Written submission from the Scottish Agricultural Arbiters and Valuers Association (SAAVA)

[From the submission made to the Agricultural Holdings Law Review Group]

SAAVA

SAAVA is the specialist body for those advising and acting for agricultural and rural owners and tenants as well as other interests including government, environmental bodies and lenders.

As a professional body with members acting for such varied interests, our concern is not to promote particular causes but look at matters and proposals practically, considering what will work and what will not. In this, we are conscious that our members will be advising owners and farmers in the years following the outcome of any changes and will need the position to be clear so that advice can be certain and effective for clients to be able to make decisions and spend money on that basis. Equally, in engaging with public policy we would prefer to see measures that are sensibly implementable and successfully promote the health of the industry.

As an arbitral appointments referee, we are also concerned that where disputes happen between parties the mechanisms for them are practical and proportionate, enabling the best answers for the least rancour and at reasonable cost.

Affiliated to the Central Association of Agricultural Valuers we can draw on the wider range and long experience of tenancy and other issues across the UK and further afield.

SAAVA members as individuals will act for landlords, tenants and others with interests in agricultural property. SAAVA's professional interest is in a system that functions well to achieve the aims of the parties and on which law allows good and secure advice can be given to parties making decisions.

The Tenanted Sector

Just as in the rest of commercial life and in the residential sector, there is no reason why all those who own agricultural land should be its farmers or why all farmers have to own the land they farm. While agriculture can offer a wider range of means than other sectors by which owners and farmers can come together to use property, using tenancies is a natural and classic means to manage this. However, its present condition means that it is at risk of being bypassed by other contractual arrangements that meet the needs of the parties to them. There is no basic law of nature that says that tenancies have to exist – there are good reasons for arrangements between owners and farmers. Tenancies will be used if they are useful in comparison to the alternatives.

Such arrangements allow farmers to focus their working capital on the business rather than on the property while offering a means for those owners who do not wish to farm or do have the skills to farm to create opportunities for those who do. Why expect someone to finance a cost of say £7,000/acre for an arable farm for a net farming return of, say, £15/acre supplemented by £100/acre of CAP support and a

little diversification income (SAC, 2013/14 p. 293) - £119/acre before the extra cost of finance over rent – if invested in equities with a 3 per cent dividend that would yield £210 without the need for working capital. The structure of a tenancy also allows a marriage of the long term low risk perspective of many landowners with the willingness to assume more business risk and reward offered by better and progressive farmers.

Just as perhaps the majority of commercial premises are rented and a large fraction of dwellings are rented, it seems perfectly plausible that there should be substantial tenanted sector in Scottish agriculture offering it the flexibility and opportunities for progression and withdrawal that are necessary to a successful future**. The clear fact of the relatively low and declining fraction of agricultural property that is rented is a sign of policy failure with the legal framework being used for its intended exceptions than for its mainstream provisions. The figures presented in paragraph 38 are stark:**

- **a 42 per cent decrease in area of let land since 1982 – an annual loss of some 1.3 per cent**
- **a 37 per cent decrease since 1991 – a rate of annual loss of some 1.6 per cent**
- **a 17 per cent decrease since 2004 and so since the major legislative intervention (at a greater rate of annual loss of some 1.7 per cent than before)**

and reinforced by the commentary on holding numbers in paragraphs 39 and 40. Paragraph 191 observes that the problems which the 2003 Act sought to address "continue to exist". The annual rate of loss has been accelerating. Something is clearly wrong which the current approaches are not remedying and may be compounding. By contrast, the larger tenanted sector in England, where conditions other than legislation are not so very different, has seen no decline since the reforms in 1995.

The challenge is perhaps made the greater by Government intentions to convert significant areas of rural land to forestry.

International Comparisons

International comparisons in these matters should be treated with great caution. In historical, cultural and economic terms comparison within the British Isles is likely to be of value (not only for the similarities but also as the differences are more clearly intelligible and can be more readily allowed for) but comparisons beyond that frequently need such heavy qualification as to be of little value. In each country, the rural world is especially bound by each area's own local customs, history and expectations making facile comparison dangerous. The larger tenanted sectors in most of the former Warsaw Pact states flow from the post-War history of collective farming. However, collective farming was not successfully imposed on Poland and this is reflected in its contrasting low tenanted figure. The ostensibly high figure for France does not reflect any significant arm's length voluntary letting but rather than family members inheriting land under French law are the near-prisoners of those family members who farm.

