry, NFUS welcomes the diversification provision for both fully secure tenancies and LDTs. We are, however, concerned that the grounds upon which a landlord may withhold consent are too extensive. The basic ground for objection should relate to permanent effect on the holding and the tenant should have the right to challenge the landlord’s objection to a notice to diversify.

Ultimately, the Scottish Land Court should decide what is reasonable, including compensation at waygo, which in turn, should reflect value added to the farm, or otherwise, by the diversification enterprise.

The proposals for giving the tenant the right to plant trees, consent provisions and appeal and compensation largely reflect NFUS response to earlier consultation and are, therefore, acceptable.

• DISPUTE RESOLUTION

The present means of dispute resolution is expensive, time consuming and plainly is not working. Accordingly, NFUS agrees with the detailed proposals from the Scottish Law Commission, substantially incorporated in the draft Bill, to give a virtually universal jurisdiction to the Scottish Land Court for the determination of disputes relating to agricultural holdings and the consequent abolition of compulsory arbitration. Retention of arbitration as a voluntary process is acceptable, but practical agricultural experience together with training in arbitration and valuation techniques should be a prerequisite for inclusion in any revamped arbiters’ panel.

Costs associated with referring cases to the Scottish Land Court, and indeed informal arbitration, must be kept to a minimum. Capping of expenses in both situations should be introduced.

We are anxious to ensure that there should be sufficient flexibility to mediate in disputes with expert knowledge and valuation experience. Those areas identified as being within the exclusive jurisdiction of the Land Court should not be resolvable by arbitration.

• SUCCESSION

NFUS welcomes the provisions in sections 19 to 22 providing for a power to bequeath and assign a tenant’s interest in the lease.

• PRE-EMPTIVE TENANT RIGHT TO BUY

NFU Scotland has for some years now, maintained a policy that fully secure tenants in an agricultural lease should have a right of pre-emption when the holding is exposed on the market for sale. This policy was confirmed at the beginning of this year after an extensive member consultation which resulted in an overwhelming majority of 82% of the 2,500 respondents being in favour of the right which would mean fully secure tenants having first claim to buy their holding. This includes 75% of the landowners who responded. Two-thirds of the respondents were not in favour of an absolute right to buy. Fully secure tenants were 57% in favour of an absolute right to buy.
Accordingly, NFUS supports Ministers’ proposal to introduce a right of pre-emption. It is noticed that the proposed trigger of the exercise for the right would be the decision of the landowner to sell land or otherwise transfer property. In principle, that is acceptable but we are concerned that the property could be alienated to beneficiaries outside the landowners’ immediate family to frustrate that tenants’ ability to exercise the right. Satisfactory anti-avoidance measures must be introduced.

Valuation should be open market involving a willing seller and a willing buyer in recognition of the fact that there is a sitting tenant on the holding. There should be no reference to injurious affection since it is the Landlord who takes the initiative in the process.

4. OTHER ISSUES TO BE ADDRESSED IN RELATION TO 1991 ACT

Rental Determination

The present basis of rental valuation laid down in section 13 of the 1991 Act has become discredited. It is necessary now to amend it. The provisions of subsection 4 of section 13 were introduced by the Agricultural Holdings (Scotland) (Amendment) Act 1983, the aim of which was to exclude the “key money” factor or premium in rents distorted by scarcity of lets or other factors. The ascertainment of open market rental is to be adjusted by having regard to the factors in section 13(4) (a) to (d).

This has led to cases involving expensive professional examination of comparables and the other factors specified. Evidence of comparables is becoming scarcer with few 1991 Act tenancies being granted. Moreover, the expense of a rental determination has been used to force tenants to accede to rental demands from landlords and their professional agents. Notwithstanding agriculture’s economic difficulties over recent years, rental values have held up and have borne little or no relationship with farms’ profitability.

Accordingly, NFUS believes that, since budgeting is the basis of virtually every negotiation, the tenant’s ability to sustain the rent should be a primary consideration. The variation in rent should be determined according to the economic viability of the holding in the context of the current economic conditions in the relevant sector of agriculture.

Compensation at Waygo

There is a widespread feeling of discontent among tenant farmers that the compensation provisions in the 1991 Act are being frustrated by the use of post-lease agreements.

Tenants are reluctant to invest in their holdings as there is currently no means of ensuring that they will be able to realise the value of that investment should they quit the holding. In turn this makes tenants unwilling to retire and relinquish their tenancies - it must be borne in mind that the farm represents a home as well as a work place. This stagnation is contributing towards the ageing profile of farmers and the scarcity of let land.

The present practice of writing down improvements gives the tenant reduced scope to realise his investment in the farm. The value of that investment and any grant aid it has attracted often falls free of charge to the landlord.
The Bill does not, at present, prohibit any write down agreement. Section 37 aims to render null and void any agreement which purports to provide that no compensation is payable in respect of an improvement. Writing down agreements should be specifically addressed. Many of them provide for a written down value of £1 or some other nominal figure after a brief period, eg 10 years, and so would not be covered by section 37 as presently drafted.

These agreements are frequently entered into just after the lease is signed or they can relate to a specific project the tenant wants to undertake. Modern styles of these agreements impose a wide range of obligations on the tenant. They have the effect of the tenant assuming many burdens without getting much benefit – thereby denying the tenant the rights given to the tenant by the lease and by statute.

We have recommended that post-lease agreements be treated like writing down agreements, ie declared null and void. We want to ensure that the tenant can recover the investment he has made over the years.

It is widely accepted that the existence of a secure tenancy on a holding reduces its open market value. This notional value has also been recognised by the Inland Revenue in assessing the potential tax liability of a heritable tenancy.

Termination of a heritable tenancy with statutory compensation would allow the landowner to realise the full value of his holding, including the benefit of the stewardship of the tenant and the increased value of the holding through his improvements. It is only reasonable that the tenant should be compensated for assigning that benefit to the landlord.

The value of the heritable lease could be calculated as a percentage of the open market value (say, 40-50%). An assessment could be made of the investment in the holding by both tenant and landlord over the period of lease, taking into account the improvements made and the relative repair and maintenance burden of both parties. From this assessment a compensation figure could be calculated for the tenant for quitting the farm.

This form of statutory compensation will allow tenants to retire and realise some of their life’s investment and in turn this will lead to more land becoming vacant and it would encourage both landlords and tenants to invest in their holdings, knowing that the value of their investment would not be lost.

The attribution of a value to a lease will provide increased security to banks. Such compensation will recognise the full value of improvements and would recognise the relative burden of repairs and maintenance.

Restriction on the Operation of Notices to Quit

Tenants should be given greater protection against the operation of Notices to Quit by landlords intending to use land for non-farming purposes. There is doubt as to the protection the planning process could afford agricultural tenants. NFUS does not agree that no changes are needed in cases where planning permission has been granted. Planning departments could lack the expertise in understanding the requirements of tenants on agricultural holdings. The Scottish Land Court should be involved in an appeal process if approval for the proposed development has already been given by the planners. Alternatively, the planning authority should take account
of the views of the Scottish Land Court and not give approval without that Court’s agreement. The Court’s consent should be required where planning permission is not required. Similarly the Court’s scope for refusal of the operation of a Notice to Quit should be extended. The SLC should be required to consider additional factors in deciding whether or not to consent to the Notice to Quit. This could involve the broader views on effects on the local economy and the environment. If development does not take place within the period of the Notice to Quit, then the Notice to Quit should be rescinded and reserved.
Submission to Rural Development Committee on behalf of Scottish Tenant Farmers Action Group

Draft Agricultural Holdings Bill (Scotland)

1. Background

The Scottish Tenant Farmers Action Group was formed to respond to the publication of the above bill on behalf of tenant farmers who believe that their interests are not being fully represented by the National Farmers Union of Scotland. The group has increasing widespread support throughout Scotland from currently over 450 tenant farmers, many of whom are not members of the National Farmers Union of Scotland.

STFAG welcomes the opportunity that the bill represents to reform the landlord / tenant system to create a dynamic environment of land tenure to serve Scottish agriculture in the 21st Century. The Group broadly welcomes the proposals to introduce the new style tenancies, encourage diversification, simplify dispute resolution and create rights of purchase for secure tenants. We do, however, believe that there are other aspects of the existing holdings legislation which are in need of reformation and will comment in detail on these.

