RURAL DEVELOPMENT COMMITTEE

AGENDA

27th Meeting, 2002 (Session 1)

Tuesday 12 November 2002

The Committee will meet at 2.00 pm in Committee Room 2.

1. Item in private: The Committee will decide whether to take item 3 in private.

2. Agricultural Holdings (Scotland) Bill: The Committee will take evidence at Stage 1 from—
   
   John McDiarmid, Scottish Agricultural Arbiters’ & Valuers’ Association

   Judith Morrision, Scottish Law Commission

   Lord McGhie, Chairman, Scottish Land Court

   A representative of the NFU Scotland Tenants’ Working Group

3. Work Programme: The Committee will consider its future work programme.

Tracey Hawe
Clerk to the Committee
The following papers are attached or are relevant to this meeting:

<table>
<thead>
<tr>
<th>Agenda item 2</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Submission from Scottish Agricultural Arbiters’ &amp; Valuers’ Association</td>
<td>RD/02/27/2/a</td>
</tr>
<tr>
<td>Submission from the Scottish Law Commission</td>
<td>RD/02/27/2/b</td>
</tr>
<tr>
<td>Submission from the Scottish Land Court</td>
<td>RD/02/27/2/c</td>
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<tr>
<td>Members are reminded to bring with them a copy of the Agricultural Holdings (Scotland) Bill and accompanying documents</td>
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</tbody>
</table>

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<tr>
<th>Agenda item 3</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A paper from the Committee’s work programme reporters (for Members only)</td>
<td>RD/02/26/3/a</td>
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</tbody>
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Jurisdictions under the Agricultural Holdings (Scotland) Acts

Scottish Law Commission Report (No 178)
Summary prepared for Rural Development Committee

Why did the Scottish Law Commission issue a report on this matter?

The Scottish Executive Land Reform Action Plan published in August 1999 adopted the Land Reform Policy Group’s recommendation in relation to agricultural holdings for "legislation to simplify and reduce the cost of dispute resolution and to extend the role of the Scottish Land Court."

In October 1999 the Deputy First Minister and Minister for Justice sent us a reference requesting that we consider existing procedures for dispute resolution in the law on agricultural holdings and advise on possible reforms in jurisdictions and procedures.

One of the Scottish Law Commission’s statutory functions is to provide such advice on the request of Ministers. At the time we received the reference and submitted our report our Chairman was the Rt Hon Lord Brian Gill, widely acknowledged as an expert in agricultural law with considerable experience in the conduct of agricultural disputes.

When was the report published?

We were requested to submit our report to the Scottish Ministers by 31 March 2000 in order that our recommendations could be included in the White Paper on Agricultural Holdings - Proposals for Legislation which was being prepared by the Scottish Executive. Our Report was submitted to the Scottish Ministers on 23 March 2000 and published with the White Paper on 17 May 2000.

What method of research was adopted?

The Commission carried out a statistical survey of the agricultural arbitration system, of agricultural holdings litigation in the various jurisdictions and of the administrative jurisdictions of the Scottish Ministers. We also consulted various interested parties and acknowledged experts in this field. From the findings of our survey and these wider enquiries, we made an appraisal of the practical operation of the current system and identified its weaknesses. We then considered various options for reform and formulated our recommendations.

What consultation did the Commission carry out?

Normally the Commission issues a discussion paper for consultation before it reports. However, in this case given the urgency of the request, the consultation exercise already carried out by the Land Reform Policy Group, and our report’s relationship to the White Paper, we did not carry out our customary public consultation exercise.

Our recommendations were adopted by the Executive in the White Paper and have been subject to full public consultation as part of that paper and in the subsequent draft Bill.
The problems with the present system

- The current system of jurisdictions is complex and requires to be rationalised.
- The compulsory arbitration system has the following defects
  - The skills of the arbiter are not matched to the nature of the dispute
  - Arbiters usually do not have the skills necessary to resolve legal disputes and so require to employ legal clerks
  - It is productive of delay
  - It is expensive
  - The statutory panel of arbiters is not deployed to good effect

The guiding principles for reform

Our recommendations for reform were based on three guiding principles: -

- Agricultural disputes should be determined by the tribunal best qualified to answer the question at issue.
- Agricultural disputes should be dealt with as efficiently as possible and without any avoidable delay.
- Agricultural disputes should be conducted as economically as possible with the minimum of expense.

Our main proposals for reform

- The Scottish Land Court should acquire a universal jurisdiction in questions between landlord and tenant.
- Recourse to the Land Court should be available to either party without the consent of the other. Accordingly, no party may be denied access to the Land Court by the other party.
- The existing system of compulsory arbitration should be abolished and with it the statutory panel of arbiters.
• Once a dispute has arisen, the parties may agree to have their disputes resolved by arbitration or any other competent mode. The key difference is that there must be agreement to such a reference, which cannot be given in advance.

• Such reform would enable arbitration to be used in cases where the parties are agreed that it is the most suitable means of resolving their dispute.

• However, arbitration would not be available where the Land Court already has exclusive jurisdiction.

• In cases where arbitration is resorted to, the procedural provisions of Schedule 7 to the 1991 Act should no longer apply. It should be left to the parties to decide on the procedure to be followed in any individual case.

• There should be no procedure for stated case from an elective arbitration. Instead there should be a single right of appeal to the Land Court.

• As a general rule there should be a two-stage procedure for all litigation in this area - a first instance decision and one opportunity of appeal.

• The specific statutory jurisdictions of the sheriff under the 1991 Act and under section 16 of the Succession (Scotland) 1964 should be abolished.

• The sheriff’s power under Schedule 7 to the 1991 Act to remove an arbiter for misconduct and to reduce an award should be transferred to the Land Court.

• The jurisdiction of the Court of Session would be unaffected by these proposals.

• The introduction of expedited procedures in the Land Court should be done by way of amendment of the Land Court’s Rules.

• The administrative jurisdictions presently exercised by the Scottish Ministers should remain with them.

• The statutory office of recorder should be abolished. The parties should be free to appoint the recorder of their choice in any case. If the parties cannot agree on the choice of the recorder the Scottish Ministers should make the appointment.
Dispute arising from an agricultural holding

Court of Session (Outer House): concurrent jurisdiction* to declare the existence of a Landlord/Tenant relationship.

Land Court has jurisdiction in all cases

Sheriff Court: retains common law jurisdictions regarding the existence of a tenancy. Statutory jurisdictions abolished

Voluntary private arbitration: no prescribed statutory procedure

Appeal to Court of Session

Appeal to Court of Session

Appeal to Court of Session

Appeal to Scottish Land Court

Appeal to Scottish Land Court

* With the Land Court and the sheriff court.
Appendix to accompany
STATEMENT TO RURAL DEVELOPMENT COMMITTEE
By
SCOTTISH LAND COURT

A GUIDE TO THE SCOTTISH LAND COURT

Introduction

The Court was initially set up in 1912 to deal with crofts and small landholdings throughout Scotland. That remit was extended in 1931 to cover all tenanted farms in Scotland. Those with experience of the Court in action are able to confirm that it is a body with a long tradition of “user-friendly” service to the agricultural community particularly in the Highlands and Islands. Part of that tradition is to combine a proper judicial approach to resolving disputes with an ease of access to litigants. In other words, fairly formal when that is necessary in the interests of justice and fairness but relatively informal whenever possible.

Set-up of the Court

At present the Court has three members and a chairman. (The members are sometimes referred to as “the practical members” to distinguish them from the legally qualified chairman.) The members all have a long experience of agricultural matters. They were selected for appointment to the Court on the basis not only of that experience but after an assessment of their ability to apply that experience wisely and fairly to the type of disputes with which the Court is involved. After appointment members continue to gain experience in handling such disputes and can be said to combine to a unique degree experience in both agricultural matters and litigation.

The Chairman is an experienced court lawyer. He is regarded by statute as equivalent to a judge of the Court of Session. He does not pretend to be an expert in farming matters and will rely on advice from the members when necessary. He does however have advantage of being immersed in legal issues relating to agriculture from his experience in the Land Court. Accordingly, he too has a useful combination of experience in law and agricultural litigation.

The Court is also assisted by two legal assessors. The principal clerk is the senior legal assessor. He has been with the Court for over 25 years and has unrivalled experience of litigation involving crofting and agricultural holdings in Scotland. The practical members work closely with the assessors.

The Court, of course, has full secretarial and office back-up. The staff are experienced in the routine of litigation. Because the Court is a small body whose members all work from the same office, they have the advantage of a pool of experience and ready access to advice both practical and legal at all times.

The way cases are heard

1 Scottish Land Court Act 1993 sec 1(3).
Most cases are dealt with by the practical members. When they sit on their own to hear cases they are known as the “Divisional Court” - a throwback to the days when Scotland was divided into different areas or “divisions” for the purposes of arranging hearings. Sitting as a single member court, the member is always accompanied by a legal assessor who acts as clerk and legal advisor. However, the responsibility for the decision rests with the member.

Where it is clear that a case involves complicated issues or is of special importance or where it is obvious that it will raise legal difficulties, the Full Court will sit to hear the whole case. The Full Court sits as a Court of three made up of the Chairman and two of the practical members. The benefit of more difficult cases going straight to the Full court is that it provides, from the beginning, the advantage of two practical members and the chairman considering the issues together. It also avoids the risk of the expense and delay of an appeal. (As we discuss below, the Court’s own charges are the same whether the Full Court or the Single Member Court is sitting).

Where the Court sits

The Court is based at 1 Grosvenor Crescent, Edinburgh. The paper work is administered from there. However, at the hearing stage we try where possible to meet the convenience of parties and normally the hearing will be held in a Sheriff Court near the farm in dispute. When a suitable court-house is not available a local hall or hotel facility may be used. Hearings occasionally take place on the farm itself if there is suitable accommodation.

In some types of dispute it may be cheaper or more convenient to have the hearing in Edinburgh. For example, where counsel are involved or where there are expert witnesses who do not live near the farm, they may find it more convenient to attend a hearing in Edinburgh. It may be possible to split the hearing between the farm and the Court in Edinburgh depending on what the case is about, what witnesses are to be used, and whether the lawyers are based in Edinburgh. In a rent dispute the hearing will probably be near the farm. The Court will wish to inspect the farm itself and may have to inspect any holdings relied on for comparison.

Who may appear

Although the Court is used to dealing with party litigants, in other words, parties acting on their own behalf and without solicitors, it is preferable to have some legal representation. The level of this depends on the nature of the issues in dispute.

Often the main problem is finding and presenting a lot of facts. They may or may not be complicated. Good presentation by solicitors or counsel can be well worthwhile in such cases. Surveyors or land agents are often able to present things very effectively. Our experience, however, is that it is not easy to combine the job of presenting the case with the task of appearing as an expert witness in it. Some Courts would not permit this on the view that an expert witness must be entirely independent. The type of case which come before the Land Court seldom allows the luxury of such a clear approach. We have to look at the circumstances of each case and expect parties to have discussed this in advance with the Clerk. In short, it is usual, but not essential,
to use a solicitor before the Divisional Court and to use solicitor or counsel before the Full Court.