Within the British Isles, we adduce two points:

- that the historic disrepute of tenancies in Ireland, north and south, has created a situation in which there are very few long terms relationships between owners who do not want to farm and farmers. Instead much land is taken on conacre, seasonal cropping and grazing, to the general detriment of the land as often neither owner nor the insecure user is investing in the care of the land. There is no rule that the descendants of those who bought their farms under the Irish Land Acts are now the right farmers for today's commercial and regulatory environment. While there is an official policy desire for longer term, investing relationships, they are few and far between.
- the 1995 tenancy reform in England and Wales with its near freedom of contract, now followed by the Isle of Man, has clearly staunched the previous haemorrhaging of land from the let sector and saw a revival of lettings until the area-based payments of the Single Payment Scheme created a bias to stasis in land occupation.

One point that was axiomatic to the industry wide agreement on the 1995 reforms for England and Wales was that the changes for new lettings should not take rights or obligations from existing tenancies whose tenants have property rights. It is quite possible to envisage creating a simple and flexible new legal code, attending to justified essentials while treating the situation in the 1991 Act as a separate policy issue. However, landowners, including retiring farmers, need to have confidence in the stability of that new statute for them to venture to use it properly. That necessary confidence will only be gained over time as the system, preferably after a well-founded revised system, is allowed time to be seen to be stable without the constant amendment that may only delay its growth.

An Approach

Assuming that the aim is indeed to promote a successful tenanted sector that will be part of Scottish agriculture's commercial future, there are several fundamental points to underpin this:

- an agricultural tenancy is a relationship to enable a business. The statutory definition of an agricultural holding (as set out at the very beginning of the 1991 Act in its s.1) is essentially about the use of land "for the purposes of a trade or business" while farming is now very seriously a business calling on farmers to have a wide range of commercial skills as well as husbandry. If some people wish to undertake farming as a lifestyle choice that is their freedom but it is less easy to discern the public interest in framing policy around that choice – that was not the purpose of the 1949 Act.
- it is a relationship about the business use of that property. Agricultural business, more than almost any other line of business, is one in which the tenant is directly using, managing and investing in the landlord's land. It is that interaction that led to the growth of custom governing tenancies and then specific agricultural tenancy law and which now must be the main justification for any legislative intervention that is truly needed.

- there needs to be no more legislation than is objectively warranted. With the pressures for economic change, the flexibility needed by businesses and the prospects for diversification, the law needs to step back to give parties the freedom to tackle the coming decades. Over-legislation (sometimes in response to alleged but unevidenced problems) may prove to fetter them with a wider cost to the economy.
- the parties have to be assumed to be adults and each should treat the other with mutual respect. For an owner, becoming a landlord should be a rational decision and not just assumed as an act of public good will. The tenant is embarking on a business proposition in what will often prove to be long term relationship, even if the legal form of the agreement may be short term. The framework for those tenancies should be such as to support good behaviour.
- even keeping the tenanted sector at its present shrunken size, never minding securing a revival, needs willing landlords. Any significant influx of new land can only come from private owners. Generational change and economic pressure can create many owners who no longer wish to farm. What would give them confidence in letting?
- a climate of political challenge to landlords does not attract owners to becoming landlords and deters existing ones from new lettings. The Interim Review offers the comment at paragraph 205 that being an agricultural landlord is now seen as a "low return/high risk investment" – a shift of view that risks undermining the rationale for using tenancies rather than other arrangements.
- it needs an effective means of dispute resolution. There will be occasions when reasonable parties will reasonably disagree or need a third party answer. If the means to do that are not practically accessible, through procedure or cost, that is of itself a source of poor results and grievance. With some 7,000-8,000 holdings renting land (some perhaps with more than one tenancy) over the last decade reported by Table 1 (and so potentially some 21,000 or more occasions for a rent review in that period), it is strange that Table 9 and paragraph 72 records only 3 rent reviews (including the recent *Elliot* case) have reached a hearing in the Land Court since it was made the dispute forum in 2003. That so very few reach third party determination does not demonstrate a functioning system but is rather a measure of the lack of effective access to dispute resolution, especially with the level of clamour that surrounds tenancy issues.

In looking outside agriculture but within Scotland we have not detected any substantial or organised concern about its virtual freedom of contract for commercial lettings.

An approach to the future, quite possibly considering the framework for agreements over the next 50 years (after all it may be that a third of present 1991 Act tenancies pre-date the 1949 Act), needs to take realistic account of the commercial pressures for restructuring and change that pervade this sector like any other. These challenges are about to be compounded by the changes to the CAP which are likely to see some businesses (perhaps particularly dairy and arable) have to adapt to significant reductions in support – in the earlier arable example the £100/acre of

Single Payment support might now become £67 of Basic Payment and Greening with a larger movement likely in dairying.

