



Scottish Government
Riaghaltas na h-Alba
gov.scot

A review of the functions of the Tenant Farming Commissioner



AGRICULTURE, ENVIRONMENT AND MARINE



Executive Summary

This report is a statutory review of the functions of the Tenant Farming Commissioner. The Tenant Farming Commissioner was established by the Land Reform (Scotland) Act 2016 which took effect on 1 April 2017. Section 24 (3) states that Scottish Ministers must review the Tenant Farming Commissioner's functions before the end of the period of three years from which the Act took effect.

The Tenant Farming Commissioner and relevant stakeholders were invited to give their views on the operation of the Tenant Farming Commissioner's functions and on whether the Commissioner's powers are sufficient. An online survey, which ran between 20 January 2020 and 3 February 2020, received 36 responses. The current Tenant Farming Commissioner, Dr Bob McIntosh, submitted a written response to the review (see Appendix 1).

One of the main functions of the Tenant Farming Commissioner is to prepare and promote codes of practice on agricultural holdings for the purpose of providing practical guidance to landlords and tenants of agricultural holdings and their agents. The Tenant Farming Commissioner has published six codes of practice which have been successfully promoted to the tenant farming sector. Respondents consider them easy to understand, useful, fair and robust and it is thought that they will improve relations between tenants and landlords. The Tenant Farming Commissioner has received positive feedback on the codes from tenants, landlords and agents.

The Tenant Farming Commissioner must inquire into alleged breaches of the codes of practice. The Commissioner does not, however, have power to impose financial penalties or other sanctions on parties found in breach of the codes of practice. Many respondents, including the Tenant Farming Commissioner, noted the impact that this may have on compliance. They argue for the introduction of statutory powers which would allow the Commissioner to fine or sanction parties found in breach of the codes of practice. This would bring reassurance to tenants and landlords who raised concerns about the expense of bringing cases before the Land Court.

Both the Tenant Farming Commissioner and the majority of respondents indicated that all of the current functions of the Commissioner should be retained. Many respondents noted that, given the recency of the Land Reform (Scotland) Act 2016, it is too soon to determine what changes are needed to the functions. It is thought that more time is needed to become accustomed to the role of the Tenant Farming Commissioner before any changes are made.

Nevertheless, a number of amendments and/or extensions to the functions were suggested. These suggestions form the basis of the report's recommendations. The recommendations are as follows:

1. To foster compliance with the codes of practice, the Tenant Farming Commissioner should be granted the authority to sanction and impose financial penalties on anyone found to have been in breach of the codes of practice.
2. To continue the delivery of additional guides and information for landlords, tenants and agents, the provision and promotion of guidance, information and advisory documents should be added as a function of the Tenant Farming Commissioner.
3. To keep pace with the changing nature of the business arrangements of agricultural holdings, ministers should consider extending the remit of the Tenant Farming Commissioner to include alternative business arrangements, such as joint ventures and business partnerships.
4. To further encourage good relations among landlords and tenants of agricultural holdings and their agents, the Tenant Farming Commissioner may adopt the additional function of providing mediation services where the relationship between tenants, landlords and agents has deteriorated but codes of practice have not necessarily been breached.
5. Where not already happening, the Tenant Farming Commissioner should be consulted on matters of land reform and agricultural tenancy.

Contents

1. Introduction	1
2. Methodology	2
3. Codes of Practice	3
4. Alleged breaches	6
5. Referral of questions of law to Land Court	8
6. Collaboration with the Land Commission	10
7. Amendments to the functions	12
7.1 Addition of functions.....	13
A greater role in dispute resolution.....	13
Statutory powers to fine and/or sanction parties in breach of the codes of practice	14
Greater involvement in legislative change	14
Provision of guidance.....	14
Extending functions to other business arrangements.....	14
7.2 Removal of functions	15
Recommendations	16

1. Introduction

This report is a statutory review of the functions of the Tenant Farming Commissioner. The office of Tenant Farming Commissioner was established by the Land Reform (Scotland) Act 2016 which took effect on 1 April 2017. It was established with the policy aim of improving relations between landlords and tenants. The first, and current, officeholder is Dr Bob McIntosh.

Section 24 (1) of the Act comprises a list of specific functions of the Tenant Farming Commissioner. These include: preparing and promoting codes of practice for tenanted agricultural holdings and making inquiries into, and reporting on, breaches of these codes. The Commissioner's functions must be carried out in a way which encourages 'good relations between landlords and tenants of agricultural holdings'. Six codes of practice, eleven guides, and two reviews have been produced and a Tenant Farming Advisory Forum established.