**Formal procedures**

Once parties have submitted their application to the Court the written stages of the case will be controlled by a series of orders by the Court providing a time for one side to put in to the Court their written contentions and for the other to reply.

*This is an important feature of the Land Court practice.* Although we have a set of detailed Rules for conduct of litigation and guidance of parties, our present practice is to instruct the parties as to appropriate procedure at each stage of the case after the initial application. Indeed, it is common for parties to discuss their applications informally with the Court staff to make sure that they adopt the right procedure from the start.

The main reason for written statements is to give fair notice to the Court and to the other side of the basis of your case and the facts you will seek to rely on in support. It is not necessary to give notice of everything. In most disputes it will be pretty obvious what is to be put before the Court. Fair notice is required of things which are not obvious. If it is not given there may be delay and difficulty at a later stage.

In addition to the written contentions parties will have to lodge with the Court any written material they wish to rely on as evidence. They may be able to ask the Court for assistance in obtaining particular types of written material from the other side.

**Hearing**

In most cases matters will proceed to a hearing where parties can put their arguments to the Court. Evidence will be given on oath. The Court will rely on written material where appropriate.

If parties are agreed and the issue is essentially a legal one turning on documents or agreed facts, the Court will take the decision on paper without a hearing.

We do not have a shorthand note of the evidence and the practice of the Divisional Court is to provide a judgement which sets out a fairly full narrative of the relevant evidence given by each witness. The Judgement will then summarise any legal arguments presented and go on to explain the Court’s reasons for the decision.

**Appeals and reviews**

A member’s decision can be *appealed* to the Full Court. An appeal is not the same as a complete re-hearing. Broadly speaking, it is necessary in an appeal to be able to show the Court that the single member made some mistake. This usually has to be based on examination of his written decision. The Full Court may be able to correct such mistake or refuse the appeal without hearing any further evidence.

*Re-hearing* is a different type of process. It may, in effect, mean starting the whole case all over, although circumstances vary. It is therefore broadly accurate to say
that, before the Court will allow a re-hearing, the person asking for it will need to show that important new evidence is available and satisfy the Court that there was a good reason why that evidence was not presented to the single member. He will have to satisfy the Court that the new evidence means that the whole case needs to be reheard. It might be possible in some cases just to add the new evidence but if it is important it may well be necessary to open up the other evidence to see how it adapts to the new material.

From the Land Court the appeal is to the Court of Session and is only available by way of stating a question on a point of law accepting the facts as found by the Land Court. (It is not easy to explain in a layman’s guide precisely what Courts mean by “questions of law” – although it is possibly even more difficult to explain it in a legal text book! One thing it does mean is that the Court of Session will not hear further evidence).

**Cost**

The Court is provided by the State to be available for resolution of disputes and the level of fees is fixed by Parliament. In some types of case there are separate fees for the various stages of the case. The highest single element will be the fee for the actual hearing which is currently £120 per day.

The major cost of any litigation or arbitration is the payment for suitably skilled legal representation and the expense of paying for witnesses. There may be a significant expense in the copying of documents. The amount of this will, of course, depend on the amount of work involved.

**Checking the bills**

The Rules make provision for the Clerk to scrutinise the solicitors accounts. This process is known as “taxation”. The Clerk “taxes off” or deducts from the account any elements which are excessive. This is particularly important if a loser has been found liable to pay his opponent’s expenses. The bill will be scrutinised by the Clerk to see that only items which were reasonable in the proper conduct of the case are included. The rates to be charged are fixed by the Court - they can vary according to any specialities of the case.

This does mean that if a person chooses to spend a lot on legal expertise or on expert witnesses it may not be recovered back even if he wins the case. On the other hand it is obviously necessary to have this protection for the losing party who is not forced to pay cost incurred unreasonably by his opponent.

**Further information**

We would normally encourage parties to look to solicitors for advice on matters bearing on the merits of any case but Court staff are always willing to advise on procedure and a good deal of time is currently spent dealing with such matters by

^2 Scottish Land Court Rules (S.I. 1992 No.2656 rule 95
telephone. We are in little doubt that many disputes are resolved on the basis of the informal advice given in this way.

For the avoidance of doubt it may be said that Court members are not involved in such informal advice.
The Committee will be aware that the present scheme of dispute resolution under the Agricultural Holdings legislation, involves compulsory arbitration. We make the point that although arbitration is an alternative to Court litigation, it is essentially a litigation process. Parties are required to go through formal procedures; the arbiter is obliged to have a fair hearing of issue in dispute and to give his or her decision on the material presented. The parties are bound by the decision. If the proper formalities are not complied with, there can be an appeal.

We doubt whether this system has any procedural advantages over litigation in the Land Court where procedure is flexible and the decision maker is experienced in agriculture, law and dispute procedures.

We do think that informal private arbitration has an important procedural role. If parties can agree how and by whom their disputes can be resolved they can agree quick ways of doing so appropriate to the matter in hand. Apart from arbitration other important methods of obtaining a binding decision include reference to an expert valuer or assessor to decide on the basis of his own expertise.

We consider it important to distinguish such procedures from the various methods of Alternative Dispute Resolution to which reference may be made. It is important to keep in mind that when reference is made to ADR that this term is now used to describe the various systems of assisting parties to reach their own agreement. The “mediator” or other ADR "facilitator" has no power to made a decision which binds the parties. In short, litigation and arbitration are similar procedures whereby the adjudicator reaches a binding decision. ADR procedures assist parties to negotiate a settlement.
SUBMISSION FROM THE SCOTTISH LAND COURT

We have been invited to give evidence in relation to the first stage of the Agricultural Holdings (Scotland) Bill.

As a Court we try to avoid any comment on issues of policy. However, we are happy to try to assist on procedural matters and we do consider it appropriate to raise questions about procedural matters which will involve the working of the Court itself. However, apart from the time limit discussed below, we have no strong views about the procedural issues. Whatever form the Act eventually takes, we shall have to do our best to interpret and apply it independently.

As the Bill would give a significant additional jurisdiction to the Court and as the workings of the Court may not be widely known, we append a copy of a brief Guide prepared for visitors to the Court. However, it is not thought that detailed reference to it will be needed at this stage.

An important procedural feature of the Bill is the proposal to give to either party the right to bring their dispute before the Court without consent of the other, instead of being compelled to go to arbitration as they are at present. We think this entirely appropriate but it may be helpful if we record our acceptance of the importance of private arbitration.

Private arbitration, free from the procedural constraints of the current legislation can be expected to be the preferred procedure in many cases. Under the Bill it will be available to parties as a matter of choice. When parties have genuine disputes and a desire to have these resolved in a reasonable way, they should normally be free to try to agree the best method of resolving matters. This is entirely consistent with the scheme of the Bill that where agreement cannot be reached each party should have a right to go to a Court without requiring the consent of the other to do so.

It may be added that most disputes are settled by agreement. The fact that each side knows that the other can chose to follow established and comparatively predictable routines of litigation to get a decision, is well recognised to be an important element in negotiation.

We have been involved in discussion of the procedural “nuts and bolts” since the stage when the need for revision of the Agricultural Holdings (Scotland) Act 1991 was first under consideration by the Scottish Law Commission. We later provided officials at SEERAD with a list of comments on technical aspect of the original draft Bill. We have recently provided a further list of observations intended simply to draw attention to matters where some change might clarify or simplify operation of the new Act. (A copy of this list of observations is attached but, with the exceptions discussed below, we do not think that it raises the type of policy issues which the Committee is considering at the Stage of the Bill )
We consider that only three matters require to be brought to the particular attention of the Committee at present. The first relates to detail of the appeal procedures under section 33; the second seeks amendment to the Scottish Land Court Act to add a little flexibility to the jurisdiction of the Court by allowing the Court to deal with any kind of dispute that parties agree to bring before it; and the third seeks two simple revisions of that Act to increase the potential working flexibility of the Court.

We have set out the arguments on these matters in the list of observations mentioned above. We invite consideration of the arguments there set out. At present we think it unnecessary to repeat the arguments on the second point which we think self-explanatory. We would hope that unless the Committee express a view to the contrary the Executive will accept it as an appropriate amendment. We return to the other points below but first deal with the expected impact of the Bill on the work of the Court which we understand to be the main matter upon which our evidence is sought.

Implications of the Bill for the Court
As we have indicated above, we consider that the matter of appeal on issues of value in relation to the tenant’s pre-emptive right to buy is one which requires further consideration. However, we are satisfied that in relation to all other matters – including certain procedural aspects of the right to buy provisions - the nature of the work involved is well within the range of the Court’s current jurisdiction. The question accordingly is one of ability to cope with any increase in volume of work.

It is certainly expected that there will be an increase. However, the extent is impossible to predict with any accuracy. The number of applications to the Court has been steadily falling in recent years. The individual expert members have the capacity to cope with a significant increase in work load.

The amount of litigation resolved by the statutory scheme of arbitration at present is small. See the Law Commission Report No 178 2-66 to 2.68. It is thought that the existing members could probably cope with this work.

The difficulty is that if parties are entirely free to adopt private arbitration methods - including reference to expert assessor – it may be expected that even the available figures for statutory arbitration will prove an unreliable guide. Parties can be expected to make more use of private methods of arbitration and ADR.

However, it is possible that the new right of either party to go to the well established yet flexible routines of the Court will attract more work overall than was attracted by statutory arbitration. We simply do not know.

We expect the real pressure on the Court to come from the combination of new jurisdictions which we have been or are likely to be given under current legislative proposals. In addition to the right to buy provisions of this Bill, there are, of course, the community right to buy provisions of the Land Reform Bill. The Court is to have a role in relation to the crofting communities’ rights. We have recently acquired an appellate jurisdiction in relation to the various schemes for agricultural grants, subsidies etc. It was expected that we would have seen the effect of this by now. We had understood there to be a variety of issues upon which the agricultural community
would welcome independent appeal. However, the new appeal scheme created various administrative stages intended to give ample opportunity for resolution of grievances before they reached the Court. It appears that these have worked well and we have not yet seen any appeals. This is an illustration of the difficulty of accurate prediction of demand.

The Chairman of the Court currently combines his office with that of President of the Lands Tribunal for Scotland whose jurisdiction is also expected to see various increases. When new jurisdictions are involved it is inevitable that the “bedding down” period will give rise to legal issues which have not been fully anticipated. Accordingly, although both bodies can function by having individual expert members sit to hear cases, it is likely that the Chairman will feel it necessary to be involved personally in the hearing of the early cases. This is likely to give rise to a need for a further member suitably legally qualified and preferably able to cover both Court and Tribunal.