It can appear that much of the present legislation with its main roots in the 1949 Act uses the model of the letting being of whole and self-sufficient farms but this is now simply not an adequate model when considering legislation for the sector. The drivers for expansion and flexibility (see, for example, paragraphs 155 and 159) are so strong that they should be better managed and accommodated than improved. This is perhaps one of the basic flaws in the present system which is making it creak so badly.

A more flexible approach then offers opportunities both to:

- the present generation of farmers who can compete and thrive, taking extra opportunities, as well as those who wish to reduce and withdraw
- new entrants of all ages (older ones often having more capital and business experience) and backgrounds (not necessarily from farming backgrounds) who want not only to enter but then to progress. Entry and starter units should not be left as traps – today's good new entrant will want to bid for additional land tomorrow.

The reform of the law for new lettings is thus not simply a question about young farmers. However, it is worth noting the CAAV's annual Agricultural Land Occupation Surveys for England and Wales repeatedly show those identified as new entrants taking over a quarter of lettings where the tenant changes.

The economic analysis in the Interim Review mostly considered owner occupiers and tenants rather than those with mixed tenure holding who are often thought to be better performing. These will be owners who have expanded by renting land in or tenants who have done well enough to buy some land. Accepting the analysis that there are many factors at work here, the basic point is that tenancies offer opportunities to good farmers.

In all this, agricultural tenancy law is only part of the picture. Taxation (noted further below) is relevant to many owners but the present structure leaves little room for effective action though some for easing points of difficulty. However, the impact of taxation flows from the values created by underlying economic forces, whether the economics of farming, diversification or of land values – those values are then subject to the tax system. Perhaps the hardest but most important area to influence is psychology. What will give an existing landlord the confidence to re-let? What will make it easier for a private owner to accept he might be a landlord? Yet if he does not, there is nothing of which to be a tenant. There has probably been an underlying shift in economic attitudes to risk that now drives an emphasis on flexibility than might have seen a generation or two ago – that militates against longer formal agreements.

Above all, this calls for clear analysis of issues, objectives and tools. The simpler the objectives, the easier it is to identify the strategy and tools needed to promote it. The more complicated and conflicting the objectives, the more muddled the approach is likely to be and less will be achieved. While this policy area is beset by rhetoric and

assertion, this review needs to look beyond that if it is to secure real gains for the future of Scottish agriculture.

In any such document, it is always easy for fresh eyes to pick on points of drafting but it is concerning to see such points as, for example, the comment at paragraph 286 implying that landlords can use capital values to drive rent increases unilaterally. Capital values have no bearing on rents, whether under s.13 or generally while any change in rent could be sought by either party and has to be agreed. Without dwelling on it in this evidence, we hope that the final report will be proof read for objectivity and accuracy as to law and practice.

The Eight Aspirations – What is Wrong?

Chapter 7 of the Report reviews a range of issues against the aspirations set out for tenant farming, highlighting a number of specific issues. Paragraph 198 notes the problem of uncertainty about interpretation of the present law. That should be taken as a more fundamental concern than that paragraph suggests as it derives from complex legislation, often not well drafted, being applied to the rapidly changing sector that is very different from when the present code was put in place.

Aspiration 1 – Are the existing tenancy options fit for purpose? – Despite the apparent range of legal vehicles, itemised in paragraph 199, we agree with the view of paragraph 200 that the law now operates to restrict not enable parties. With the obvious Scottish example of a business tenancies operating successfully by freedom of contract, a single simple flexible framework for new lettings will do far more for the sector than more complex structures.

Aspiration 2 and 4 – The ability to move into, through and out of the sector; barriers to entry – The essential barrier to entry is not land and certainly not the price of entitlements but capital. Farming is a sector with the cost structure of manufacturing yet massively dominated by the self-employed and family businesses. Encouraging under-capitalised new entrants is not the way to promote a successful future for the sector. It is inevitable that the better existing players will have more resources. That does not prevent new people from entering the industry; those who do are often the ones harshest in their judgments on support for those who do not make it. In practice, surveys do not show too many farmers as unable to retire but rather that they do not want to. It is unrealistic to seek to use waygoing compensation as means to resolve those issues – its purpose is fair compensation for value left behind so supporting good farming. It should be recalled that increasing waygo payments will often increase the ingoing for the new tenant.

Where there is an issue, housing is more to the point (as noted in paragraph 221) but a retiring owner is likely to want to stay in his and make his land available. While Scotland's national planning policy appears tolerant of new rural housing in such circumstances, it could be relevant to review such policies as that in the Welsh TAN 6 for a second home to ease changing management on a farm.

