

Review of Legislation Governing Small Landholdings in Scotland

March 2017



Scottish Government
Riaghaltas na h-Alba
gov.scot

MINISTERIAL FOREWORD



Small landholdings are a part of our Scottish agricultural heritage and we, the Scottish Ministers, are strongly aware of their unique status in rural Scotland. In the same way as Scottish agriculture has modernised and changed over the 20th Century, it is natural that numbers of small landholdings have dropped as their purpose and ownership has changed.

Small landholdings form part of the mosaic of land tenure in Scotland. In a rural Scotland that looks towards the future, instead of focusing on the past, this diversity supports the delivery of a dynamic and prosperous rural economy. Along with crofting and tenant farming, small landholdings provide benefits to Scotland's people, by helping to sustain rural communities and supporting better connections to the land and the food we produce.

This Review would not have been as comprehensive as it is, without the significant level of support from individual small landholders and landlords. While the total population of small landholders is low, their level of contribution has been high. Their passion and commitment to their rural communities is evident from the level of engagement and interaction with my officials and during the consultation period. Their voices have been strong and it is important that any alteration to their future status takes proper account of their views and direct impact upon their communities. I would like to thank everyone who took the time to meet and engage with this Review and I hope it reflects the position of small landholdings within Scotland.

A handwritten signature in black ink that reads "Fergus Ewing". The signature is written in a cursive style with a large loop at the end of the last name.

FERGUS EWING
Cabinet Secretary for the Rural Economy and Connectivity

CONTENTS

	Page No.
MINISTERIAL FOREWORD	2
INTRODUCTION	5
BACKGROUND	7
VIEWS ON THE CURRENT SMALL LANDHOLDING LEGISLATION	12
SECURITY OF TENURE	13
RIGHT TO BUY	14
SUCCESSION	15
ASSIGNATION	17
NEW ENTRANTS	18
HOUSING	19
INFRASTRUCTURE	21
DIVERSIFICATION (NON-AGRICULTURAL ACTIVITY)	22
FINANCE (PUBLIC FUNDING & BANKING)	23
RENT	24
COMPENSATION FOR IMPROVEMENTS	25
REGISTRATION & VACANT SMALL LANDHOLDINGS	27
CONVERSION TO OTHER TYPES OF TENANCY	30
CREATION OF NEW SMALL LANDHOLDINGS	33
CONDUCT & CONSIDERATION OF AN UMBRELLA BODY	34
WIDER SOCIAL AND ECONOMIC ISSUES	35
RECOMMENDATIONS & CONCLUSIONS	36

	Page No.
ABBREVIATIONS	39
GLOSSARY	40
ANNEX 1: KEY STATISTICS	42
ANNEX 2: LEGISLATION GOVERNING SMALL LANDHOLDINGS	43
ANNEX 3: MAP OF LOCATIONS OF SMALL LANDHOLDINGS IN SCOTLAND (2016)	45
ANNEX 4: LEGAL DIFFERENCES BETWEEN SMALL LANDHOLDINGS, CROFTS AND 1991 ACT TENANCIES	46
ANNEX 5: KEY DIFFERENCES BETWEEN LANDHOLDERS AND STATUTORY SMALL TENANTS	48
ANNEX 6: STATUTORY SMALL HOLDINGS IN OTHER PARTS OF THE UK	49
ANNEX 7: CONSULTATION ANALYSIS	51

INTRODUCTION

Purpose

1. This document is a review of the legislation regulating small landholders, setting out the current position concerning small landholding tenancies in Scotland. Small landholders, of which there are approximately 74 remaining in Scotland, are tenanted holdings under the Small Landholdings Acts 1886-1931. Small *landholdings* are a sub-set of smallholdings.¹

Context

2. During Stage 3 of the Land Reform Bill, Scottish Ministers committed to a review of the legislation governing small landholdings. Section 124 of the Land Reform (Scotland) Act 2016 requires Scottish Ministers to review the legislation and to lay a report of that review before the Scottish Parliament by 31 March 2017. In carrying out this review, Scottish Ministers have consulted with small landholders and other persons as appropriate.

Previous consideration

3. The former Cabinet Secretary for Rural Affairs and the Environment, Richard Lochhead MSP, established and chaired the Agricultural Holdings Legislation Review Group (AHLRG) in 2013. In its Interim Report, the AHLRG commented on small landholdings² and concluded in their Final Report in 2015 that:
 - “further consideration should be given to providing small landholders with an automatic pre-emptive right to buy their holdings, should they come up for sale.”³
 - “Small Landholders in the designated [crofting] areas should still retain their right to convert to become a croft under relevant legislation.”⁴
4. The Land Reform Review Group (LRRG) also considered small landholdings as a part of their 2014 review into the Land of Scotland and the Common Good. They recommended that:
 - “...there should be major improvements in the position of tenants under the Small Landholders (Scotland) Act 1911....these tenants should, like crofters, have a statutory right to buy their holdings”.⁵

Remit & scope

5. The terms of reference of the review are specified in section 124 of the Land Reform (Scotland) Act 2016. The remit is to review the legislation that governs small landholdings. Small landholdings are defined as a landholding where the tenancy is one to which section 32 of the Small Landholders (Scotland) Act 1911 applies, or to which any of the provisions of the Small Landholders (Scotland) Acts 1886 to 1931 applies. Specifically, this review addresses some of the key legislative provisions in: the Crofters Holdings (Scotland) Act 1886; the Small Landholders (Scotland) Act 1911; the Land Settlement (Scotland) Act 1919; and the Small Landholders and Agricultural Holdings (Scotland) Act 1931. Consideration is also given to other relevant legislation concerning small landholdings.

¹ Scottish Government Rural and Environmental Science and Analytical Services, ‘Results from the June 2016 Agricultural Census’. Available at: <http://www.gov.scot/Publications/2016/10/4348> Smallholdings are a mix of owner-occupied or are tenanted secure 1991 Act and small landholdings, of which there are around 20 000 in Scotland today.

² Agricultural Holdings Legislation Review Group, ‘Review of Agricultural Holdings Legislation: Interim Report’ (2014), p.79. Available at: <http://www.gov.scot/Resource/0045/00452838.pdf> (AHLRG - Interim Report)

³ Agricultural Holdings Legislation Review Group, ‘Review of Agricultural Holdings Legislation: Final Report’ (2015), Recommendation 23. Available at: <http://www.gov.scot/Publications/2015/01/5605> (AHLRG - Final Report)

⁴ Ibid, paragraph 219.

⁵ Land Reform Review Group, ‘Land Reform Review Group Final Report - The Land of Scotland and the Common Good’ (2014), p.195. available at: <http://www.gov.scot/Publications/2014/05/2852> (LRRG Final Report)

6. This review focuses on the legislation as it applies to “landholdings”, which by far forms the largest sub-category within small landhold tenure. “Statutory Small Tenancies” (SSTs), a sub-category of small landholdings of which there are fewer, are considered where relevant. The differences between these two categories are discussed further in para 13-25 and are summarised in Annex 5 of this review.

Review Process

7. Given their small numbers, government officials endeavoured to make personal contact with all known small landholders. A short consultation was directed at the estimated 74 current small landholders and via stakeholders to landlords. This involved a written mailshot where a number of open questions were asked, followed up on with telephone calls.
8. Alongside this, the Scottish Government attended various events to meet relevant stakeholders. Some of these were Scottish Government–led events which afforded individual small landholders and landlords the opportunity to meet officials at a small number of separate surgeries in the areas where the highest density of small landholdings in Scotland are located. Government officials also attended a number of industry events including the Smallholder & Growers Festival in Lanark, the Rural Parliament in Brechin and AgriScot in Edinburgh.

BACKGROUND

What is a small landholding?

9. Small landholdings are those holdings, subject to the Small Landholders (Scotland) Acts 1886 to 1931⁶ which are present in all parts of Scotland, except the crofting counties⁷. Crofts in the crofting counties, which used to be subject to the Acts 1886 to 1931, were removed from the small landholdings regime by the Crofters (Scotland) Act 1955, and are now primarily governed by the Crofters (Scotland) Act 1993.
10. The small landholding regime was introduced into the crofting counties, following the Napier Commission Report,⁸ by the Crofters Holdings (Scotland) Act 1886 which introduced three key rights for crofters: security of tenure;⁹ fair rent;¹⁰ and payment of compensation for improvements at the end of a tenancy.¹¹ A crofter was defined as tenant of a holding from year to year where the annual rent did not exceed £30, situated within a crofting parish.¹² The 1886 Act makes specific provision excepting certain categories of persons from the definition of crofter.
11. The Small Landholders (Scotland) Act 1911 remodelled the small landholding landscape, extending the 1886 Act to the whole of Scotland. The 1911 Act contained some freestanding provisions but also amended and modified the application of the 1886 Act, and the other Crofters Acts¹³. This means that the 1886 Act was not replaced and remains relevant as regards small landholdings. The 1911 Act provided that where the Crofters Acts said “crofter” this should be substituted to read as “landholder”.
12. The 1911 Act came into force on 1 April 1912. On that date, existing holdings were reclassified depending on the characteristics of the holding. The classification of the holding determined the set of rules applying to that holding. The term “small landholders” is normally used as the generic term to include those individuals who are technically a “landholder” and those who are technically a “statutory small tenant”. The law applying to each of these is not the same and the following paragraphs set out some of the differences.

⁶ See Annex 2 for a list of legislation for small landholdings.

⁷ The former counties of Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland and Zetland (see section 61(1) of the Crofters (Scotland) Act 1993) (1993 Act).

⁸ The Royal Commission of Inquiry into the Condition of Crofters and Cottars in the Highlands and Islands (known as the Napier Commission) was established in 1883 to investigate conditions causing hardship to crofters and cottars which were the root of widespread unrest in the Highlands and islands. Disputes were the result of tenants concerns about high rents, lack of rights and eviction to make way for larger farm operations. The Napier Commission Report was published in 1884, with documents available from the following link: <https://www.whc.uhi.ac.uk/research/napier-commission>.

⁹ Crofters Holdings (Scotland) Act 1886 (1886 Act), Part I, s(1-3)

¹⁰ Ibid, Part II, s(4-6)

¹¹ Ibid, Part IV, s(8-10)

¹² Ibid, Part IV, s(34).

¹³ The “Crofters Acts” are defined in section 31 of the 1911 Act as the Crofters Holdings (Scotland) Act 1886, the Crofters Holding (Scotland) Act 1887, the Crofters Common Grazings Regulation Act 1891 and the Crofters Common Grazings Regulation Act 1908.

Landholders

13. The 1911 Act provided that a variety of different types of persons became landholders under that Act.¹⁴ The provisions of the 1911 Act, and of the Crofters Acts, which apply to landholders applied to these holdings. These persons were:
 14. Existing crofters - On 1 April 1912 every holding which was held by a crofter to whom the 1886 Act applied became a landholding for the purposes of the new small landholdings regime. These were referred to as existing crofters.
 15. Existing Yearly Tenants - On 1 April 1912 certain tenants who held a holding from year to year became landholders for the purposes of the new small landholdings regime, provided certain criteria were satisfied. The tenant had to reside on or within two miles of the holding,¹⁵ and had to cultivate the holding by themselves or with their family (with or without hired labour). The rent of the holding on 1 April 1912 had to be less than £50 if the holding exceeded 50 acres¹⁶ (however the rent could exceed £50 if the holding was less than 50 acres).¹⁷ The tenant, or their predecessors in the same family, had to have provided or paid for the greater part of the buildings or other permanent improvements on the holding. The final criteria was that none of the disqualifications under section 26 of the 1911 Act applied.
 16. Qualified Leaseholders - Certain tenants held their holdings under a lease for a term of more than year. If they satisfied the same criteria as existing yearly tenants, then those tenants became landholders from the termination of the lease. This meant that they did not gain landholder status when the 1911 Act came into force on 1 April 1912 but later, when the lease terminated. Such persons were termed “qualified leaseholders”.
 17. New Holders - The 1911 Act put in place a process for creating new holdings, which were registered by the Scottish Land Court under the Act. The tenants of newly registered holdings had landholder status for the purpose of the new small landholdings regime and were known as “new holders”.
18. Importantly, the status of existing holdings was fixed at 1 April 1912. Existing crofters and tenants became landholders in accordance with the above processes, provided they met the criteria. They acquired landholder status either as an existing crofter; existing yearly tenant; or qualified leaseholder. New holdings could only be constituted in the meaning of the Acts if they were specifically created as such in terms of the legislation. The 1911 Act established a process in which a landowner and any other person could apply to the Scottish Land Court for that person to be registered as a new landholder under the Act.¹⁸
19. Provision was made to allow new holders to obtain loans or grants for certain purposes with a view to preparing the land to be suitable for cultivation. Following World War I, the Land Settlement (Scotland) Act 1919 amended the process for the creation of new small landholdings, which were offered to war veterans as a means of support and were often created by breaking up larger farms. Existing landlords or tenants could apply for compensation for any loss to the rental value or depreciation in the value of the estate that they sustained. This was settled by the Scottish Land Court unless the landlord required arbitration.
20. It should also be noted that a person who inherited a small landholding also became a landholder.¹⁹

¹⁴ See section 2 of the 1911 Act.

¹⁵ Amended to ‘3 kilometres’ by the Agriculture (Adaptation of Enactments) (Scotland) Regulations 1977 (S.I. 1977/2007).

¹⁶ In Lewis these amounts were £30 and 30 acres; see section 27 of the 1911 Act.

¹⁷ S 26 of the 1911 Act. See also James Scott, ‘The Law of Smallholdings’ (1993), pp. 4-5. It was possible to have a holding of between 2-300 acres where the rent did not exceed £50. In 1912, £50 was equivalent to £4000 (approx.).

¹⁸ Section 7 of the 1911 Act.

¹⁹ Section 2(2) of the 1911 Act.

Statutory Small Tenants

21. As mentioned above, the 1911 Act established alternate regimes for landholders and for statutory small tenants. Statutory small tenants were those tenants who would otherwise have been an existing yearly tenant or a qualified leaseholder (i.e. landholders) but for the fact that the landlord provided the whole or greater part of the buildings or other permanent improvements on the holding i.e. where the landlord provided most of the fixed equipment.²⁰ Statutory small tenants also had to satisfy the relevant criteria in section 26 of the 1911 Act.
22. The distinction between small landholders and statutory small tenants is important because a statutory small tenant is subject only to certain of the provisions of the 1911 Act.²¹ The 1911 Act provided that, except as expressly provided by the 1911 Act, the legislation shall not apply to statutory small tenants.²² Further provision is made as regards statutory small tenants by the Small Landholders and Agricultural Holdings (Scotland) Act 1931. This means statutory small tenants had different rights than landholders and that any continuing statutory small tenants do not have the same rights as landholders under the Small Landholders Act 1886 to 1931.
23. Persons who inherit SSTs are themselves statutory small tenants in the meaning of the legislation.²³
24. The legislation permits for statutory small tenants to gain the status of landholder in certain circumstances. Where a landlord failed in any duty to provide or maintain buildings and equipment required for the cultivation of the land by the tenant, the tenant was eligible to apply to the Scottish Land Court, which could declare that the statutory small tenant was a landholder.²⁴ This would bring the holding under the small landholding regime as opposed to the SST regime.
25. Additionally, the Small Landholders and Agricultural Holdings (Scotland) Act 1931, established a process where by a statutory small tenant could serve notice on their landlord that they wish to become a landholder. If that was agreed the holding would then be registered as a small landholding and the tenant would obtain the status of a landholder.

(see also Annex 5 for comparisons between statutory small tenancies and landholders)

Extent of Small Landholdings

26. During the 1880's there were more than 50,000 smallholdings or small farms²⁵ covering 14.6% of all agricultural land.²⁶ Today, the number of small farms in Scotland is 20,000. The number of statutory smallholdings (comprising both statutory small landholdings and statutory small tenancies) is approximately 74. One per cent of holdings with tenanted land are small landholdings. Land allotted to small landholdings covers 2,889 hectares or 0.2% of tenanted land, or about 0.05% of agricultural land. This compares to 5.58 million hectares for all agricultural holdings.²⁷

²⁰ Section 2(1)(iii) of the 1911 Act.

²¹ Primarily section 32 of the 1911 Act.

²² See section 32(2) of the 1911 Act.

²³ Section 32(2) of the 1911 Act.

²⁴ Section 32(11) of the 1911 Act.

²⁵ Smallholders and small farms are distinct from statutory small landholders: the former includes owner-occupier small holdings, owner-occupied and tenanted farms of 50 acres or less.

²⁶ James Scott, 'The Law of Smallholdings' (1993), pp. 4-5

²⁷ 2016 Agricultural Census

27. In the early 20th century the practice of creating new small landholdings was abandoned and few were established after 1931.²⁸ In some cases, the small landholder purchased the land from their landlord, ending the status as a landholding under the Acts.²⁹ Between 1959 and 2008 successive governments actively pursued a policy of removing state owned small landholding tenancies from land tenure and/or converting them to secure 1991 Act agricultural tenancies³⁰ or selling them back to the landlord for a fair consideration. Dwindling numbers are compounded by challenges in identifying this tenancy type.³¹

28. The reduction in the number of small landholdings can also be attributed to tenancy conversion. Following the Crofters (Scotland) Act 1955 small landholdings located within the crofting counties were automatically converted to crofts.³² Today, all small landholdings lie outwith crofting counties. Some lie in the designated crofting areas; Arran, Bute, Great and Little Cumbrae, Moray and parts of the Highlands,³³ with the largest number, between 15-18 on Arran. Concentrations of small landholdings remain in Ayrshire, Aberdeenshire, Moray, Dumfriesshire, the Scottish Borders and east central Scotland.