The Scottish Land Court Act provides for up to six practical members of Court to be appointed. We are currently working with one full time and two part time members so there is obvious scope for increased staffing to meet any demands at Divisional Court level. We have kept the Justice Department aware of our thinking in this matter. We are agreed that there is no point in increasing the staffing in anticipation of a dramatic increase. In comparatively recent years the Court had three full time members and we would hope to have no difficulty in being able to return to that sort of level if necessary.

As the role of the Lands Tribunal for Scotland is important for an understanding of the work of the Chairman of the Land Court and the issues arising under section 33, we attach a copy of the statement of evidence provided by the Tribunal member, Mr Macleary for the Justice 2 Committee. This covers the question of time limits for decisions on valuation. It also includes his evidence about the work of the Land Court. This duplicates material in the Guide referred to above but is a convenient summary. We have printed the overlapping material in italics but otherwise have left the substance of the statement in its original form.

**Comment on section 33**

The whole right to buy provisions were added to the Bill after the original draft was circulated for comment and we had no input to the provisions of Part 2 as introduced. However, we have made observations to officials in respect of certain procedural aspects including some of the subsections of section 33. At present we think it necessary only to draw attention to our observations in respect of two aspects of that section.

**Sec 33(1).**

We raise the question of whether the Court is the preferred forum for these appeals. It will be noted that we also question whether the Court is the appropriate body to deal with certain issues in section 29.

The expertise of the Court is in agricultural matters rather than valuation of land. The Lands Tribunal is the expert Tribunal regarded for nearly all other purposes as the proper body to determine issues of valuation. They have a recognised expertise in
that field. Although the Land Court does, from time to time require to make assessments in relation to valuation evidence in crofting matters this is not their primary area of expertise. The Tribunal also has experience in relation to issues of technical conveyancing which may arise in relation to the provisions of section 29.

One specific reason for concern about the nomination of the Court is that it is the Lands Tribunal which is to be given the jurisdiction in relation to the pre-emptive right given to the community under the first part of the Land Reform (Scotland) Bill. Both types of pre-emptive right will be triggered at the same time and by the same event ie a proposal to sell all or part of an estate. If there are disputes on valuation it is entirely foreseeable that they will involve individual farm and community bodies at the same time.

The choice of forum is an issue upon which it is inappropriate for the Court as such to express a view. We would expect to cope with the work. The Committee will simply have to decide whether the Tribunal’s range of expertise is to be preferred. The matter is discussed more fully in our list of observations and reference should be made to that.

On the other hand, we do consider it appropriate to express a view on the implications of the proposed section 33(6). We direct particular attention to our observations in relation to that provision. Although, a comparatively minor issue in relation to other topics before the Committee, it is the matter which could have the greatest direct impact on us. We make no apology for seeking to stress our views that:

A statutory deadline is unnecessary because in the overall scale of an appeal the time taken on the decision is comparatively minor. The appeal process can be expected to involve solicitors on each side having to find suitably qualified witnesses to take time to investigate and prepare to give evidence. Dates have to be found to suit counsel, solicitors and witnesses. The whole process can be expected to take the best part of a year without the Court or Tribunal adding any identifiable element of delay.

It is inappropriate because it creates an arbitrary priority and an avoidable risk of harm to the reputation of the Court. Our job is to deal with cases without avoidable delay. Specification of a deadline creates a priority. It is disruptive of other work. In addition, it is inappropriate because the Court should not be put in a position where failure to comply with a statutory duty is likely. This would not only be a source of embarrassment but a risk to the authority of deadlines imposed by the Court.

It is counter productive because the primary step to be taken to try to ensure compliance would be to allocate to the time table of the case an extra two weeks for writing the judgement. We would not be able to hear such a case until we could see that we had a clear space ahead for the decision writing.

In a more general sense it would be counter productive because the need to build in a specific period for the decision stage in every such case would simply restrict the availability of hearing dates leading to delay for all types of case.
It is important to realise that although a similar provision appeared in the Land Reform (Scotland) Bill as introduced, Mr MacLeary, a Tribunal member, gave evidence on the point to the Justice 2 Committee. We append a copy of the statement of his evidence in full. We understand that the provision is to be changed.

The period of two weeks is hopelessly unrealistic. (The Justice 2 Committee expressed sympathy for a need for two months.) The work of preparing a judgement is usually taken up with ensuring that there has been a proper evaluation of the evidence and its effects. The experience of the Tribunal in similar matters is that two months is a more realistic target.

We accordingly urge that section 33 (6) should be omitted from the Bill.

Amendment of the Scottish Land Court Act
The other matter on which we would like to comment relates to the need to maximise the flexibility of the Court to cope with the increased work loads which it faces. Straightforward issues of increased staffing are matters for the Executive and we shall make appropriate representations as and when the need arises. However, two potential ways of coping sensibly with the problem are excluded by the present provisions of the Scottish Land Court Act. We think it would be sensible to take the chance to revise the Act in two respects.

Both are set out in some detail under the heading “Scottish Land Court Act” in the list of technical observations and we simply direct attention to them. In the first place there is the proposal to bring the Court into line with the Tribunal by increasing the retirement age to 70. This would be of great value in increasing the pool of experienced people who might be prepared to work part-time. It would also give scope for retired members to come back on an ad hoc basis. This would be of particular value in the manning of the Full Court.

The second change to increase flexibility is the proposal to allow a permanent appointment of a deputy chairman, perhaps on a part-time basis.

The technical changes involved are minimal. In relation to the deputy chairman the proposal would simply be enabling and would not have any immediate effect. We would prefer any change to the provisions about retirement to have immediate effect so as to give present members an option, but if need be, they could be restricted to future appointments.

We would urge the Committee to support all the changes discussed above.

PAPERS APPENDED

Agricultural Holdings Bill – list of technical observations.

Guide to the Scottish Land Court
Statement of Evidence by Mr MacLeary put before Justice 2 Committee for hearing of Stage 1 of Land Reform (Scotland) Bill.
(This is appended in full. The main reason is to let the Committee see the specific material which was before the Justice 2 Committee in relation to the proposed time-limit. His evidence also provides a summary of the respective workings of Lands Tribunal for Scotland and Scottish Land Court.)

FURTHER REFERENCE

Justice 2 Committee 2nd Report: Stage 1 Report on Land Reform (Scotland) Bill
Vol 1 Report paras 121 and 122;
Vol 2 Evidence cols 923 - 927
Appendix to
STATEMENT OF EVIDENCE
By
SCOTTISH LAND COURT

NB. This is appended to show the specific material which was before the Justice 2 Committee in relation to the proposed time-limit for the Tribunal to reach a decision on valuation appeals. It may be noted that his evidence also provides a summary of the respective workings of Lands Tribunal for Scotland and Scottish Land Court.

Lands Tribunal for Scotland

Evidence to be given by A. R. MacLeary F.R.I.C.S.

The Tribunal is a judicial body and, as such, has been anxious to ensure that it expresses no views which relate, or appear to relate, to issues of policy. We accordingly did not seek to give evidence to the Committee. We appear by invitation to give such assistance as possible in relation to Parts 2 and 3. We have always been willing to advise on any matters relating to the practical application of the new Act. We were able to participate in several discussions with the solicitors involved in preparation of the Bill.

We wish to use this opportunity to repeat our concern about the time limits for the giving of decisions set out in sections 58(7) and 89(5). We deal with this further below.

Brief Description of the Tribunal:
Jurisdiction
The Lands Tribunal for Scotland has a range of jurisdictions falling into two broad categories: those involving valuation of land; and those involving certain categories of rights to land.

Valuation:
- Valuation of land taken by way of compulsory purchase.
- Valuation of commercial land for the purpose of fixing rates.
- Valuation of land in certain specific categories such as compensation for mining subsidence.

Rights to land:
- Disputes arising out of tenants’ rights to buy their homes from public authority landlords. A typical example is the basic question of whether a particular applicants falls into the category of "secure tenant" so as to
have a right to buy. Other disputes may arise as to what particular land is covered by the tenancy or what the conditions of sale should be.

Discharge of title conditions. A typical example is when someone has planning permission to build a new house or extension in his or her garden but the titles give the neighbours a right to prevent this to preserve their view. The Tribunal has jurisdiction to determine whether or not the development should go ahead. The scale of such restrictions varies greatly. A current case raises the question of whether Aberdeen Harbour Board Trustees should be allowed to prevent Railtrack from building a shopping centre on the goods yard which currently takes harbour traffic.

Appeals from the Keeper of the Register. These can involve any aspect of title to land; including determination of boundaries, title conditions, and claims for compensation against the Keeper.

Members
Because of the range of jurisdictions the workload is subject to quite distinct swings. In recent years the Tribunal has been fairly quiet and, as a result of retirements, the President has been able to cut back in staffing. Currently we have Lord McGhie as President. He combines this post with that of Chairman of the Scottish Land Court. Both organisations are administered from the one building but with separate office systems. John Wright, QC, is a part-time legal member. Roger Durman F.R.I.C.S. is a recently appointed surveyor member. Alistair MacLeary is a full-time surveyor member. In most cases the tribunal which takes the hearing is made up of a lawyer and a surveyor.

The Tribunal was very busy when the public sector “Tenants Right to Buy” legislation first came into force. Similarly, revaluations for rating have produced dramatic upsurges in work. It is not expected that the current proposals will lead to significant volume of cases but it is expected that the issues in individual cases will be time consuming. It is not currently the intention to increase the staffing in anticipation of an increase in demand. However, we shall have to monitor the position. There may well have to be an increase in staffing. We would hope to cope in the first instance by increasing the commitment of the part-time members. If other appointments are needed we would expect to be able to effect any necessary increase within about six months – allowing for advertisement and appropriate selection processes. (The Lord President of the Court of Session is responsible for appointments and can be expected to apply ‘Nolan’ principles as far as possible.)

Procedure
Although it is regarded as an “expert tribunal” it is important to keep clearly in mind that the Lands Tribunal functions in broadly the same way as a Court. The expertise allows for a quicker process – the fundamentals can be taken as understood and
parties can therefore concentrate attention on the particular issues arising in the case in dispute. However, the role of the tribunal is to decide between competing parties. It is up to the parties to put such evidence as they wish before the tribunal. The task of the tribunal is to assess the evidence. It applies its expertise in this assessment but will not simply substitute its own views. The aim is to reach a decision based on the evidence presented to it. The tribunal is not an investigative body.

Our prime consideration is to deal “judicially” with all issues coming before us. In other words to ensure that matters are dealt with fairly and impartially and with all parties having proper notice of issues and evidence. We try to conduct cases as informally as is consistent with maintenance of a proper judicial approach. Our clerk and clerical staff are approachable – and easily accessible by telephone to discuss procedures – and regard it as their main function to assist parties dispose of cases in the most efficient way. We try to avoid formality when possible while recognising that where serious issues are in dispute a degree of formality is necessary to avoid any suspicion of unfairness.