Aspirations 3 and 7 - Investment and Risk – Business investment in the tenanted sector will be subject to equal flexibilities and constraints as the owner-occupied sector – We do not know what this means. Businesses of equivalent scale and competence will have equivalent abilities to service loans but it

is a simple fact that the tenant will not, as such, have the collateral to offer the security that lenders need to offer better rates. Where a lender has confidence in a borrowing proposal made by a tenant, it may take comfort from extended security of tenure under the 1991 Act for the assurance that may give about the business' ability to service the loan but that will not make bad proposal without a good business plan viable. The last few years have seen unparalleled opportunities for agriculture to borrow cheaply and these have been seized by those taking a strategic view of investment in the future of their business.

The consequences for farm rents make substantial capital investment unattractive to those landlords who have the resources to do it. An owner considering an arrangement with a farmer is often doing so to withdraw capital from farming. There is no obligation on a landowner to volunteer to be in a positon where this investment is unremunerative.

The problem of financing new fixed equipment (see paragraphs 240 and 241, albeit not accurate in their description of landlord's liabilities) are common to all – it needs to be warranted commercially by the income (or other benefits) it will return. That is one of the pressures for restructuring.

We do broadly agree with the Scottish Government's conclusion noted in paragraph 231 that the tax regime does not now act as a major deterrent to the letting of land. While there are points of detail (such as the operation of s.117 of the Inheritance Tax Act), Inheritance Tax is effectively neutral as to management of land that has no development potential or other non-agricultural value. Capital taxation is more of an issue where that other value is in play. Changes in tax law can often be careless as to tenancies – the shift for Capital Gains Tax from Business Assets Taper Relief to Entrepreneurs' Relief poses problems. At a deeper level the longstanding distinction between property and trading income is a problem. Owners can though be concerned that letting land can put them in an inflexible position should tax policy change. While paragraph 232 cites comments on landed estates which can be debated (given most estates long term retention of what is described there as becoming a speculative commodity while their existence offers a prime source of lettings), the position of the ordinary farm owner who could be landlord must also be considered.

We disagree with the analysis of the effect of the CAP, whether the expiring Single Payment regime or the prospective Basic Payment regime. Any business for which the price of entitlements is a deterrent is unlikely to be viable – especially when considering the income stream they unlock. The much cited "slipper farmer" will very often be the retiring farmer, often a tenant, releasing his productive land for others, enabling entry and progression – he might just as validly be seen as creating opportunities for new entrants and progressive farmers. The opportunity for "slipper farmers" to emerge arises as a function of the naked acres that the Scottish Government seems determined to keep as a feature of the new system. The real problems posed by the CAP for a flexible industry is more fundamental. All subsidies tend to distort behaviour and so long as the CAP makes an area-based payment for occupying land that will have two effects:

- it will drive up the rental value of the land that is needed to match the entitlements – to date a lesser factor in Scotland than in England precisely because of the greater volume of naked acres

- it will encourage those who should retire and move to stay and live on their payments that are only available by matching them against land.

It tends to fossilise farm structures, not liberate them. That is the problem.

Aspiration 5 – Rent levels should reflect commercial returns – Having last year prepared and published the *Practitioner's Guide to Scottish Agricultural Rent Reviews* in response to the Scottish Government's RRWG recommendation, we can sympathise with those who see the problems of s.13 as complex. Valuation is, of course, an art involving judgment and appraisal and not a species of arithmetic but it is complicated by the extent to which s.13 deviates from a straightforward open market basis and does so with such concepts as scarcity. As the Land Court noted in its concluding comment on the recent *Elliot* case, the law may tend to drive an excessive focus on detail rather than what the market might do – it urged a broader brush with lighter touch.

However, the concerns reported to the Group are probably not so much about simplicity to replace the complexity of the statutory basis as the practical point of the level of current and anticipated rents. Many tenants would not appreciate a simple system that led to higher rents. But limiting rents artificially is no benefit to the sector, discouraging investment, encouraging stasis, tolerating weaker businesses, promoting alternative arrangements and stimulating short term agreements where the renewal is the review.

Aspiration 8 – Landlord-Tenant Relationships – We see the key here in the phrase "mutual respect" and thoroughly endorse it as a principle of behaviour for both landlords and tenants. That though is a matter of culture, not law. Looking to the future requires working with those who are positive in this. While bad practice should be remedied, defensive attitudes should not constrain what needs to be done to ensure the future health of tenanted agriculture.

