



## Assignment of agricultural tenancies in Scotland: changes afoot



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The word 'radical' has been used by both supporters and critics alike when commenting on the various proposals set out by the Scottish Government in the Land Reform (Scotland) Bill. This gives a flavour of the tone of the debate. Both sides have also been particularly vocal on the previously little discussed topic of succession and assignment of secure agricultural tenancies. The implications of the proposals are discussed in this briefing.

A secure agricultural tenancy (also known as a '1991 Act tenancy') is a tenancy of a farm which can continue indefinitely, from generation to generation, and the tenant does not have to vacate the farm on any termination date stated in the Lease.

### Conversion to a Modern Limited Duration Tenancy

As part of its remit, the Agricultural Holdings Review Group, who published their findings last year (and whose proposal we previously [commented on](#)) suggested that a tenant farmer should be entitled to convert their tenancy to a new Modern Limited Duration Tenancy (MLDT) for a fixed duration and then to assign it for value to a third party. This proposal was designed to help those farmers who did not have a successor to take over their secure tenancy under the current legislation. It was also aimed at striking a balance between the landlord's property rights (since the new tenancy would no longer continue indefinitely, but would eventually come to an end on its termination date) and providing means for the tenant to retire with dignity, so enhancing the tenanted sector overall.

### 'Assignment for value'

While the Review Group's widely consulted proposal was originally contained in the first draft of the Land Reform Bill, the Scottish Government has, as a reaction to those who criticised the Bill as not going far enough, proposed an 'assignment for value' model. This mechanism would permit a tenant under a secure tenancy to assign that tenancy to another party without converting it to a fixed duration tenancy, but with the landlord having the option of buying out the tenancy before it was assigned.

This proposal has resulted in much comment from both sides of the debate and, policy considerations and personal views aside, it has a number of interesting legal implications - particularly due to its general application. The original proposal to convert secure tenancies to MLDTs was designed to be a means to permit succession where a tenant farmer had no near relative successors. While not expressly limited to those particular circumstances, and therefore freely available to all tenants at all times, this option was unlikely to be used by tenants without good reason - since security of tenure would be lost and the tenancy converted to one of a fixed duration.



Similarly, the 'assignment for value' proposal also affects any tenant and can be exercised at any time. However, it may be far more attractive as there is no drawback of losing security of tenure.

### **A move away from *delectus personae***

Historically, secure agricultural tenancies were subject to *delectus personae* – meaning that the tenant farmer was chosen precisely because of their personal identity - their skills, local knowledge and ability to farm the land. The landowner trusted them with a significant asset, and the particular identity of the tenant was very important. That tenant could therefore not transfer the tenancy to another party without the landowner's permission. This position was later qualified by the succession and assignment provisions to allow a secure tenancy to be passed on to a fixed class of near relatives. The possible justification for this change was that the same family may continue to farm the land with the same practices and on the basis of previous relationships between the families of the landlord and the tenant (although such relationships may not always have been positive). Indeed, the fact that the same family has often occupied or farmed the same area of ground under a tenancy for a number of generations is often cited, by those calling for further protection of tenants.

Accordingly, allowing a tenant to freely assign their tenancy to another party, albeit subject to the landlord's right to buy the tenancy out, departs entirely from the original principle of *delectus personae*. In short, the landlord may end up with a tenant to whom they have no prior connection or relationship and may not have opted to let the land. The landlord may have grounds for objecting if the proposed assignee will not be able to pay the rent, or lacks experience in agriculture but, those characteristics aside, the personal relationship between landlords and tenants, particularly where the tenancy may continue for an indefinite duration, is clearly very important in ensuring the success of the sector as a whole.

### **'New entrants' and 'progressing farmers'**

It has been suggested that any proposed assignee acquiring such a tenancy must be a 'new entrant' or a 'progressing farmer'. While those definitions will have to be pinned down in due course, the gist appears to be that a new entrant is someone setting up as the head of an agricultural holding for the first time and who has not already held a secured tenancy. At present, however, the absence of detail on what these terms will mean does little to reassure the landowner.