2. Summary

- Whilst welcoming the introduction of Limited Duration Tenancies STFAG would like to ensure that the legislation does not permit contracting out arrangements which in time may give rise to the same problems which beset the 1991 Act.
- The Group agrees with the proposals to permit non-agricultural use of holdings, but believes landlord’s powers of objection are too wide.
- The Group supports enhanced role of the Scottish Land Court in dispute resolution and the end to compulsory arbitration which has caused major problems in landlord/tenant relationships.
• STFAG welcomes the proposal to introduce a pre-emptive right to buy for secure tenants but believes that there should also be provision for tenants to purchase their holding at any time. Valuations should be on the basis of open market value.
• The opportunity should be taken to reform the 1991 Act and in particular examine those areas which are causing the greatest problems; writing down of improvements, post lease agreements and compensation at way-go, rental calculations, and restrictions on notices to quit. These issues should be addressed in the forthcoming bill and not consigned to the long grass in a commission as proposed by landowning interests.

3. New Tenancy Arrangements

3.1 These proposals are broadly welcomed as a framework for land tenure in the 21st Century. It has been acknowledged that they are as a result of negotiation between the SLF and NFUS with little direct tenant input and as such represent a delicate compromise.

3.2 We believe that the minimum term of 15 years in a Limited Duration Tenancy is too short. 21 years or life would be preferred. Most young entrants to farming at the age of thirty or so will find their lease expiring at their peak of economic productivity.

3.3 Short Limited Duration Tenancies are welcomed as giving flexibility to the land owning sector without circumventing other arrangements but they should be simplified, possibly in the shape of a pro forma lease. There should be no provision to extend SLDTs beyond the maximum term, even to accommodate environmental schemes; this would lead to the undermining of LDTs.

3.4 Provision for conversion from a secure tenancy to an LDT should also include full compensation for tenant’s improvements as it represents the termination of one lease and the start of another.

3.5 Rent Reviews
It is proposed that provision for rental variation should mirror Section 13 of the 1991 Act but this section is itself in need of modernisation (see below). Rental calculation should be based primarily on the economic viability of the unit. There may be some reflection of open market value in assessing LDT rents but it should not be the over-riding criteria. There should be no provision for contracting out of statutory rental arrangements.

3.6 Fixed Equipment
Fixed equipment should be put in working order at the commencement of a lease; it should be compliant with welfare, SEPA and HSE regulations. Housing should be at the least up to council house standards. Reference to Section 5 of AHA 1991 in Section 15 of the bill will still permit post-lease agreements to allow landlords to abrogate their responsibilities regarding maintenance and replacement. Such post-lease agreements must be outlawed.

3.7 Compensation Rights
Agreements to write down tenant’s improvements should be null and void. Value to an incoming tenant should be the principle of compensation. Sections 37-41 should be amended to take account of this. In the past, residual value of grant aid has always fallen to the
landlord; it should be shared between both parties, since the tenant is usually required to be the applicant for any such original grant aid.

The same compensation provision should be carried forward to the new types of tenancy: improvements, diversification and disturbance, damage by game and compulsory acquisition of land. We also welcome the lifting of the maximum limit of compensation payable to the tenant for disturbance.

3.8 Resumption
Section 16 provides the landlord with statutory powers to resume that are absent in the 1991 act, resumption is commonly provided for in leases. It is unnecessary to include these powers here.

The principle of compensation should be extended to compulsory purchase and resumption for non-agricultural purposes to reflect the development value of the land being withdrawn from the holding especially in the case of tenancies held under the 1991 Act. Current disturbance provisions are woefully inadequate; the development value of land may be 20-50 times the agricultural value.

4. Opportunities for Diversification

4.1 We welcome the extension of this proposal to permit diversification in secure tenancies as well as LDTs. It is especially important with the increasing emphasis on support measures for conservation and the environment through modulation.

4.2 Landlords have 60 days to object to diversification projects but their grounds for objection are too wide ranging. Landlords should only have grounds for objection to a diversification project where the holding will be permanently affected by such a diversification. Here the over-riding principle should be the public interest particularly in consideration of rejuvenation of the rural economy. The tenant should have the right of appeal and the Scottish Land Court should judge as to what is fair and reasonable.

4.3 It is proposed “compensation be paid to the landlord for loss of value of the land as a result of the acting of the tenant through diversification or conservation activities.” In many cases such activities will enhance the value of the land, so conversely in such an instance compensation should be payable to the tenant.

4.4 Compensation should be paid to tenants for their non-agricultural improvements where they increase the value of the holding. The Scottish Land Court should be the final arbiter in such disputes.

4.5 Proposals to permit tree planting are largely acceptable.
5. Dispute Resolution

5.1 STFAG welcomes the proposal to increase the role and powers of the Scottish Land Court. Parties now will not be able to contract out of their unilateral right to have matters referred to the Court. The current arbitration system is clearly not functioning properly; it is expensive, time consuming, unnecessarily complicated and has been used more as a tool of intimidation, rather than a fair way of dispute resolution.

5.2 Costs of the court must be kept down to a minimum to ensure and encourage accessibility to all tenants. Capping of expenses could be introduced.

5.3 The SLC should have ultimate responsibility in all land matters rather than the Sheriff Court or Court of Session.

5.4 Voluntary Arbitration will still be acceptable. But the concept of arbiters should be reviewed. Too many are land agents with vested interests and little practical agricultural experience. A system of local assessors could be set up under the jurisdiction of the SLC who would provide training and legal back up. Assessors could be pre-eminent farmers who are kept regularly up to date with training.

6. Tenant’s Right to Buy

6.1 STFAG agrees with the principle accepted by the Minister that secure tenants should have a pre-emptive right to buy their farms when the landlord decides to sell. This is a common sense measure which will prevent farms from being sold over the tenant’s head as has happened only too often in the past. It is necessary to incorporate anti-avoidance measures to ensure that this cannot occur. The inclusion of registration is welcome. It should be recognised that there will be very few tenants who will have the opportunity to benefit from this right as let land is rarely sold on the open market and most is tied up in trusts or companies.

6.2 The group believes that a further right of purchase should be introduced to allow secure tenants the means to initiate the purchase of their holdings. The arguments in favour of a right to buy are outlined in “The Case for a Right to Buy” which formed part of STFAG’s submission to the Scottish Executive in response to the Draft Bill. Since the publication of that document, the debate has centred round the key elements of the willingness to let land and the compensation issue to satisfy the European Convention of Human Rights. The enclosed paper “The Risks of Excessive Caution” deals with the myths surrounding an absolute right to buy.

6.3 STFAG accepts that the valuation process in an absolute right to buy would have to be based on full market value taking into account the relative interests of landlord and tenant. Valuation procedures should always reflect the balance of investment between landlord and tenant, for example, in intensive dairy units the tenant’s investment may well account for a large percentage of the value of the farm. The mechanism proposed in valuing a holding for a pre-emptive purchase is more suited to an absolute right to buy. The current proposals for a pre-emptive right relate to an agreement between a willing seller and a willing buyer, there is no need to incorporate provision for “injurious effect”. 
Amendments to the 1991 Act

7.1 Introduction
The provisions in the 1991 Act, which have evolved from the 1948 Act, have served the agricultural industry well for over 50 years, but the agricultural environment has also evolved and legislation must be adapted to meet those needs. Over the last few decades, loopholes in the Act have been found and exploited to the detriment of the tenanted sector. Due to the prohibitive costs associated with arbitration and traditional deference, tenants have not challenged rentals or insisted on rights. As a consequence there has been widespread use of write-downs, post lease agreements and the arbitration system has been used as a method of intimidation. There is need of an overhaul of the system which would redress the balance of power between landlord and tenant.

This bill represents a unique opportunity to address the shortcomings of the 1991 Act and create legislation where neither party can take advantage of the other. This more than any other measure has the potential to invigorate the tenanted sector. It is important that these issues are tackled now rather than left to be buried by some ‘commission’.

7.2 Rental Variation
Section 13 should be amended. Since its’ introduction in 1983 to eliminate the effect of key money on rents Sub-section (4) has only served to make the process of rental negotiation complex and expensive. The practice of seeking comparables from far outside the surrounding area has been a contributory factor to the abuse of the current system by land agents and the unwillingness of individual tenants to initiate rent reviews. There have been few new secure tenancies created in the past decade or so making the criteria of open market value irrelevant in assessing rent.