Hearings
The Tribunal usually sits in Edinburgh. However where there is a need for inspection or where the convenience of witnesses requires, it is common for us to sit in the locality of the subjects in dispute. When possible we sit in the local sheriff court but may have to sit in council chambers, hotels or other suitable public facilities.

Our invitation was in respect of Parts 2 and 3 of the Bill. It is not proposed to give the Tribunal a role in Part 3. That relates exclusively to crofting and as the Land Court has a wide jurisdiction and extensive experience of all matters relating to crofting it has been given the major role in that Part. Lord McGhie is head of both bodies and they work closely together. Experts from one can be co-opted to sit on the other. We understand that it is not intended to invite evidence from the Land Court. The following material may, however, be of assistance.

Brief description of Scottish Land Court
Jurisdiction
Although the title “Land Court” implies a wide jurisdiction in relation to land a good idea of the real scope of the work of the Court can be obtained by thinking of it as limited to disputes between agricultural landlords and tenants. In the context of the present Bill it is enough to say that it is the Court which currently has wide specialist jurisdiction in relation to crofting matters – crofts being, in essence, tenancies of small agricultural units.
Members
The Chairman of the Court has a rank equivalent to that of a judge in the Court of Session. The other three Members of the Court are not lawyers. They are Members who have been selected for their expertise and knowledge of agricultural matters and for their ability to deal with cases in a proper judicial fashion. Their ability in this respect has been developed by their work with the Court. Because the areas of law in which they practice are comparatively limited they have all developed a specialist knowledge of the law relative to the work of the Court. In other words, all have wide knowledge of crofting law. They have experience of valuation of crofts as part of their jurisdiction in relation to the crofter’s right to buy his croft and apportionment. They have experience in fixing rents and on compensation and valuation – particularly in the context of payments to be made in respect of resumptions.

Procedure
The bulk of the work of the Land Court is carried out by these practical Members sitting individually. When sitting alone they are known as a Divisional Court - a throw-back to days when Scotland was divided into geographical areas for the purposes of the work of the Court - and are assisted by an experienced solicitor as legal assessor.

It is expected that all matters arising under the reference or appeal provisions of the Bill will be dealt with either by the Chairman and Full Court or by the Chairman sitting alone.

Hearings
The Divisional Court sits where convenient, locally to the subjects in issue. If possible it will sit in the local Sheriff Court but is very common to have sittings convened in local halls or hotels or even in the croft house itself. Proceedings can be fairly informal but, by and large, the more informal the setting the greater the need for conscious formality by the Court in order to demonstrate to parties and witnesses that serious business is involved.

The Full Court sits to hear more important cases or cases which appear to raise issues of law and also to hear appeals. The structure of the Land Court allows a very flexible system of appeal. Decisions of a single Member sitting as a Divisional Court can quickly be reviewed by the Full Court.

The Court conducts all its business as a Court. Its role is to determine disputed issues. It will approach the new legislation in that light.

Like the Tribunal, the Court prides itself on having staff who see their prime task as the assistance of parties and who are easily accessible to give appropriate advice on procedure.

Comment on the Bill
We wish to use the opportunity of the appearance before the Committee to repeat our concern about the time limit specified for the giving of our decisions.

We request that the provisions of section 58(7) be changed to provide that “In its decision the tribunal shall give such brief statement of reasons as it considers necessary to inform the parties of the approach it has taken to any significant disputed issues of fact or law and shall issue such decision as soon as reasonably practicable” A similar change should be made to section 89(5).

The Tribunal have had various discussions with the Executive in the earlier stages of the Bill and have no serious reservations about the role envisaged for the Tribunal apart from the concern about the current proposal that decisions of the Tribunal on matters of valuation should be issued within two weeks. We always try to get decisions out without avoidable delay. Our direct experience of disputes over valuation of land in the context of compensation for compulsory purchase suggests that this figure is quite unrealistic. Such a provision will create embarrassment and stress for the Members concerned and will impair the authority of the Tribunal. It will not help in attempts to speed up the time required for preparation of decisions.

There are many situations in public life where a decision has to be made at a particular time. A person reaches the best decision he can in the time available. We doubt, however, whether the intention of the Bill is that the Tribunal should just “do the best it can” in two weeks. If that is not the intention, it must be made very clear that in our experience, the tension created by attempts to impose a deadline on decisions seriously interferes with the decision making process. We have very often sat down with a firm resolution that a particular case has to be dealt with in a limited period because of the pressure of other work only to find that the issues do not prove amenable to this approach. The significance of particular issues in their relationship with other issues is not always immediately apparent. Minor points often grow in their significance on proper reflection. A deadline inhibits this process which we think fundamental to proper resolution of the issues with which we have to deal.

We refer to the creation of embarrassment because it is clear that like any Court, the Tribunal should be seen at all times to be itself complying with the law. This is a matter of real concern to members.

If, as we think inevitable, we find ourselves repeatedly failing to meet the statutory limit this will impair the authority of the Tribunal. We ourselves frequently require to impose time limits on parties. We expect them to be complied with. We recognise that they impose particular pressure on solicitors. We try to be realistic. Solicitors comply with our time limits not through fear of sanctions, but as a matter of practice and professional responsibility. There is no doubt a recognition that we are all aiming at smooth conduct of all cases in the interests of all parties. That professional culture may be seriously impaired if it become known that we routinely fail to comply with statutory time-limits. If, as the Bill provides by subsection (8), the specific time does not really matter, we think there are very good reasons for omitting it.

We seek a provision that would positively reduce the time taken for decision. We accept that as a matter of policy the intention is that such decisions be given priority by the Tribunal. If it was provided that we should produce a decision as soon as
reasonably practicable, that could be treated as a justification for giving the case priority. We would work such hours as possible to give effect to that.

Speed would be positively assisted by a provision which authorised a simplified form of decision.

It is recognised that one reason for the time taken to produce legal decisions is the desire that the decision should provide guidance to the public at large. The hope is that by publishing decisions in fully comprehensible terms setting out the principles upon which we proceed, other parties will find it easier to settle their disputes without recourse to litigation. That is a well-established reason for the terms in which judgements of both courts and tribunals are presently couched. With this in mind it is thought necessary for all decisions to be fully comprehensible to third parties or at least to their legal advisors. Full and accurate descriptions of the land and the background to the issues have to be set out so that the decision can be fully understood.

The parties themselves are well aware of the lie of the land and of the background. They may recognise that the whole issue turns on one short argument. A decision meeting the needs of parties might be very different in form from one aimed at a wider public.

In the present context we suggest that it be provided that the decision need only be sufficient to inform parties of the approach taken by the Tribunal to all significant disputes issues of fact and law. This would allow the preparation of a much shorter form of decision than is currently the practice. It should be recognised that the main time is often taken in reaching a view on the overall effect of the evidence and in satisfying ourselves this view is robust. It cannot be said that preparation of a shorter written decision would, in all cases, save significant time, but in every case it would undoubtedly save some time. We currently regard a target of two months as realistic rather than two weeks. We would, in practice, aim for four weeks in the present context.

We have expressed this view informally in course of the earlier stages of preparation of the Bill and rather think that retention of the two week figure demonstrates an imperfect understanding of what is involved in the process of valuation.

As indicated above, our role is essentially to resolve disputes. Our decision will be based on resolving conflicting bodies of evidence. Significant disputes are unlikely in relation to valuation of standard types of land in respect of which there is a ready comparable market. For example, in the housing market, even if parties do not agree with the precise figure reached for a particular house, there would be a recognition of what was within a realistic bracket. Appeal – except, perhaps, for tactical reasons – would be unlikely because parties would have no certainty that any other valuation would be better. In relation to rural subjects adequate comparative evidence is likely to be hard to find. It is likely that appeals to the Tribunal will involve difficult valuation issues.

The subjects in dispute are likely to complex, in the sense of containing different elements. A typical country estate may involve diverse units ranging from a
traditional farm to a Christmas tree farm with any number of different units in addition. Valuation is, therefore, very likely to give rise to inter-related questions of fact and law.

It might be helpful to refer to some typical examples. A very common difficulty in relation to agricultural subjects is the question of "hope value". By this is meant the prospect that at some time in the relevant future planning permission will become available for development of the land. We have recent experience of a dispute between a local authority valuation at £1,500 per acre and a claim for £100,000 per acre based on a potential value of several times that figure if planning permission for development of any sort did become available. Each figure was supported by a body of respectable evidence. Assessment of the appropriate figure involved close consideration of a range of allegedly comparable subjects and assessment of the relative positions of each in relation to the likelihood or otherwise of planning permission for development becoming available. The exercise required careful assessment and reflection although the subjects were simply fields.

Many different types of issue can arise. For example, it may be contended that a peat bog is an ideal site for establishment of a waste disposal site. This would, of course, lead to a dramatic increase in value. We have some experience of the difficult questions of expert evidence which can arise in relation to such matters. Here again a proper conclusion will require mature study of the evidence and pressure to produce a quick result is unlikely to produce a proper result.

Scottish Land Court

Similar considerations apply to the provisions of sec 89(5). We urge a similar approach. We recognise that some cases can be dealt with comparatively quickly. Some people can produce decisions more quickly than others. However, the ability to do so is not likely to be enhanced by time limits. The observations of the tribunal reflect the experience of the Court.

Other comments

We have provided a list of comments on technical aspects of the Bill for the possible assistance of solicitors involved in the drafting exercise. A copy is attached for convenience.

(NB This copy related, of course, to the Land Reform Bill)
Scottish Land Court.

Agricultural Holdings (Scotland) Bill – as presented

Technical Points made for consideration. It must be understood that except when dealing with proposals which have a direct bearing on the operation of the Court, these observations are deliberately based at a fairly superficial level i.e. first impressions. Because we may ultimately have to rule on such matters in the context of a litigation, we have not attempted a full analysis either of what the law may be at present or what the precise implications of the Bill may be.

For the same reason, it should also be noted that any drafting suggestions are intended to give an indication of our thinking rather than to make positive proposals. We must be free to give an independent judicial ruling on provisions as enacted.

Section.

9. What if the provision in the lease is that "rent will be based on a specified index"? Is this a "provision for review"? It is a fixed method of calculating rent.

9(3) The provisions of sec 13 of the 1991 Act are hard to follow. We did suggest that they should be radically overhauled while recognising that the purposive approach the Court has taken in the past is understood and can be said to work. We recognise that wholesale revision is not thought appropriate at this time. This new provision makes some modest changes in the wording while obviously intended to make no change in substance. Further minor drafting clarification might simply delete from “there” to “or” in the first two lines of sec 9(3).

Because strict compliance with the current provisions is hard to achieve, we would wish to be able to adopt simplified procedures where this could be done without altering the substantive effect.

One possibility is that instead of the Court having to fix a precise figure it would leave the parties to propose appropriate figures and limit its own task to that of choosing the more appropriate.