(The distribution of small landholdings in Scotland can be found on the map in Annex 3)

Key issues small landholders face

29. Some of the issues small landholders face stem from a lack of understanding of how the legislation works in this area. Small landholders do have rights of security of tenure, but, they do not share the same benefits or legal rights as crofters or tenant farmers with secure 1991 Act agricultural tenancies:

- The legislation governing small landholdings was last updated in 1931. The legislation can appear inaccessible either because small landholders and landlords do not know where to access it, do not understand it or find it unwieldy and can be uncertain where they can go to get expert advice.
- Small landholders have to provide and maintain the entire infrastructure of their farms: housing, drainage, fencing and buildings (i.e. fixed equipment). The burden of maintenance falls entirely to them. This position stems from small landholders originally providing the fixed equipment and buildings on the holding; often with a government grant. This is the same regime as applies to crofters under the Crofters (Scotland) Act 1993, who also have to provide and maintain their own fixed equipment. Under the Agricultural Holdings (Scotland) Acts 1991 & 2003, obligations are subject to a more equitable split between landlord and tenant farmer.

²⁸ In 1928 the Report of the Committee on Land Settlement in Scotland (the Nairn Committee) had recommended that the government discontinue the creation of small landholdings on privately owned estates.

²⁹ See, for instance, Highland Primary Care NHS Trust v. Thomson 1999 S.L.C.R. 32

³⁰ a letting of land for a term of years, or lives of the tenant, or for lives and years

³¹ Scottish Government figures indicate a marked reduction in employment figures in agriculture from 127 000 (1931) to 63,473 (2016) people.

³² Crofters (Scotland) Act 1955, section 3, and see also transitional and saving provisions in section 39(5). The 1955 Act was repealed and replaced by the Crofters (Scotland) Act 1993, which consolidated the law on crofting.

³³ With effect from 4 February 2010 Section 3A(1) of the Crofters (Scotland) Act 1993 (inserted by the Crofting Reform etc. Act 2007) allows Scottish Ministers to designate new areas in Scotland where crofts can be created, with the approval of the Crofters Commission. The Crofting (Designation of Areas) (Scotland) Order 2010 designates certain areas for this purpose.

- In certain circumstances buildings, housing and land can fall into disrepair if the small landholder is unable to manage the land. This can raise concerns about eviction on the part of those individuals if they fear they are not meeting the statutory standards for maintaining the land.
- Some small landholders are uncertain of their rights and how small landholding legislation works in relation to succession or assignation. This has led to fears of homelessness upon retirement, as they do not own the house that they or their predecessor may have built and/or invested in.
- Legal provisions for compensation on improvements are similar to those applied to crofts, although some small landholders consider they are not fairly compensated for investments at resumption or waygo³⁴ e.g. as a crofter can assign a croft for value they can realise the value of their investment.
- There is no right to buy for small landholders. Crofters have a statutory right to buy their croft (introduced by the Crofting Reform (Scotland) Act 1976) and tenant farmers with secure 1991 Act agricultural tenancies have a pre-emptive right to buy (introduced through the Agricultural Holdings (Scotland) Act 2003).
- There is significant uncertainty as to tenancy type: some small landholders are unsure whether they have a small landholding tenancy; in addition the Scottish Government no longer links tenancies to the old development loans and no formal register is kept.

Current contribution to a vibrant tenanted sector

30. Smallholdings can provide both an important point of access into agriculture for new entrants and are essential for the sustainability of the industry and for those farming part-time or on a smaller scale. Small landholdings are in a different position and this review is the first step towards trying to understand how small landholdings can improve, how they contribute to land tenure and the tenanted sector and to our vibrant rural economy.

³⁴ See section 8 of the 1886 Act (read with section 12 of the Small Landholders and Agricultural Holdings (Scotland) Act 1931(1931 Act)) and section 30 of the 1993 Act; see also *Strachan's Trustees v Harding* 1990 SLT (Land Ct) 6.

VIEWS ON THE CURRENT SMALL LANDHOLDING LEGISLATION

Issues Raised

32. Of those who responded to our consultation, most small landholders and landlords consider the current small landholding legislation to be outdated and inaccessible. The general position amongst some small landholders was that they felt the current legislation made little difference to them. It is felt by landholders that the existing legislation is unbalanced, favours the landlord and has little protection and no equality for them; particularly when compared to crofters or tenant farmers. Conversely, the general position of landlords was that the legislation favoured the small landholder.
33. Due to the complexity of the legislation, both small landholders and landlords also considered that it was not generally understood by non-specialist solicitors, which they consider results in additional expense and time to navigate.
34. A significant number considered that consolidation, modernisation and simplification of the legislation is necessary. Individuals also sought more freely available information on the legislation so they could have a better understanding of their legal rights and the differences between statutory small tenants and landholders.

Legislation

35. The last primary legislation on small landholdings was in 1931. While there have been some amendments made to small landholding legislation through crofting legislation there is no modern small landholding legislation. This compares unfavourably to the range of modern legislation providing support for crofting and other forms of tenant farming.

Discussion

36. There are a number of ways to help achieve better understanding of small landholding legislation. The provision of a guide to the current small landholding legislation could help small landholders to gain a better understanding of the legal framework. While this work would need to be undertaken by a specialist it could provide a first step in improving knowledge.
37. Further consideration could also be given as to whether legislation could be introduced to modernise and consolidate the law in this area. One option could be that the Scottish Ministers consider requesting the Scottish Law Commission to review this area and recommend reforms.

(See Annex 2 for a list of legislation for small landholdings)

SECURITY OF TENURE

Issues Raised

38. Feedback from the majority of small landholders responding to our consultation, suggests that there is a need to retain security of tenure, regardless of any other future changes to the policy for small landholdings. Some small landholders were unclear about the rights of succession.
39. On the other hand, some landlords considered that small landholders have significant security of tenure and it was felt this created issues if the land becomes neglected and the landlord is unable to get it back.
40. Some individuals on Arran can trace back familial links to a tenancy or specific tract of land, some 400 years, with the average tenancy length being 111 years. The original tenancy (provided it met the criteria described above) would have been brought under the statutory regime for small landholdings in 1912.³⁵
41. There was concern expressed by some small landholders that security of tenure should not be eroded as a result of a landlord's or small landholder's inability to provide the correct tenancy documentation or failure to keep good records. This issue reflects feelings of a lack of security in their position, but lack of documentation does not necessarily affect security of tenure.

Legislation

42. The Crofters Holdings (Scotland) Act 1886 sets out the requirements that must be met by a small landholder if they are to retain their security of tenure.³⁶ If the small landholder wishes to terminate the tenancy they require to give one year's notice to their landlord.³⁷ If the landlord requires to resume the small landholding, for a reasonable purpose having regard to the good of the holding or of the estate, they must apply to the Scottish Land Court for permission to do this.³⁸ The position as regards Statutory Small Tenancies (SSTs) is similar.³⁹ The legislation provides for compensation for both landholders and statutory small tenants.

Discussion

43. Many small landholders and landlords may be unaware of that fact that a small landholding does not require tenancy documentation. Many small landholders and landlords will never have had any documentation. Those small landholdings created under section 7 of the 1911 Act (as amended by the 1919 and 1931 Acts) should have a written lease and this might be held in the Scottish Land Court records of when the holdings were created, or might be held in Government records.
44. Given the strong views expressed by small landholders about retaining their security of tenure, any future policy development or consideration of legislative change will need to consider the implications of this. This should of course, be balanced against the rights of the landlord.

³⁵ As either a landholding or as a statutory small tenancy.

³⁶ See section 1 of the 1886 Act, as read in accordance with subsequent legislation on small landholdings.

³⁷ See section 7 of the 1886 Act, as read in accordance with section 18 of the 1911 Act and section 22 of the 1931 Act.

³⁸ See section 2 of the 1886 Act, as read in accordance with section 19 of the 1911 Act.

³⁹ See section 32(15) of the 1911 Act, as read in accordance with section 13 of the 1931 Act.

RIGHT TO BUY

Issues Raised

45. Small landholders do not have a pre-emptive right to buy⁴⁰ or an absolute right to buy⁴¹ their holding. Some small landholders view this as unfair when compared with crofters and tenant farmers with secure 1991 Act agricultural tenancies.

Legislation

46. The legislation does not provide for a right to buy for landholdings or small statutory tenancies. A statutory right for crofters to buy their croft was first introduced in 1976, but that only applied to crofts which had been removed from the small landholdings regimes under the 1955 Act. Similarly the pre-emptive right to buy which was given to secure 1991 Act agricultural tenancies in 2003 has not been extended to small landholders.

Discussion

47. Some small landholders perceive it as unfair that they are treated differently from other tenancy types on this issue. Tenant farmers with secure 1991 Act agricultural tenancies have a pre-emptive right to buy their holding and crofters have an absolute right to buy their holding; small landholders have neither. This has been raised as an issue by both the Agricultural Holdings Legislation Review Group (AHLRG) and the Land Reform Review Group. The AHLRG recommended that small landholders should be given a pre-emptive right to buy⁴² and the Land Reform Review Group went further and recommended that small landholders should, like crofters be given a statutory right to buy their holdings at 15 times its annual rent.⁴³
48. Further thought could be given to whether a pre-emptive right to buy for small landholders should or could be introduced. However, careful consideration would need to be given to the benefits of such a proposal and how it could operate in practice.
49. Generally, where small landholders and their landlord have in the past agreed to the purchase of the small landholding by the landholder, it is has been removed from the small landholding regime. Any decision to explore offering small landholders a right to buy would need to be balanced against any possible benefits of retaining small landholdings as a form of land tenure.
50. Finally, it should be noted that there are still two small landholdings owned by Scottish Ministers and a small number owned by the Crown Estate. The Scottish Government has in the past enabled many of the small landholdings they owned to be sold to sitting small landholders.

(see also Conversion section on page 30)

⁴⁰ The tenant or small landholder can only exercise his right to buy when the owner proposes to sell the tenanted land.

⁴¹ The ability to require a landlord to sell the farm to their tenant or small landholder without the land being on the open market.

⁴² Paragraph 215 and Recommendation 23 , of the AHLRG – Final Report

⁴³ Paragraphs 13 and 15, Section 27 - LRRG – Final Report.

SUCCESSION

Issues Raised

51. Although there is a right of succession for small landholders, some perceive that the succession provisions in the legislation are inadequate for a modern tenancy. There were suggestions that the categories of eligible successors required to be widened to provide the small landholder with more opportunities to identify an eligible successor, similar to the approach taken for agricultural holdings.
52. The majority of small landholders who responded wanted to ensure that they could pass their small landholding to their successors, regardless of how the future policy developed or altered.
53. Some small landholders considered that there was little demand from new entrants for opportunities to succeed or be assigned (see below for discussion on assignation) a small landholding as it was not seen as an attractive option. One reason why it may not be an attractive option, is that it may prove difficult for some to provide a full time occupation on the small landholding due to its size⁴⁴ and there may also be associated maintenance costs arising from managing a small landholding.⁴⁵
54. Landlords and small landholders both raised concerns that where small landholdings had deteriorated, the successor would be required to invest to make the holdings fit for agricultural production.

Legislation

55. The 1886 Act allows for the bequest of a holding by a landholder to certain persons. The provisions of the 1886 Act on bequests were amended to take into account the Succession (Scotland) Act 1964. The general position is that a small landholder may, by will or other testamentary writing, bequeath their right to the holding to certain persons.⁴⁶ The list of persons to whom they may bequeath the holding are their son-in-law or any one of the persons who would be entitled to succeed to the estate on intestacy.⁴⁷ The person to whom the holding is bequeathed is known as the legatee, and the 1886 Act sets out the process which the legatee is to follow to succeed to the holding and become the small landholder of that holding.⁴⁸
56. Where a small landholding is not the subject of a bequest contained in a will or other testamentary writing, or any bequest is declared null and void, or the legatee does not accept the bequest, the holding forms part of the deceased's intestate estate. Rules on intestacy contained in the Succession (Scotland) Act 1964 apply to any such lease. The 1964 Act sets

⁴⁴ All the small landholders on Arran we have spoken with report that they have had to rely on a second income in order to sustain their agricultural lifestyle.

⁴⁵ The maintenance obligation is similar to that of secure tenants under the 1991 Act to maintain fixed equipment, however the small landholder has to carry the additional cost of replacement; legal provisions under crofting law are the same.

⁴⁶ The legislation states that the holding may be bequeathed to "one person". This, and certain Scottish Land Court cases, suggest that this means that the holding cannot be bequeathed to two or more persons to be shared amongst them. See, section 16(2) of the 1886 Act as read in accordance with the 1911 and 1931 Acts; see also *Anderson v. Barclay-Harvey* 5 SCLR 65; and James Scott, 'The Law of Smallholdings' (1993), p.122, although cf Scott, p.60 on joint tenants where an existing crofter, existing year to year tenant or qualified leaseholder held a holding on a joint tenancy basis immediately before they became classed as landholders on 1 April 1912.

⁴⁷ Generally those are the categories of persons listed in section 2 of the Succession (Scotland) Act 1964, Statutory small tenants may bequest their tenancy to the same categories of persons as landholders (section 32(1) of the 1911 Act).

⁴⁸ Section 16 of the 1886 Act, as read in accordance with the 1911 and 1931 Acts.

out a process⁴⁹ by which an executor can transfer the interest in an agricultural lease⁵⁰ to a person known as the transferee.

Discussion

57. Any guide to the current small landholdings legislation that is prepared could include information on how the provisions of the Succession (Scotland) Act 1964 apply to small landholders, as well as an outline of the succession provisions of the legislation on small landholdings. This information could also be included as part of the Farm Advisory Service provision to small farms, thereby supporting stronger businesses. These proposals could assist small landholders (and statutory small tenants) in undertaking in-life planning. Small landholders are also encouraged to seek independent legal advice specific to their own circumstances.

⁴⁹ See section 16 of the 1964 Act.

⁵⁰ "Agricultural lease" includes a lease of a holding within the meaning of the Small Landholders (Scotland) Acts 1886 to 1931 (section 16(9) of the 1964 Act.

ASSIGNATION

Issues Raised

58. Some small landholders sought the ability to assign their tenancy on the open market at a price, which would enable them to raise sufficient capital upon retirement to buy a retirement property.
59. In addition, it was felt by some small landholders that there would be merit in expanding the categories of individuals who can be assigned a small landholding to provide more options to small landholders and to enable more new entrants to take on a small landholding, which would also assist small landholders who want to retire.
60. Guidance on in-life planning could help small landholders plan and improve the management of the end of their tenancy. In turn this could help reduce their concerns about homelessness at the end of a tenancy when they must move out of the farmhouse and perhaps purchase a house for the first time. Some consultees have indicated concerns that the statutory waygo compensation rarely meets their expectations or the costs of purchasing a house.

Legislation

61. The Small Landholders Act 1911 grants small landholders the statutory right to apply to the Scottish Land Court to assign their holding.⁵¹ Under the 1911 Act they may apply in the circumstances where they are unable to work the holding due to illness, old age or infirmity. The persons to whom a small landholder may apply to assign their holding to certain categories of person.⁵² The application to assign is to be intimated to the landlord and other interested parties, and a hearing before the Scottish Land Court will take place if necessary. If it appears to the Scottish Land Court that assignation would be reasonable and proper, it may grant permission on such terms and conditions as it sees fit. While the 1911 Act permits a landholder to assign only to certain persons, a landlord could in theory consent to assignation on different terms as a private agreement between the parties.⁵³
62. There does not appear to be an equivalent statutory right of assignation as regards statutory small tenants under the Small Landholders (Scotland) Acts 1886 to 1931, however the 1911 Act does appear to allow for assignation if it is permitted by the lease.⁵⁴

Discussion

63. As part of a wider consideration of the future of small landholdings, there may be merit in commissioning a review of the criteria for assignation of a small landholding to ensure it is fit for the 21st Century. The scope of any such review could include a comparison of the situation of small landholdings with other forms of land tenure, where assignation has been updated e.g. agricultural tenancies and crofts.

⁵¹ Section 21 of the 1911 Act (as amended by the Succession (Scotland) Act 1964).

⁵² Under section 21 of the 1911 Act, the persons to whom a landholder may apply to assign his lease are their son-in-law or any one of the persons who would be, or would in any circumstances have been, entitled to succeed to the estate on intestacy by virtue of the Succession (Scotland) Act 1964 (see section 2 of the 1964 Act).

⁵³ Representatives of the late *Hugh Matheson v Master of Lovat* 1984 SLCR 82 - landlord's implied consent to an assignation.

⁵⁴ Section 32(1) of the 1911 Act. & Representatives of the late *Hugh Matheson v Master of Lovat* 1984 SLCR 82.

NEW ENTRANTS

Issues Raised

65. The lack of new small landholding tenancy opportunities combined with how the legislation works for assignation, succession and treatment of fixed equipment (including houses) means that this is generally not a route into agriculture that new entrant farmers choose to utilise.⁵⁵
66. Some respondents suggested that there is a need to provide guidance to prospective new entrant farmers about where they can helpfully find out about accessing funding and advice. There was also the suggestion that loans previously managed by the then Board of Agriculture for Scotland to help new entrants should be reintroduced, to improve productivity.

Legislation

67. There are no specific provisions within the Small Landholders (Scotland) Acts 1886 to 1931 to encourage new entrants to take on a small landholding. However further information on the creation of new small landholdings can be found in page 33 of this report.
68. Legislation governing loans previously managed by the Board of Agriculture for Scotland is considered in the public finance section of this report.

Discussion

69. Further discussion is required with prospective new entrants to agriculture and engagement with small holder groups to assess the barriers and opportunities and potential levels of demand for small landholdings, given these could provide a foothold for new entrants into the agricultural sector in a similar way that agricultural tenancies provide at present. Successful management or regulation of vacant and renounced holdings may also be of significance to new entrants.
70. The New Entrants Grant, New Entrants Start up Grant, Young Farmers Start up Grant and Small Farm Grants Scheme provided through the Scottish Rural Development Programme could all potentially provide measures of assistance to new entrants and further discussion could be undertaken with small landholders and landlords.

(see also Housing, Finance, Vacant Holdings sections)

⁵⁵ A new entrant would need to be a member of the family to succeed to the tenancy or to have the tenancy assigned to them by the current tenant.