Rental variation should be primarily assessed on the economic viability of that unit with regard to the conditions under which the tenant is operating. Scottish Agricultural College figures used by government to show farm income trends could be used as a benchmark. Rental calculations should take into account both the economic conditions in the relevant sector of agriculture and also the type of lease held by the tenant. Many tenants are operating under full repairing leases with post lease agreements where the landlord has contracted out of his obligations under Section5. (2)(b), placing an unacceptable burden on the tenant. These circumstances must be taken into account in assessing rental values.

It should be accepted that the relative profitability of agriculture is reflected more in the tenant’s working capital than in the landlord’s capital. Land values have been little affected by fairly dramatic changes in farm profitability.

7.3 Compensation at Way-go
The lack of meaningful compensation at way-go is the biggest single cause of dissatisfaction amongst tenant farmers. The use of contracting out provisions through post-lease agreements has removed the protection of compensation measures in the 1991 act.

There is an investment stalemate in the tenanted sector. Landlords will not invest in agricultural holdings due to the low rate of return. Tenants will not invest as they will be unable to recoup that investment at a later date should they terminate their tenancy. This is
contributing towards the aging profile of tenants and their reluctance to quit and consequently a scarcity of land becoming available to let.

Most tenants are in the position of having agreed to write-down their improvements in order to obtain consent from the landlord. It is essential that tenants are able to renegotiate these agreements so that they will be able to realise value for their improvement at waygo. The 1991 Act should be amended to prohibit any new write-down agreements.

There should be statutory compensation payable to a tenant on terminating a secure tenancy. This should reflect the value of the tenancy which has already been recognised as a percentage of the open market value of the holding, qualified by the relative investments of landlord and tenant. This would have the effect of encouraging older tenants to retire with recognition of their life’s work and investment, giving the landlord possession of his land and removing potential pressure being put on the tenant to quit. This proposal to compensate a tenant at way-go would encourage both tenant and landlord to invest knowing that their relative investment would be valued thus relieving the current investment impasse in the tenanted sector.

7.4 Post – Lease Agreements

Post lease agreements by which landlords contract out of their statutory obligations, such as the renewing and replacement of fixed equipment, should be disallowed in the proposed system of LDTs; they are intrinsically unfair and make the long-term future of a tenant unsustainable. Steps must be taken to remove them from existing leases as they place an intolerable burden on tenants. They also deny tenants much of the protection due them in the legislation and their burden is rarely reflected in rental values.

7.5 Restriction on the Operation of Notices to Quit

The balance between rural and urban use of land has changed dramatically over the last generation presenting considerable development opportunities. The tenant’s position must be reviewed and strengthened where land is to be resumed for non-agricultural purposes. Where planning permission is sought prior to notice being served the tenant should have right of appeal to the SLC. Currently the planning process does not provide the tenant with adequate protection, there is little scope for the tenant to contest planning permission and it is doubtful whether planning officers have experience in dealing with agricultural matters. The SLC should be consulted in such cases during the planning process.

Where planning permission is granted and Notice to Quit served, the proposed development should take place within the period of the notice or the notice should be rescinded. Planning permission lasts for a considerably longer period than notice to quit.
Scottish Tenant Farmers Action Group
An Absolute Right to Buy
The Risks of Excessive Caution

Executive Summary

(1) In June 2002 the Scottish Tenant Farmers Action Group submitted a detailed case to the Scottish Executive for inclusion of an absolute right to buy in the new Agricultural Holdings Bill. In subsequent discussions it became clear that, while the public interest case set out in the submission had been largely accepted, the Executive was not willing to include such a right in the Bill because of concerns over its practical implementation. The purpose of this paper is to explore those concerns.

(2) The caution exhibited by the Executive is understandable. Three areas of concern have been identified all of which deserve further assessment. There is no evidence, however, that a detailed risk analysis has been carried out in response to this, and there is a sense that concern over risk has in itself been enough to halt further consideration of the absolute right. This paper therefore assesses the three concerns directly, appraises the risks involved, and considers how they might be avoided where necessary. It concludes that none of the theoretical risks is sufficient grounds for excluding an absolute right to buy from the Bill, but that one (the risk of a compensation claim relating to ECHR legislation) requires further amendment to the Bill in order to make the basis of valuation for exercise of the absolute right different from that for the pre-emptive right, and inclusive of “marriage value”.

(3) The overall conclusions of this paper have important implications for the new Bill. They highlight the risks of over caution just as they emphasise the importance of proper and balanced risk assessment. They underline the damaging consequences of inaction just as they recognise the dangers of ill considered action. Above all they emphasise that if the Executive is to enable the widely accepted public benefits of an absolute right to buy to be realised, then it cannot allow itself to be put off by unjustified and excessive caution over inadequately assessed risks.

(1) Background and Introduction

(1.1) In June 2002 the newly formed Scottish Tenant Farmers Action Group responded to the Scottish Executive’s Draft Agricultural Holdings Bill (published April 2002) by submitting a detailed case for inclusion of an absolute right to buy for farmers in secure heritable tenancies. The submission set out the public interest case for a right to buy, including an examination of how tenant farmers viewed the practical implications of such a right, and it explored why despite a consultation process lasting over two years the full case for a right to buy had not been properly explored.

(1.2) In discussions over the summer with Scottish Executive officials, the Minister (Ross Finnie), and a large number of MSPs, it became clear that the public interest case for an absolute right to buy had been largely accepted by policy makers in Edinburgh. It emerged, however, that despite this there was a reluctance to include such a measure in the Bill due to caution about the possibility of exposing the Executive to certain potential risks.
(1.3) In the event the final version of the Agricultural Holdings Bill published in September 2002 did not include an absolute right to buy, but instead proposed a pre-emptive right that, while avoiding the theoretical risks identified by Executive officials, is likely to deliver only a fraction of the potential public benefits that could be expected from an absolute right. Many observers concluded that this reflected a Parliament paralysed by a sense of institutional caution that is not in itself necessarily in the public interest.

(1.4) The public interest case for an absolute right to buy has already been set out by the Scottish Tenant Farmers Action Group in its submission last July, and has been largely accepted. The purpose of this paper is to explore the reasons given by the Minister and officials for not including such a right in the final version of the Bill to be set before Parliament, and in particular to assess the nature and extent of the risks that might be involved were this to be changed.

(2) The Rationale for Caution

(2.1) Scottish Executive officials have summarised their concerns about the practicality of an absolute right under three broad headings –

- A concern that the value of land subject to a secure tenancy might fall were an absolute right brought into force, and that this could lead to claims for compensation under the relevant ECHR legislation.
- A concern that landlords might reduce or even cease the letting of agricultural land on any terms were an absolute right brought into force for secure farm tenants, for fear that the right might be extended to other agricultural tenants by some future Scottish Parliament.
- A concern that an absolute right to buy for secure farm tenants might lead to demands for a right to buy among tenants of other commercial and residential properties, and that this in turn could discourage the letting of such properties by landlords for fear that some future Scottish Parliament might accede to such pressure.

(2.2) The possibility of a successful claim for compensation under ECHR legislation is an important one, and deserves rather more rigorous scrutiny than has hitherto been accorded to it. Apart from an unsubstantiated estimate of £100m cost based on putative falls in land values, no proper analysis appears to have been done on this (or at least has been made public, despite the tabling of a Parliamentary question on the matter). It is primarily a financial risk, although there is also a degree of political risk if the Executive were to fail to examine the matter properly and make provisions accordingly.

(2.3) The likelihood that landlords would refuse to let land on any terms at all if a right to buy were introduced for heritable secure tenancies has been given credence by threats from a small number of landlords to do precisely this. It deserves careful consideration, not only with respect to the potential impact of such action but also as regards measures that the Executive might take to prevent it. In essence it represents a potential economic and/or social risk, and should be examined as such.

(2.4) The idea of an absolute right to buy is not new to landlords of commercial or residential property. Unlike some landlords with tenanted farms, however, they have made no threat to cease letting their properties if an absolute right to buy is introduced for secure tenant farmers, and there has been no evidence of any such expectation from their tenants. The extent to which this risk exists at all is therefore open to question, and at this stage the risk is primarily
a political one, although it could have the potential to become economic if it materialised in practice.