The Court would still have to make a fairly accurate assessment of open market value in order to determine which figure should be chosen. However we think that litigation in the knowledge that the Court would simply make a choice and not fix its own rent would simplify procedures. It would force parties to be entirely realistic in the figures put forward. Each side would know the other side’s figure. It would also have the advantage of some simplification of the writing of decisions. It would allow a decision based on explanation of the choice of one or other of the figures rather than detailed explanation as to how the Court reached a figure following the labyrinthine provisions of section 13.

Such an approach is, of course, in accord with the adversarial approach to litigation which is traditional in British Courts. The Land Court has traditionally refused to see its role as limited in that way but there may be occasions when it is entirely appropriate.
Consideration might be given to something on the lines of: "notwithstanding anything in section 9 of this Act and section 13 of the 1991 Act, the Court shall regulate its procedures as it sees fit and, without prejudice to the foregoing, may determine rent for the purposes of that section by selection between figures proposed by landlord or tenant".

It must be recognised that this is a proposal of very minor significance and we make little of it. Many disputes over rent turn on specific issues of fact or principle and we would need to be free to ignore parties’ figures where appropriate.

17. We have previously pointed out that provision for notice must not be confused with a right to allow purging. Policy on irritancy is not for us, but if it is intended that the giving of notice is to give the tenant a chance to remedy his breach this should be explicit.

We have also raised the question of whether “set aside” is adequately covered by these provision. There may be scope for argument that it is neither a “conservation activity” nor “good husbandry”.

27. We assume that there is some provision which will regulate the inter-relationship of this right with the community right to buy. We have not yet identified it. (Although it seems that sec 26(1)(g)(iii) touches on this, it refers only to a late stage in affairs.)

29. See comment below as to the appropriate appeal body. Section 29 raises matters of technical conveyancing similar to issues dealt with by the Lands Tribunal under its jurisdiction in relation to tenants rights to buy their homes from public sector landlords and its jurisdiction to deal with appeals from decisions of the Keeper of the Registers. These are essentially legal issues which would have to be dealt with in the Land Court by the Chairman or in the Lands Tribunal by the President or any other legal member (Currently John Wright Q.C.). In administrative terms it would be sensible to have these dealt with by the Tribunal although regard must, no doubt, be had to the underlying policy of limiting the number of different Courts which might potentially have to deal with disputes between landlord and tenant of agricultural subjects.

29(4) This provision may have come from provisions appropriate to compulsory purchase. (cf Housing (Scotland) Act 1987 sec 64). However, if the landlord has power to refuse to sell except on conditions agreed by him, the scope of this provision is unclear. Under the 1987 Act – as it has been construed by the Tribunal – a housing landlord can become contractually bound by the Tribunal to give a good title even if that landlord does not have a good title to give. (He will be liable in damages if he cannot remedy the situation). In what circumstances might an agricultural landlord be bound in this way?

29(9) If the tenant fails at a late stage to comply the landlord will almost inevitably wish to re-advertise. Does this trigger the tenant’s right afresh under section 27 (1)(b) read with (4)(a)?
Part II

Right to Buy.

31(1) and 31(2)(f).
Land would include fixed equipment whether or not it was recorded. Comparatively few records exist. What is to happen if there is no record? Could fixed equipment be dealt with simply by appropriate “disregard” under subsection (2)?

We are not clear about the thinking behind the deemed inclusion of sheep stock. This provision requires further thought. Where the tenant as existing owner of the flock is to take them over, the landlord will be free of his obligation to pay for them. His rights and obligations should in principle cancel out without need for any explicit provision.

31(2) To what extent is the valuer to have regard to the proposed terms of sale. If the landlord seeks to impose real burdens limiting the potential development can the valuer take them into account?

The personal circumstances of the tenant would play a part in any real life negotiation. A tenant with no apparent family successor is not in as strong a position as an established family business. Is the valuer to allow for this?

31(2)(d)
“High farming” is virtually unknown and these provisions will cause no difficulty in practice. It is recognised that where such a practice has been followed the land may have an agricultural value which is not reflected in the market value of the land.

31(2)(e)
Is the intention simply to exclude ‘dilapidation or deterioration’ for which the tenant is responsible under any contract or rule of law?

33. (1) A question arises as to whether the Land Court or the Lands Tribunal for Scotland should have the appeal jurisdiction in relation to valuation. In considering this it is important to remember that both are judicial bodies which use their expert knowledge to reach a sound decision on the evidence presented. Neither would attempt to make an “assessment of value” for themselves. In context the assessment must be understood to be an assessment of evidence led by parties bearing on valuation.

It can also be borne in mind that whichever body is nominally to deal with these appeals, members of the other can be co-opted to help in the assessment of evidence on any specialist issues.

The primary expertise of the Court is, of course, in agricultural matters. Members are selected for their skill and experience in that respect. It is notorious that “expert witnesses” become devalued when they try to cover areas outside their own speciality. There may be a risk of this for the Court if it requires to go too far into
issues of valuation. The Lands Tribunal, on the other hand, is the expert Tribunal regarded for nearly all other purposes as the proper body to determine issues of valuation. They have a recognised expertise in that field. In this connection it may be added that it is the experience of the Tribunal that disputes over land valuation arise, as often as not, over issues such as the development potential of the land. This requires assessment of planning evidence and has to be based on a sound understanding of the planning system. The Tribunal has that expertise.

Selection of the appropriate specialist body requires an assessment of the dominant speciality in relation to valuation of farms. While this may not be the same in every case and the question must have regard to the provisions of sec 31(2) dealing with agricultural specialities, it is thought likely that a sound knowledge of valuation methods and skills is likely to be the main requirement. If this accords with the public perception, it would be appropriate to have the Tribunal as acknowledged specialists in this field.

It is, of course, correct to say that for the purposes of the Crofting Community Right to Buy provisions of the Land Reform (Scotland) Bill the Land Court has been nominated as the appropriate appeal body. This decision was taken after careful consideration of the predominant issues likely to be involved. It was thought that fair valuation of crofting estates, where there were active crofting interests, would be likely to require a sound understanding of the nature and extent of crofters rights. As the Court was the recognised authority on crofting matters no major issue of principle arose. The Court does, from time to time require to make assessments in relation to valuation evidence in crofting matters although this has tended to be on a comparatively small scale. It was recognised that, in practice, the Court could readily co-opt members of the Tribunal to assist in their assessment.

The second main reason for questioning the nomination of the Court is that the rights given to an individual tenant are to be triggered on proposed sale. Such proposal would also trigger any community right to buy under the first part of the Land Reform (Scotland) Bill. There may be some distinctions to be drawn between the valuation exercise required in the context of pre-emptive rights of individual farmers and that in the context of pre-emptive right given to the community, but the essential purpose of each exercise will be the same. In particular it may be noted that under current proposals, if an entire estate consisting of a number of farms requires to be valued for community purchase purposes the Tribunal would have to carry out the work. It appears that almost exactly the same exercise might have to be done, at the same time, for the purposes of section 31(3).

Although we can accept the term “reassess” in context as meaning that we shall reach a fresh conclusion on the basis of evidence lead, it is important to keep in mind that both Court and Tribunal function as courts of law. Unlike procedures for initial valuation (sec 32) appeals will follow the routine of written statements of case, hearing of evidence, and submission of argument on that evidence. We shall, of course, consider written evidence by way of reports and the evidence of witnesses may be taken on affidavit or other written form, where appropriate. By agreement of parties an entire appeal could be dealt with on the basis of material presented to us in written form. The Tribunal has no experience yet of this ever being agreed in relation to a complete valuation but parties have been known to
leave specific issues arising in a valuation to be resolved on the basis of written submissions.

33(4) "Heard" is a technical term in a Court context. It implies that the Valuer has a right to be a party. As this provision stands we would require to intimate the appeal procedures and he would require to take formal steps to enter our process. He would be a party to the process. He would face a liability in expenses if his intervention proved unsuccessful. (This much is fairly clear although there is conflicting authority on the precise weight to be given to other implications of the term "heard": *Scott v Wilson* 1993 SLT (Lands Tr) 52; *South Lanarkshire Council v Cunningham and Others* (LTS/LO/1999/27 - unreported - 21 June 2000).

In the preparation of the Land Reform Bill this point was clarified and the provision as introduced did no more than resolve any doubt that parties would be entitled – at their own hand – to call the valuer as a witness.

33(5) Is interest used in the sense of a legal interest? Might it include other tenants. What about neighbours or other prospective purchasers. It is important to have an easily recognised category as we will have to ensure that intimation of the appeal is made to all person who might be able to assert an interest.

33(6) Summary:
We consider specification of any period to be unnecessary, inappropriate and counter-productive. The present provision would have no significant impact on the overall time taken for an appeal. It would inevitably lead to delay in the processing of other types of cases where no deadlines are in place and would have an overall adverse impact on efficient administration. It would lead to embarrassment for Members and impairment of judicial authority.

Comparison with Land Reform Act:
Although a similar provision appears in the Land Reform (Scotland) Bill it is vital to understand: (a) that this provision is expected to be changed; and (b) that the effect of a deadline is to create a priority. This must be justified as a matter of policy.

The Lands Tribunal has already given evidence on the point. In the Justice 2 Committee, Second Report, 2002: Stage 1 Report on the Land Reform (Scotland) Bill, Volume 1, paragraph 122 their finding appears: “The Committee is sympathetic to the Land Tribunal's position that a two month period for adjudicating appeals is appropriate and invites the Executive to consider this further with the Lands Tribunal”. Our understanding is that the Tribunal have received assurances that a period of two months will be substituted at the later stages of that Bill.

It is acknowledged that in his oral evidence Mr MacLeary indicated that a period of two months would be tolerable – “if necessary”. However, the position of the Tribunal was essentially one of opposition to having any fixed deadline. The need for two months was advanced as part of the demonstration that a two week period was totally impractical. [Mr MacLeary’s written evidence also attempted to address a possible improvement by giving specific statutory authority for a briefer type of decision. However, it has been recognised that this would not make any
major difference to the time taken and we do not understand that this proposal has found favour. We do not repeat it here.]

The preference for unrestricted time for proper decision making:
The exercise of determining market value is essentially the same type of judicial exercise as that involved in relation to assessment of compensation in relation to compulsory purchase although the specific statutory criteria will not be the same.
The Tribunal’s management target time is two months. Currently they expect always to meet that target. Some cases take less time.

The time is required not simply to write out a written statement of reasons but to allow a proper decision to be reached evaluating all the evidence. We think it common judicial experience that in most cases of any difficulty, the exercise of setting out and dealing comprehensively with all the material presented is an essential part of the process of reaching a sound decision. It is a complete fallacy to think that we would be able simply decide on a figure and write up a judgement to support it.