Overall, we fear that the italicised sections of that chapter do not properly identify the major obstacles. Notice procedures are not the issue when the law itself is in the way. The imbalance between those with resources and those without is not very susceptible to policy intervention. Waygo compensation will not solve retirement and, if unjustly inflated, would add to the load on the incomer, new entrant or otherwise.

Disputes Procedure

While all systems need a practical means of determining disputes, the present disputes mechanism for agricultural tenancies is not working. If it were, more cases where reasonable people reasonably disagree would reach the Land Court. Other methods are burdened by the statutory opportunity to refer any outcome to the Land Court, so they are not final and binding but exposed to further litigation risk and cost.

A great new opportunity to tackle this by the modernising Arbitration (Scotland) Act 2010 providing a new framework for arbitration to be the servant of the parties and achieve more economical and effective answers. Encouraged by the representative organisations of the sector, SAAVA has taken advantage of this to promote a model form for arbitration and is now working on the allied option of expert determination. However, for these to work properly statutory amendment of the 1991 Act is needed to make such determination final and binding, as it would be for commercial tenancy disputes.

Experience elsewhere of arbitration under equivalents of the 2010 Act is of costs that are not one sixth of those seen in the Land Court rent review cases with procures tailored to the issues is hand – the 15 days taken to hear the recent *Elliot* case is unheard of in agricultural arbitrations elsewhere. As simple examples, we have this experience from one English agricultural valuer and arbitrator of two cases reviewed under the equivalent English Arbitration Act 1996 (in passing, that is two thirds of the total number of rent reviews that have reached a hearing and determination in Scotland since 2004):

> "I sat as an arbitrator on a case involving an AHA rent and a s.6 Notice. The claimant lost comprehensively and I awarded £3000 of costs against him. The respondent actually sought £5800 but I disallowed part on account of proportionality (both time taken and hourly rate), it was a small holding of bare land, and the claimant had made a valid objection to the respondent's submission. I awarded £3000. I don't know what the claimant's costs were.
>
> "I represented the Landlord in another bare land rent case and we won. Our costs were £10500 and the arbitrator charged £6500. Again I don't know the tenants costs but he was unrepresented."

Now having the 2010 Act on the statute book, replacing the previous melange of statute and case law combined with poor culture, gives an opportunity to be seized.

A Right to Buy?

If one measure could be identified that would most undermine a landowner's willingness to become a landlord or an existing landlord's willingness to invest in a tenancy, it is for tenants to have a right to buy. Not only would it, of itself, reduce the size of the let sector that is supposed to be revived but it is a fundamental intrusion on property rights. Paragraph 275 notes the issues for minerals, sporting, wayleaves and servitudes.

It may equally not satisfy tenants' desires and the substantial sums of money involved will leave a more heavily indebted agriculture with the rigidity of finance costs vastly outweighing the rents presently paid. Whether using existing savings or incurring borrowing, 1991 Act rents offer lower returns on capital than would be asked for the money required while the capital cost would itself have to be repaid to any lender. That burden would take money out of the rural economy.

The most obvious way in which that circle could be squared is that, so far as tenants do not buy at full vacant possession value, they could immediately turn round and profit by selling the land they have bought – perhaps often in a back to back series of

transactions, limiting their financial exposure. That might attract institutions and investors who would fund them for this in exchange for part of that return – perhaps especially where there was development potential. It is not obvious that this is the outcome that advocates of the policy intend.

Yet unlike the tenant's opportunity for a pre-emptive purchase when a landlord does wish to sell, here this is imposing an expropriation on a landlord who does not wish to sell. Of itself, that may not suggest a case for an imposed sale to be at any discount.

Contrary to stereotype, many tenants will be of a larger scale than many landowners. Why, for example, should an owner of 3000 acres have right to buy the 200 acres let to him by the now dead father of someone farming 500 other acres?

We do not readily understand the argument (paragraph 270) that a right to buy has a potential role as offering leverage to secure greater investment by landlords that is otherwise unavailable, uncommercial or not forthcoming.

If the object is, as at paragraph 2 to "put the tenanted sector back at the heart of Scottish agriculture" a right to buy would be precisely destructive of that goal. While understood to be limited to 1991 tenancies (paragraph 257 says this is the "current proposition"), such a move would be seen to prejudice all letting – why put yourself in a position where a tenant has the right to buy your farm?

What Needs to be Done?