(3) Financial Risk – Compensation Payable?

(3.1) The basis for the Executive’s concern about ECHR legislation have been set out in a written answer to a recent parliamentary question. In summary, the Executive is concerned that an absolute right to buy could result in a loss in the value of a landlord’s assets, and since an absolute right to buy would also be construed as amounting to an interference of the enjoyment of the landlord’s possessions there would be a need under ECHR to pay full compensation for any such loss in value. It is worth noting, however, that no such concerns have been raised over the crofting right to buy (individual or community).

(3.2) The core issue in this risk is that of whether or not a loss in value would actually occur. This has not been fully assessed. It depends crucially on both the price at which an absolute right would be exercisable and the likely behaviour of the market for land with sitting secure tenants. A secondary issue is the scale of any compensation that might result. Once again this has not been fully assessed. It depends both on the scale of any loss in value that occurred, and the amount of land under secure tenancy (figures for which are not available).

(3.3) The rationale for claiming that a loss in value would occur appears (from the Executive’s written answer and discussions with officials) to be based on an assumption that the “marriage value” inherent in estates with several tenant farms might be lost, particularly where such estates are held primarily for reasons other than investment return (i.e. for sporting enjoyment, for status, etc.). There has been no suggestion that tenants would be able to exercise their right at anything other than a fair value for the holding, and so there is no indication from the Executive that they expect anything other than the loss of this “marriage value” to be involved. Moreover there has been no thought given to the longer term effect of a right to buy on land values more generally. A right to buy could be expected to mean more investment in the countryside, a more buoyant rural economy, and therefore more demand for the assets on which it is based.

(3.4) The risk of a compensation claim under ECHR arising from an absolute right to buy is based entirely on an assumption that an absolute right to buy would be exercisable on the same terms as the proposed pre-emptive right, and even then it involves implausible expectations about land values. If, however, the Bill were to be amended to include both a pre-emptive and an absolute right, then this could be resolved so long as the terms for exercise of an absolute right (i.e. when the property was not otherwise on the market) were required additionally to pay the landlord for any loss of marriage value that was involved. This could be further strengthened if the absolute right excluded the right to buy sporting rights, as this is the main likely source of marriage value.

(4) Economic and Social Risk – No More Land for Let?

(4.1) The Executive’s concern about the future supply of let land is essentially twofold. Firstly it presupposes that landlords would act to take land “in hand”, and secondly it assumes that this would be economically and/or socially damaging. Both are legitimate issues for consideration, but to date no robust assessment of either has been carried out (or at least made public) by the Executive.

(4.2) A small number of major landlords have openly threatened to cease letting land if secure tenants are given a right to buy. It would be irresponsible, however, to take such posturing at
face value. The current trend of CAP reform is to target resources more and more towards smaller farm units, so that a move by landlords in the opposite direction would imply deliberately acting to their own financial disadvantage (an estate that comprises several small tenanted farms will attract greater total subsidy income, and hence return to the landlord through rents, than an estate run as one large holding). Moreover if landlords were to take land in hand they would have to find substantial new working capital (currently provided by tenants) in order to do so, and they would have to employ a large number of new farm managers not currently working in the industry. Whether they could, or would, raise the necessary working capital would vary with circumstances, but such action would fly in the face of the current trend to greater diversification of investments by most estates, and would result in substantially greater exposure to the financial risks inherent in farming. What is certain, however, is that no industry can suddenly expand its demand for skilled management without a long lead in period – the supply of trained and experienced farm managers simply is not there.

(4.3) The rural economy needs some flexibility of land supply to accommodate the needs of individual farmers who require additional land on a temporary basis. A decline in the supply of short term lets would undoubtedly be damaging. The argument that the rural economy also needs a large supply of agricultural land for long term let is less persuasive, however, and there is little evidence from other parts of Europe to support the view that it is either required or beneficial (quite the contrary). It is claimed that long term lets are needed to encourage new entrants into the industry, and to permit those with limited capital to invest in developing the farm business rather than in the land itself. Neither of these is particularly plausible. In today’s capital intensive high risk industry, new entrants seldom come in to farming except as farm managers or through inheriting a family farm. Farmers (including new entrants in so far as there are any) with limited capital now have a number of choices available to them through normal investment channels, and indeed it is precisely because of this that many secure tenant farmers today feel inclined to contemplate purchase (if permitted), something that many of their parent’s generation would not have found practicable.

(4.4) The risk of economic or social damage due to a decline in the supply of let land for agriculture is therefore based on unsubstantiated threat and relatively shallow analysis. There is no need to take account of this in including an absolute right to buy in the Bill, but in so far as threats from landlords continue (and destabilise the tenanted sector as a result) policy makers could make it clear that a clear precedent exists in crofting tenure for enforcing the letting of land by statute if this were felt to be necessary in the public interest.

(5) Political Risk – Demands from Residential and Commercial Tenants?

(5.1) The Executive’s concern that a right to buy for agricultural tenants would prompt demands for a similar right from commercial and residential tenants is a little difficult to understand. The issue is already on the table as a result of rights given to local authority tenants some years ago, and more recently to tenants of other parts of the public estate. Changes in England to leasehold legislation have also received considerable media attention. No residential or commercial tenant has equivalent heritable secure terms to those of a secure farm tenant, so that the comparison is in any case somewhat spurious.

(5.2) In so far as the risk is a real one, it underlines the importance of making an absolute right to buy applicable only to secure farm tenants, and of making it abundantly clear at a political level that the creation of the right reflects the heritable nature of such tenancies. The secure farm tenant is locked into a situation that is not of his/her making. The family’s capital - human, emotional and financial – is all invested in the farm, usually over many generations.
Unlikely though it is, any suggestion of a legitimate comparison between this and a normal residential or commercial tenancy could and should be rebuffed with strong political leadership.

(6) Conclusions

(6.1) Scottish Executive officials are right to highlight the potential risks inherent in including an absolute right to buy in the Bill, and they are right to advise caution. This needs to be followed, however, by a proper assessment of the risks involved so that fully informed decisions can be made. The assessment also needs to consider the risks inherent in NOT including an absolute right in the Bill, risks that are implicit in the public interest case for its inclusion. This assessment has not been carried out, leaving the impression of an administration hamstrung by inherent over caution and biased towards the status quo.

(6.2) The primary concern of officials is the risk of a claim for compensation arising from a fall in land values. This is a real risk, but can be addressed by so drafting the Bill that the absolute right can only be exercised at a price that includes full value for the landlord, including compensation for marriage value. A clause to exclude sporting rights from the absolute right (the main source of marriage value) would also greatly help. The result of this will be a slightly different valuation method for the absolute right as for the pre-emptive right.

(6.3) The risk of a significant decline in the supply of let land has come to light largely due to threatening statements by a minority of large landlords. It implies illogical behaviour by landlords that is not in their own long term interest, and therefore is unlikely once sufficient time has elapsed for more careful thought. Moreover a decline in the supply of long term lets need not necessarily be damaging in the way that some have claimed, and many international comparisons are available to support this. What matters is that there continues to be a good supply of short term lets – something that not even the most vociferous landlords have seriously suggested.

(6.4) The least plausible of the risks proposed by Executive officials is that of some sort of political spill over into the residential and commercial property sector, resulting in demands for a right to buy from tenants of all kinds. No such demands have been heard despite many years of a right to buy for local authority housing tenants, and the concern does not stand up to serious analysis.

(6.5) The argument in favour of an absolute right to buy has been based on a range of public interest benefits - social, economic and environmental. To exclude the right as now proposed risks continuing social and economic damage to our rural communities, and further environmental degradation of our countryside. The Executive’s caution over risk fails to balance the risks of action with the risks of inaction, and thereby fails to provide the constructive and progressive leadership on which the future of our rural communities depends.

Compiled and written by Andrew Thin
On behalf of
The Scottish Tenant Farmers Action Group
October 2002
Issues affecting the Scottish scallop industry

As you are aware the Rural Development Committee has considered issues affecting the Scottish scallop industry on a number of occasions during this Parliamentary session. The Committee’s second report of 1999 examined the growing impact of Amnesic Shellfish Poisoning (ASP) on the scallop industry, and the Committee has received regular updates since then. The Committee has remained concerned to ensure that the needs and views of the industry are given due consideration, while acknowledging the primary aim of protection of public health.