We are, of course, well aware that there are many situations in public life and indeed in other judicial processes where a decision has to be made at a particular time. A person reaches the best decision he can in the time available. We doubt, however, whether the intention of the Bill is that the Court should just “do the best it can” in two weeks. If that is not the intention, it must be made very clear that in our experience, the tension created by attempts to impose a deadline on decisions tends to interfere with the decision making process. We have often expressed a firm resolution that a particular case must be dealt with in a limited period because of the pressure of other work only to find that the issues do not prove amenable to this approach. The significance of particular issues in their relationship with other issues is not always immediately apparent. Minor points often grow in their significance on proper reflection. A deadline tends to inhibit this process which we think fundamental to proper resolution of the type of issues with which we have to deal.

The overall time taken also depends, of course, on the nature of the other commitments of Members. We had understood that the policy behind introduction of a time limit in the Land Reform Bill was to force the Tribunal to give such applications priority over all other applications. That was a matter of policy and the Tribunal did not feel able to resist it although we do not understand it to have been reached after assessment of the other demands on the Tribunal. It cannot be policy that all types of application should have priority!

Is there likely to be a measurable benefit in a deadline?
The overall effect of a quicker decision in the context of an appeal will be minimal. Delays occur at many stages. The principal problem is usually to fit the diary commitments of legal representatives. We would also expect difficulties for solicitors in the organisation of suitable expert evidence from valuers, surveyors, planners and others. Creating a priority by placing an arbitrary pressure on the Court is, we think, the least necessary and least efficient way of attempting to speed procedures.
The negative effect is likely to be more dramatic. If we have to produce a decision in a fixed time we shall have to allocate time after the hearing diet to allow us to attempt to meet our statutory obligation. Thus a case which might have been fitted in to an available hearing diet will now have to wait until the Court or Tribunal can be sure of a clear three weeks. To illustrate the point crudely: we might decide not to allocate a diet for hearing of a section 33 appeal for the weeks before a holiday period in case we did not finish the decision in time. We might allocate such weeks to some other type of case and postpone the section 33 case to a later date.

Need for deadline?
We always try to get decisions out without avoidable delay. That is an essential part of our work. Both Court and Tribunal attempt to meet the apparent needs of each case within the overall confines of their workload. Any deadline has the practical effect of creating a priority. In other words it forces an re-ordering of resources. The need to get a decision out within a fixed period would need to be taken into account in fixing diets, staff leave etc. We could not ignore a statutory deadline. We would have to allow a period after every hearing for the writing of decisions. This has various implications.

Implications for work of Court:
Most cases do settle before hearing. When they do our overall time-table loses all the time allocated. Unlike other Courts we have no way of using lost time to hear other cases. We can, however, normally use it to get on with written work. This of course includes the writing of judgements. If we have to allocate a specific period after each case for the judgement to be written this will limit the number of days we can offer for hearing. The overall effect will be an increased delay for all cases. This will include any other cases under section 33 and also community purchase cases although, of course, they would require, in turn to have priority in relation to the remaining Court time available. Priority to one case implies additional delay to another. More generally, we consider that the addition of any fixed deadlines for decisions would add a burden to our system.

What exactly is the policy?
The effect of a deadline is that cases under Part 2 would have priority over all other work. We cannot comment on that policy nor how it ranks with the provisions of the Land Reform Bill. However, if that is the policy, we think that it would be more appropriate to spell it out as an instruction. For example; “The Court shall, where it considers it practical to do so, give priority to dealing with appeals arising under this Part of this Act over all other applications which may be before it”

Implications for members
We are aware that subsection (7) may be construed as an invitation to ignore the period specified but as a Court we could not take that view. We would normal feel a professional obligation to comply with a statutory provision bearing on our own work by attempting to put such a deadline before other commitments, including personal ones.
The Tribunal’s experience in valuation makes it clear that we cannot expect ever to meet the deadline. This is of grave concern. We think it quite wrong that a Court or Tribunal should put in a position where it would routinely be in default of a statutory obligation.

Public perception:
If we repeatedly fail to meet the statutory limit this will impair the authority of the Court. We routinely impose time limits on parties. We expect them to be complied with. We recognise that they impose particular pressure on solicitors. We try to be realistic. Solicitors comply with our time limits not solely through fear of procedural sanctions, but as a matter of practice and professional responsibility. There is a recognition that we are all aiming at smooth conduct of cases in the interests of all parties. That professional culture may be impaired if we routinely fail to comply with limits imposed on us.

Conclusion:
If, as the Bill provides by subsection (7), the specific time does not really matter, we think there are very good reasons for omitting subsections (6) – and of course (7) – in their entirety.

35. We wondered whether any further guidance as to factors to be addressed in relation to “reasonable” might be provided but recognise the desire to leave this fairly open.

37. This makes void any agreement purporting to provide that no compensation will be paid. Is this intended to cover an agreement purporting to make provision for compensation fixed at specific sum?

An alternative approach would make any agreement which purported to have the effect of excluding or limiting statutory rights to compensation be to that extent null and void. However, this may raise issues of policy. Agreement fairly reached at the outset may be preferable to dispute at the end.

37/38(4) Is it intended that an entire agreement should be “null and void” or “of no effect”. What is the intended difference? Words such as “to that extent” might help to avoid any dispute as to whether a Court has power to sever objectionable parts of an agreement. (See sec 60 and new sec 61B)

Jurisdiction

Sec 60 [and 63(5)]
The new section 61A(5) provides that any provision that would apply to the Land Court in its “determination” also applies to arbitration (properly so called). It does not appear that this provision would be wide enough to include the procedural powers of the Land Court in course of the conduct of the arbitration or the disposal powers under section 52. Private arbiters would not be expected to have such powers. They may be given certain powers by the terms of the agreement to refer or may be able to seek powers from the sheriff. Where the Land Court is to have the fall-back jurisdiction it might be appropriate to make provision that an arbiter is entitled to
apply to the Court either at his own instance or at the instance of either party to seek any necessary orders to facilitate proper disposal of the reference.

Section 61A(b) provides for appeal to the Land Court on a point of law. This is said to be final. It is assumed to be the intention that this will supersede section 56. We understand that doubts have been expressed on this point. It might be clarified one way or another.

Note that the effect of section 61B is that any agreement reached prior to an actual dispute arising is to be null and void. Is the right under sec 9 to agree methods of rent review adequately preserved?

61(5) Petty point – is this the right way round?

63 It is common practice, at present, for arbiters to issue a draft decision to allow legal issues to be determined by a Court before the arbiters actual decision is made. We understand that there may be a desire to cut out this as a possible source of deliberate delay. However, it is possible that such a course would avoid delay. The net result of a successful appeal is that parties may have to start all over.

If a legal issue was identified in course of arbitration, it might be worth have an express provision allowing parties, of consent, to have the arbitration sisted pending a declarator by the Land Court. Sec 63(2) might be thought to exclude this. Any such reference would, accordingly be outwith the jurisdiction of the Court. (It would be the type of situation covered by the “agreement to refer” procedure we discuss below in context of change to Land Court Act but it would be better made explicit in sec 63.

66(a) This provision is part of the change to make appeals under the 1991 or the 2003 Acts simple "appeals". In other words the "special case" procedure has been superseded.

Appeal from the Land Court is at present limited to questions of law and is made by "Special Case". This can be a clumsy procedure and is unnecessarily complex where a full decision has been issued by the Land Court. Where there is such a full decision setting out all the relevant findings in fact an ordinary "appeal" is straightforward. The Rules of the Court of Session will require the appellant to identify his Grounds of Appeal but all other material will be within the context of the Land Court decision.

Where a decision is in short form or where the Court, accidentally or deliberately, has omitted factual material which the appellant thinks important, procedure by Special Case allows what might be called a second bite at the cherry. However, this may be a vital safeguard because in Land Court practice we do not have a short hand record of evidence. The evidence is recorded by the sitting member. The clerk will also keep notes. The Court can add material into the Statement of Facts at the request of parties. This allows the party appealing to present Questions of Law against a more complete statement of background fact than the Court may have considered necessary in its original decision.
In current practice our decisions try to include a full summary of relevant facts. Accordingly requests for a Special Case usually need do no more than simply refer to the existing decision for its narrative of fact. In that situation, the whole procedure by way of preparation of a Special Case is just an extra – but fairly modest – layer of work for the Court and parties. However, the value of the Special Case procedure in allowing an unsatisfied party to ask for a more complete statement may be one which should not lightly be discarded.

In theory the existence of this procedure would allow time to be saved on the routine case at the expense of a good deal of extra time in any case which was actually to be appealed.

If the Court was forced to adopt a practice of producing much shorter decision, perhaps by omitting details of background well known to parties, the availability of Special Case procedure would allow any case which was appealed to be set out more fully. We have not yet had occasion to test the value of Special Case procedure as we have not found any appropriate cases for adoption of an abbreviated form of decision. However the procedure is well known in criminal matters where it is common to have a brief oral decision unless an appeal is taken. It has also been used in the Tribunal. We think there would probably be a value in having both procedures.

66(c)

The effect of these provisions is that delegated decisions will not be subject of appeal to Full Court. The appeal from an arbiter is to the Full Court and is “final”. Appeal from Divisional Court to Full Court has been removed. It is thought that these provisions arise out of proposals by the Court which would have allowed the Chairman to sit as a delegated single member in a case involving a purely legal issue without the difficulty created by the current provisions of a right of appeal to the Full Court. The result has gone further than anticipated.

However, we recognise the Law Commission’s recommendation for a “two stage” process only. However, there may well be cases where a simple appeal to the Full Court would meet the needs of the situation. We understand that consideration may be given to provision of a choice of appeal.

Choice may involve various interests. If both parties agree, the Court chosen is unlikely to have an interest to decline to hear it. If parties to not agree, a question arises as to whether the appellant should have unfettered choice or whether this is to be subject to control. Control could be exercised by giving the chosen Court a power to remit to the other. (In practice this would be on the motion of the respondent.) Alternatively, the statutory appeal could be to the Full Court with power to remit ex proprio motu or on cause shown.

It is to be noted that even under the present proposals, the “Rehearing” provisions of our Rules will remain. A tighter distinction might have to be drawn between appeal and rehearing.

66 general
We think it important to take the opportunity to make the Court as efficient and flexible as possible. This might be done in the context of this section or by way of additional sections. We discuss two matters below in the latter context.

68 Subsection (2) gives power to order caution or an undertaking. We do not know why has this been made explicit. We have assumed that we have such a power at present and one drawback about the express conferring of a power is that it opens the argument in other contexts that the power does not exist.

We have ordered caution in several cases in recent years. One is an Agricultural Holdings case which is currently being appealed to the Court of Session but not, as yet on this point. Court cannot authoritatively decide the limit of its powers and if a doubt exists we would welcome clarification. However, the power should not be limited to Agricultural Holdings. We see no reason why the powers should not apply generally (eg by deletion of the first line of sec 68(1).