HOUSING

Issues Raised

72. Under small landholder legislation, most small landholdings are bare land lets where many of the buildings, including the dwelling houses, have been erected by the small landholder or their predecessor. Funding for such an investment usually came by way of grant via the then Board of Agriculture for Scotland.

73. This raises a number of issues:

- Small landholders can sometimes perceive that they own the houses that they or their predecessors have had built, but that they do not own the land under the buildings. However, the general legal position is that the owner of land owns the buildings on it, with the small landholder generally entitled to compensation on waygo, with compensation for permanent improvements governed by the provisions of the Crofters Holding (Scotland) Act 1886.⁵⁶ It may be that in individual circumstances, small landholders have ownership of their home. For instance, anecdotal evidence suggests that some have purchased the land under their buildings, although this figure remains low. If small landholders are in doubt as to their particular circumstances they are encouraged to seek independent legal advice.
- Non-ownership of the land under the buildings might prevent access to funding from lending authorities who do not recognise the buildings as collateral.
- The insecurity of not owning their homes means that many small landholders are concerned over the risk of homelessness or the stress of having to purchase another property late in life. It has been reported that this contributes to a sense of lack of security in their general position, although it should be borne in mind that small landholders have security of tenure (see Security of Tenure section on page 13).

Legislation

74. There is no provision in the Small Landholders (Scotland) Acts 1886 to 1931 for the purchasing of the site of the dwelling houses. There is very little in the legislation on housing in general: the 1911 Act (section 9) provided that the then Board for Agriculture in Scotland may provide loans for the rebuilding or improvement of dwelling houses. The construction of a dwelling house is also listed as an improvement for which compensation can be claimed by the small landholder at waygo.⁵⁷ By way of comparison, crofters can purchase their dwelling-house.⁵⁸

75. The small landholder needs the landlord's written consent to sublet or erect an additional dwelling house on the holding (other than substituting the one that is already there).⁵⁹ On the matter of building, this is comparable to crofting legislation, however, crofters may now sub-let with the permission of the Crofting Commission.⁶⁰

76. Perhaps a wider view needs to be taken when it comes to the purchase of the whole small landholding.

⁵⁶ See section 8 and the schedule of the 1911 Act (as read in accordance with section 12 of the 1931 Act),

⁵⁷ See paragraph 1 of the schedule of the 1911 Act.

⁵⁸ Section 12 of the 1993 Act.

⁵⁹ Section 1 of the 1886 Act (as read in accordance with the 1911 and 1931 Acts).

⁶⁰ See section 5 and paragraphs 6 and 8 of schedule 2 of the 1993 Act.

77. Contrast to crofting where there is a provision for crofters to take land out of crofting, termed 'decrofting'. When land is decrofted, the crofter must then purchase the land, otherwise it reverts back to croft land.
78. A crofter has the absolute right to decroft and purchase the land necessary for one croft house and garden (Statutory Croft House Site and Garden Ground (CHSGG)). Crofters can choose to build upon the croft but not decroft, in which case the croft and house remain as one unit, which can then be assigned to another person.
79. Small landholdings legislation also provides that the landholder is responsible for the maintenance of all buildings on the holding regardless of who was responsible for building them.⁶¹ In theory, breach of this condition of security of tenure may result in the landholders removal from the holding.⁶² Legal provisions in crofting tenure are broadly the same.⁶³
80. In certain cases a small landholder may qualify for grants or loans under the provisions on assistance for housing purposes in the Housing (Scotland) Act 2006.⁶⁴ However, availability of funding may vary amongst the different local authorities, dependent on competing priorities and resources.

Discussion

81. Notwithstanding the lack of statutory provisions, in the past some parties have reached agreement whereby the landholder has purchased the solum or land under their dwelling house. Consideration could be given to establishing a right for small landholders to purchase the solum and curtilage⁶⁵ in order that they own their dwelling-house.
82. Any introduction of a right to buy would need to be balanced with what may be considered to be a possible barrier to new entrants or assignee, who would have to take on a holding where there is no existing farmhouse. These individuals would have to face the potential cost of building a house, on top of any business investment costs. As a further barrier to new entrants, offering a potential right to buy may encourage small landholders to remain on the holding, when they might normally retire. Any right to buy proposal would require careful consideration, including removal of the property from small landholding tenure and compensation for landlords.

⁶¹ See section 1 of the 1886 Act (as read in accordance with the 1911 and 1931 Acts).

⁶² See section 3 of the 1931 Act

⁶³ See section 5 and paragraph 5 of schedule 2 of the 1993 Act.

⁶⁴ See Part 2 of the Housing (Scotland) Act 2006, and in particular section 93 of that Act.

⁶⁵ Land immediately around the farm house and including any associated adjacent farm buildings; excludes fields etc

INFRASTRUCTURE

Issues Raised

83. Small landholdings come with limited fixed equipment. The legislation does not generally provide for any infrastructure obligations on the part of the landlord.⁶⁶ This places a considerable burden on the small landholder, particularly given the income restrictions faced by many of them. This means that infrastructure in many cases does not receive adequate investment. However, the same might be said for crofting tenure.
84. Some landlords indicated that they found it extremely difficult to remove a small landholder when the individual concerned had not maintained the buildings and land to the necessary standard, this included action through the Scottish Land Court. Originally, the then Board of Agriculture would have provided loans or grants to support such maintenance, however, these schemes are no longer in place.

Legislation

85. The landlord can at any time enter the holding to inspect the state of the holding, including buildings and improvements and can also access the holding for mining, quarrying, and gaming and for opening roads, fences, drains, and watercourses.⁶⁷ The reserved rights of the landlord under small landholding tenure are generally similar as regards crofting and for agricultural leases under the relevant legislation.
86. When enacted, the small landholders legislation provided for loans for certain types of infrastructure. These loans have now ended.

Discussion

87. The onus placed on the small landholder to provide housing and other infrastructure appears burdensome, particularly given the restricted agricultural income of small landholders. Although the legislation enables a landlord to remove a small landholder if the buildings and land are not maintained to a certain standard, some landlords have reported to us that they have found this difficult and in practise this rarely happens.
88. There may be merit in further considering how the infrastructure burdens are balanced between the landlord and the small landholder. As the landlord did not provide the fixed equipment, any further consideration of this matter would need to take this into account, along with additional burdens which could arise upon the parties.

⁶⁶ Although see section 32(11) of the 1911 Act as regards statutory small tenants.

⁶⁷ Section 1(7) of the 1886 Act (as read with the 1911 and 1931 Acts)

DIVERSIFICATION (NON-AGRICULTURAL ACTIVITY)

Issues Raised

89. During the consultation process a number of small landholders identified that their houses cannot be used for collateral for loans, improvements or diversification because they do not own the site of the house. Some also wished the ability to diversify without their landlords consent. There was a range of non-agricultural diversification sought, including craft businesses, self-catering, livery, farm shops and cafes. This has led some small landholders to reach a view that a right to buy the land under their house would provide them with the necessary borrowing power they require to develop their business, including diversification for non-agricultural purposes, which could also provide greater employment within their community. (see also Finance section on page 23)
90. A further number of small landholders, with the knowledge and consent of their landlords, had already diversified into non-agricultural businesses and taken the risk upon their investment (as they do not own the land under the house or buildings being used for the diversified activity).

Legislation

91. The 1911 Act allows a landholder “to make such use thereof for subsidiary or auxiliary occupations as in case of dispute the Scottish Land Court may find to be reasonable and not inconsistent with the cultivation of the holding.”⁶⁸ Common auxiliary or subsidiary occupations could include, for example, carpenter, mason, fisherman, postmaster, keeping a small shop, letting lodgings, spinning & weaving, keeping caravans for holiday lets, provision of camping ground and arts and crafts.⁶⁹

Discussion

92. The lack of direct reference in the legislation as to what is and is not permissible for non-agricultural diversification means that there is little guidance at present and our consultation unearthed confusion amongst small landholders and landlords about whether diversification is possible. Consideration could be given as to whether non-statutory guidance or perhaps a code of practice would be beneficial in this area. However, it would have to be clear that any guidance was not binding and small landholders should seek independent advice if they have concerns about whether their proposed diversification is lawful.
93. Compensation for improvements is discussed below, however that subject is also relevant for diversification. It is not clear as to the extent to which small landholders can claim compensation as regards improvements made for the purposes of subsidiary or auxiliary occupations. Crofters are able to claim compensation for improvements made on the croft for the purposes of subsidiary or auxiliary occupations. Consideration could be given as to whether a similar explicit right could be introduced as regards small landholders.

⁶⁸ Section 11 of the 1911 Act.

⁶⁹ *Mackintosh v. Lumsden*, 1 S.L.C.R. 92

FINANCE (PUBLIC FUNDING & BANKING)

Issues Raised

94. The financial situation of some small landholders is precarious. Some raised concerns about poor access to lending because they do not have the asset of land and therefore have no security for borrowing. The UK leaving the EU, and the risk of loss of direct payments, is also a major concern for some small landholders. Suggestions from consultees for improving the financial position of small landholders included:
- Re-introduction of 'Board of Agriculture-style' loans
 - Access to Crofting Agricultural Grant Scheme or similar
 - The provision of grants for capital projects such as buildings/drainage, reseeded and fencing

Legislation

95. Historically, legislation provided that the Board of Agriculture for Scotland could provide loans and grants to small landholders and landlords. For example, the Small Landholders (Scotland) Act 1911 constituted the Agriculture (Scotland) Fund to be used for a variety of purposes around constituting, enlarging and improving holdings.⁷⁰ The Land Settlement (Scotland) Act 1919 made provision for more funds to be made available for loans to be made to certain small landholders for the purchase of livestock, seeds, fertilisers and implements.⁷¹

Discussion

96. In the modern agricultural sector, payments can be made under either Pillar 1 or Pillar 2 of the Common Agricultural Policy. Local Rural Payments and Inspections Division (RPID) offices can advise small landholders about their eligibility for Pillar 1 and for Scottish Rural Development Programme (SRDP) grants run under Pillar 2. Non-crofters cannot access the Crofting Agricultural Grant Scheme. However, they may access a variety of others – for example the Small Farm Grant Scheme (SFGS),⁷² which provides targeted support for small farms that face similar issues as crofters regarding sustainability.
97. To be eligible, small landholders would need to have between 3 hectares and 30 hectares of agricultural land and also be under a set income threshold. The SFGS provides grants of between 40 and 80 percent towards infrastructure works. The Farm Advisory Service also provided under SRDP comprises a number of elements that will be helpful to the small landholding sector, including a subsidised subscription service and provision of face to face advice to crofters and small farmers.
98. When these schemes are reviewed, it will be important to continue to ensure that the small landholding sector is considered and taken into account in any changes made, so that they continue to be able to access support as appropriate.
99. The issue of land ownership, and the apparent financial issues that small landholders face as a result of not owning the land under their houses, is dealt with elsewhere in this review. However, relevant points for any review of grant schemes would require to consider take up rates of grants and advisory service provision and any constraints around borrowing faced by small landholders when compared to crofters and other areas of the agricultural sector.

⁷⁰ See sections 5 and 6 of the 1911 Act (as enacted).

⁷¹ See section 29 of the Land Settlement (Scotland) Act 1919 (as enacted)(1919 Act).

⁷² Funding for capital projects eligible under the Small Farm Grant Scheme can cover all aspects of the project, including the cost of materials, transportation of materials, costs of contractors and your own labour. This is a competitive scheme and eligibility is not a guarantee of success. Available at:

<https://www.ruralpayments.org/publicsite/futures/topics/all-schemes/small-farms-grant-scheme/>

RENT

Issues Raised

100. There have been calls by stakeholders for a fair and open rent review process. Some landlords have stated that rents are kept artificially low as they are based on the productive capacity, which is invariably moderate for most landholdings.

Legislation

101. The landlord and small landholder may by agreement alter the rent. Where such agreement cannot be made, parties can apply to the Scottish Land Court to fix a fair rent.⁷³ As regards statutory small tenants, the legislation is in terms of “equitable rent”.⁷⁴
102. In arriving at a fair rent the Scottish Land Court will take into account the circumstances of the case, the holding, the quality and situation of land prior to improvements, landlord’s improvements and in particular any improvements carried out by the small landholder or their predecessors. No rent is to be allowed on any improvements made by the small landholder (unless the landlord provided benefit in kind or made a financial contribution to them). In addition, a core component of the determination of a “fair rent” is the assessment of the productivity of the holding. Fair rent aims to provide for a fair division of profits from the land. The main element in arriving at a fair rent was deemed to be what the small landholding “could make out of the holding”⁷⁵.
103. Once the Scottish Land Court has fixed the rent this normally remains unchanged for a period of seven years, except where parties mutually agree otherwise.⁷⁶
104. If a year’s rent remains unpaid the small landholder can be removed by the Scottish Land Court.⁷⁷

Discussion

105. Rent is fixed by the Scottish Land Court as a “fair rent”, which is the same wording used in the renting of crofts.⁷⁸ While the effect has been to maintain a very low rent for these holdings because the small landholding essentially has a “bare land let”, altering the procedure may result in unrealistic rents for some small landholders. Further, in relation to certain other categories of agricultural tenancies the Land Reform (Scotland) Act 2016 provides for a new rent system based on a fair rent taking into account the productive capacity of the holding.⁷⁹ Further evidence would be required to justify a change in the calculation of rent for small landholders.
106. Any proposed changes to the terms of the rent review provisions applying to landholdings and statutory small tenancies would need to be carefully considered particularly as this could result in an increased burden or benefit created for either party.
107. However, the production of best practice guidance for landlords and small landholders on conducting rent reviews is something that could be considered.

⁷³ See section 6 of the 1886 Act (as read in accordance with the 1911 Act); although in practice there are few recent cases if any of either party applying to court to resolve such issues.

⁷⁴ See section 32(8) of the 1911 Act.

⁷⁵ *Mackinnon v Duke of Hamilton’s Trustees* 6 S.L.C.R 119; 1918 S.C. 274

⁷⁶ Section 6(2) of the 1911 Act (as read in accordance with the 1911 Act).

⁷⁷ See section 3 of the 1931 Act.

⁷⁸ See section 6 of the 1993 Act.

⁷⁹ As of the date of this report the relevant provisions of the Land Reform (Scotland) Act 2016 (2016 Act) are not yet in force.

COMPENSATION FOR IMPROVEMENTS

Issues Raised

108. Some small landholders believe that they are not adequately compensated for improvements. However, the tests are broadly the same as exists for other types of agricultural lease. Some landlords also argue that the estate cannot support small landholding improvements due to insufficient capital.

Legislation

109. When a small landholder renounces or is removed from the holding, they are entitled to compensation for permanent improvements made on the holding by themselves or their predecessors in the same family.⁸⁰
110. The improvements for which compensation are payable include: dwelling houses; farm offices; drains and fences; and generally all improvements which in the judgement of the Scottish Land Court will be of value to any incoming small landholder⁸¹, which is similar to tests for other types of agricultural tenancies. In addition, in order for an improvement to be eligible for compensation it must be one that is suitable for the holding. Improvements are valued at such a sum which fairly represents the value of improvements to an incoming small landholder.⁸²
111. When a small landholder gives notice of renunciation of their tenancy, parties may agree between them the level of compensation due to the small landholder for improvements. If agreement is not reached improvements are valued by the Scottish Land Court who will assess the compensation payable to the small landholder for any permanent improvements carried out by them during the tenancy (provided that they had not received consideration for them by the landlord, for instance in the form of reduced rent).⁸³
112. No provision requires small landholders to seek the consent of the landlord or to give notice to the landlord of any improvements. The landlord may take comfort from the knowledge that it is only improvements that are of value to the incoming small landholder and are appropriate for the holding that qualify for compensation.⁸⁴
113. If the small landholder renounces or is removed from the holding, the landlord is entitled to offset all rent due or to become due against any sum due to the small landholder for improvements.⁸⁵ Removal of a small landholder for breach of statutory conditions is not in itself an exclusion of the right to compensation.

⁸⁰ See section 8 of the 1886 Act (as read in accordance with section 12 of the 1931 Act).

⁸¹ See section 8 and the schedule of the 1886 Act

⁸² See section 10 of the 1886 Act (as read in accordance with the 1911 and 1931 Acts).

⁸³ *Strachan's Trs v Harding 1990 SLT (Land Ct) 6* is an example of the Scottish Land Court valuing the improvements on a small landholding.

⁸⁴ The Law of Smallholdings, James Scott, 1933, Ch 6, Distinctive Rights of Smallholders, p80

⁸⁵ See section 23 of the 1911 Act.

Discussion

114. Criticisms about waygo appear to be about the monetary value assigned to improvements. No criticisms emerged about the waygo process itself. Therefore there are likely to be limited ways to address this through legislation. Indeed, the Court of Session has held that “the process of valuation is not a piece of legal reasoning, but a problem for experts, and that it is impossible to affirm that there is any one single formula which must be applied as the sole and exclusive principle in valuing permanent improvements”.⁸⁶
115. In addition, if improvements are not suitable for the holding, the compensation the small landholder receives on waygo may not reflect the cost incurred of executing the improvements.⁸⁷
116. Criticism of monetary value assigned to improvements at waygo is an issue for all tenant farmers, not just small landholders. Such calculations are a matter for negotiation between the two parties concerned, or for judicial determination.⁸⁸ The production of non-statutory guidance may help to improve the process when agreement cannot be reached, but any such guidance would not be legally binding, and both small landholders and landlords should seek independent advice if there is a dispute.

⁸⁶ The Law of Smallholdings, James Scott, 1933, Ch 6, Distinctive Rights of Smallholders, p85; *Wight v Morison* 10 SLCR 91

⁸⁷ *Hannan v Dalziel* (11 SLCR 15)

⁸⁸ In certain circumstances recourse may be had to arbitration.