On 8 October 2002 the Committee heard evidence from a number of bodies with an interest in this field, to coincide with the end of a consultation by the Food Standards Agency Scotland (FSAS) on the implementation in Scotland of a tiered testing regime for monitoring of ASP in scallops. The Committee heard from representatives of the scallop industry (including catchers, growers and processors), and from the European Commission, the FSAS, and Scottish Executive officials. The Committee also heard evidence on proposed technical conservation measures for the scallop fishery.

Amnesic Shellfish Poisoning and the Proposed Testing Regime

The Committee acknowledges that the procedures required by the regulatory framework are complex. The Committee understands that Council Directive 91/492/EEC must be complied with, and that the Commission Decision 2002/226/EC is intended as an optional derogation to allow Member States more flexibility. It also acknowledges the FSAS role in developing appropriate systems for the protection of public health. However, the Committee is gravely concerned that unanimous opinion of the industry is that the proposed regime will be so costly and restrictive that it will decimate the industry. The Committee considers that appropriate accommodation of the industry’s perspectives can be made without undermining the primacy of public health protection.

The Committee strongly requests that you consider the following points:

a) The FSAS indicated that it intends to bring forward advice to Ministers on the implementation of tiered testing before the end of this year. This is presumably based on the apparent opinion of the European Commission that the enforcement regime currently in
place in Scotland does not comply with obligations under the Directive. The Committee notes that no formal evidence of this opinion has been made publicly available, and requests that confirmation of such advice should be provided.

b) The Committee notes the uncontested evidence that the existing regime has been pursued over recent years with no single recorded public health incident as a result of consuming scallops. In this context, the Committee strongly recommends that Scottish Ministers should instruct the FSAS to delay bringing forward a proposed tiered testing regime. The Committee considers that the case for urgency in bringing this new regime forward was not well made, and that such a regime should be delayed until scientific understanding of the issues has developed further, and until further consultation has taken place with the industry.

c) On previous occasions the Committee has conveyed the concerns expressed by industry at the scientific basis for the regulatory framework. It has urged the Scottish Executive to support measures which would enhance the scientific understanding both of the causes and biochemistry of ASP, and the appropriate means of ensuring the safety of those consuming scallop products. The Committee understands that FSAS has recently received the results of commissioned research on inter-animal variability, and hopes this research will be taken into account during the development of proposals. The Committee requests that the Scottish Executive provides the Committee with a progress report on all research activity undertaken since 1999, and on the research currently in progress or being considered.

d) The Committee was particularly concerned that the assumptions governing the action limit set in the regulatory regime are based on science associated with mussels rather than scallops. The available science is also focused on concentrations of toxins rather than any risk assessment based on likely portion size and amount of scallop actually consumed. The Committee particularly noted that an industry group was trying to raise funds for a key study which would include research on scallop consumption. The Committee welcomed the undertaking by Executive officials that identifying funding for research would be a priority, and urges you to confirm that this will be pursued urgently.

e) The Committee particularly welcomed the invitation from the European Commission for the FSAS to formally request that the European Reference Laboratory in Vigo be asked to examine whether evidence now exists to justify modifying the action level of 20mg/kg and the trigger level. The Committee was concerned at indications that developing the research effort was not being pursued by the various statutory bodies as energetically as might be hoped. It urges you to ensure that the FSAS takes the lead (at a UK level) in taking up this invitation immediately.

f) The Committee acknowledges that long-term changes to the European Directive must follow an appropriate process, and must be generated through scientific development. It particularly welcomes the re-affirmation of the European Commission's position that the Directive can be reviewed in the light of scientific progress. In the event that the European Reference Laboratory confirms that modification may be appropriate, the Committee urges you to ensure that the FSAS vigorously pursues modification of the Directive and Decision as appropriate.

g) The Committee was very interested to hear of the apparently robust and comprehensive traceability and quality assurance schemes already employed by many scallop processors. It also noted recent research indicating that high quality guidance on processing and
preparation of scallops could go a long way to reducing toxin levels in end products. Many in the industry indicated their hope that this would be the long-term route to controlling ASP. The Committee welcomes the undertaking by the FSAS to examine quality assurance and education schemes, and urges the FSAS to consider adapting and utilising existing industry systems. However, the FSAS stated that legal advice from the Scottish Executive was that such measures may not be adequate to meet the requirements of the Directive and Decision. The FSA agreed that this advice could be made public, and the Committee requests that you ensure that it is sent to the Committee and to industry representatives as soon as possible.

h) If, in due course, a tiered testing regime is brought forward, the Committee is extremely concerned at evidence that many aspects of the regime go beyond that required by the European regulatory framework. In particular the Committee notes that repeated sampling of scallops must be undertaken by fishermen and at their own expense. The Committee considers that this, and other aspects of the FSA’s proposed regime (such as tagging and landing arrangements), place an unjustifiable burden on the industry. Their rationale in terms of the protection of public health is not immediately obvious to the Committee. More fundamentally, placing the burden of responsibility on fishermen is an inappropriate approach to public health and undermines the required credibility of the sampling.

i) The Committee is concerned that industry representatives unanimously feel that the FSAS proposals do not indicate any appreciation of the way in which the scallop industry operates. After two years of discussion, the Committee is particularly concerned at the indications that communication between the parties has not been effective. The Committee therefore recommends that the current draft regulation is not an appropriate basis on which to proceed, and should be radically reconsidered if some form of tiered testing regime is eventually to be implemented. The Committee welcomes indications from the FSAS that points made in evidence on 8 October would be considered.

j) The Committee noted with concern evidence that the FSAS had apparently breached an agreement to involve the industry in consultation prior to producing its consultation document on the tiered testing regime. The Committee recommends that any future scheme must take into account a full regulatory impact assessment, and should not be brought forward before the research (commissioned by the Scottish Executive) into the economic impact of ASP has been completed and fully considered.

Proposed Technical Conservation Measures

On 8 October the Committee also heard evidence on proposed technical conservation measures for the scallop fishery. The Committee recognises that the consultation on the draft Prohibition of Fishing for Scallops (Scotland) Order 2001 was originally conducted before the industry was so seriously affected by recurrent outbreaks of ASP. However, the Committee also noted that you announced in August 2002 your intention to proceed with such measures.

The appropriateness of such measures when the industry is overshadowed by the pressures associated with ASP is not clear. The Committee is extremely concerned that the introduction of such measures would be, at best, irrelevant until such time as the method for dealing with ASP has been satisfactorily resolved. It is persuaded by evidence from the industry that the introduction of some of these measures at this time may be unnecessary. The Committee considers that soundly-based and appropriate conservation measures are likely to secure the broad support of the industry. Indeed some of the technical measures
(for example, relating to dredge design) do appear to have industry support. However, the Committee is not persuaded that some of the proposed measures, and in particular the proposed weekend ban, are appropriate. The Committee therefore requests that you reconsider your intention to introduce them at present.

In particular the Committee is very concerned that:

- no evidence or reasoned argument has been presented to indicate precisely what these measures are expected to achieve in conservation terms
- some within the fishing and processing sectors have suggested that the weekend ban will result in no reduction in fishing effort, but rather will cause significant disruption to the processing industry and has the potential to expose crews to safety risks through the added pressure that an inflexible scheme would place on catchers
- the measures do not appear to have taken the impact of ASP, or the requirements of any new testing regime into account
- the proposals do not appear to have changed significantly as a result of the consultation exercise, in spite of very substantial concerns expressed by a large proportion of the industry.

If, in due course, you consider that it is appropriate to bring forward revised technical conservation measures, the Committee strongly recommends that you engage in early discussion with the industry to consider alternative approaches to conservation measures, including more robust use of scallop licences, alterations to the minimum legal landing size, or a days-at-sea scheme. The Committee hopes that this would be an appropriate way to secure the support of the industry.

I would be grateful to have your comments on these matters in early course. The Committee considers these issues to be of urgent concern, and has agreed to consider this matter again at its meeting on 29 October. The Committee is anxious to have your reply on these matters by then so that it can consider whether to seek further oral evidence from you in the light of that reply. Accordingly, I would be grateful if you could reply by Wednesday 23 October if possible. As this is in Parliamentary recess, I would be grateful if you could copy your response to the Clerk to the Committee, Tracey Hawe.