68 We have no doubt that it would be useful to have a power for to Court to dispose of cases in whole or in part by sending particular issues to arbitration, or remit to a man of skill, or a valuer. However, further consideration would be required as to the competency of doing so.

We consider the proposal to put all disputes to the Court at first instance to be justifiable in principle as it will only happen if parties have been unable to reach agreement as to procedure. There may be a variety of reasons for this. However, some routine valuation issues simply do not justify the full adversarial procedure. (We think that in this context, statutory arbitration can be regarded as adversarial procedure). Once in Court parties might be susceptible to suggestions that we sist to allow certain identified matters to be dealt with either in a way proposed by the Court or mutually agreed. We would have a sanction in expenses if a proposed method was unreasonable rejected.

74 We must observe that, taken on its own, we have some doubt as to whether this is an issue falling within the established scope of the Land Court. However, we recognise that questions of misconduct etc may arise in course of an appeal from an arbiter and there may be merit in leaving one Court to deal with all issues.

We are aware that the terms "misconduct" or "improperly procured" have been used by Courts as a justification for interference with private arbitration. An arbiter who does not conduct procedure in proper accordance with the rules may be said to have been guilty of “misconduct”. However, that expression at least may now have a connotation which tends to go beyond the context. We suggest that it would be worth considering whether greater definition and specification could be provided.

Revision of Scottish Land Court Act 1993
(This material could go into the proposed sec 66 but it might be appropriate to add a more general section to deal with it)
The Bill makes provision for various amendments to the 1993 Act and it would be appropriate to take the opportunity of considering what further amendment is appropriate.

**Two important matter for discussion: First:** We have previously stressed the benefit of giving the Court a broad jurisdiction to act as arbiters of consent in any appropriate matter. The Lands Tribunal has such a power (Sec 1(5) of Lands Tribunal Act 1949) and it has been a valuable one.

We would wish to be able to decline to accept references in any particular case but such a jurisdiction is thought to be one of considerable practicable importance. We understand that instructions were given to draftsmen to include such a provision. We do not know whether it has been omitted by accident. We would certainly wish to urge that it now be included.

We have set out the full arguments on several occasions. Put shortly, we think there are three broad justifications. The first is the obvious: that if parties wish and the Court thinks it appropriate – in light of the nature of the case and any other commitments – it makes sense to allow the dispute resolution skills of the Court to be used to resolve disputes. There may be many issues involving agricultural expertise which the Court would be well placed to resolve even if the issues have nothing to do with the relationship of landlord and tenant which, of course, is at the heart of the present jurisdiction. The Court, however, is a creature of statute and can only act if it has express statutory authority.

Secondly, the power has proved valuable to the Tribunal in cases where it has been discovered or ruled that a particular application is outwith the particular legislation which parties have relied on. This is very common in cases of compulsory purchase. In practice the acquiring authority and the private party will simply agree to go on as if the legislation did apply. The Tribunal is able to do this by acting tacitly as an arbiter of consent.

The third reason is a combination of the first two. Parties may be in dispute over a range of issues and want to have them all dealt with at once. They may not give much thought to which are within the jurisdiction of the Court. It is helpful to be able to deal with them all without risk of a decision being void as *ultra vires*.

**The second important matter for the efficient and effective running of the Court relates to retirement.** Schedule 1, paragraph 2 requires each Member to vacate office on attaining the age of 65. Tribunal Members can continue to 70 and this applies to most judicial posts. A provision allowing Members to continue until 70 would therefore be compatible with typical judicial provisions. It would allow greater flexibility. It would allow Members to accumulate greater savings and a higher pension. It would facilitate part-time appointment of senior people. We think that a part time job is not likely to prove attractive to people in the middle of their working lives. An appointment of a fit person in his or her sixties would be fine.

Such a retirement age would be of great assistance in allowing a member who had retired at 65 to be available on an *ad hoc* basis. This would be of particular value in relation to the proper constitution of the Full Court. The quorum of three requires two practical members. If one of the three members has sat to hear the case, that leaves no choice at present and sittings of the Full Court may have to fit the availability of two part-time
members. Where there are, for example, cumulative periods of leave, this can lead to lengthy delay.

Other matters where revision might usefully be considered:

- In Para.13(3) the provision relating to contempt is out of date. The Divisional Court Members ought to have power to report the matter to the Chairman. There is now no identified “Lord Ordinary” on the Bills who might have been thought to be covered by the existing provision.

- The interests of gaelic are now protected by the Directive in relation to Minority Languages. This provides that the Court should allow parties or witnesses to use Gaelic as a matter of free choice without regard to ability to use English. Interpreters will be used. It is thought that in modern practice a judge could not communicate direct with a witness in Gaelic without ensuring that there was an independent interpreter for the benefit of all parties who did not have an adequate command of that language. Accordingly, section 1(5) may no longer serve its original purpose.

- There has been some doubt about the power to appoint part time members. This could be resolved by providing that for the avoidance of doubt it shall be competent and shall be deemed always to have been competent to appoint members to work as members for limited periods or to work in restricted parts of Scotland or in relation to specific aspects of the jurisdiction of the Court and to make arrangements for terms of salary and pension appropriate to such terms of appointment. [Such a provision, taken with the extended retirement age, would be likely to provide a good pool of persons adequately qualified for specific aspects of the work of the Court. The Tribunal has experience of part time members who dealt only with specific aspects of the work. This worked well in allowing a high degree of expertise directed to the particular jurisdictions in question.]

- If, as expected, the effect of the various additions to the jurisdiction of the Court requires a level of commitment from the Chairman which is incompatible with the present sharing of this office with that of President of the Tribunal, something will have to be done. The offices could again be separated. A better solution would be to have a deputy also combining both roles. This would not only increase the flexibility in coping with varying workloads but would allow a joint approach to some of the legal problems arising in each jurisdiction. We think this requires some revision of Para 10(1) of the Schedule to make it clear that the Deputy Chairman is not to be simply an ad hoc appointment. We think that this could probably be made entirely clear by deletion of the final requirement of consent. However, this would require consideration by the Justice Department. [If this was done the obvious course would be to use an existing member of the Tribunal – currently John Wright, Q.C.]

- An apparent alternative solution would be to appoint a legally qualified person as “member”. The difficulty about this course is that currently the members of the Land Court –as opposed to the Chairman – are only paid about half the rate of members of the Tribunal. Salaries of Tribunal members are determined after an extensive assessment and consultation process by the Senior Salaries Review Body. The rate
selected covers both lawyers and surveyors. Salaries of Members of Court are fixed by the Scottish Executive.

Edinburgh
29 Oct 2002
1. THE ASSOCIATION

The Association was formed in 1925 to provide some uniformity in agricultural valuation practice and results across the country. Its objectives include the training of members; making representations in appropriate quarters on matters relating to arbitration and valuation; the dissemination of information; and to act as a consultative body. The various local Associations of Valuers and Arbiters are affiliated to the Association (there are currently five) and the Association currently has some 219 Members including most but not all of the current Panel of Arbiters. The membership is drawn from professional people and from working farmers, all of whom are involved in some way in agricultural arbitration and valuations. They are admitted after peer assessment. The Association with limited resources provides training for its members and their guests on a regular basis and a forum for discussion and advice to Arbiters and Valuers on problems arising in the course of their practice. In the time honoured phrase arbiters are "men of skill."

Given the Association's background and objectives its representations will largely concern the proposals in the Paper for dispute resolution between landlords and tenants and valuation issues. Members act regularly for all sides of the industry and adopt a neutral stance on the other issues but do have some observations to make on some of the proposals relating to minimum term and diversification as appear later in the Paper.

The Association makes the following representations:-

2. TENANTS' RIGHT TO BUY

The Association is glad to see that some of its concerns over a tenant's right to buy - a specific right to buy for limited partnerships; the use of District Valuers to carry out the valuation and the lack of an appeal against valuations expressed in its representations on the draft Bill have all been met. On the other concerns expressed in its previous representations, the Association has the following further comment:-

(a) Sporting and Mineral Rights

It is noted that sporting and mineral rights are to be included in the right to buy. It would follow that trees within the boundaries of the land will be included also, although presumably not plantations within the land but excluded from the tenancy. The Executive's original proposal was that minerals and sporting rights should only be included if within the lease. The Association thinks that the tenant should be able to buy without minerals or
sporting rights, thus reducing the price he would have to pay. There is a precedent for separating sporting rights from the land over which they are exercisable in Section 102(5) of the Title Conditions (Scotland) Bill.

(b) Valuations and Servitudes

As already mentioned, the Association is pleased to see that it is up to the parties or, failing agreement, the Land Court to appoint a Valuer for the purposes of fixing the price. The Association will take forward with the Royal Institution of Chartered Surveyors and the Institute of Auctioneers and Appraisers in Scotland its proposed panel of suitable experienced people to carry out such valuations. The Association notes that Section 26, which deals with the procedure for a purchase by the tenant and the terms of his offer, makes no provision for the reservation of rights over the farm to be sold for the protection and benefit of other parts of the larger landholding of which it forms part. Given that in theory the right to buy could arise in respect of a farm entirely surrounded by other ground in the same ownership (although perhaps less likely in practice) and that land subject to the right to buy will be interspersed with land not so subject, the question of rights of access and rights for services will be particularly important. Where woodland is situated in the middle of a tenanted farm, for example, the appropriate rights for extraction of timber will be required, and estate water schemes are commonly still in use. The question of sporting rights and the adverse effect the loss of sporting rights over the farm being purchased will have on sporting rights over other adjoining ground is also a matter which will require to be dealt with. All of these matters will or may have an effect on valuation and would be dealt with in the hypothetical negotiation between the landlord and the tenant before the sitting tenant could purchase. It is suggested, therefore, that the Valuer be required to set out in outline in his valuation the provisions which will require to be incorporated in the tenant’s offer on these and any other relevant matters. They will be an integral part of the valuation.

(c) Withdrawal

It is not clear (as it is, for example, in Part 2 of the Land Reform (Scotland) Bill) that the landowner is entitled to change his mind and not proceed with a sale. It may be implicit in that there is no compulsion on him to accept the tenant’s offer but the point should perhaps be spelt out.

(d) Part Farm Sales

The Association, in its previous representations, raised the possibility of part only of the tenanted farm being sold and the necessity for an adjustment of the lease of the remaining ground. It is suggested that that be dealt with in the same way as the question of protective clauses for the remainder of the estate of which the farm forms part in sub-paragraph (b) above. It is noted also that Section 24 does not make provision for deregistration of any ground which is resumed from the tenancy and that must be provided for. There is a somewhat special situation where part of the farm is being worked for minerals and, under the provisions of the Bill, must be returned to the farm when restored for agriculture. Should the right to buy, if exercised over the rest of the farm whilst the minerals are being worked, extend to the mineral ground after restoration?
3. LDTs AND SLDTs

(a) Notices to Quit and Relocation

In its previous representations the Association expressed concern at the double notice to quit procedure for terminating an LTD and the complicated relocation provisions, increasing the chances of things going wrong and inducing disputes. The Association regrets that its representations appear to have been ignored. As previously suggested, the evil which the requirement for a second notice to quit is supposed to solve will not, in fact, be resolved by the requirement. A second notice to quit simply complicates the procedure with no corresponding benefit.