REGISTRATION AND VACANT SMALL LANDHOLDINGS

Issues Raised

117. The lack of a register of small landholdings has contributed to uncertainty about tenancy type.

Registration

118. The 1911 Act introduced a duty on the then Board of Agriculture for Scotland to compile and maintain a register of small landholdings.⁸⁹ The register was never fully established and lapsed entirely after World War I.⁹⁰ It may be possible for a new administrative register to be put in place, however, many small landholders are uncertain about their tenancy type and therefore it may be problematic to do so. Some resolution may be found in the archives of the Scottish Land Court where records of proceedings to register new landholdings after 1912 may be housed. Registration already forms part of crofting policy.⁹¹

119. The non-registration of small landholdings was discussed in Parliament by the Rural Economy & Connectivity Committee recently.⁹² During those discussions Derek Flynn, crofting lawyer, stated "...I see nothing wrong with smallholdings elsewhere having a clear code and having their land registered. After all, the new crofting register is a map of the whole of Scotland with crofts placed on it, so there is no reason why smallholdings should not be recorded on the same register." The Crofting Commission indicated they felt there was merit in bringing small landholding and crofting legislation together. See also the following section (para 130) which sets out the discussion on conversion to other forms of land tenure, highlights that many small landholders do not wish to convert to other forms of tenure. Therefore any proposals for the administrative registration of small landholdings need to be fully considered.

Vacant Holdings

120. Where a landholding becomes vacant due to renunciation or failure to identify a successor, then the landlord has a duty to advise Scottish Ministers in writing.⁹³ Adjacent small landholders or a new holder should be offered first refusal for the vacant holding and any deviation from this should only happen following consent from Scottish Ministers. In certain circumstances where a holding is vacant, Scottish Ministers have the power to re-let it, ensuring that appropriate payment is made to the landlord.

121. Where a landholding is let out with the Act, if Scottish Ministers do not take steps to nullify the let within 6 months, then the new let ceases to be small landhold tenure under the 1911 Act. However, Scottish Ministers can reverse this where they act in good time.⁹⁴ A holding also falls out of small landholding tenure where the small landholder is able to purchase the holding or they accept a different type of lease.⁹⁵

⁸⁹ Section 33 of the 1911 Act.

⁹⁰ James Scott, 'The Law of Smallholdings' (1993), p.243

⁹¹ Section 3 of the Crofting Reform (Scotland) Act 2010 (2010 Act).

⁹² Scottish Parliament's Rural Economy and Connectivity Committee

9 Nov 2016. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10620&mode=pdf>;

16 Nov 2016. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10632&mode=pdf>

⁹³ Section 17 of the 1911 Act (as read in accordance with the 1919 and 1931 Acts). The functions of the Board of Agriculture were transferred to the Secretary of State for Scotland and then devolved to Scottish Ministers: see Secretaries of State Act 1926, Reorganisation of Offices (Scotland) Act 1928, Reorganisation of Offices (Scotland) Act 1939, and the Scotland Act 1998.

⁹⁴ Agricultural Law in Scotland, Crispin Agnew of Lochnaw, Ch 22, Small holdings and statutory small tenancies, Vacant Holdings, p 259

⁹⁵ Ibid, p 260

122. To renounce their tenancy effective from Whitsunday or Martinmas, a small landholder should give one year's written notice to the landlord.⁹⁶ In this instance, any payments of compensation to the small landholder should be offset by outstanding rent payments to the landlord.⁹⁷ In theory the landlord should also notify Scottish Ministers (in the case of renunciations, within 2 months⁹⁸). In practice this rarely happens and the Scottish Government has not sought to enforce this either directly or via the Scottish Land Court.
123. When a Statutory Small Tenancy (SST) becomes vacant it stops being held under small landholding legislation. The land, typically, cannot be merged with an agricultural holding as defined under the Agricultural Holdings (Scotland) Act 1908, without approval by Scottish Ministers. This is in contrast with crofting legislation which allows for land of different tenure to be merged with and form part of a croft if the owner and crofter agree. Where the enlarged croft exceeds 30 hectares or the combined rent exceeds £100 consent is required from the Crofting Commission.⁹⁹

Resumption

124. A landlord can apply to the Scottish Land Court to resume a holding, provided that the Court is satisfied that it is for a reasonable purpose, having relation to the good of the holding or the estate.¹⁰⁰ Resumption can take place on a case by case basis, for different purposes e.g. the protection of an ancient landmark or monument, for the construction of roads, piers, harbours, churches or schools.¹⁰¹ However, trying to resume land for potential development where there is no prospective buyer might not be considered reasonable.¹⁰² Where the Scottish Land Court approves a resumption request, they may also determine fair compensation covering the loss of the tenancy and profits is due to the small landholder.¹⁰³ However some small landholders may consider that the compensation being offered at resumption does not provide them with fair value for their improvements.

Discussion

125. During the course of this review, consultation responses indicated concerns about the non-enforcement of the vacant holding process, small landholdings being amalgamated to create larger holdings, small landholders holding more than one holding, or holdings taken back into the estate and land being removed completely from agricultural tenure, all without changes being recorded in any way. Some landlords also raised the issue of the standard of management of holdings and the costs involved in maintaining vacant holdings.
126. A number of suggestions were made in relation to this, including the introduction of a scheme which would encouraged the management of agricultural land on vacant holdings so that the land does not fall into disrepair.
127. A further option involved establishing a body with overarching responsibility for managing of smallholdings, in the way that the Crofting Commission does for crofts, ensuring that de-registration is properly authorised and vacant holdings properly managed.

⁹⁶ Section 7 of the 1886 Act

⁹⁷ Agricultural Law in Scotland, Crispin Agnew Of Lochnaw, Ch 22, Small holdings and statutory small tenancies, Vacant Holdings, p 263

⁹⁸ Stair Encyclopaedia: The Laws of Scotland , page 367

⁹⁹ Section 4 of the 1993 Act, as amended

¹⁰⁰ Section 2 of the 1886 Act (as read in accordance with the 1911 and 1931 Acts).

¹⁰¹ See section 2 of the 1886 Act and section 19 of the 1911 Act.

¹⁰² *Lands Improvement Holdings Landmatch Sarl v Cole*, 2015 S.L.T. (Land Ct) 137 held in favour of the tenant on the basis that the resumption would not be reasonable and that there was no prospective buyer of the land intended for development.

¹⁰³ Section 2 of the 1886 Act.

128. Such as scheme would require further consideration, including consideration of the costs involved and the active co-operation of all parties.
129. Some consideration may also need to be given to legal provisions concerning the compensation paid out to small landholders for full or partial farm resumptions to ensure fair valuation.

CONVERSION TO OTHER TYPES OF TENANCIES

Issues Raised

130. Some consultees felt that converting small landholdings to another tenancy type would remove the legal uncertainty small landholders have been experiencing; it would introduce a right to buy (if the type of tenancy that the landholding converted to had an associated right to buy) and spread the burden in relation to obligations.
131. Rationalisation of tenancy types may be advantageous in terms of simplifying the agricultural landscape, however, it could possibly result in disproportionate burdens being imposed on the landlord where the rent does not reflect their obligations.

CONVERSION: Crofting

132. The part of the Highland region that was outwith the crofting counties, Moray, the parishes of Kingarth, North Bute and Rothesay in Argyll and Bute and the islands of Arran, Great Cumbrae, Little Cumbrae in North Ayrshire became designated crofting areas in 2010.¹⁰⁴ The Crofters (Scotland) Act 1993 as amended by the Crofting Reform etc Act 2007 and Crofting Reform (Scotland) Act 2010, provides for small landholders to convert their holdings located in these areas to crofting tenure, provided no part of the land is tenanted by other means.¹⁰⁵ The landlord need not agree. The process involves providing proof of tenancy type by way of the Scottish Land Court, payment of the agreed compensation to their landlord followed by a request to the Crofting Commission for conversion to a croft. Small Landholders, as new crofters, then have the right to buy their croft.¹⁰⁶

Discussion

133. To date, no small landholder in one of the areas covered by the 2010 Order has gone through the crofting conversion process. During the consultation process, some individuals indicated this was due to the complexity of the legislative process. In addition, this poor uptake is attributed to small landholders not wishing to sign up to the specific terms, rights and duties that apply to crofts; there are regulatory burdens associated with crofting which small landholders consider are excessive.¹⁰⁷ Additionally, they may be deterred by a possible decrease in land value as a result of conversion,¹⁰⁸ the cost implications in relation to valuations.
134. If the possibility of converting to a croft was extended to all small landholdings, crofting would then apply to the whole of Scotland and geographical jurisdiction of the Crofting Commission would extend to the whole country; historic crofting counties could become obsolete. In addition, extending the crofting regions may result in increased numbers of applicants accessing crofting grants. Such a change would require support from all aspects of the crofting sector and the Scottish public given the cultural significance of crofting.
135. Small landholders on Arran can already convert to crofting, however, they have indicated that the process appears complex.

¹⁰⁴ The Crofting (Designation of Areas) (Scotland) Order 2010

¹⁰⁵ Sections 3A and 3B of the 1993 Act (as amended). Holdings tenanted under the Agricultural Holdings (Scotland) Acts 1991 and 2003, whether in the crofting counties or in new areas designated, cannot be converted to crofts without the written agreement of both owner and tenant.

¹⁰⁶ See section 12 of the 1993 Act.

¹⁰⁷ Crofters are required to submit regulatory applications to the Crofting Commission to make changes to their croft including apportionment of common grazings land, assignation and letting.

¹⁰⁸ Para 140, Scottish Government Report to Parliament: Economic Condition of Crofting, 2011-2014. Available at: <http://www.gov.scot/Resource/0047/00473575.pdf>

136. As part of this review, the opinions of small landholders were canvassed on the possibility of converting to crofts. Their responses were mixed. Some suggested that although conversion would mean that small landholders would have the right to buy for the first time, allowing access to funding that has previously been unavailable to them, conversion to crofting would be as a last resort. Some consultees indicated that any further advantages would have to be made very evident to them, especially in relation to their perception of crofting being too bureaucratic with little clarity on rights and conditions.
137. A further barrier to conversion may be the payment of compensation by the small landholder to the landlord. Some small landholders considered that, where small landholdings had automatically converted to crofts under the 1955 Act these individuals were not required to pay compensation. They also felt that the sale value of the land would not be calculated to reflect their personal long term investment. They also argued that it was potentially possible that compensation in the form of tax breaks or direct payment could have been paid to landlords at the time that certain small landholdings were originally formed.
138. However some small landholders felt that having a governing body such as the Crofting Commission would be advantageous, helping ensure that both small landholders and landlords adhered either to the legislation or to a code of conduct.
139. The Scottish Parliament's Rural Economy and Connectivity (REC) Committee has considered small landholding conversion to crofting on two occasions recently. Whilst the Crofting Commission appear to be open to the idea of encompassing small landholdings within crofting tenure, it was reported that small landholders were generally against the idea of crofting law applying to them.¹⁰⁹

CONVERSION: Secure 1991 Act Tenancy

140. Another option would be to allow a small landholding to convert into a secure 1991 Act agricultural tenancy. However, consultation responses indicate that conversion to this type of tenancy would not be an attractive option for small landholders as they felt agricultural holdings legislation was complex.

Legislation

141. No legislation currently exists to allow small landholding to convert into an agricultural holding.

Discussion

142. Conversion to secure 1991 Act agricultural tenancies could help improve clarity of the rules applying to those small landholdings which are converted. However, there would be significant implications for landlords and these would have to be carefully considered. Landlords would no longer be required to apply to Scottish Land Court to serve notice to quit on the small landholder. There may be potential for a higher rental income as a result of a conversion.
143. The small landholder would still benefit from security of tenure and would no longer be responsible for providing or for replacement and renewal of all fixed equipment. In addition, they would be able to benefit from a pre-emptive right to buy the land leased under the converted secure 1991 Act agricultural tenancy and could potentially benefit from the legislative requirements around fixed equipment and improvements at waygo.

¹⁰⁹ Scottish Parliament's Rural Economy and Connectivity Committee, 9 Nov 2016. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10620&mode=pdf>; 18 Nov 2016. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10632&mode=pdf>

144. Such a change would require support from tenant farming and across the Scottish agricultural sector and consideration would also require to be given to the legal impacts upon small landholders and their landlords.

(A table comparing the legal differences between small landholdings, crofting, & secure 1991 Act tenancies can be seen at Annex 4).

CREATION OF NEW SMALL LANDHOLDINGS

Issues Raised

145. Amongst those we consulted, it was unclear if there was demand for new small landholdings and uncertainty about which legal provisions are still in force.

Legislation

146. As described above, when it was enacted the Small Landholders (Scotland) Act 1911 allowed prospective landholders and landlords to create and register new landholdings. The Act also included powers to encourage the creation of new landholdings, and following amendments made by the Land Settlement (Scotland) Act 1919 the then Board of Agriculture for Scotland had the ability to make schemes for the creation of new holdings.¹¹⁰ Under a scheme, a parcel of land became a small landholding, with the landlord generally entitled to compensation. It was essentially a form of compulsory leasing. The process for the making of a scheme is laid out in the 1911 Act, as amended. During and following WWI, the then Board of Agriculture for Scotland was also given further, time-limited, powers to compulsorily purchase land for the purpose of providing land for new small landholdings.¹¹¹
147. The functions of the Board of Agriculture for Scotland were eventually transferred to the Secretary of State and then devolved to Scottish Ministers.¹¹²

Discussion

148. Supporting the creation of new small landholdings has the potential to build on the Scottish Government's land reform programme. From a land tenure perspective there may be benefit in the Scottish Government continuing to explore the extent of the available powers, and for Scottish Ministers to consider further whether these could or should be exercised to facilitate the constitution of new small landholdings, including their use as a letting vehicle. The extent to which powers in this area continue to exist requires further consideration. Further consideration is also required as to whether the framework for the exercise of Scottish Ministers' powers would allow for the use of any remaining powers in this area. Any further consideration needs to take into account whether there is a value to the rural economy and to Scotland as a whole in creating new small landholdings. The following matters are important considerations to take into account and explore further:
- Examination of socio-economic benefits of small landholdings to rural Scotland.
 - Comparison of small landholdings to other types of agricultural tenancies.
 - Identification of the potential opportunities to develop small landholdings with public and private landlords.
 - Consideration of the cost of implementing new schemes.
 - Impact of creation of new holding on land values.
 - Ensuring retention of the small landholding for agricultural use or diversification under the terms of the Acts.
 - Scheme may create a demand for second or country homes.

¹¹⁰ See section 7 of the 1911 Act (as amended).

¹¹¹ See the Small Holdings Colonies Act 1916, the Small Holdings Colonies (Amendment) Act 1918, and the Land Settlement (Scotland) Act 1919.

¹¹² See the Secretaries of State Act 1926, Reorganisation of Offices (Scotland) Act 1928, Reorganisation of Offices (Scotland) Act 1939, and the Scotland Act 1998.

CONDUCT AND CONSIDERATION OF AN UMBRELLA BODY

Issues raised

149. Whilst some consultees had good relationships with other parties (landlords, agents or small landholders), others raised concerns about the conduct of other parties. Connected to this is a further concern about a lack of umbrella body covering small landholdings. Crofts have the Crofting Commission, agricultural holdings are now covered by the Tenant Farming Commissioner as part of the Scottish Land Commission, but small landholdings do not fall under either of these.

Legislation

150. The concern about other parties' conduct relates to all parts of small landholding legislation rather than any specific provision.

Discussion

151. Reasonable conduct of all parties (landlord, agent and small landholder) is crucial to maintaining a good relationship. It is clear that in some cases there are concerns on all sides, and resultant feelings of resentment and frustration. Part of the problem is lack of accessibility of the legislation, which is covered above. Addressing this issue may lead to additional clarity around aspects such as rights of access and rent review, which in turn may have a positive effect on conduct of parties. However, the legislation itself, whilst it can clarify roles and responsibilities does not govern the spirit in which individuals approach things or provide guidance for non-legislative processes. In this respect, non-statutory guidance or codes of practice might help in this regard. However, this would be a significant undertaking and it would need to be decided who would be best placed to produce such guidance or codes.
152. For agricultural holdings, the new Tenant Farming Commissioner within the Scottish Land Commission will produce codes of practice. In addition, he is specifically tasked with preparing a report on the operation of agents of landlords and tenant farmers to be submitted to Scottish Ministers by 31 March 2018. Issues covered within that report may be similar to those experienced by small landholders and landlords.
153. Small landholdings do not currently fall within the remit of either the Crofting Commission or the Tenant Farming Commissioner. Coverage by an umbrella body could provide the sector with an independent source of information and dispute resolution for some issues, although it should be noted that these bodies do not and should not replace the Scottish Land Court. As a small group (estimated 74 small landholdings in Scotland) it may not be appropriate to create a new body specifically for such a small group and it may be more appropriate for them to fall under the umbrella of an existing organisation. However, if this was required, further exploration of options would be needed, particularly as existing bodies have remits and scope tailored for their respective sectors.
154. The functions of the Tenant Farming Commissioner are governed by the 2016 Act, and do not encompass small landholdings at this time. The functions must be reviewed by Scottish Ministers within 3 years (i.e. by March 2020).

WIDER SOCIAL AND ECONOMIC ISSUES

Issues raised

155. Consultees raised a number of concerns about wider issues not specifically related to small landholdings legislation, but concerning the social and economic position of farmers and aspects of rural development. These included:

- Growing a vibrant rural economy
- Issues of employment in rural Scotland, including attracting and retaining skilled workers to the agricultural sector
- Income and the financial viability of farming
- Planning in a rural context
- Availability of housing in rural Scotland
- Access to Justice in relation to ability to meet legal costs
- Women in Agriculture
- Access to Business Advice
- Land ownership

Discussion

156. These are issues which are not specific to small landholders and instead reflect the wider concerns of the rural population in Scotland. As such, they are not within the remit of this review. However, officials have endeavoured to provide additional information on these issues to consultees where applicable, and will continue to do so. We will ensure that the small landholdings pages on the Scottish Government website are updated to reflect this desire for information on the wider topics identified above.