You may wish to note that I am writing to Malcolm Chisholm MSP, Minister for Health and Community Care, in similar terms on the ASP issue.

Yours sincerely

Alex Fergusson MSP
Convener
Rural Development Committee
Tel: 0131-348-5636

cc Margaret Smith MSP – Convener, Health & Community Care Committee
Jennifer Smart – Clerk, Health & Community Care Committee
Thank you for your letter of 9 October on issues affecting the Scottish scallop industry. I know that you wrote in similar terms to Malcolm Chisholm, and he will be replying to you on the points that are particularly relevant to his responsibilities for public health.

Amnesic Shellfish Poisoning

In your letter to me, the Committee poses a number of questions in relation to whether the present ASP testing regime and industry-proposed scallop quality assurance schemes meet European obligations. In addition, the Committee has requested a delay to the implementation of the proposed tiered testing regime until new research into the ASP risk to human health is completed. Linked to this, the FSAS has been asked to pursue modifications to European legislation. These points all relate specifically to fundamental measures to ensure that public health is protected, and Malcolm Chisholm will comment on them in his response.

With reference to the recent consultation by the FSAS on the proposed tiered testing system (the third consultation on the subject), the Committee comments that the draft regulation as presented is inappropriate, and that proposals which include sampling undertaken by fishermen are unfair. The purpose of undertaking a consultation exercise was to gather the views of stakeholders, and thereby providing another opportunity to flag up any concerns or suggestions in relation to the proposed tiered testing regime. The FSAS will be taking concerns that have been expressed by fishermen and other stakeholders during the consultation, and reflected by the Committee, into consideration as they work towards recommendations for a way forward. As far as I am aware, those recommendations, which will include the timing of implementation, have not yet been fully developed, and Ministers have certainly not taken any decisions on the matter. A request to delay implementation is therefore perhaps a little premature.
You will be aware that the alternative to implementation of the derogation to Directive 91/492 that the Commission Decision of 15 March provided (and which is being pursued via the tiered testing proposals) is to implement the Directive in full. This was confirmed in the Commission’s evidence at the session on 8 October. The effect of this would be to close areas to scallop fishing once a whole animal sample was taken that exceeded 20µg/g of domoic acid. That amounts to a more stringent control on fishing than is in place at present, and than that which is to be found in current tiered testing proposals.

In terms of Executive and FSAS research activity relating to ASP since 1999:

- The FSAS commissioned new research into the relationship between phytoplankton and algal toxins, due to run between January 2000 and September 2003;
- The FSAS has provided continuing funding to develop rapid detection test kits for ASP and PSP between August 2000 and August 2002;
- The Executive commissioned EKOS to undertake an economic analysis of the impact of algal toxin closures in August 2001. The final report was received at the end of September 2002 and the Scottish Scallop Advisory Committee will discuss the findings of the report.

Furthermore, my officials are presently developing proposals for new research with scientists and the industry through the Scottish Scallop Advisory Committee, in order to inform any revision of European legislation. Proposals have also been received from the industry for FIFG (Financial Instrument for Fisheries Guidance) funding for a scallop portion size study.

### Scallop Technical Conservation

The Committee queried what the proposed measures are intended to achieve in conservation terms. The Executive is concerned that continued increase of effort could lead to unsustainable pressure on the stock and the measures are principally designed to constrain that increase in effort. The most recently published scientific report\(^1\) has indicated that the most obvious signs of decline are to be found in the area which had experienced the highest level of effort. The Executive does not wish to see all of Scotland’s scallop stocks giving cause for concern. The measures are in line with the precautionary approach to fisheries management, and I believe it would be wrong to wait until the stock is seriously damaged before acting.

The Committee also raised questions regarding the necessity of implementing technical conservation measures while ASP closures are currently preventing dredging in certain areas. The Executive cannot responsibly rely on a disease over which it has no control as a stock conservation policy. The closures caused by ASP do not provide consistent stock protection because as soon as an area is re-opened, it is immediately subject to heavy fishing pressure to take advantage of the fresh grounds. A further cause for concern is caused by the displacement of the fleet from closed areas. This increases pressure on the areas which remain open as they are subject to increased pressure from the displaced boats; the stocks in these areas are thus in greater need of protection.

I recognise that the weekend ban is controversial, but I do not accept that it would offer no reduction in fishing effort. Indeed it is the inflexible nature of the closure that places a downward pressure on days fished. The suggestions made of a more robust use of scallop licensing and a days at sea scheme were included in the Executive's consultation in April last year. They did not receive widespread support. I am unclear as to precisely what is meant by the suggestion to alter the minimum landing size or what benefit this would have.

\(^1\) FRS Marine Laboratory Report No 19/01, Report of Marine Laboratory Scallop Stock Assessments (October 2001). Available from: FRS Marine Laboratory Library, PO Box 101, 375 Victoria Road, Aberdeen, AB11 9DB
Nevertheless, I do recognise that certain sectors of the industry have genuine concerns and I shall reflect fully on the balance of the current package and consider whether there is a case for a reconsultation on the proposals. I will of course keep the Rural Development Committee informed.

I hope that this is helpful. A copy of this letter goes to Malcolm Chisholm, and to Tracey Hawe (Clerk to the Committee).

ROSS FINNIE
Amnesic Shellfish Poisoning (ASP)

Background

As you are aware the Rural Development Committee has considered issues affecting the Scottish scallop industry on a number of occasions during this Parliamentary session. The Committee’s second report of 1999 examined the growing impact of Amnesic Shellfish Poisoning (ASP) on the scallop industry, and the Committee has received regular updates since then. The Committee has remained concerned to ensure that the needs and views of the industry are given due consideration, while acknowledging the primary aim of protection of public health.

On 8 October 2002 the Committee heard evidence from a number of bodies with an interest in this field, to coincide with the end of a consultation by the Food Standards Agency Scotland (FSAS) on the implementation in Scotland of a tiered testing regime for monitoring of ASP in scallops. The Committee heard from representatives of the scallop industry (including catchers, growers and processors), and from the European Commission, the FSAS, and Scottish Executive officials.

Proposed Testing Regime

The Committee acknowledges that the procedures required by the regulatory framework are complex. The Committee understands that Council Directive 91/492/EEC must be complied with, and that the Commission Decision 2002/226/EC is intended as an optional derogation to allow Member States more flexibility. It also acknowledges the FSAS role in developing appropriate systems for the protection of public health. However, the Committee is gravely concerned that unanimous opinion of the industry is that the proposed regime will be so costly and restrictive that it will decimate the industry. The Committee considers that appropriate accommodation of the industry’s perspectives can be made without undermining the primacy of public health protection.
The Committee strongly requests that you consider the following points:

a) The FSAS indicated that it intends to bring forward advice to Ministers on the implementation of tiered testing before the end of this year. This is presumably based on the apparent opinion of the European Commission that the enforcement regime currently in place in Scotland does not comply with obligations under the Directive. The Committee notes that no formal evidence of this opinion has been made publicly available, and requests that confirmation of such advice should be provided.

b) The Committee notes the uncontested evidence that the existing regime has been pursued over recent years with no single recorded public health incident as a result of consuming scallops. In this context, the Committee strongly recommends that Scottish Ministers should instruct the FSAS to delay bringing forward a proposed tiered testing regime. The Committee considers that the case for urgency in bringing this new regime forward was not well made, and that such a regime should be delayed until scientific understanding of the issues has developed further, and until further consultation has taken place with the industry.

c) On previous occasions the Committee has conveyed the concerns expressed by industry at the scientific basis for the regulatory framework. It has urged the Scottish Executive to support measures which would enhance the scientific understanding both of the causes and biochemistry of ASP, and the appropriate means of ensuring the safety of those consuming scallop products. The Committee understands that FSAS has recently received the results of commissioned research on inter-animal variability, and hopes this research will be taken into account during the development of proposals. The Committee requests that the Scottish Executive provides the Committee with a progress report on all research activity undertaken since 1999, and on the research currently in progress or being considered.

d) The Committee was particularly concerned that the assumptions governing the action limit set in the regulatory regime are based on science associated with mussels rather than scallops. The available science is also focused on concentrations of toxins rather than any risk assessment based on likely portion size and amount of scallop actually consumed. The Committee particularly noted that an industry group was trying to raise funds for a key study which would include research on scallop consumption. The Committee welcomed the undertaking by Executive officials that identifying funding for research would be a priority, and urges you to confirm that this will be pursued urgently.