Reform of the 1991 Act – There are indeed many issues with the 1991 Act if it is to work usefully for those bound by it. Reviewing these may be simpler if this is considered as a separate policy issue from that of opening up new lettings on a new basis but the measures taken should not complicate or inhibit that important goal. Very few new 1991 Act tenancies have been created since 2003 and it might be that further confidence could be given to new lettings by providing that no new ones could be created (save by surrender and regrant) from the date of any reform so separating the two questions clearly.

Rent Review – S.13 was drafted for a different age and has since been amended with often poor drafting. Our work on the *Practitioner's Guide to Scottish Agricultural Rent Reviews* identified many issues. However, the indications given by paragraph 302 risk creating new problems:

- "agricultural value" is a nebulous concept with no real evidence on which it might be assessed. It is currently invoked by s.116 of the Inheritance Tax Act as the value that may be relieved by Agricultural Property Relief but its assessment has proven very difficult given the agreed lack of evidence. It is a concept in the same class of hypothetical valuation as the scarcity of s.13. It has to be remembered that so much farming income is now unrelated to agricultural production – Single Payment, Basic Payment, agri-environment agreements, cottage lettings, diversification and so forth.
- even if such a value is identified there is no reason to presume that rents are in any stable relationship to that figure, whether overall, over time, over sectors or types of equipment.

- care should be taken in considering any proposal to segment the holding into parts as appears mooted for diversification. Component analysis is merely a tool for applying comparables to a valuation and component values have no wider relevance. Tenants quite properly resist treating a farmhouse in a holding as though it were separate, rather than as part of the holding. The diversification may have synergies with the agricultural use of the land but if it takes any area of the farm it may also wholly or partly replace agricultural use of that part, complicating the judgment of the overall rent.

Using anything other than a market basis seems very unlikely to meet both the fifth and sixth aspirations.

Investment

Investment may be in both buildings and equipment. It may be that, especially in some sectors, the bias of modern technology and economics is towards a greater fraction of investment to be in machinery while it may yet be that we will see a trend toward off-farm storage. Machinery (and perhaps the increasing mechanical components of some buildings) will naturally be the farmer's investment. Buildings will either be tenant's improvements, tenant's fixtures or landlord's investment.

One of the greatest deterrents to investment in buildings is the loss of Agricultural Buildings Allowances for taxation.

In considering public policy here, one question is what would justify investment that is not being made for commercial reasons – there is a difference between an potential improvement being nice and it being justified which may be blurred when considering spending someone else's money. There may be specific arguments about market failure in this context (still to be proven) but the line between tackling any such failure and stimulating investments that cost rather than benefit the economy may be a fine one.

The question posed in paragraph 304 about the value of the tenancy as potential security requires the ability for a lender to take and release that value. As it would be challenging under present law for a lender to take on a tenancy and seek to release its value as security, that appears to imply consideration of assignation. Were that possible, that would in turn will depend on the lender's confidence in the value that third parties will be willing to spend on acquiring the tenancy during the life of the loan. We discuss the value of a secure tenancy under assignation below but waygo compensation is not likely to be its main factor. It must be understood here that the sanction that comes with giving a charge over a property to the lender is that the lender can take possession on default.

While understanding the concerns in paragraph 307 about proper recording, care should not be taken not to alter retrospectively the treatment of existing investment.

Finally, it may be a point of limited significance but in reviewing this subject with a banker it appears that the Agricultural Credits Act 1928, allowing a lender to take a floating charge over a farmer's assets and end of tenancy compensation, does not apply in Scotland. This may limit the tenant's ability to offer security by comparison

to England and Wales. The Scottish Act of 1929 appears limited to the then agricultural credit societies.

Retirement – We have commented on this above. Surveys suggest that fewer farmers do not retire for financial reasons than is said anecdotally. On the whole they prefer to remain involved – that has been the focus of their lives. Housing is a practical issue and we have suggested a review of the approach taken by the Welsh TAN 6 planning policy on this point.

Succession

None of the analysis in the report or elsewhere suggests any wider gain from enlarging the 1991 Act sector, however much the property rights of those with 1991 Act tenancies should be respected.

Any proposals here have to answer the basic challenge that there is no reason why the grandchild of a good farmer should himself be a good farmer in today's (or tomorrow's) frequently more challenging and certainly different circumstances, however much he may meet the tests of the Act. With more open European and world trade, Scottish agriculture needs to be in the right fettle to hold in its own in competition. No one has suggested that the Olympic teams be selected from the children of previous Olympians – the sector's economic need is to be open for the best to come forward. What is the right balance between continuity for tenants' families and having the best farmers in place? Do the economic needs of the sector require those tests for succession to be made more stringent? The report does regularly seek a larger turnover of tenancies (as in paragraph 326).