157. In addition, the Scottish Government recognises that there are challenges around identifying how land ownership has changed over time, which land has fallen out of small landholding tenure and which estates would have historically been in receipt of financial compensation. This is due to the fact there has been no small landholder register since World War I. It may be possible to undertake some archival research over a period of time to help towards providing resolution for this issue for small landholders and their landlords.

158. As part of the land reform programme, a Scottish Government consultation on land rights and responsibilities was launched in December 2016, indicating a move towards increasingly productive partnerships between land owners and local communities. It may be useful for the purposes of this review to see what the outcome of this consultation is, geared as it is to rights and responsibilities relating to land ownership, management and use.

RECOMMENDATIONS & CONCLUSIONS

OPTIONS FOR A WAY FORWARD

159. This review of the legislation governing small landholdings raises a variety of issues, some related specifically to the legislation itself and some not. As the legislation is not well understood, some issues arise from misunderstandings. The obvious wider question raised relates to what the role of small landholdings is, or could be, in the modern agricultural sector and how they should be treated. At the present time they do not appear to be an attractive option for potential small landholders but that is not to say that they could not be.
160. We have identified 3 broad options for a way forward:
- Retain status quo;
 - Alter small landholdings status by converting them into other forms of agricultural tenancy; or
 - Reform and modernise small landholdings.

Retain status quo:

161. If nothing is done to change the position of small landholders, it seems likely that the number of small landholdings will diminish yet further and they may cease to exist altogether. In our discussions with small landholders, a significant proportion appeared to be elderly, and it was not clear whether or not succession issues had been addressed.
162. Any legislative change is likely to be extremely resource intensive, given the complexities of the existing legislation and the issues that would have to be considered. However, Parliamentary committees (RACCE¹¹³ and REC¹¹⁴) have expressed an interest in this. It is worth noting that some small landholders have told us that they have good relationships with their landlords and no desire for change although there were those that did have issues and did not want legislative change to give any more powers to landlords than they already have. Some small landholders also felt that landlords and agents focussed on their own interests to the detriment of the wider community.

Alter small landholdings status by converting them into other forms of agricultural tenancies:

163. Small landholdings share some characteristics with both secure 1991 Act tenancies and crofts. Converting them to either of these systems, or possibly different types of agricultural tenancy, could address some of the issues that have been raised. The possibility of conversion to crofts in particular has been a subject of interest to the REC Committee recently (see section on conversion to other types of tenancies). However, whether conversion to another form of agricultural tenancy is possible is something that requires further consideration and analysis.
164. It is not clear that stakeholders would welcome this - in our consultation, significant numbers of small landholders did not want to be converted. Some have concerns that such a process might affect their security of tenure, and whilst they might welcome some elements associated with other forms of agricultural tenancy, they might not be prepared to accept other elements such as added responsibilities that they would acquire. Careful consideration of the impacts of conversion on the landlords would also be essential.

¹¹³ Scottish Parliament's Rural Affairs, Climate Change & Environment Committee, the predecessor of the Rural Economy and Connectivity Committee

¹¹⁴ Scottish Parliament's Rural Economy & Connectivity Committee

Reform and modernise the small landholding sector:

165. The clear message from our consultation was that the key issues are:

- *Clarity of legislation (all respondents (small holders and landlords):* A large scale revision, modernisation and consolidation of small landholdings legislation could provide additional clarity. Though this would be a lengthy process requiring primary legislation and would require significant resource. A clearer picture of how small landholdings were created is required, and an option could be to commission research into this area, focussing on ownership of small landholdings and the individual circumstances in which they were established. This research could also consider whether a modern administrative register of small landholdings could be established. Even a light touch modernisation covering key areas such as assignation and succession, diversification, compensation for improvements and resumption would be a very significant undertaking and would not address the issue that clarity is required now. To assist with the understanding of existing legislation at this time, an option could be to commission a guide on the existing law applying to small landholdings. This could assist with the understanding of a number of issues (i.e. around security of tenure, rights and responsibilities of each party, rent etc).
- *Right to buy (13 respondents to the written consultation mentioned this topic):* This is a difficult and complex area. Providing small landholders with any form of right to buy raises significant issues that would need to be explored in depth, and further careful consideration is necessary. It should be noted that, despite it being a request of small landholders, introduction of a right to buy could affect the existence of small landholdings. If a pre-emptive right to buy small landholdings was introduced and exercised, it is possible that the numbers would diminish even further from today's low levels.

166. In addition to these issues, consideration could be given to possible methods designed to address some of the other points raised in the consultation.

167. In particular, having recourse to a representative body could resolve some of the issues raised by stakeholders. Consideration could be given as to whether small landholdings could be included within the remit of either the Crofting Commission or the Tenant Farming Commissioner. A representative body could potentially be a source of guidance, advice, support and dispute resolution, without requiring recourse to the courts. In addition, mechanisms already exist to provide advice and guidance on a variety of matters not specifically related to small landholdings, which small landholders could access.

Conclusions

168. Small landholdings are a part of our Scottish agricultural heritage and Scottish Ministers are mindful of their unique status.

169. From the point of view of retaining diversity within the sector, it makes sense for small landholdings to remain, and it then follows that they must be reformed and modernised. However, this is not a straightforward matter and serious consideration must be given to the issues arising, not least around the ECHR rights of all parties involved.

170. Based on the consultation we have conducted and the review of small landholdings legislation, we will:

- **Commission an independent legal expert to write a guide to the legislation.**
- **Commission additional research on smallholdings to:**
 - **Review the historical changes to small landholdings ownership, including identifying estates and landlords of the land subject to small landholding tenure and any government support provided to those estates to encourage the creation and establishment of small landholdings and Statutory Small Tenancies, and consider the feasibility of establishing a modern administrative register of small landholdings.**
 - **Assess the socio-economic benefits of small landholding to rural Scotland including comparison to other types of agricultural tenancies and potential opportunities to develop small landholdings with public and private landlords.**
- **Keep under review the possibility of requesting the Scottish Law Commission to review the law on small landholdings and to recommend reforms.**
- **Keep under review the issues surrounding right to buy in the context of small landholdings.**
- **Consider further whether small landholdings could be included within the remit of either the Crofting Commission or the Tenant Farming Commissioner.**
- **Review current grant schemes available to small landholders, including consideration of take up rates, use of the farm advisory service and consider any constraints around borrowing faced by small landholders when compared to crofters and other areas of the agricultural sector.**
- **Ensure that small landholders are included in the Farm Advisory Service provision to small farms on succession planning.**
- **Maintain a Scottish Government web page for small landholders, providing them with a resource that will point them towards advice and support on a wide range of agricultural issues.**

ABBREVIATIONS

AHLRG - Agricultural Holdings Legislation Review Group

ARTB – Absolute right to buy

CAP – Common Agricultural Policy

CHSGG - Statutory Croft House Site and Garden Ground

CIPFA - The Chartered Institute of Public Finance and Accountancy

CRTB - Community Right to Buy

DEFRA - Department of Environment Food & Rural Affairs

ECHR - European Convention of Human Rights

EU – European Union

FAS - Farm Advisory Service

LRRG - Land Reform Review Group

PRTB - Pre-emptive right to buy

RACCE - Rural Affairs, Climate Change and Environment Committee

RTB - Right to buy

REC - Rural Economy and Connectivity Committee

RESAS - Rural Environmental and Analytical Services

RPID - Rural Payments and Inspection Division

SAC – Scottish Agricultural College (Now Scotland's Rural College)

SFGS - Small Farm Grant Scheme

SRDP - Scottish Rural Development Programme

SST - Statutory Small Tenancies

GLOSSARY

agricultural holding - the agricultural land which comprises a lease

agricultural land - land used for agriculture for the purposes of trade or business

agricultural lease - a letting of land for a term of years, or lives of the tenant, or for lives and years, or from year to year

agricultural unit - land defined as an agricultural unit for the purposes of the Agriculture (Scotland) Act 1948

agriculture - includes horticulture, fruit growing, seed growing, dairy farming, livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes

assignation - the transfers of a tenant's interest in an agricultural lease of land

curtilage - the area, usually enclosed, encompassing the grounds and buildings immediately surrounding a farmhouse

diversification - to permit a tenant farmer to diversify his farming operations into non-agricultural use or uses

fixed equipment - includes any building or structure affixed to agricultural land and any works on, in, over or under that land. It also includes anything grown on the land for the purpose other than use after severance from land, consumption of the thing grown or of produce thereof, or amenity.

grass (grazing) or mowing let - normally a 364 day let where the tenant farmer rents land for the purpose of grazing livestock on it or for taking a silage crop from it

infrastructure - the basic physical and organisational structures and facilities (e.g. buildings, roads, drainage, power supplies) needed for the operation of an enterprise.

Land Court - the Scottish Land Court

Land Tribunal - the Lands Tribunal for Scotland

market garden - a holding, cultivated, wholly or mainly, for the purpose of the trade or business of market gardening

martinmas - Scottish term day, usually 28 November

pre-emptive right to buy - a tenant farmer, under a traditional agricultural leasing arrangement, who has registered their interest to acquire their farm land must be approached first of all by landlord to see if they wanted to buy the farm land

produce - includes anything (whether live or dead) produced in the course of agriculture

rent - how much money is paid by tenant farmer to their landlord for use of his farm land

renunciation – in Scottish law, when a tenant renounces his lease, his contract is terminated completely and the landlord can take personal possession of the property.

resumption clause - drafted in its widest terms, entitles the landlord to recover farm land from the agricultural holding for any non-agricultural purpose

right to buy for tenant farmers - the ability to require a landlord to sell the farm to their tenant farmer without the farm being advertised on the open market

secure “1991 Act” tenancy - a letting of land for a term of years, or lives of the tenant, or for lives and years

sisted - the running of time in any litigation is halted, it is like the operation of a “pause” button and the parties are not required to take any positive action regarding their court procedures

solum - an area of ground upon which buildings have been constructed. An owner of a building will also own the solum, unless there is provision to the contrary, but not necessarily the mineral rights.

succession - a right to inheriting a tenant farmer’s agricultural leasing arrangement (tenancy)

tenant - the holder of land under a lease of an agricultural holding and includes the executor, assignee, legatee, disponee, guardian, curator *bonis*, tutor, or permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985), of a tenant

Tenant Farming Commissioner – a commissioner of the Scottish Land Commission (with effect from 1 April 2017) who will have responsibility for developing new industry led guidance for landlords and tenants of agricultural holdings

tenants improvements - improvements made to a farm, including improvements made to buildings, by the tenant farmer

termination - the termination of the lease by reason of effluxion or expiration of an agreed period of time or from any other cause

vacant possession - the value of a tenant farm if there was no agricultural tenancy in place on the farm

waygo - effective date or termination date on a notice of intention to quit or a notice to quit of an agricultural leasing arrangement

whitsun - Scottish term day, usually 28 May

Women in Agriculture - a Scottish Government-funded research project established to identify the opportunities and challenges for women involved in Scottish agriculture.

KEY SMALL LANDHOLDING STATISTICS

SCOTLAND

Agricultural Holdings

- Wholly rented farms generated an estimated **£340 million (14%)** of food production in Scotland, with mixed tenure farms producing an estimated **£450 million (18%)**.
- Scotland has one of the lowest proportions of rented land in Europe: in 2014, around 25% of agricultural land in Scotland is rented on a full tenancy or croft, with a further 13% seasonally let.
- Including crofts, but excluding seasonal lets, the total area of land let in Scotland fell by 44% from 1982 to 2014.
- There are around 52,000 agricultural holdings in Scotland, of which 6,700 holdings (13%) have rented land (excluding crofts).

Small Landholdings

- Once numerous, there are now few small landholdings left in Scotland. Dwindling numbers are compounded by issues in identifying the extent of small landholdings with many individuals being uncertain as to the type of tenancy they have.
- Typically a small landholding can be up to 50 acres in size, although the average is 20 acres.
- The Agricultural Census 2014 recorded 157 Small Landholders (Scotland) Act 1911 holdings in the whole of Scotland.
- A recent survey carried out by RESAS generated a 74% response rate with 110 of the 157 farms returning information.
- Of those responding 43 farms confirmed that they have an small landholding, with a further 11 being unsure.
- Further investigations are being carried out to further clarify the number of small landholdings, now estimated to be 74.
- The total area given for these small landholdings in the Agricultural Census fluctuates year to year, but is estimated to be c.2889 ha.

LEGISLATION GOVERNING SMALL LANDHOLDINGS

The Crofters Holdings (Scotland) Act 1886 - provided a statutory framework governing the relationship between tenants and landlords over small landholdings where only the land (as opposed to the house and other structures) is leased. This gave tenants' rights of security of tenure, succession, fair rents and compensation for improvements. However, the 1886 Act was restricted to qualifying tenants in seven counties in the Highlands and Islands.¹¹⁵

The Small Landholders (Scotland) Act 1911 - The purpose of the Act was "*to encourage the formation of small agricultural holdings in Scotland and to amend the law relating to the tenure of such holdings (including crofters' holdings)*".

The 1911 Act: -

- Provided that the Crofters Acts were to be read as if the expression "*landholder*" were substituted for "*crofter*" and that the Act "*shall have effect throughout Scotland*". In other words, it extended the application of the Crofters Acts to the whole of Scotland.
- Created two types of small landholder tenancies, that of "landholder" or "Statutory Small Tenancy". The former, and more common form of tenancy, is one where the tenant or his predecessors have supplied all the fixed equipment. The latter, where the landlord has provided the fixed equipment or the majority of same.
- Gave extra rights to existing small holders outside the Crofting Counties.
- Obligated the Board to compile a register of small holdings. The register, started in 1912, was suspended during WW1 and never reinstated.

Land Settlement (Scotland) Act 1919 – Following the end of WWI and the increased demand for land settlement following demobilisation, this Act amended and extended acquisition of land and a compulsory element to the creation of small landholdings.

Small Landholders and Agricultural Holdings (Scotland) Act 1931 – This Act amended the Small Landholders (Scotland) Acts, 1886 to 1919, and the Agricultural Holdings (Scotland) Act, 1923.

The Crofters (Scotland) Act 1955 – This Act re-introduced the separation between croft tenancies and other small landholdings, which continued to be held under the Small Landholders Acts 1886-31. It also converted all small landholdings in crofting counties into crofts. The Crofting (Scotland) Act 1991 consolidated the legislation on crofting and repealed and replaced the 1955 Act. The 1993 Act was later amended by the Crofting Reform etc. Act 2007 and the Crofting Reform (Scotland) Act 2010.

¹¹⁵ Argyll, Inverness, Ross & Cromarty, Caithness, Sutherland, Orkney and Shetland

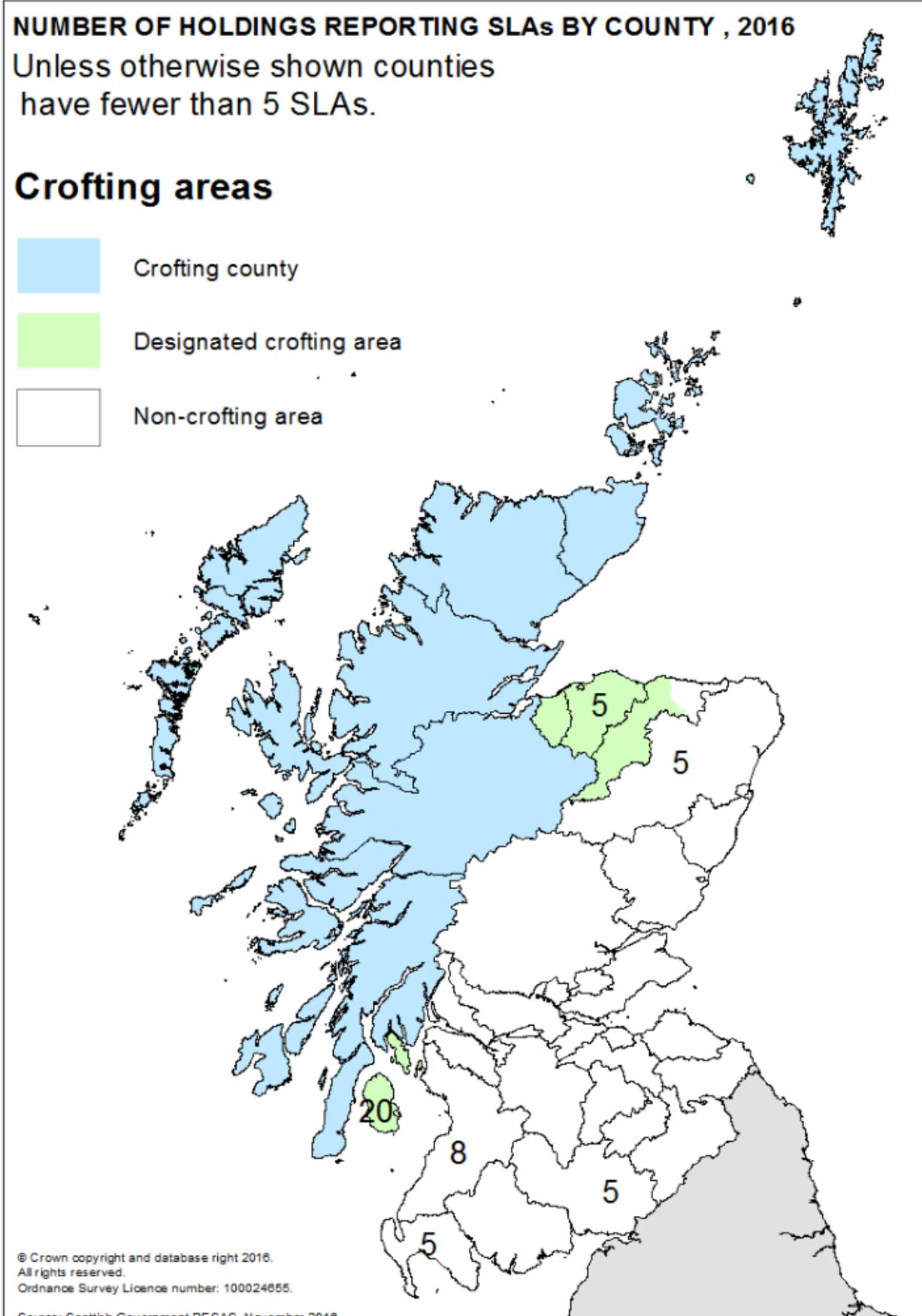
Acts collectively referred to as the Small Landholders Acts 1886 – 1931 (key legislation is highlighted in bold).