e) The Committee particularly welcomed the invitation from the European Commission for the FSAS to formally request that the European Reference Laboratory in Vigo be asked to examine whether evidence now exists to justify modifying the action level of 20mg/kg and the trigger level. The Committee was concerned at indications that developing the research effort was not being pursued by the various statutory bodies as energetically as might be hoped. It urges you to ensure that the FSAS takes the lead (at a UK level) in taking up this invitation immediately.

f) The Committee acknowledges that long-term changes to the European Directive must follow an appropriate process, and must be generated through scientific development. It particularly welcomes the re-affirmation of the European Commission’s position that the Directive can be reviewed in the light of scientific progress. In the event that the European Reference Laboratory confirms that modification may be appropriate, the
Committee urges you to ensure that the FSAS vigorously pursues modification of the Directive and Decision as appropriate.

g) The Committee was very interested to hear of the apparently robust and comprehensive traceability and quality assurance schemes already employed by many scallop processors. It also noted recent research indicating that high quality guidance on processing and preparation of scallops could go a long way to reducing toxin levels in end products. Many in the industry indicated their hope that this would be the long-term route to controlling ASP. The Committee welcomes the undertaking by the FSAS to examine quality assurance and education schemes, and urges the FSAS to consider adapting and utilising existing industry systems. However, the FSAS stated that legal advice from the Scottish Executive was that such measures may not be adequate to meet the requirements of the Directive and Decision. The FSA agreed that this advice could be made public, and the Committee requests that you ensure that it is sent to the Committee and to industry representatives as soon as possible.

h) If, in due course, a tiered testing regime is brought forward, the Committee is extremely concerned at evidence that many aspects of the regime go beyond that required by the European regulatory framework. In particular the Committee notes that repeated sampling of scallops must be undertaken by fishermen and at their own expense. The Committee considers that this, and other aspects of the FSA’s proposed regime (such as tagging and landing arrangements), place an unjustifiable burden on the industry. Their rationale in terms of the protection of public health is not immediately obvious to the Committee. More fundamentally, placing the burden of responsibility on fishermen is an inappropriate approach to public health and undermines the required credibility of the sampling.

i) The Committee is concerned that industry representatives unanimously feel that the FSAS proposals do not indicate any appreciation of the way in which the scallop industry operates. After two years of discussion, the Committee is particularly concerned at the indications that communication between the parties has not been effective. The Committee therefore recommends that the current draft regulation is not an appropriate basis on which to proceed, and should be radically reconsidered if some form of tiered testing regime is eventually to be implemented. The Committee welcomes indications from the FSAS that points made in evidence on 8 October would be considered.

j) The Committee noted with concern evidence that the FSAS had apparently breached an agreement to involve the industry in consultation prior to producing its consultation document on the tiered testing regime. The Committee recommends that any future scheme must take into account a full regulatory impact assessment, and should not be brought forward before the research (commissioned by the Scottish Executive) into the economic impact of ASP has been completed and fully considered.

I would be grateful to have your comments on these matters in early course. The Committee considers these issues to be of urgent concern, and has agreed to consider this matter again at its meeting on 29 October. The Committee is anxious to have your reply on these matters by then so that it can consider whether to seek further oral evidence from you in the light of that reply. Accordingly, I would be grateful if you
could reply by Wednesday 23 October if possible. As this is in Parliamentary recess, I would be grateful if you could copy your response to the Clerk to the Committee, Tracey Hawe.

You may wish to note that I am writing to Ross Finnie MSP, Minister for Environment and Rural Development, in similar terms.

Yours sincerely

Alex Fergusson MSP
Convener
Rural Development Committee
Tel: 0131-348-5636

cc Margaret Smith MSP – Convener, Health & Community Care Committee
Jennifer Smart – Clerk, Health & Community Care Committee
Thank you for your letter of 9 October on Amnesic Shellfish Poisoning. I note that you have written to the Minister for the Environment and Rural Development, Ross Finnie MSP, in similar terms and he will be responding to you on those points that fall within his portfolio.

I further note that the Committee has taken evidence from a number of bodies with an interest in this field, including from the Food Standards Agency Scotland (FSAS). The FSAS, as you are no doubt aware, forms part of the independent Food Standards Agency which is a UK non-ministerial Government Department, set up to protect public health from risks which may arise from the consumption of food, and otherwise protect the interests of consumers in relation to food. As such, it operates uniquely at arms' length from Ministers, and Agency staff are principally accountable to a Board rather than directly to Ministers. In Scotland, the Board itself is accountable to the Scottish Parliament. In this context, Scottish Health Ministers are advised on all matters relating to food safety by the FSAS. In addition, to safeguard its independence, the Agency has the unique legal power to publish the advice it gives to Ministers. The Agency’s views have, therefore, been sought in seeking to respond to those points you have raised which concern public health.

**Proposed Testing Regime**

The Committee has sought evidence to the effect that the enforcement regime currently in operation in Scotland does not fully meet the obligations provided for in Council Directive 91/492/EEC.

In relation to ASP, the Directive states that “The total Amnesic Shellfish Poison (ASP) content in the edible parts of molluscs (the entire body or any part edible separately) must not exceed 20 micrograms of domoic acid per gram…” Further, the Directive requires that where monitoring reveals that the requirements of the Directive are no longer being met, the competent authority shall close the production area…concerned until the situation has been restored to normal.”

At the meeting of EU National Reference Laboratories on Marine Biotoxins, held on 15-17 March 2000 in Vigo in Spain, the Group stated that “Placing on the market of whole scallop on the basis of DA (domoic acid) concentration content ≤20 μg/g in the gonad or the gonad/muscle combined is inappropriate and represents a risk to public health.” An extract from the minutes of the meeting is enclosed.

The interpretation of the Directive has been confirmed by the European Commission as recently as at the Rural Development Committee meeting on 8 October, when Paolo Caricato of the European Commission clearly stated “If a member state decides to avoid the application of the decision, it has to follow Directive 91/492. All scallops in which the contents exceed 20 mg per kg are considered toxic and must stay in the sea.”

b) Request for delay to the introduction of the tiered system

FSAS officials confirmed to the Committee on 8 October that the decision to introduce the tiered system is optional for member states and therefore there is no deadline for its introduction. However, as the European Commission official, Paolo Caricato, made clear, the alternative is to comply fully with the provisions of Council Directive 91/492/EEC.

The urgency for the introduction of the tiered system stems from the fact that, relative to the provisions of the Directive, the tiered approach is a derogation which would allow fishing to continue when otherwise waters would be closed, whilst at the same time ensuring that public health is adequately protected. Should the introduction of a tiered system be delayed indefinitely, then the full provisions of Council Directive 91/492/EEC will have to be applied, leading to potentially longer and more widespread closures. Both measures provide for a higher degree of protection of public health than a system based on testing the gonad.

c) Research activity

Since 2000, the FSAS has commissioned research into the relationship between phytoplankton and algal toxins, due to run between January 2000 and September 2003 and is continuing to provide funding to support the development of rapid detection test kits for ASP and DSP. In addition, FSAS has recently received the final report on a research project intended to help identify appropriate levels of end product testing
for various scallop products harvested under the tiered regime. The outcome of this is still under consideration and there is a possibility that this could be used as scientific evidence for a reduction in the requirement to end product test every batch of scallop product as is currently required under Commission Decision 2002/226/EC, which provides the detailed rules for the tiered system. Various other pieces of research on algal toxin related issues are also underway at a UK level.

d) Research into appropriateness of current action levels in the context of king scallops

In addition to its duty to, first and foremost, protecting consumers, the FSAS also has a responsibility to be proportionate in its response to any potential public health risk. As such, the FSA has indicated that it would be supportive of any research intended to help ensure that the controls applied to scallops meet this criteria.

e) Invitation for the FSAS to write to the European Commission

Following the suggestion from the European Commission for the FSA to write to them on the question of the ASP action level for scallops, a letter to this effect was issued to the Commission by the FSA on 15 October on behalf of the UK.

f) Recommendation for the FSAS to vigorously pursue modification of the Directive and Decision as appropriate

As indicated at point e), the FSA has already written to the Commission on the possibility of reviewing the ASP action levels, and as noted at point c), work has already been completed which it is hoped will result in an amendment to the end product testing provisions of the Decision. Should further UK or European research indicate that there is scope to secure modifications to the Directive that will ensure the most proportionate response to the risks associated with algal toxins, then the FSA will pursue these vigorously.

g) Examination of industry systems and advice on requirements of the Directive and Decision

The FSAS proposals set out in their consultation document on 27 June were intended to provide an opportunity for stakeholders to offer suggestions and comments. Some of the evidence and suggestions for alternative systems which were put forward at the Rural Development Committee had not previously been put to the Agency for consideration. I am advised by FSAS officials, they will be following up on some of the new information that came forward, particularly in respect of traceability as part of their ongoing consultation with stakeholders. As was clearly stated at the Committee, the Agency is open to all suggestions, providing they are able to meet with the requirements of the Directive and/or the Decision as appropriate.