Section 24 (3) of the Land Reform (Scotland) Act 2016 states that Scottish Ministers must 'review the Tenant Farming Commissioner's functions before the end of the period of 3 years' from which the Act took effect and 'publish the findings of the review as soon as practicable'.

Section 24 (4) states that when carrying out the review, Scottish ministers must:

1. Invite the Tenant Farming Commissioner to give views on the operation of the Commissioner's functions and, in particular, on whether the Commissioner's powers are sufficient in relation to the Commissioner's duties;
2. Invite such other persons appearing to Ministers to have an interest in the Commissioner's functions to give views on the operation of those functions, and;
3. Have regard to any such views.

Section 24 (5) states that following the review, the Scottish Ministers may:

1. Amend the functions of the Tenant Farming Commissioner;
2. Remove functions from the Tenant Farming Commissioner; and
3. Confer new functions on the Tenant Farming Commissioner.

In order to support Scottish Ministers in executing their duties under Section 24 of the Act, this report reviews the functions of the Tenant Farming Commissioner. In accordance with the Act, the report outlines the views of the Tenant Farming Commissioner and other stakeholders, and makes recommendations on the functions of the Tenant Farming Commissioner.

2. Methodology

Stakeholders were invited to give their views on the functions of the Tenant Farming Commissioner via an online survey, which ran between the 20 January 2020 and 3 February 2020. The survey outlined the various functions of the Tenant Farming Commissioner and asked respondents whether they should be amended or removed and whether the Tenant Farming Commissioner has sufficient power to carry out the functions.

The survey was hosted on Questback- an online platform used to develop and host surveys. Largely, the survey comprised close-ended questions in which respondents choose their answer/s from a list of pre-selected options. All questions were supplemented by optional open-ended questions which were used to gain further insight into the respondents' opinions.

The survey was open to all stakeholders with an interest in the Tenant Farming Commissioner's functions and it received 36 responses. Stakeholders were initially identified from the membership of the Tenant Farming Advisory Forum. The membership of the forum comprises representatives from a range of industry bodies. A full list of organisations who were sent the survey can be found in Appendix 2, however only three responses were received from this list. Some of these organisations circulated the survey to their membership and, thus, responses were also received from other interested stakeholders. In total, 27 responses were received from individuals and 9 responses were received on behalf of 8 different organisations. These organisations are listed in Appendix 2.

The current Tenant Farming Commissioner, Dr Bob McIntosh, provided a written response to the review which is included in Appendix 1.

3. Codes of Practice

Section 24 (1) of the Land Reform (Scotland) Act 2016 states that the Tenant Farming Commissioner must prepare codes of practice on agricultural holdings to provide practical guidance to landlords and tenants of agricultural holdings and their agents.

The codes of practice may include, among other things, provision about:

- Negotiating and conducting rent reviews;
- Agreeing and recording improvements by tenants;
- Negotiating the fulfilment of the obligations of landlords and tenants;
- The conduct of agents of landlords and tenants;
- The process of succession and assignation;
- Determining compensation at waygo¹;
- Negotiating the terms of a modern limited duration tenancy and a repairing tenancy;
- The management of sporting leases; and
- Game management

The Tenant Farming Commissioner must, from time to time, review the codes of practice and revise the codes if the Commissioner considers it appropriate.

Before the Tenant Farming Commissioner publishes a code of practice, they must consult any persons appearing to have an interest in the draft code. Only then can the code of practice be published, in such a form that the Commissioner considers appropriate, and a copy laid before the Scottish Parliament.

To date, six codes and nine guidance publications have been published.

Consultation with stakeholders shows that 91% of respondents agree or strongly agree that preparing codes of practice should be a function of the Tenant Farming Commissioner. Respondents have found the codes of practice easy to understand, useful, unbiased, robust and fair. It is thought

¹ Compensation paid to tenant at “waygo” (end of an agricultural tenancy) for any improvements made to any building or structure affixed to land and any works on, in, over or under land.

they will improve relations between tenants and landlords. As one respondent said:

‘The codes of practice have been a significant step forward in terms of improving relationships between landlords and tenants. To remove this function would lead to rapid deterioration of behaviour in the sector.’

Table 1: Preparing codes of practice should be a function of the Tenant Farming Commissioner

Response	Number	Per cent
Strongly disagree	3	6.3%
Disagree	0	0%
Neither agree nor disagree	0	0%
Agree	8	22.2%
Strongly agree	25	69.4%
	36	

The Tenant Farming Commissioner, Dr Bob McIntosh, agrees that the codes of practice are an important function. He explains, in his response to the review, that the codes of practice were produced after extensive consultation with key stakeholder organisations. Dr McIntosh has received positive feedback on the codes from landlords, tenants and agents and is often contacted for advice on issues covered by the codes. He feels that the codes have, thus, been successful in ‘...modifying behaviour and helping to avoid conflict’.