Assignation

With all the issues reviewed, assignation for value becomes an interesting question for close and careful exploration, introducing a greater opportunity for flexibility and progression for holdings currently let under 1991 Act tenancies. It could clearly offer a route for retirement or withdrawal by those who want to leave but perhaps risks becoming a death bed manoeuvre by a tenant whose heirs do not qualify for succession.

One model for that could be for the new tenancy to be under the rules for security of the regime for new lettings (under LDTs, SLDTs or whatever might replace them after reform). That will require consideration of the appropriate term and other revisions of a possibly historic tenancy agreement, potentially even a market judgment based on what a "sound" bidder might propose.

It seems likely that some form of landlord's pre-emption should be considered (he is having a new tenant imposed on him) together with ways to assure a landlord that the proposed assignee would be a tenant appropriate to the holding and so:

- that the outgoing tenant is having due regard to the long term management of the holding (indeed is not simply careless of the outcome)
- that the proposed tenant will have regard to the long term management of the holding
- that the proposed assignee is good for his offer, not a man of straw

- is not, say, just buying the right to a nice house, noting that the rent for 3 bedroom house can sometimes be more than that for a 100 acre farm with a nice house under the 1991 Act.

Those points indicate the care that is needed in designing a viable structure for this.

The value of a tenancy is conventionally a judgment of the profit rent (market rent less current rent) and the period for which that profit rent is thought secure with the result being a capital value. The greater the profit rent and the longer that is thought secure, the greater will be the capital value. Whatever may originally have been intended by the 1949 and 1958 Acts in their very different world, the operation of s.13 in practice sees rents well below market levels, creating that profit rent. That essential value may then be adjusted to reflect both entitlements to waygo compensation and the tenant's liability for dilapidations (overlooked by the report) but these may only rarely be significant drivers of value.

Pre-emptive Right to Buy - This has not really been a significant functioning part of the tenancy system since its introduction, more of an additional complication intruding on property rights. Owners who let tend to do so because they want to retain ownership. Our practical concern is that the law should provide a proper basis for valuation so that this is not simply a means to impose a transfer of value from the landlord to the tenant.

Fulfilling Obligations – The concept of removing a landlord is an extraordinary and unwarranted proposal that can do nothing for confidence in letting. Notice to quit sanctions on the tenant, arising from substantial breach of the commercial agreement by which he rents the property, are not commonly implemented and even then only very rarely result in the removal of the tenant. The enforcement of the landlord's obligations can surely be achieved by reviewing the arrangements for requiring their performance on pain of the tenant doing the work and recovering the costs.

A Framework for New Lettings

Letting Vehicles

We see no reason for distinguishing between the present alternatives to 1991 Act tenancies but rather one basic flexible regime to cover all lettings from seasonal grazing and cropping to long term lettings.

Such a new framework should give the parties the freedom to agree a wider range of practical terms, including repairs (often now undertaken by tenants). The effect of those terms on the rent would depend on the circumstances.

Contracting agreements, share farming agreements, joint ventures and other arrangements may all have their place in the future of Scottish agriculture but do not involve the letting of land. It is the decline in the attraction of letting that that is giving these vehicles their opportunity. The relative success of contracting agreements has been aided by the fact that it has not been the subject of any specific legislation, just the general law of contract.

The New Entrant

We have commented on new entrants elsewhere in this submission. This should not just be code for the younger scions of farming families but cover entrance by those of all ages and backgrounds. The critical question is their capability as farmers and their ability to meet the obligations of the agreement. The opportunities offered should not be at the cost of the progression that the self-same entrants may well then want.

Their main problem is the capital required by farming business, rather than the issue of opportunities. Work by the Cornish Fresh Start Scheme suggests that repayable loans offer a better business discipline for new entrants than grants which may themselves, like other subsidies, serve to inflate values.

One caution is to be careful in creating any specific measures that they do not attract existing businesses able to exploit them.

Context

Landlord-Tenant Relationships, Codes of Practice and Ombudsmen

Especially in the rural world, the practical economy and the long run needs of farming function on the basis of working relationships. SAAVA strongly encourages good working relationships and the basis of mutual respect espoused by Aspiration 8. In the Interim Report's Summary Chapter, the review of Chapter 8 observes:

> "At the same time, we have heard positive stories of great relationships between landowners and tenants that are overcoming all these issues to enable and promote thriving, modern tenanted farms."

That aspect of the Group's findings is not represented in this section of its text.