On the question of whether or not certain industry proposals would meet the requirements of the Directive and Decision, this point related to a specific enquiry which was put to the FSA by Mallaig and North-West Fishermen’s’ Association outside the responses to the consultation exercise on the tiered system, and was not related to traceability, quality assurance and education schemes. That proposal was to
prohibit the marketing of all soft tissues from king scallops with the exception of white meat and gonad. The Agency has recently responded explaining why this proposal does not meet the requirements of the Decision or the Directive. A copy of that letter is enclosed for the Committee’s information.

h) Scope of the proposed tiered system

I note the Committee’s concern regarding additional burdens on the industry and the suggestion that some aspects of the regime go beyond what is required by the European regulatory framework. Those parts of the regime which the FSAS have proposed which are not set out in full in the Commission Decision are considered to be elements which are necessary in order to meet certain requirements of the Decision, e.g. the use of tags is intended to meet the provisions for batches to be sealed under the direction of the competent authority. The suggestion that fishermen assist in the collection of samples is not a statutory obligation on fishermen, but it was considered by the FSAS to be a practical solution to ensuring that sufficient samples could be obtained to keep production areas open. Alternative solutions are available which will form part of the Agency’s considerations in putting forward its recommendations to Ministers.

i) Reconsideration of the draft regulatory proposal

As has already been indicated, the FSAS will be considering all alternative proposals put forward during the course of their most recent consultation exercise. Consultation has, however, already been extensive, consisting of three written consultations and two rounds of public meetings, this year and last. There has also been ongoing dialogue through the Scottish Scallop Advisory Committee and through attendance of FSAS officials at various industry meetings. To date, no significantly different proposals have been put forward to that suggested by the Agency which would fulfil the requirements of the Directive and the Decision.

j) Regulatory Impact Assessment

I can confirm to the Committee that the FSAS is required to provide a full Regulatory Impact Assessment along with its recommendations to Ministers. I understand that the Scottish Executive Environment and Rural Affairs Department has recently commissioned a report on the economic impact of algal toxin closures and the FSAS will be liaising with SEERAD and the Scottish Scallop Advisory Committee over the use of this data in developing the RIA.

Finally, you may wish to note that on 18 October the Food Standards Agency Scotland issued a layman’s guide to the scientific report which formed the basis for the European Commission’s proposals for the tiered system. A copy of the report has been sent to the Clerk of the Committee.

A copy of this letter has been sent to Ross Finnie, Minister for Environment and Rural Development, Mary Mulligan, Deputy Minister for Health and Community Care and Tracey Hawe, Clerk to the Committee.
MALCOLM CHISHOLM
THIRD ALTERNATIVE TO SAFEGUARD HUMAN HEALTH FROM THE EFFECTS OF ALGAL TOXINS IN SCALLOPS

Thank you for your letter of 19 September concerning the above. As we discussed, I have sought guidance on the interim measures you have proposed in the context of their ability to meet community obligations, and the following sets out the advice of the Food Standards Agency based on that guidance.

You have proposed two basic points from which we might seek to take this issue forward. First that the current “pragmatic” levels be replaced with safety levels that have been founded in dedicated science appropriate to scallops; and second, that in the meantime, until the science has been worked through, that interim measures should be introduced.

On the first point, I can advise you that the Food Standards Agency has now written to the European Commission (DG SANCO) on exactly this issue, and I will keep you fully informed of their response as soon as it is forthcoming. And I should also say that the Food Standards Agency is entirely supportive of the principle of ensuring that methods of risk management are proportionate to the actual risk to public health – though, of course, we do have to operate within the parameters of European Community law. Clearly, however, even assuming the Commission responded positively and a review of the action level for scallops is undertaken, the scientific process to gather and review the necessary data will take some time. I am, though, fully aware that the industry is already attempting to get this particular ball rolling through the proposals for a portion-size study into scallops. In addition, should the outcome from any such review result in a
recommendation to alter the action level (either up or down), this will require an amendment to Council Directive 91/492/EEC (or any future legislation arising from the work on the consolidation of the hygiene Directives). This again, would take some time. In other words, this is not a short-term solution and is more likely to take years rather than months. However, this is a point which you well understand and hence your proposal for the introduction of interim measures.

On this point, I very much regret that I have to advise you that there does not appear to be any scope for the adoption of interim measures. As you know, the relevant Community law is contained in Council Directive 91/492/EEC on production and placing on the market of live bivalve molluscs and Council Directive 91/493/EEC on the production and placing on the market of fishery products. These Directives provide for the harmonisation of the Community market in these products and allow for them to be placed on the market anywhere in the Community as long as they comply with the requirements of the Directives. There does not appear to be anything that allows member states to unilaterally restrict what parts of live bivalve molluscs can be placed on the market. Importantly, even if there were scope to try and prohibit the placing on the market in Scotland, it would not be possible to apply this prohibition to imported scallops that complied with the Directive. Even setting aside the economic considerations associated with this apparently anomalous situation, this would also give rise to difficulties associated with effective enforcement.

Your suggestion also relies on the European Commission agreeing that only the gonad and not the whole animal need be tested. This would be difficult given the very clear statement from Paolo Caricato at the Rural Development Committee on 8 October when he made clear that member states must either comply with the Directive or the Decision, both of which require testing to be carried out on the whole animal.

I am sorry that I am unable to give you any more heartening news on your proposals for interim measures, though I hope you can take some encouragement from the fact that we are seeking the Commission’s views on the possibility of revisiting the action level.

A copy of this letter has also been sent to Mr Alex Fergusson MSP, in his capacity as Convener of the Rural Development Committee.

Yours sincerely

Martin Reid
General Food Hygiene

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Tel: 01224 285134 Fax: 01224 285168 Email: martin.reid@foodstandards.gsi.gov.uk
Our Website address is: www.food.gov.uk
3. Placing on the market of whole scallop on the basis of the DA content ≤ 20 μg/g in the gonad or the gonad/muscle combined is inappropriate and represents a risk to Public Health. Similar considerations should be extended to PSP in scallops.

The report of the expert group on AZP that met on 18\textsuperscript{th} March 1999 in Brussels was reviewed. The conclusions of the expert group were supported and extended with extra information as follows:

- AZP represents a risk for consumers and therefore should be included in monitoring.
- Mussels seem the main species affected, but AZP has also been found in oysters.
- Because the presence of the toxin in shellfish can last for a considerable period of time (up to 10 months) year-round monitoring is recommended.
- The whole body of shellfish should be analyzed, because new evidence is now available that shows that the toxin migrates from the hepatopancreas to the meat.
- Current available analytical methodologies include the rat bioassay, the mouse bioassay (Yasumoto, 1978, 24 hrs.) and LC/MS.
- The mode of action of AZP is not known. Sataki and Yasumoto are the only researchers who seem to have small amounts of standard available.
- AZP should not be included in the DSP complex. Therefore the NRL group strongly recommended appropriate amendment of Directive 91/492/EEC.

11. Miscellaneous

It was noted that the impact of the Chemical Weapons Convention, which restricts the transfer of saxitoxin for sanitary control, monitoring and research, has led to considerable difficulties. The group insists that this problem be given the highest attention in the European Commission, particularly in view of the fact that the Commission has funded work that led to the development of BCR CRMs, that cannot now be made available to the laboratories that require them.

\textit{Extract from the Minutes of the third meeting of EU National Reference Laboratories on Marine Biootoxins (15-17 March 2000 Vigo Spain)}