As can be seen in Table 2, 61% of respondents agree or strongly agree that the Commissioner has sufficient powers to prepare codes of practice. 25% disagree or strongly disagree. The main reason for this is that codes of practice are not legally enforceable. As one respondent stated, ‘while it is a function of the TFC his codes are voluntary. He needs to have statutory powers to enforce the codes’. Respondents want the Tenant Farming Commissioner’s powers to be extended to ensure that land owners abide by the codes of practice. They do not feel confident that there is the necessary “buy in” from all parties and observance is, thus, reliant on the decisions of individuals rather than law.

Table 2: The Tenant Farming Commissioner has sufficient powers to prepare codes of practice

Response	Number	Per cent
Strongly disagree	4	11.1%
Disagree	5	13.9%
Neither agree nor disagree	5	13.9%
Agree	17	47.2%
Strongly agree	5	13.9%
	36	

The Tenant Farming Commissioner must also promote the observance of the codes of practice, including by:

- Educating and advising about the codes;
- Supporting best practice in accordance with the codes among landlords and tenants of agricultural holdings and their agents;
- Encouraging good relations among landlords and tenants of agricultural holdings and their agents;
- Working in collaboration with other persons (whether in partnership or in other ways);
- Contributing to the development and delivery of policies and strategies in relation to agricultural holdings.

As can be seen in Table 3, 97% of respondents agree or strongly agree that promoting the observance of the codes of practice should be a function of the Tenant Farming Commissioner.

Table 3: Promoting the observance of the codes of practice should be a function of the Tenant Farming Commissioner

Response	Number	Per cent
Strongly disagree	0	0%
Disagree	1	2.9%
Neither agree nor disagree	0	0%
Agree	11	32.4%
Strongly agree	22	64.7%
	34	

As can be seen in Table 4, 56% of respondents agree or strongly agree that the Tenant Farming Commissioner has sufficient powers to promote the observance of the codes of practice. 15% strongly disagree.

Table 4: The Tenant Farming Commissioner has sufficient powers to promote the observance of the codes of practice

Response	Number	Per cent
Strongly disagree	5	14.7%
Disagree	0	0%
Neither agree nor disagree	10	29.4%
Agree	16	47.1%
Strongly agree	3	8.8%
	34	

4. Alleged breaches

Section 24 (1) of the Land Reform (Scotland) Act 2016 states that the Tenant Farming Commissioner must inquire into alleged breaches of the codes of practice. The Tenant Farming Commissioner has power to serve a non-compliance penalty, of up to £1000, for failure to provide information that the Commissioner considers appropriate for the purpose of the inquiry. The Commissioner does not, however, have power to impose penalties or other sanctions if, on completion of an inquiry, the Tenant Farming Commissioner finds a party in breach of the code of practice.

As can be seen in Table 5, 100% of respondents agree or strongly agree that inquiring into alleged breaches of the code should be a function of the Tenant Farming Commissioner.

Table 5: Inquiring into alleged breaches of the codes of practice should be a function of the Tenant Farming Commissioner

Response	Number	Per cent
Strongly disagree	0	0%
Disagree	0	0%
Neither agree nor disagree	0	0%
Agree	12	34.3%
Strongly agree	23	65.7%
	35	

As is shown in Table 6, 46% of respondents agree or strongly agree that the Tenant Farming Commissioner has sufficient powers to inquire into an alleged breach of the codes of practice. 23% disagree or strongly disagree. For those who disagree, it was argued that the Tenant Farming Commissioner has insufficient powers to sanction or fine those parties found in breach of the codes of practice. As one respondent said:

‘The TFC has sufficient powers to inquire into alleged breaches of codes of practice, but has limited power to compel compliance or co-operation and non-power to impose sanctions in the event of any breach.’

In his response to this review, the Tenant Farming Commissioner raises similar concerns. Though he considers the inquiry process a strong driver of compliance, he is mindful that he is unable to impose any form of penalty on someone found to be in breach of the codes of practice. He explains:

‘A fear of being “named and shamed” is potentially therefore the only reason for seeking to avoid breaching a code. It has to be accepted, therefore, that it is open to any company or individual to care little about any reputational damage and to ignore any recommendation made by the TFC in a report of an inquiry.’

It was suggested by some respondents that the Tenant Farming Commissioner requires statutory powers to enforce compliance with the codes of practice.

Table 6: The Tenant Farming Commissioner has sufficient powers to inquire into alleged breaches of the codes of practice.