In many cases, owners and tenants will retain agents to undertake the professional work and detail that they may not have the time, inclination or skill to undertake themselves. As noted in paragraph 331, it can often fall to the agents of both parties to manage those relationships, perhaps especially where there are practical differences between the parties, as can arise in any business relationship. Paragraph 173 notes properly that:

> "These intermediaries have a vital role to play in ensuring a collaborative partnership between landowners and tenants."

Professional work is often a matter of active mediation, ensuring a focus on practicality. Equally, it should be noted that an agent may be instructed late in the process between the parties and may have to convey unpalatable truths about the real positon. Jointly appointed intermediaries (as mooted in paragraph 175) may, howver, often face severe issue severe issues over conflicts of interest.

The professional bodies, both SAAVA with the CAAV or the RICS and also solicitors, promote qualification, the maintenance of professional standards with sanctions for breaches, members' active participation in Continuing Professional Development and produce technical papers supporting members' work - such as *A Practitioner's*

Guide to Scottish Agricultural Rent Reviews. SAAVA's work in promoting more effective means of dispute resolution has already been mentioned.

As, of course, neither owners nor tenants are required to use an agent nor to choose one who is professionally qualified. We do not see that a further external code of practice for agents alone strikes to the issue here. It is unlikely to resolve any issues over individuals without "key communication and inter-personal skills" (paragraph 174) – successful rural practitioners have to call heavily on those skills as well as their technical competence. These are not made to seek to insulate agents from reasonable criticism but it should be recognised that it sometimes easier to blame the agent rather than face up to or solve the problem.

If the issue is about the conduct of landlord-tenant relationships then any code has to bear on all parties: owners, tenants, their agents, qualified or otherwise, and others who may become involved. It should be recognised that an agent is simply the person instructed by a party, not an independent party in his own right, but with an obligation to work within the facts and legalities of the case. Any Code should be apt the wide range for circumstances and not simply offer another means for parties to pursue their grievances against each other.

Legal rights and obligations, as conferred by a tenancy agreement or under statute, need certainty and require proper process, both for the rule of law to operate and to assure those, owners or tenants, considering investing.

The suggestion of an ombudsman with some powers to review disagreements, appears to be a further quasi-judicial process with evidence and a determination that may be referred do the courts – perhaps not the normal use of work "ombudsman" with its focus on process. SAAVA urges instead that a realistic development of dispute resolution facilities such as arbitration and expert determination. In the real world, we question whether the ombudsman post is a role that could actually be filled effectively given the expectations that appear to be invested in it, being neutral, presumably knowledgeable with Olympian powers yet vulnerable to contention.

Meanwhile, SAAVA supports all reasonable endeavours to encourage good practice and better, constructive relationships by all and between all.

Taxation and the Common Agricultural Policy

As noted above, the present taxation system is in many key respects reasonably neutral between the letting of land and other arrangements. There are points in which it is either careless of the issue or imposes burdens on letting but they are individually not strategic in this (while tackling the longstanding divide between property income and trading income may be a larger topic than this issue). With the main reliefs, such as Agricultural Property Relief from Inheritance Tax being at 100 per cent of "agricultural value" for any letting since 1995 it appears hard to offer a major improvement to assist letting, though minor ones are feasible. In essence, it may be that owners who are troubled by taxation ceased to let years ago or have not been attracted by it while those who can accept the present arrangements would let but for other issues such as the legal and political clouds over the sector. In that context, owners can justify their concern that by letting, particularly for any length of

time, they may find they have put themselves in an exposed or inflexible position should matters become adverse.

We do not understand the reference to business rates in paragraph 335 in this context. Were these to be extended to agricultural land they would be a significant extra outgoing on the occupier (tenant) which would in turn depress rents.

We have commented on the CAP and its real rather than alleged issues earlier in this submission (see 4.9).

Developing the Recommendations

Enabling – This should not only focus on new entrants (of all ages and backgrounds) but also on the need for open progression within the sector. The scale of the challenges to farming in general and the tenanted sector in particular and the responses required to the many commercial, environmental, regulatory and other pressures needs to be recognised.

Balanced – As with any long term business relationship, SAAVA agrees that there has to be mutuality as to rights and obligations in the relationship. It has to recognise the tenant's need to pursue his business within the agreement and the landlord's interest in his own land. Investment by other party can only be expected where it is advantageous or necessitated by regulation without alternative. More widely, that will all function better where relationships are good and reform should be so cast as to encourage that rather than otherwise.

Resilient – Any outcome will only be resilient if it does recognise the business circumstances that are likely for farming over the next generation with all the challenges it will being. It requires a modern simple flexible framework for lettings and a practical means for handling such disputes within the existing ones as may naturally arise.