- **Crofters Holdings (Scotland) Act 1886**
- Crofters Holdings (Scotland) Act 1887
- Crofters Common Grazings Regulation Act 1891
- Congested Districts (Scotland) Act 1897
- Crofters Common Grazings Regulation Act 1908
- **Small Landholders (Scotland) Act 1911**
- Small Holdings Colonies Acts of 1916
- Small Holdings Colonies (Amendment) Act of 1918
- **Land Settlement (Scotland) Act 1919**
- **Small Landholders and Agricultural Holdings (Scotland) Act 1931**

Other Legislation Related to Small Landholders Issues

- Crofters (Scotland) Act 1993
- Crofting Reform etc. (Scotland) Act 2007
- The Crofting Reform (Scotland) Act 2010
- The Crofting (Designation of Areas) (Scotland) Order 2010
- Scottish Land Court Act 1993
- Succession (Succession) Act 1964
- The Land Reform (Scotland) Act 2016

Map of location of Small Landholdings in Scotland (2016)



LEGAL DIFFERENCES BETWEEN SMALL LANDHOLDING, CROFTS & 1991 ACT TENANCIES

	Small Landholders	Crofters	Secure 1991 Act agricultural tenants
Security of Tenure	Yes – cannot usually be removed from the holding unless breaches the conditions of the 1886 Act section 1 and in the 1911 Act at section 10(1). By failure to pay one year’s rent, or on breach of other statutory conditions, the Scottish Land Court has the ability to remove the small landholder.	Yes – cannot usually be removed from the croft by landlord, except in cases where one year’s rent is unpaid. May have tenancy removed by the Crofting Commission if the statutory duties of residency, not to misuse or neglect, and /or to put the croft to a purposeful use are not complied with.	Yes. Notices to quit may be given by either tenant farmer or landlord. If contested, these are decided upon by the Scottish Land Court. When 6 months’ rent unpaid, landlord may raise removal action in the Scottish Land Court which will determine if tenant farmer should be removed at next term-day. Removal effectively annulled if the arrears are paid before that point, or caution for 1½ years’ rent is decided upon by the Court.
Right to Buy	None	Right to conveyance of a house and garden site. If purchase of croft land (non-house site) cannot be agreed, a crofter may apply to the Scottish Land Court for an order, which may be refused by the Court, to purchase at a maximum of 15 times annual rent.	Pre-emptive right (first refusal) to buy at the current market value should it come up for sale. Such purchase can be made provided the tenant farmer has registered their interest with Registers of Scotland. This is only valid in the short term as the Land Reform (Scotland) Act 2016 has repealed this.
Succession	Yes - but limited to son-in-law or any one of the persons who would be, or would in any circumstances have been entitled to succeed to	Croft may be bequeathed to a natural person, who would then be required to take on the croft.	Tenancy may be bequeathed to a specified group of relatives – son-in-law or daughter-in-law or to person entitled to succeed to the estate on

	the estate on intestacy by virtue of the Succession (Scotland) Act 1964	In addition, a crofter may assign (pass over the tenancy) to another person with the consent of the Crofting Commission.	intestacy under the Succession (Scotland) Act 1964
Rent Reviews	May be altered by agreement between landlord and small landholder, so long as no different rent has been set by the Scottish Land Court, but the landlord or small landholder can apply to the Land Court to fix the rent and once fixed it subsists for 7 years.	May be altered by agreement between landlord and crofter, so long as no different rent has been set by the Scottish Land Court or the landlord or crofter can apply to the Scottish Land Court to which the rent once fixed subsists for 7 years.	May be altered, at an interval of not less than 3 years, by agreement between landlord and tenant farmer, or by recourse to the Scottish Land Court
Resumption of Land by Landlord	Permitted on application to, and favourable decision of, the Scottish Land Court	Permitted on application to, and favourable decision of, the Scottish Land Court	Provided the leases contain agreed resumption provisions, the landlord may resume land for agricultural purposes and in the event of a disagreement the parties can apply to the Scottish Land Court for a determination of the resumption rights of the landlord.
Compensation for Improvements at end of tenancy	Yes	Yes	Yes

Comparison of statutory small tenants to statutory landholder

	Statutory Small Tenant (SST)	Statutory Landholder
Possession	Only for the term of the lease but apart from payment of rent other conditions are statutory in 1911 Act	Under statutory conditions
Possession	Bound for any term that may be agreed upon that the Scottish Land Court may think reasonable	Yearly term with right of renewal as tenants option
Rent	Revised only at the end of the previous lease	Revisions at 7-yearly intervals
Rent	Scottish Land Court fixes an “equitable rent” – must be similar as might reasonably be looked for on the open market	Scottish Land Court fixes a “fair rent” – open market can be disregarded
Landlord’s obligations	At renewal of lease period, must provide and maintain buildings and improvements necessary for cultivation of the land	None in relation to buildings or other improvements
Failure of landlord obligations	Scottish Land Court may declare the tenant as a landholder	N/A
Remove Sitting Tenant	<ol style="list-style-type: none"> 1. Resumption 2. At the expiry of an agreed term if the Scottish Land Court is satisfied there is a reasonable objection to the tenant 3. Non-payment of rent or ease conditions or those existing at common law 	Only by resumption for a reasonable purpose or by removal for breach of statutory conditions
Enlargement of Holding	Cannot obtain through Scottish Land Court	Can obtain through Scottish Land Court
Bequeath	Yes to member of family but not by assignation when infirm	Yes to member of family and by assignation when infirm
Compensation	Claim under Agricultural Holdings Acts	Claim under 1911 Act
Vacant Holdings	Cannot be merged with any other agricultural holding without SG approval. There is no obligation to let under any particular form of tenure	Landlord cannot let out other than to another landholder for enlargement of their holding or to new landholder

SMALL LANDHOLDINGS: THE REST OF THE UK

As part of the review Scottish Government have also considered statutory small farms regimes in other parts of the UK.

Statutory smallholdings in England and Wales are administered by local authorities. Over time there has been publicly voiced concerns regarding the selling off of these type of tenancies, whilst councils continue to impose sharp rent increases.

ENGLAND:

Smallholding Tenancies

- There are two types of smallholdings tenancies¹¹⁶ in England, the management of which is devolved to county councils. This idea can be traced back to 1601, when small parcels of land were given to the poor to encourage self-sufficiency.
 - Smallholdings authorities provide an annual report to DEFRA¹¹⁷ under the Agriculture Act 1970¹¹⁸ on any statutory smallholdings. This applies to 22 Smallholdings Authorities in England.
 - A second category, reported on by CIPFA¹¹⁹ applies to 21 unitary authorities which fall outwith the 1970's legislation. DEFRA's 2016 report on smallholdings incorporates the CIPFA data for the first time.
- Smallholdings and Unitary Authorities have actively invested in these county farms in the past to support new entrants into farming. This is a declining model, however, and there are now other options for new entrants (farm business tenancies, share farming, joint ventures and contracting).
- DEFRA are working to stem the flow of selling county farms by encouraging local authorities to retain their council farm stock, to champion innovation and to attract new entrants. DEFRA's aspirations for smallholdings are voiced in their publication 'Rural Estate Asset Management Planning Good Practice Guidance'.¹²⁰

Key Statistics (as at 31 March 2016)

- Total area of land held by the 42 smallholdings was 89 360 hectares of which 86 700 hectares was let as a small holding.
- Number of smallholding lets - Of those local authorities providing data, 41 advised that they owned and let 2 583 smallholdings as at 31 March 2016.
- Of those 41 smallholding authorities providing data there were 2081 tenancies during 2015/16. During this period 115 tenancies were granted, 49 of which were to new tenants, and 174 tenancies were terminated. There were a total of 579 lifetime tenancies, 330 retirement tenancies and 1172 Farm Business tenancies.
- In 2015/2016 a total of 86 ha were acquired by 3 smallholding authorities and a total of 1048 ha sold by 25 smallholding authorities.
- Of those 39 small landholding authorities providing information a total of £23 million in rent was due at 31 March 2016; average rent/ha was between £235-£292 per hectare

¹¹⁶ Also described as council farms or county farms; Note: there are small holdings in England under private tenancy agreements as there are in Scotland, but DEFRA does not collect data on them as a distinct group.

¹¹⁷ Department of Environment, Food & Rural Affairs

¹¹⁸ Section 39

¹¹⁹ Chartered Institute of Public Finance and Accountancy

¹²⁰ Department for Environment, Food & Rural Affairs, 'Local Authority Rural Estate Asset Management Planning – Good Practice Guidance' (2015). http://www.aces.org.uk/images/editor/TRIG_REPORT-FINAL-WEBpdf.pdf

WALES (as at 31 March 2015)¹²¹

Wales have a similar approach to the English system and are also governed by the Agriculture Act 1970.¹²² Figures for 2015 are marginally altered on the previous year.

- **The total area of land held** - was around 17 400 hectares of which circa 15 000 hectares were used as smallholdings; this equates to just more than 1% of all agricultural land and is relatively unchanged compared to previous years.
- **No. of holdings** – there were 1033 smallholdings (increase of 11 holdings on the previous year) of which 641 were below 20 hectares and 247 were 20-40 hectares; there were 145 (14%) over 40 hectares.
- **Tenants** – there were 920 tenants, some of which were tenants of multiple farms. Of 1033 holdings there were 1006 tenancies, with 390 Farm Business Tenancies, 278 Agricultural Holdings Act tenancies and 338 other types of tenancies. During 2014/15 a total of 257 new tenancies were granted and of those new tenancies 211 were given to new entrants, a further 245 to existing tenants and there were 39 terminated tenancies.
- **Finance** – an operational surplus of just over £1M was generated

NORTHERN IRELAND¹²³

- Almost all farms in Northern Ireland have owned land and just under half include some rented land.
- Only 4.7 per cent of total farms are entirely rented or leased using 2.8 per cent of the total area farmed. None are small farm tenancies from District Councils.
- 45 per cent had a mixture of owned and rented land and the remaining 51 per cent were entirely owner-occupied.
- Information from the Agricultural Census in NI indicates that 40 per cent of farms have less than 20 hectares with these farms only working 10 per cent of the total area farmed.
- Much of the rented land is taken under the conacre system of short-term lettings which is a particular feature of land tenure throughout Ireland. By renting conacre land, farmers may expand their businesses to grow more crops or keep more livestock than would be possible on the owned area. Landowners who are unable or unwilling to farm all or part of their land may let it in conacre, i.e. on a seasonal basis, (nominally for 11 months or 364 days) without entering into a long-term commitment. 28 per cent of the total area farmed was leased or taken as conacre in June 2016.

¹²¹ Welsh Government, 'Annual report on Local Authority Smallholdings in Wales 2014 – 15. Available at:

<http://gov.wales/docs/drah/publications/160317-smallholding-report-2014-15-en.pdf>

¹²² Section 59(2)

¹²³ Department of Agriculture, Environment and Rural Affairs Northern Ireland

SMALL LANDHOLDERS REVIEW: CONSULTATION ANALYSIS

CONTENTS

	Page No.
1. Executive Summary	53
• The Consultation Process	53
• Policy Background	53
• Findings	54
2. Introduction	56
• Review Process	56
○ Legal Review	56
○ Consultation	56
○ Consultation Responses	57
○ Analysis of Responses	57
3. Views on current legal provisions governing small landholdings	60
4. Views on groups and individuals disadvantaged by small landholding legislation	64
5. Views on what can be done to improve small landholdings	67
6. Conclusion	72

1. Executive Summary

The Consultation Process

During the months of October and November 2016 the Scottish Government consulted on the Review of Legislation Governing Small Landholdings. The consultation process was initiated by the Land Reform (Scotland) Act 2016, which stipulated a review of the legislation governing small landholdings. The consultation asked three open questions which were primarily in relation to current legislative provisions and how they could be improved. The consultation paper was sent to small landholders and landlords. Officials endeavoured to make personal contact with all small landholders and to ensure that landlords had fair representation.

SG Officials also organised workshops attended by small landholders, organised individual meetings with landlords and attended a number of industry events to publicise the review. We estimate that there are 74 small landholdings in Scotland. Twenty two (22) responses to our consultation were received in total, 17 from small landholders and 5 from landlords or their representatives. Twenty three (23) per cent of all small landholders in Scotland responded to the consultation.

Policy Background

The Scottish Government has stated aspirations for a vibrant tenant farming sector which contributes to a prosperous and sustainable rural economy. Reviews undertaken in the tenant farming sector and in land reform in 2014 have considered small landholdings and suggested that modernisation of the legislation may be required.

Under section 124 of the Land Reform (Scotland) Act 2016, Scottish Ministers made a commitment to review the legislation governing small landholdings and lay a report before Parliament by 31 March 2017, consulting with small landholders and other parties as appropriate.

The legislative framework on small landholdings is fragmented and out of date with the last substantive legislation being passed in 1931. Legal provisions for small landholders were originally created under the Crofters Holdings (Scotland) Act 1886. Thereafter key legislation shaping small landholding policy included the Small Landholders (Scotland) Act 1911, the Small Holdings Colonies Acts of 1916 & 1918, Land Settlement (Scotland) Act 1919 and the Small Landholders and Agricultural Holdings (Scotland) Act 1931. After this date changes to small landhold tenure have been carried out under crofting or other statutory provisions.

The legal review has focused on the issues highlighted during the consultation accompanying this review. Key stakeholders from the small landholding and tenant farming sector have also contributed their expertise.

Findings from the Consultation

Views on current legal provisions governing small landholdings

1. All respondents found the legislation governing small landholdings dated and inaccessible.
 - Landlords and small landholders alike did not always understand their rights or the statutory processes underpinning them.
2. Some small landholders felt they could benefit from having an organisation with over-arching responsibility for small landholdings ensuring that small landholding legislation is properly adhered to.
3. Some of the processes within the legislation had resolution via the Scottish Land Court. Landlords and small landholders both found the court process costly and onerous.
 - Small landholders felt the court process was unnecessarily stressful, indicating it was not the best use of their limited funds.
 - Landlords wanted to simplify things and come to agreement with small landholders without the burden of attending court.
4. Small landholders wished to retain legal provisions for security of tenure and succession. They also all raised the issue of a lack of a right to buy. This was aligned with a range of related issues that depended on their ability to invest in the land and infrastructure.
5. Some small landholders found it difficult to develop viable small landholding businesses.
 - Both landlords and small landholders wanted to make small landholdings more attractive for new entrants.
6. There were mixed opinions from small landholders regarding the potential to convert to crofting.
 - Some small landholders can already convert but felt there were issues with the current legislation that needed to be resolved before this was desirable to them.
 - Some small landholders outwith the designated areas wanted to convert to crofting to give them parity with crofters.
 - No small landholders were interested in converting to a secure 1991 Act tenancy, however some landlords felt this was a possible option at the end of a tenancy.

Views on groups and individuals disadvantaged by small landholding legislation

7. Some small landholders considered there was a lack of parity between themselves and landlords, and felt subjugated and financially outmatched. Conversely some landlords felt that the legislation was drafted in favour of the small landholder.
8. Some small landholders felt disadvantaged compared to other types of agricultural tenancies as they had no right to buy and found it difficult to secure banking and funding streams. Some small landholders found it difficult to meet the costs of running their farm business and many had other jobs.
9. Some small landholders advised that legal provisions allowing conversion to crofting were unfair to those who could convert and discriminated against those located outwith the designated crofting areas who could not take

advantage of the benefits that would be afforded to small landholders within the designated crofting areas.

10. Both landlords and small landholders were frustrated by and called for an overhaul of the provisions for succession, assignation and new entrants under the small landholding regime.
 - Small landholders feared that compensation on waygo would not reflect their lifetime investment.
 - Landlords disliked the low return on their land by way of rent and the legal requirement to financially compensate the small landholder on waygo. This may contribute to the small landholder staying on the land longer than intended and has implications for new entrants.

Views on what can be done to improve small landholdings

11. Right to Buy was a pivotal issue. Small landholders requested the right to buy land under their buildings as a starting point. Landlords demonstrated an understanding of this issue.
 - The right to buy process can be complex with regard to disparity in land valuation. It also raises ECHR issues on the part of the landlord.
12. Small landholders did not wish to negotiate on the issue of security of tenure as they felt this was key to their survival. Conversely, landlords felt that security of tenure was a barrier to progress and new entrants.
13. Both small landholders and landlords wanted to see modernised provisions that benefitted both sides of the small landholding equation and created confidence and certainty.
14. Although it was suggested by some small landholders that landlords could be resistant to diversification, ultimately both tenants and landlords wanted to see small landholdings develop into viable businesses.
 - Small landholders called for better access to funding and banking allowing greater investment in their holdings, given that any current borrowing may be reliant on ownership of capital assets such as buildings.
15. Some small landholders felt they might benefit from the establishment of one single organisation with responsibility for regulation of small landholdings. Linked to this they also asked for codes of conduct outlining obligations and rights on a range of prevalent issues that would eradicate non-uniform practices which may have replaced processes set down in statute.

2. Introduction

Consecutive SNP manifestos¹²⁴ pledged to create a thriving tenant farming sector and prosperous rural communities. In 2014 the Scottish Government published the final report of the Agricultural Holdings Legislation Review Group (AHLRG).¹²⁵ This report considered the role of small landholdings as a part of their 2014 review into tenant farming. The review group concluded that the legislative framework governing small landholdings required modernisation to bring them into line with other types of tenancies¹²⁶ and that further work was needed to be undertaken with industry bodies in order to achieve that. The need for modernisation of small landholdings was also recorded in the simultaneous review carried out by the Land Reform Review Group.¹²⁷

Under the Land Reform (Scotland) Act 2016,¹²⁸ Scottish Ministers made a commitment to review the legislation governing small landholdings and lay a report of the review before Parliament no later than 31 March 2017, consulting with small landholders and other parties as appropriate.