### **Natural and non-natural persons as tenants: unintended consequences?**

Something also has to be said of using non-natural persons to hold the tenancy. At the time of writing, it is understood that the proposed assignee must be a natural person, so could not, for example, be a company. Allowing the assignee to be a corporate body could entirely frustrate the process by enabling what is often referred to as 'assignment by the back door'. In other words, once the tenancy is transferred to a company, or other form of corporate body, the shares in that company can subsequently be bought and sold freely: the tenancy would transfer with them, without triggering any future assignment requirements in the legislation - including the possibility of the landlord objecting or exercising their right to buy.

However, this also raises an interesting question about what happens where the current tenant is a corporate body – for example a limited partnership. It is relatively common, and indeed encouraged practice to avoid the various issues caused by the Agricultural Holdings (Scotland) Act 2003, for the landowner and the farmer to agree a 'drop dead date' on which the limited partnership will terminate - and therefore the lease will also terminate (as the tenant is no longer in existence). However, under the new proposals, a corporate entity controlled by the farmer may be able to assign its tenancy to another party and so avoid the agreed termination date. Since assignment was not previously competent without the landowner's express consent, such an eventuality is unlikely to have been considered when the documentation was completed. Following assignment, the new tenant would benefit from security of tenure, whereas it had previously been understood and agreed between both the landowner and farmer at the outset that the arrangement was for a finite and specified duration. Taking this one step further into absurdity, the tenancy could be assigned (eventually or immediately) personally to the farmer who was the party to the original arrangement. If the landowner was unable to exercise their right to buy-out the tenancy, that farmer would have entirely circumvented the previously agreed 'drop dead date'.

Aside from these particular circumstances, as the proposal applies in all instances and not only where there is an absence of succession, there are bound to be many other quirks and other unintended consequences.

Timing issues for landlords

Timing could also be very important, in particular, whether the landlord has the funds available to buy the tenancy out and prevent the assignment (should they wish).



Much has been made of the proposal that the buy-out should be assessed relative to the value of the land. It is therefore likely to be greater than the amount that would be paid to the tenant by any incoming assignee, which is assessed on a different basis. For many landlords this may mean a choice of selling assets to recover the farm or choosing to allow the farm to pass to another tenant. Also, given the proposed timescales, the landlord may need to move very quickly to realise those other assets and raise the cash.

This stark choice for the landlord, amongst other points within the proposals, raises the questions of whether what is proposed is compliant with the European Convention on Human Rights (ECHR), or whether it violates the landowner's property rights. This question is worthy of further detailed consideration. We would emphasise that this point is of the utmost importance and should not be swept aside in haste to pass the legislation. As we have already seen with limited partnerships, getting the legislation wrong can have far reaching and long enduring consequences for those that it affects. In previously seeking to afford additional protection to farmers under limited partnership arrangements, and ultimately ending up with legislation that was not ECHR compliant, that legislation prejudiced both landowners who had entered into agreements directly as a result of the legislation, and tenant farmers who had thought that legislation meant they could remain in their farms. Hasty and non-compliant legislation will ultimately prejudice both landowners and tenant farmers alike.

### Do not repeat the mistakes of the past

Although the proposals are yet to be finalised and some key matters such as the definition 'new entrants' or progressing farmers' may be left to the Scottish Ministers to define, the possibility of allowing free assignation of secure tenancies proposes a number of interesting legal issues. Many have heralded it as the death knell of the sector. That may be something of an over-reaction, but it is clear that it is a significant departure from the historic position – enshrined in the earliest institutional legal writings – that the personal identity of an agricultural tenant was of the utmost importance to a landlord, and subsequently built a relationship between landlords and tenants for generations to come. If this principle is viewed as out of date, and a hindrance to the modern tenanted sector, then any change should be thoroughly reviewed and widely consulted on: it deals with a fundamental characteristic which underpins tenancies and will significantly alter arrangements which have been in place for many decades. It is clear from the rhetoric on both sides of the debate that the assignation for value proposal has the potential to strain relations between landlords and tenants. Hasty and 'radical' proposals can cause greater scope for disputes and engender equally radical actions or protective measures to be taken. They could pit the parties against each other, ultimately prejudicing those whom they seek to benefit.

If you have any queries on the Land Reform Bill or agricultural tenancies, please contact [Peter Misselbrook](#), [Stuart Greenwood](#) or your usual contact in the Rural Property & Business Team.