On the other hand, the tenant is to be entitled simply to give written notice which may be as little as twenty-four hours. The Association previously pointed out that the Sheriff Court (Scotland) 1907 would impose a minimum period of notice of one year, but the 1907 Act is now excluded by the Bill. It is unreasonable and impractical that the tenant should not be required to give a minimum period of notice of at least one year as at present. Not only does it take time to go through the procedure for re-letting a farm, but it also takes time for the prospective new occupier to ready himself for taking occupation and possible to wind up his farming operation elsewhere. Continuity of occupation is important to preserve the health and fertility of the land, and livestock cannot be bought or sold, or quota and machinery acquired, in a moment. On the other hand, any departing tenant is bound to know some time in advance that he will be departing and the Association can see no good reason why a suitable period of notice cannot be given.

The 1907 Act is also excluded from SLDTs so that SLDTs are expected to come to an end without any notice. The Association believes that this is unworkable. The requirement for a notice “marks out” the position of the landlord or the tenant, as the case may be. This is important in the circumstances where, for example, an SLDT for quite a short period can default to a full five-year SLDT if the tenant remains in occupation with the landlord’s consent. If the tenant in fact remains in occupation after the expiry of the stated term without immediate objection from the landowner, is his consent to be presumed? The consequences of default from, say, a one-year SLDT, to five years could be serious. Similarly, if the tenant remains on the ground for some months after the expiry date of the SLDT and then removes, is he entitled to do that? Or has he now exposed himself to a five-year SLDT
and the consequent liability for rent? The common law (quite apart from the 1907 Act) required notices by one party or the other to bring a lease to an effective end and exclude tacit relocation for all but the shortest leases, such as seasonal grazing lets. The Association regards that as sensible. It should also be remembered that dwelling houses may be involved in both SLDTs and LDTs, and appropriate notices are required to bring to an end any residential lease of a separate dwelling under the Housing (Scotland) or Rent (Scotland) Acts.

(c) LDT Extensions

The Association is glad to see the inclusion of Sub-section 14 of Section 8 allowing the parties to an LDT to extend the term of the LDT by agreement. The Association does not feel, however, that the wording adequately covers the situation. Frequently, extensions of the lease deal with other matters as well which, technically, are in themselves new leases and in those circumstances would require to be for a minimum of 15 years. The Association suggests that in that Section the words “agreement in writing” should be replaced by the words “a new lease or other agreement in writing”.

(d) Transitional Section 2

The repeal of Section 2 of the 1991 Act will leave arrangements made on the basis of that Section in limbo. On the face of it they will suddenly become 1991 Act leases which is presumably not the intention. A transitional provision is required to preserve Section 2 for those arrangements entered into in reliance on it prior to commencement of the new Act.

4. PARTNERSHIPS

The Association regrets that Section 58, giving certain partners in partnerships a right to have the tenancy transferred into their individual names in certain circumstances, is still in the Bill. The Association believes that this provision will create difficulties in numerous family situations.

5. DIVERSIFICATION

(a) Tree Planting

In the draft Bill the landlord’s consent was required to a diversification notice, but that was not to be presumed from silence in the case of planting trees. As the Bill is now drafted, the landlord’s consent is not required but he has a right of objection to a notice. The Association finds the position of the tenant who wishes to diversify by planting trees to be obscure under Section 35. Where the tenant gives notice of diversification, and the landlord is silent, he is deemed to have consented in all cases except where the diversification is for the planting of trees. Is the landlord deemed to have objected to a notice in that case? The Bill does not say so.

(b) Rents

As already indicated, the Association regards Section 54 of the Bill dealing with the effect of diversification on rents as inadequate. As practical Valuers,
the Association regards the only basis on which the diversified ground can properly be rented is to regard it as a separate "lease within a lease" and rented by reference to the appropriate market place. As a non-agricultural use the references in Section 13 of the 1991 Act (compulsory for 1991 Act Leases) and Section 9 of the Bill (default for LDTs) to comparable rents of agricultural properties and to the economic conditions in the relevant sector of agriculture are irrelevant. There is also a question of fairness to other businesses in the locality of the same type as the diversified activity.

(c) **Sub-lets**

The Association is concerned by Section 34(3) which allows the tenant to sub-let. The Association believes that the objective is to allow the tenant to diversify, not himself to become a landlord. The Association can see merit in permitting a diversified business to be conducted by a company controlled by the tenant but not any wider sub-letting. If the intention is simply to ensure that holiday lets are permitted the wording is far too wide and the Association wonders whether any specific provision is necessary.

6. **DISPUTE RESOLUTION**

(a) **Walking Valuations**

The Association is of the view that the Executive may not realise how impracticable the reference of everyday bread-and-butter valuations to the Land Court is. The average walking involves a valuation - just that. As already indicated, they are carried out at two times of the year, May and November, in different parts of the country and have to be carried out within a few days of the actual walking date. Knowledge of values in the locality is vital, and the Land Court cannot be expected to have that knowledge in all areas. There is also the question of cost. The Association feels strongly that there should be excluded from the blanket reference to the Land Court valuations along the lines of Section 61(7) of the Agricultural Holdings (Scotland) Act 1991. Whilst this exclusion has led to confusion in the past where all other matters of dispute were determined by an arbiter appointed on a different basis to the Valuer carrying out the valuations, the Association believes that there would be a clear distinction under the Bill between the matters referable to the Land Court and matters referable to a Valuer.

(b) **Existence of 1991 Act**

The Association wonders if it is deliberate that a dispute as to whether or not a 1991 Act tenancy exists should remain in the jurisdiction of the ordinary courts. Section 61 does not appear to transfer jurisdiction to the Land Court.

(c) **Appointment of Oversman**

Where the parties agree to have their dispute resolved by two Arbiters and an Oversman, and agreement cannot be reached as to the identity of the Oversman, he is appointed by the ordinary courts under the Arbitration Act 1894. The Association believes this jurisdiction should be transferred to the Land Court which would be quicker.
7. **SUCCESSION (LDTs and SLDTs)**

The Association distils from Sections 19 to 21 of the Bill, the following:-

1. The tenant of an SLDT or an LDT can bequeath his lease to any one of his potential intestate heirs or son-in-law or daughter-in-law. This provision, like Section 11 of the 1991 Act, presumably has to be read subject to any exclusion of any assignees in the lease; assignees may be excluded completely in SLDTs and there is a qualified exclusion for LDTs which would presumably invalidate any bequest.

2. A lease falling into intestacy may be transferred by the executors not only to any potential intestate heir, but also "to any other person". In the case of an SLDT that opens up to the executors possibilities not open to the tenant in life and the Association cannot see the justification for it. The landlord's right of objection is that under Section 12 of the 1991 Act, which may be sustained on limited personal grounds only, as the Land Court has in the past interpreted the section, and so it is hardly appropriate. Why should an SLDT be in a different position to any other lease, where assignees are excluded? It should be remembered that Section 16 applies to all leases.

3. An LDT already gives the tenant the ability to assign subject to the landlord's consent, which may only be withheld in certain circumstances. There is a potential conflict between the terms of the lease in relation to assignation, and the terms of Section 12 of the 1991 Act, and it is suggested that the terms of the lease are those which are appropriate in the circumstances.

These sections of the Bill have not been properly integrated with the provisions relating to LDTs and SLDTs, and perhaps not with the existing law.

The Association would be very happy to discuss and develop its concerns further with the Committee.
Jurisdictions under the Agricultural Holdings (Scotland) Acts

Scottish Law Commission Report (No 178)
Summary prepared for Rural Development Committee

Why did the Scottish Law Commission issue a report on this matter?

The Scottish Executive Land Reform Action Plan published in August 1999 adopted the Land Reform Policy Group's recommendation in relation to agricultural holdings for "legislation to simplify and reduce the cost of dispute resolution and to extend the role of the Scottish Land Court."

In October 1999 the Deputy First Minister and Minister for Justice sent us a reference requesting that we consider existing procedures for dispute resolution in the law on agricultural holdings and advise on possible reforms in jurisdictions and procedures.

One of the Scottish Law Commission's statutory functions is to provide such advice on the request of Ministers. At the time we received the reference and submitted our report our Chairman was the Rt Hon Lord Brian Gill, widely acknowledged as an expert in agricultural law with considerable experience in the conduct of agricultural disputes.

When was the report published?

We were requested to submit our report to the Scottish Ministers by 31 March 2000 in order that our recommendations could be included in the White Paper on Agricultural Holdings: Proposals for Legislation which was being prepared by the Scottish Executive. Our Report was submitted to the Scottish Ministers on 23 March 2000 and published with the White Paper on 17 May 2000.

What method of research was adopted?

The Commission carried out a statistical survey of the agricultural arbitration system, of agricultural holdings litigation in the various jurisdictions and of the administrative jurisdictions of the Scottish Ministers. We also consulted various interested parties and acknowledged experts in this field. From the findings of our survey and these wider enquiries, we made an appraisal of the practical operation of the current system and identified its weaknesses. We then considered various options for reform and formulated our recommendations.

What consultation did the Commission carry out?

Normally the Commission issues a discussion paper for consultation before it reports. However, in this case given the urgency of the request, the consultation exercise already carried out by the Land Reform Policy Group, and our report's relationship to the White Paper, we did not carry out our customary public consultation exercise.

Our recommendations were adopted by the Executive in the White Paper and have been subject to full public consultation as part of that paper and in the subsequent draft Bill.
Dear Mr Thomas

AGRICULTURAL HOLDINGS (SCOTLAND) BILL: STAGE 1 CONSIDERATION

Thank you for your letter of 9 October inviting the Commission to give oral evidence at the Stage 1 consideration of this Bill.

As my colleague, Mrs Judith Morrison, has explained to you, the Commission has been involved in two capacities in relation to the Bill. Its provisions on jurisdiction and dispute resolution in Part 7 are based on the recommendations contained in our Report on Jurisdictions under the Agricultural Holdings (Scotland) Acts (Scot Law Com No 178) which was published in May 2000. More recently, Mrs Morrison has participated as a member of the Executive Bill team, acting as instructing solicitor for Part 7. It is therefore not possible for us to give an independent Commission view on these provisions in the Bill. We could give oral evidence only in relation to our Report and the work leading up to it.

On this basis, we are happy for Mrs Morrison to give evidence to the Committee on behalf of the Commission. She will be accompanied by Miss Beth Elliot, another member of our legal staff.

Yours sincerely

[Signature]

JANE L MCELOD
Secretary