REVIEW PROCESS

Legal review

The legislative framework on small landholdings is complex and dated. Legal provisions are rooted in the Crofters Holdings (Scotland) Act 1886, amended by Small Landholders (Scotland) Act 1911 and then re-shaped by successive legislation including the Small Holdings Colonies Acts of 1916 & 1918, Land Settlement (Scotland) Act 1919 and the Small Landholders and Agricultural Holdings (Scotland) Act 1931. After 1931 any further changes to small landhold tenure was carried out via crofting or other substantive legislation.¹²⁹

This legal review has focused on the issues highlighted via the consultation, and stakeholders from small landholding and the tenant farming sector were invited to comment on and contribute to the report.

Consultation

As part of the review, a short consultation paper was sent to all of 74 current small landholders and via stakeholders to landlords, followed up with telephone calls.

Officials endeavoured to make personal contact with all small landholders and to ensure that landlords had fair representation; this included a number of site visits to small landholdings; open workshops were held with small landholders in Ayr and Arran, where the areas of highest concentrations of small landholdings are located and individuals outwith those areas were invited to attend those events; individual meetings were held with landlords and their representatives.

¹²⁴ Scottish National Party Manifestos. 2011, available at: http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf; and 2016, available at: [https://d3n8a8pro7vhmx.cloudfront.net/thesnp/pages/5540/attachments/original/1485880018/SNP_Manifesto2016-web_\(1\).pdf?1485880018](https://d3n8a8pro7vhmx.cloudfront.net/thesnp/pages/5540/attachments/original/1485880018/SNP_Manifesto2016-web_(1).pdf?1485880018)

¹²⁵ AHLRG – Final Report. Available at: <http://www.gov.scot/Publications/2015/01/5605>

¹²⁶ 1991 Secure Act tenancies

¹²⁷ LRRG – Final Report p 192

¹²⁸ 2016 Act, Part 11, s124

¹²⁹ Crofters (Scotland) Act 1993, The Crofting Reform (Scotland) Act 2010, Crofting Reform etc. (Scotland) Act 2007, The Crofting (Designation of Areas) (Scotland) Order 2010

In addition, officials attended industry events including the Smallholder & Growers Festival, Lanark, September 2016 to share information on the consultation. The consultation analysis represents views from all of these abovementioned activities.

Consultation Responses

The Scottish Government received 22 consultation responses in total to a mailer issued during October 2016; 17 from small landholders and 5 from landlords or their representatives¹³⁰. Written responses were submitted either by e-mail or by hand from small landholders or landlords attending our engagement events. Table 01 shows response by category of respondent.

Table 01: Distribution of responses by category of respondent

Category	No. of respondents	% of all respondents
Small landholder	17	77%
Landlord	3	13%
Factor	1	5%
Land Agent	1	5%
TOTAL	22	100

Overall, 77% of responses were submitted by small landholders and 23% from landlords or their representatives. Of those respondents indicating a location, 60% of small landholders and 40% of landlords were from Arran. Although the number of respondents was relatively low, in terms of the total number of small landholders across Scotland, a response rate of 23% was achieved.¹³¹

Analysis of Responses

The consultation contained 3 broad questions in open format. Whilst the analysis addresses each of the questions raised, written responses are presented under topic headings in order of those topics gaining the highest interest from consultees and augmented by feedback on a wider range of topics from landlord meetings and engagement workshops and events.

The report is also illustrated with broad comments provided by consultees, as small landholders were keen not to be identified in any way, and aimed at enhancing understanding of the points being made.

¹³⁰ Factor or land agent

¹³¹ There is some uncertainty about the numbers of small landholding landlords

3. Views on current legal provisions governing small landholdings

Background

Legal provisions governing small landholdings are dated. The last substantive legislation on small landholdings was made in 1931. Thereafter legislative provisions for small landholdings have been carried out via crofting, agricultural holdings or other legislation. As a result small landholders may have fallen behind their agricultural tenancy counterparts.

Question 1: What are your views on the current legal provisions governing small landholdings?

Overall, 21 respondents to the written consultation answered this question, offering a wide range of reasons as to why the legislation did not work for them, evidenced below.

ACCESSIBILITY OF THE LEGISLATION

All of those small landholders and landlords that attended the Scottish Government organised workshops indicated that the legislation was inaccessible, outdated, time consuming to navigate and by implication, inadequate for a modern farming tenancy. This is borne out by 8 respondents answering this question in the written consultation.

Many small landholders felt that they did not know where to access the legislation, did not understand it if they could access it and did not know where to go to get expert advice on interpreting it. Small landholders advised that the legal profession outside of Edinburgh may have little or no understanding of the legislation and the expertise small landholders could access in Edinburgh came at a premium.

Small landholders asked for information on the legislation governing small landholders to be more freely available and to have a better understanding of their rights. Some small landholders wanted to see change to the current legislative provisions, but were uncertain what this would bring.

Some landlords suggested all land law should be consolidated and simplified, querying the need for differentiation, in current times, between small landholder types.¹³² Landlords also called for greater understanding of how the different tenancy types, small landholdings, crofts and secure 1991 Act tenancies, compare and inter-relate to each other.

Security of tenure

Many small landholders stated that the upside of the legislation was that it gave them security of tenure and that retention of this condition was paramount and non-negotiable (alongside succession rights). Six small landholders answering this question raised this issue in the written consultation, whereas all of those attending the Arran and Ayr workshops stated this was key. Small landholders did not want their security of tenure eroded by a failure to provide the correct tenancy

¹³² There are 2 types of small landholder – the landholder and the statutory small tenant; landholders provide all of their infrastructure and statutory small tenants will have part or all of their infrastructure provided by their landlord.

documentation and did not want it to be affected by the small landholder not taking up a right to buy or land being sold on to a new landlord. Conversely, landlords also felt that whilst security of tenure worked in favour of the small landholder it did not help the landlord where a holding was poorly managed and left to fall into disrepair. One landlord raised the issue of security of tenure.

Accessing Justice

Two small landholders advised that they found the court process intimidating and costly and there was an inequality due to the fact that landlords may be more financially able to access legal advice and to be in a position to take a case to court. In addition, the opportunity cost for them of accessing justice meant that monies that small landholders could have invested in land, buildings and/or livestock is diverted into covering legal fees and expenses. However, landlords advised that they also found the court process costly and they felt, time-consuming. Certain agreements¹³³ should go to the Scottish Land Court for approval and landlords questioned whether the current legal processes were still necessary, if both parties were able to agree to the terms without going to court.

Freedom to contract

It was suggested by landlords that under the current legislation there was an inherent lack of freedom around creating your own contract and that the current method of defining various types of contract through legislation was not necessarily helpful to them.

Chain reaction

It was suggested by landlords that a domino effect or chain reaction was at play: the size of the holding restricted the earning capacity and therefore the small landholders ability to invest and to maintain buildings. This restricted income in turn meant that the small landholder may also struggle to invest in and to maintain the housing and welfare of their livestock. At the end of the tenancy the landlord is still obligated to pay a waygo figure which will reflect the general condition of the buildings and the land but perhaps fails to meet the small landholders expectations for a life's investment. If there is no natural successor to the outgoing small landholder then the landlord is obligated to carry out the repairs.

At this point it was suggested that the small landholder may also seek to use the waygo payment to buy the solum (land under the house) and will find the waygo insufficient. It was suggested that where the small landholder does have extra money to invest or to develop a business then the small landholding may thrive. However, small landholders may be forced to diversify often in ways which are not agriculturally based in order to survive and this can be costly for the incoming small landholder who has to invest so that the buildings can be reverted back to agricultural use.

¹³³ E.g resumption of a small landholding under section 2 of the 1886 Act, as read in accordance with section 19 of the 1911 Act.

RIGHT TO BUY

A recurrent theme throughout the consultation was the failure of the legislation to allow for small landholders to buy either the land under the houses which they or their predecessors had built or to buy their holding outright.¹³⁴ Four respondents answering this question raised this issue in the written consultation. Across the whole written consultation 13 respondent raised this matter. All small landholders attending the workshops in Arran and Ayrshire indicated they desired a right to buy.

Many small landholders sought an absolute right to buy the solum,¹³⁵ buildings and/or steading which they or their predecessors will have built, invested in and maintained over time. Non-ownership of the solum is linked to small landholders' fears of homelessness at the end of their tenancy; they seek to assign or pass the tenancy on to someone else but are reluctant to purchase and move house later in life as they do not think the compensation provisions will meet either their expectations or their costs. Some small landholders thought that if they bought the solum they would have to forgo the whole tenancy in exchange.

Concerns were raised about ownership of the land changing hands without the small landholder knowing or even being offered the right to buy. It was suggested that this could contribute to poor relations between the small landholder and the landlord.

RENT

One landlord raised specific concerns that they felt low rents were subsidising a lifestyle choice; rent for a small landholding is based on the profitability of the holding. As small landholdings are not considered profitable the corresponding rent may be kept artificially low. They suggested that there may be an inconsistency between the bigger sums small landholders are prepared to pay for grazing lets compared to what they pay for their holding.

NEW ENTRANTS

Two landlords opined that the small landholding regime was not an attractive option for new entrants and that it restricted investment and innovation of both the landlord and the small landholder. Small landholders from Ayr also stated that they could not see why new entrants would want to become small landholders. They felt this type of tenancy was not fit for purpose and that small landholdings were not attractive for new entrants

FUNDING

Small landholders advised that there was poor access to lending because, although they had erected buildings they did not own the asset of land and therefore they had no security for borrowing. This also created issues around being able to access insurance for some small landholders. Small landholders on Arran raised concerns about the issues with the Scottish Government's single farm payment scheme and few had heard of the Small Farm Grant Scheme. Broader financial issues were also raised such as Britain leaving the EU and the risk of loss of direct payments to small landholders.

¹³⁴ This position is in contrast to other tenancy types; crofters and secure 1991 Act tenants already have a right to buy.

¹³⁵ land under their houses

UNDERSTANDING RIGHTS

Because small landholders and landlords often do not understand the legislation, there is a corresponding failure to understand their duties and rights and a very evident gap between the processes set out in the legislation and actual practice. As a result small landholders in particular felt that the legislation was weak and intrinsically unfair. This is evidenced by feedback from consultees on a number of topics covered by the legislation. More on each of these is set out below:

Conduct

Some small landholders indicated that they were on very good terms with their landlords, factors and land agents and did not have any issues. Equally, there were those that did have issues and did not want legislative change to give any more powers to landlords than they already have. Some small landholders felt that landlords and agents focussed on their own interests to the detriment of the wider community.

Planning

Two small landholders indicated that their holding was the subject of potential full farm resumption due to industrial or residential development. They felt that constantly being worried about the enforced loss of a tenancy and therefore livelihood and the impending threat of eviction, was a massive disincentive to invest in buildings or livestock or to focus on things that may make a difference to their small landholding business such as dealing with issues on climate change or biodiversity.

Compensation

Some small landholders suggested that there were poor provisions for compensation for investment where land is resumed or at the end of the tenancy where the compensation may be insufficient to buy a house. It was felt that landlord-imposed valuations may often not fairly reflect the lifetime investment made, enrichment of the land or what the small landholder felt their tenancy was worth. Small landholders considered that inadequate provisions were linked to homelessness at the end of a tenancy, often forcing small landholders to work on well into retirement. There was also some uncertainty on the part of small landholders as to value of investments in infrastructure such as boundaries, fencing drainage etc. Feedback from small landholders on Arran and in Ayrshire mirrored this.

Vacant holdings

Small landholders and landlords were also agreed that the lack of legislation regulating vacant or poorly managed small landholdings was problematic. Both were concerned about the loss of quality of prime agricultural land and the cost associated in getting it back to a good standard.

Landlords raised concerns about the cost of improving vacant landholdings that have fallen into disrepair, acting as a barrier for new entrants. Small landholders raised concerns about vacant holdings being subsumed back into estates without regard for legislative provisions requiring the land to be offered either to other small landholders in the locality or to new entrants. They queried whether it would be possible to trace de-registered land and to examine whether the de-registration had been executed legally and queried whether de-registered land, either illegally handled or otherwise, could be re-registered as a small landholding. They also queried why Scottish Ministers or the Scottish Land Court did not enforce the law as laid out in the legislative provisions and why they did not have a regulatory body, similar to the

Crofting Commission or the Scottish Land Commission overseeing small landholdings.

Succession/Assignment & New Entrants

Some small landholders felt that the provisions for succession and assignment were unclear. During the Ayr workshop there was considerable variation in small landholders understanding of e.g. the length of time they had before notifying a landlord of a change of tenant. Some thought it was as little as 2 weeks and some suggested various longer periods of time. There was also uncertainty about the location where small landholders could live and corresponding distance from the small landholding if they were to succeed. Some suggested it had to be within a 2 mile radius and others volunteered that they had been living overseas when the small landholding had transferred to them and that this had not deterred them from succeeding. Small landholders raised concerns about the ever-reducing numbers of small landholders compared to what there used to be.

Housing

Some small landholders advised that not owning the land under the buildings had prevented them from accessing funding from banks who did not recognise the buildings as collateral. Small landholders on Arran told government officials that the ages of the buildings on their various steadings ranged from between 150 – 200 years old and the most recent around 60 years old. In many cases the buildings had been erected by family. Given that a small landholding is a bare land let, the landlord had not contributed to the maintenance of those buildings.

Non Agricultural Diversification

Many small landholders advised that non-agricultural diversification was extremely problematic, with some fearing any sort of diversification would result in the loss of their holding. Many felt they were blocked either by their landlord or by limited access to funding for the greater investment needed for diversification. These opinions were also echoed by small landholders attending both Arran and Ayr workshops.

Conversion

The issue of conversion to another tenancy type was predominantly raised during the Scottish Government-lead workshops. On Arran, which falls into Scotland's designated crofting areas, where conversion to crofting is already possible but no conversions have yet taken place, there were mixed responses as to whether small landholders would prefer to be a croft.

In almost equal numbers Arran small landholders voted 'yes' (5 respondents), 'no' (3 respondents) and 'don't know' (5 respondents) to this question. Of those small landholders stating they would want to convert it was suggested that the right to buy would be an attractive option allowing them greater access to funding. However, that was caveated that they would convert as "a last resort" with some small landholders offering that they had better security under small landholding legislation.

Those stating they did not wish to convert thought that crofting law was overly bureaucratic and a potential 'minefield' with no clarity as to their rights and conditions.

A further group of small landholders were 'uncertain', stating that they saw no clear advantages to conversion to crofting. Some, for instance, thought they would still be tenants and failed to grasp they would have an absolute right to buy. There was no

understanding amongst some small landholders that e.g. conversion would bring the right to buy.

Some small landholders felt that those small landholders based outside the crofting counties and designated crofting areas were being discriminated against because they could not convert and take advantage of what conversion might bring. Those small landholders attending the Ayr workshop were clear that they *would* want to convert to crofting as this would give them added protection.

On the related matter of payment of compensation by the small landholder to the landlord on conversion, small landholders on Arran advised that they considered these legal provisions unfair. They felt that the sale price arrived at did not reflect the fact that the small landholder would have invested heavily in the land over time in a way the landlord had not and suggested that in the light of this, compensation to landlords was unjustified.

A number of small landholders found conversion without compensation an attractive option arguing that those small landholders converting to crofts automatically under the 1955 legislation had not been required to pay compensation. It was suggested that conversion without compensation should be extended to all areas of Scotland. It was pointed out by some small landholders that compensation may have already been paid to landlords in the form of tax breaks or direct payments at the time that the small landholding had been originally formed.

None of the small landholders that gave an opinion on conversion to another tenancy type considered that conversion to a secure 1991 tenancy was an attractive option.

Summary of key points

All respondents considered the legislation governing small landholdings outmoded and inaccessible with landlords and small landholders alike not knowing where to access it or uncertain how to interpret it. Due to this inaccessibility, many failed to understand their obligations and rights and experienced frustrations and difficulties regarding their day to day operations.

Small landholders felt that their situation was made worse due to the fact that there is no single organisation with over-arching responsibility for small landholdings and therefore for ensuring processes set out in statute are properly adhered to.

Landlords and small landholders both found attending court a costly process. Small landholders alluded to associated stress of accessing justice and the opportunity cost of monies allocated to legal disputes as opposed to invested in their businesses, whilst landlords advocated simplification of processes and the freedom to contract.

Small landholders identified that retention of legal provisions for security of tenure and succession were paramount to them. The right to buy was a recurrent theme, along with related issues such as housing, poor access to funding, outmoded legal provisions on succession, assignation and compensation and making small landholdings attractive for new entrants.

There were mixed opinions from small landholders regarding the potential to convert to other types of tenancy. Some small landholders can already convert but have not chosen to do so and felt there were issues with the current legislation that needed to be addressed before this became an attractive option for them.

4. Views on groups and individuals disadvantaged by small landholding legislation

Background

The Scottish Government is keen that all aspects of tenant farming can contribute effectively to a sustainable and vibrant rural economy. This question is the first step in addressing equalities issues for small landholders and their landlords as there is little or no current day equalities data on this group. Feedback identifying those disadvantaged groups and individuals can contribute towards informing future policies on small landholdings.

The second question concerned who or which groups might be suffering as a result of the small landholding legislation.

2. What group(s) if any, do you feel are disproportionately affected by the current provisions?

Eleven respondents or 50% of those responding to the written consultation addressed this question. Of those, the majority of respondents (9 or 81% of respondents) were small landholders and 2 (19%) represented landlords.

AGRICULTURAL LIFESTYLE

Most small landholders found their agricultural lifestyle 'only just sustainable' with all Arran small landholders advising that they had to supplement their income with other work. Some small landholders felt this constant struggle resulted in an inability rather than a failure to invest properly in the land and infrastructure. On the other hand, some landlords considered small landholdings to be a lifestyle choice.

'The inheritors are inheriting still'¹³⁶

Small landholders felt they were disadvantaged for a number of reasons:

- Some small landholders suggested that there was no equality or parity between landlords and small landholders and that this was to the detriment of the small landholder.
- That good relationship management was essential in retaining the tenancy and that small landholders were dependent on the good will of their landlords.
- It was felt that the obligations on the small landholder were burdensome
- Not having a right to buy was raised by 5 small landholders who answered this question.
 - the land under houses; houses could not be used for collateral for loans or improvements because the small landholders did not own the solum. It was stated that not being able to benefit or profit from the investment in their own house was not a common sense position for small landholders and that no other section of society was forced to operate in this way.
 - the whole small landholding
- That landlords were incentivised to sell because of the market value of land being bought for developmental purposes. It was suggested that the right to buy or pre-emptive right to buy for small landholders might resolve this.

¹³⁶ Peter Porter quote from Small Landholder #1, Arran

- Concerns were raised about urban planning schemes encroaching on rural communities and small landholdings. It was suggested that the countryside and the green belt should be seen in a more positive light rather than just an opportunity for developers.
- Other small landholders were concerned that there was poor adherence to the law regarding vacant holdings and that small landholdings were quietly subsumed back into estates or amalgamated into larger farms.
- It was suggested that waygo provisions were inadequate and did not recognise the sheer investment of the small landholder.
- Small landholders also advised that assignation provisions were limited, compared to tenants under the 1991 Act.
- It was also suggested that the legislation allowing small landholders in the designated crofting areas to convert to crofting¹³⁷ was discriminatory because it did not allow those small landholders outwith these locations to also convert to crofting.
- Conversion to crofting was also ruled out as creating uncertainty regarding the right to buy and being too costly. Conversion to crofting was raised by 3 small landholders answering this question.
- Some small landholders felt it was creating an unnecessary distinction to not just apply crofting law to small landholdings, because they stemmed from the same legislation and some of the legal provisions on crofting still applied to small landholdings.

Only one small landholder felt that the small landholder scheme was detrimental for the landlord. They perceived that succession provisions were problematic for the landlord because they cannot control this process.

‘A deadly embrace’

The 2 respondents representing landlords that answered this question felt the legislation was detrimental to both parties.

Describing the small landholding scheme as a ‘deadly embrace’, one respondent suggested that the landlord was challenged by the outdated legislation, rent review procedures and the difficulty in resuming land and the small landholder by their inability to secure a mortgage or loans for improvements on the property they have built.

Another respondent went further and focussed on the failure of the legislation to provide workable solutions for both parties when it came to in-life planning and questioned whether small landholdings were economically viable.

They suggested that from the landlords perspective there is little or no incentive to address the small landholders desire for retirement as this will involve a high investment in the form of compensation on waygo and then a low return due to the low rent. The small landholder is therefore unable to get a speedy agreement from the landlord, delaying the small landholder from retiring when they want to. In turn the sitting tenants failure to retire can act as a barrier to new entrants.

¹³⁷ The Crofters (Scotland) Act 1993; the Crofting Reform etc Act 2007; Crofting Reform (Scotland) Act 2010

The incoming tenant or new entrants may be impacted by the significant investment required to get the farm fully operational only to find that there is a very poor return on their investment due to the limited size of the holding restricting their productive capacity. Similarly the landlord receives a poor return on their investment due to low rents. This has been described as an unsustainable position and it has been suggested that merging the land with other larger units may be a preferred course of action, thereby reducing maintenance costs and allowing an existing unit the opportunity to expand and to benefit from lower overheads per acre.

Summary of key points

Small landholders cited the main issue facing them as the lack of parity between themselves and landlords.

Restricted by the productivity of their holding due to size, some small landholders found it difficult to meet the costs of running their farm business, often supplementing their lifestyle with other work. Aligned to this, small landholders had no right to buy compared to other types of agricultural tenancies and struggled to identify supportive banking and funding streams.

Some small landholders felt not only did current legal provisions allowing them to convert to crofting disadvantage them, it also disadvantaged those located outwith the designated crofting who could not convert and therefore take advantage of the benefits that would otherwise be afforded to them.

Poor provisions for in-life planning may work to the detriment of both small landholders and landlords. Small landholders feared that compensation on waygo would not reflect their lifetime investment or meet their need to purchase a house and render them homeless in later in life. Landlords, frustrated by artificially low rents based on the productivity of the small landholding and therefore a correspondingly low return on their land may be reluctant to negotiate with small landholders wishing to retire and to address the legal requirement to compensate the small landholder on waygo. This may contribute to the small landholder staying on the land longer than intended.

If the land has fallen into disrepair in this intervening time, then the incoming tenant may be faced with costs to re-establish the holding to working state.

5. Views on what can be done to improve small landholdings

Background

Having identified potential weaknesses in the small landholding legislation, small landholders and landlords were asked what could be done to improve the lot of small landholdings to bring them up to date, ensure they had parity with other types of agricultural tenure and to allow them to continue to contribute to a vibrant rural and sustainable economy.

How could small landholdings be improved so that they can continue to contribute to a sustainable and prosperous rural economy? Please include legislative and non-legislative options here, indicating who or which organisations need to take action.

All 22 respondents answered this question.

It was suggested by small landholders that the intention of the review under the Land Reform (Scotland) Act 2016 was to ensure that small landholdings could continue to contribute to the rural economy and they felt that serious consideration should be given to how that might work more effectively. Some small landholders felt that small landholdings should have a specific purpose, such as to encourage a greater sense of community or to allow small landholders to act as environmental guardians protecting wildlife and promoting biodiversity. There was a suggestion that those organisations needing to engage to make the changes are the Scottish Government, specifically their Agricultural Division and Scottish Natural Heritage together with access and support from various other governing bodies. Small landholders in Arran and Ayr raised concerns about the general disappearance of this type of land tenure.

LEGISLATION

In providing solutions to the issues with the legislation, both small landholders and landlords were keen to adopt a win/win approach. Landlords also asked for the legislation to be flexible, simplified and easily intelligible. Some landlords called for a review of the terms of contract of this type of tenure, allowing both parties to make a more flexible agreement that would work for them; they suggested that this would help address the issues around neglected or unproductive land.

Some landlords suggested that a new small landholding scheme should be introduced that encouraged innovation and diversification by funding the development of livestock, housing and storage which would counter the small landholders inability to sustain bank borrowing or to build and maintain buildings and align small landholdings more closely with other modern day tenancies. Landlords felt that in doing so, consideration would have to be given to the value of small landholders improvements so that they were balanced with the productive capacity of the land and to how landlord compensation for improvements might work.

RIGHT TO BUY

The vast majority of small landholders responding to this consultation and attending the workshops requested a right to buy. Of those responding to this question 9 wanted a general right to buy (RTB). One respondent wanted an absolute right to buy (ARTB), 3 asked for a pre-emptive right to buy (PRTB) and 1 for a community right to buy (CRTB). Small landholders on Arran suggested both an absolute and pre-emptive right to buy would be appropriate.

Of those small landholders requesting a general right to buy it was suggested by some that this should be offered in preference to those small landholders with long tenure and should also come at an affordable or reasonable price; 15 times the annual rent has historically been considered a fair price or alternatively 50% of the market valuation. Affordability was raised by 3 small landholders responding to this question. Some small landholders felt that this would give them parity with crofters. Other small landholders were concerned that their tenancy might be a risk if they did not take up the right to buy when offered. Two small landholders felt that the right to buy would make small landholdings a more attractive option to new entrants.

Of those small landholders on Arran preferring an ARTB, it was suggested that this would be an appropriate move, where the lease had been held over a long period of time (a suggested timeframe was 100 years). They felt this would give renewed confidence, greater access to finance, better compensation on retirement or re-sale and be a better deal all round for new entrants, if succession remained restricted. Some were more cautious and were only interested if ARTB was offered at what was considered to be the right price e.g. 15 years rent. There were concerns that even after a holding had been bought that landlords would still be able to wield power over them and restrict access or diversification.

A number of small landholders requested the right to buy the land under their houses and steading as a bare minimum, advising that this would create greater security for them and increase access to funding and banking and encourage greater diversification. Seven small landholders responding to this question requested this. The ownership of land under buildings was also a recurrent theme with small landholders on Arran.

A small number had managed to secure ownership of the land under their buildings. It was felt this was a minimum or reasonable starting point for PRTB. This would allow small landholders access to loans and encourage greater capital investment and diversification, greater potential for employment within the community and increasing and maintaining housing opportunities. This is an option small landholders may consider in exchange for compensation for the loss of a tenancy.

Some small landholders from Arran also suggested PRTB should be appropriate on holdings where the lease had been held over a long period of time (100 years was suggested) and that a PRTB be given at a reasonable price of no more than 50% of valuation levels. Arran small landholders rejected the idea of a CRTB, raising concerns about how this might work in practice around varying degrees of commitment and long term planning.

Small landholders attending the Ayr workshop also wished for a RTB and felt that the divergence of value of land sold for agricultural value versus its development value disadvantaged them. They wished to be offered a pre-emptive right to buy if the land was being sold and were generally concerned about their lack of rights. If they had

a RTB they would want the right to buy land under their houses, steadings and out-buildings. Some small landholders suggested a minimum area of land if buying the house, garden ground and steading should be 1 acre. Small landholders in Ayr felt that lack of ownership resulted in low investment and contributed to feelings of uncertainty about their security of tenure; Some small landholders also wished to purchase at a discounted rate.

There was a general understanding amongst landlords that the RTB land under houses and buildings was a contentious issue for small landholders. There was also a consensus that this land could in theory be - and in some cases has been – sold to small landholders – but that small landholders wishing to purchase needed to speak with their landlords. Landlords felt that the issue for them was how to make the sale an attractive and fair proposition and considered that if that land under a house is valued as agricultural land then it is undervalued.

Other landlords also felt that the small landholder could possibly be given the RTB the house and garden ground at a suggested 50% of market value, less improvements, on the basis that the lease on the remaining land is converted on sale to an agricultural tenancy. It was suggested that this conversion would allow the small landholder to continue to operate and obtain a mortgage whilst retaining security of tenure.

Landlords suggested it would not be equitable or fair to give small landholders a RTB the whole holding, as this would have a considerable impact on the rural estates they form part of.

COMPENSATION ON WAYGO

Small landholders called for compensation provisions on waygo to be reviewed and modernised; They felt that property valuations were unfair and they were not fairly compensated for improvements on resumption or retirement. Small landholders wanted to see firm processes regarding the purchase of land under buildings in relation to waygo.

SUCCESSION, ASSIGNATION & NEW ENTRANTS

Some small landholders suggested that perhaps the provisions could be widened so that the small landholder can assign to a person of his/her choice. Small landholders on Arran suggested that provisions for both succession and assignation could be improved on. Some small landholders also called for the introduction of a new entrant scheme.

Some landlords proposed new legislation which allows both the small landholder and the landlord to apply to Scottish Ministers in writing at the end of a tenancy to remove the small landholding restriction from the land. This would then allow the landlord vacant possession of the land with no restrictions and the ability to achieve an improved return on the ground following small landholding tenure. This could incentivise the landlord to more readily come to an agreement with the small landholder regarding waygoing compensation and any other payments.

HOUSING (see Right to Buy, page 68)

CONDUCT

Some small landholders raised the issue of poor conduct of landlords and agents. It was suggested that it may help to introduce a process for dealing with everyday issues, to reduce the incidence of coercion or using the Scottish Land Court as a threat in the absence of compliance of the small landholder. Small landholders advised this type of conduct was stressful and asked for greater protection. On the basis of this request and on the lack of understanding of rights referred to previously, small landholders discussed the introduction of a code of conduct. Some small landholders suggested such a code could cover:

- Fair and transparent process in day to day dealing, with both parties responding within a 'reasonable' timeframe
- Fair and transparent process regarding rent reviews
- Clarity on rights e.g. tenancy type; Right of access - maintenance of access roads owned by the landlord; conversion to crofts; diversification;
- Estate Planning - a transparent policy regarding long term estate planning in collaboration with small landholders and involving e.g. maintenance of agricultural land and buildings for vacant lets as well as a fair process for re-letting; landlord to maintain march ground and ditches etc
- Improved communication on the sale of land and subsequent loss of amenity, the practise of houses being let out and clarity on processes for common grazing, seasonal lets & fallow areas.

VACANT HOLDINGS

Aligned to conduct, small landholders suggested that there should be a review of the de-registration process to ensure fairness and adherence to legislation. Some suggested that given the limited size of holdings there should be no right of resumption and that this was a dubious and dangerous practice for small landholders.

FUNDING

Some small landholders thought that there should be greater encouragement for small landholders to access funding and grants for capital investment. Some small landholders also requested the reintroduction of loans as per the old Board of Agriculture system which they felt would help any new entrants in particular improve productivity. In addition small landholders wished to be able to gain access to the crofting grant scheme.

They cited their difficulty in securing loans, because they do not own the land under buildings, as the basis for extending the crofting grant scheme to them. Small landholders advised it would encourage greater diversification and offer greater opportunity for employment within the community, aligned with increasing and maintaining rural housing opportunities. This was reinforced by Arran small landholders who also suggested that the Government consider closing tax loopholes benefitting landlords.

INFRASTRUCTURE

Small landholders indicated that there could be difficulties concerning access rights to the land immediately around their house/steading. A number also indicated that although the landlord owned the access roads and was obligated to maintain them, maintenance in fact usually fell to the small landholder.

SECURITY OF TENURE

Another recurrent theme was continued security of tenure for small landholders. Whilst 2 people responding to this question raised this issue, six small landholders overall felt this was paramount.

DIVERSIFICATION & EXPANSION

Some small landholders wanted to see greater co-operation between the landlord and the small landholder to allow for expansion and diversification. Some small landholders felt that they should be allowed to diversify without the landlords consent. It was suggested by some Arran small landholders that RTB solutions could begin to resolve this. Some small landholders also wanted to expand and rent more land to encourage the development of more viable farm businesses. All evidence indicates that landlords would also wish to see thriving small landholding businesses.(see Legislation section on page 67)

ADVISORY SERVICES

Small landholders on Arran asked for an advisory service¹³⁸ that would address concerns regarding record keeping, succession planning, assignation and & new entrants, land management and maintenance of the land.

Small landholders on Arran were open to the idea of a Scottish Land Commission or Tenant Farming Commissioner (TFC) that could intervene or make changes on their behalf, but had reservations about how they could interact successfully with this organisation.

LAND OWNERSHIP

Small landholders on Arran asked Government officials about the possibility of tracing how ownership of land on Arran had changed over time. They also asked about clarity of land owned by the Forestry Commission on Arran.¹³⁹

SOCIAL & ECONOMIC ASPECTS

A number of pressing social and economic issues were raised by the Arran group. These concerned lack of housing, attracting and retaining skilled workers, planning, income, access to justice and the role of Women in Agriculture. Officials provided feedback on a number of Scottish Government initiatives directly to the group and to landlords on Arran. In addition, the island benefits from an economic planning group, some of whom are also small landholders.

¹³⁸ The Scottish Government advised small landholders on Arran about the new service run by the Scottish Agricultural College. The Croft and Small Farm Advisory Service is available for crofts and small farms engaged in primary agriculture farming less than 30 ha.

¹³⁹ The Forestry Commission's (FC) estate on Arran is 10 378 ha and of this 7 025 ha is planted. The remaining 3 713 ha is open ground and of that 28.57 ha is being managed for agricultural purposes. Of this agricultural land the FC operates a range of agricultural lets including 1991 Act tenancy, forest worker holdings, grazing or seasonal lets and various lets under the 2003 Act. FC advised the Scottish Government that none of the land listed is let as a small landholding and that they not aware of having used this form of tenure in the past.

6. CONCLUSION

Summary of key issues identified

Small landholders indicated that they wanted their lifestyle to perpetuate and called for allocating small landholdings a specific purpose e.g. creating a greater sense of community or acting as environmental guardians.

Small landholders and landlords asked for the legislation governing small landholdings to be more accessible and fit for purpose in relation to a modern day tenancy. In modernising, both wanted to see greater confidence in new provisions that benefitted both sides of the small landholding equation.

Landlords asked for greater flexibility allowing for innovation and diversification, enabling small landholders to flourish and develop viable businesses. All small landholders also called for greater opportunity to diversify. Small landholders also sought more information on how they might access funding and banking to allow for greater investment in their holdings, given that any borrowing may be reliant on ownership of capital assets such as buildings.

Right to buy is recognised as a pivotal issue by both small landholders and landlords. Some small landholders requested the right to buy land under their buildings and the surrounding garden ground as a bare minimum, whilst other small landholders sought a right to buy the whole holding. Arguably, small landholders can negotiate with their landlords on an individual basis to buy either part of or the whole holding, even though there are no legal provisions supporting this. However, the right to buy can be a complex process. Both landlords and small landholders are acutely aware of the issues surrounding the disparity in valuation of land used for agricultural purposes versus the value calculated for land that has the potential for industrial or residential development.

Security of tenure was an issue that was non-negotiable for small landholders and they wanted to retain this regardless of how the legislation might change. However, landlords saw security of tenure as a barrier, preventing them from removing small landholders that were not managing the land well.

Much of the frustration experienced by small landholders and landlords came from a lack of understanding of how the legislation worked in practice and of their obligations and rights. Non-uniform practices that didn't reflect the legislation had sprung up over time and had become established as a normal way of working due to lack of regulation. Those practises can vary radically from location to location. This problem could possibly be resolved by bringing small landholdings under the control of an organisation like the Crofting Commission. This type of organisation may then have responsibility for the creation of a code of conduct that both parties could adhere to.



Scottish Government
Riaghaltas na h-Alba
gov.scot

© Crown copyright 2017

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78652-894-0 (web only)

Published by The Scottish Government, March 2017

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS262560 (03/17)

W W W . G O V . S C O T