Response	Number	Per cent
Strongly disagree	5	14.29%
Disagree	3	8.57%
Neither agree nor disagree	11	31.43%
Agree	14	40.0%
Strongly agree	2	5.71%
	35	

5. Referral of questions of law to Land Court

The Tenant Farming Commissioner may refer to the Land Court for determination any question of law which may competently be determined by the Land Court. As can be seen in Table 7, 94% of respondents agree or strongly agree that this should be a function of the Tenant Farming Commissioner. For many of the respondents, this function equips the Tenant Farming Commissioner with legal clarity and may reduce the volume of “expensive” legal cases being brought.

As one respondent said:

‘The TFC needs power to get clarification from Land Court which will inform landlords and tenants as to the law in areas of doubt. It will reduce controversial and expensive cases being brought.’

And another said:

‘It is crucial that the TFC should be able to consult the Land Court, to add weight to his advice to landlords and tenants with a problem. The TFC is in an excellent position to mediate in a dispute and stop a disagreement from becoming an expensive court case.’

Other respondents were concerned, however, that this function may be off-putting for tenants and landlords who may feel intimidated by the involvement of the Land Court and who may consider it a financial risk. As one respondent explained:

‘The Land Court retains the same stigma attached to it that it always has and is a fairly unapproachable prospect for many. The threat of others knowing your business, fees building up unsustainably for a farming business, especially where the outcome may not be in their favour. Both parties need to be prepared and willing to have their case settled by the Land Court, but if not, it can have the opposite effect than what it is intended for exacerbating the breakdown of relationship, and un-balanced relationships between landlords, tenants and agents.’

And another said:

‘He [the Tenant Farming Commissioner] can take landlords or tenants there [the Land Court] but it all comes down to cost. Most tenants won't risk the financial cost of taking a case there. The TFC needs to have power to look at cases out of court and make legal judgement.’

Table 7: Referring questions of law to the Land Court should be a function of the Tenant Farming Commissioner

Response	Number	Per cent
Strongly disagree	0	0%
Disagree	0	0%
Neither agree nor disagree	2	5.71%
Agree	15	42.86%
Strongly agree	18	51.43%
	35	

As seen in Table 8, 44% of respondents agree or strongly agree that the Tenant Farming Commissioner has sufficient powers to refer questions of law to the Land Court. 9% disagree or strongly disagree.

Table 8: The Tenant Farming Commissioner has sufficient powers to refer questions of law to the Land Court

Response	Number	Per cent
Strongly disagree	2	5.88%
Disagree	1	2.94%
Neither agree nor disagree	16	47.06%
Agree	13	38.24%
Strongly agree	2	5.88%
	34	

In his response to this review, the Tenant Farming Commissioner explains that this function has not yet been formally exercised. He notes, however, that 'it remains a useful option for the TFC in circumstances where uncertainty over interpretation of relevant legislation has implications for a significant number of people. It should not be used to enable an individual to gain access to free legal advice.'

6. Collaboration with the Land Commission

The Tenant Farming Commissioner is expected to collaborate with the Land Commissioners in the exercise of their functions to the extent that those functions relate to agriculture and agricultural holdings. As can be seen in Table 9, 81% of respondents agree or strongly agree that this should be a function of the Tenant Farming Commissioner.

Table 9: Collaborating with the Land Commissioners should be a function of the Tenant Farming Commissioner

Response	Number	Per cent
Strongly disagree	0	0%
Disagree	0	0%
Neither agree nor disagree	7	19.44%
Agree	15	41.67%
Strongly agree	14	38.89%
	36	

One respondent noted that the Land Commissioners should also have a duty to collaborate with the Tenant Farming Commissioner:

‘In addition to the TFC collaborating with the Land Commissioners...it is important when Land Commissioners take actions in their wider functions which may affect agriculture and agricultural holdings in Scotland that the Land Commissioners collaborate with the TFC. This allows specific considerations for tenant farming in Scotland to be fed into the Land Commissioners through the TFC’s collaboration with industry stakeholders.’

Dr McIntosh, the current officeholder, notes in his response that the relationship between the Tenant Farming Commissioner and Land Commissioners has been effective. He states:

‘There are a number of areas where the interests of the TFC and the Land Commissioners overlap. Since the TFC is a member of the Land Commission, and the staff supporting the TFC are employees of the Land Commission, it has not proved difficult to maintain effective communication and collaboration.’

As shown in Table 10, just 9% of respondents disagree or strongly disagree that the Tenant Farming Commissioner has sufficient powers to collaborate with the Land Commissioners.

Table 10: The Tenant Farming Commissioner has sufficient powers to collaborate with the Land Commissioners

Response	Number	Per cent
Strongly disagree	1	2.94%
Disagree	2	5.88%
Neither agree nor disagree	16	47.06%
Agree	14	41.18%
Strongly agree	1	2.94%
	34	

7. Amendments to the functions

Respondents were asked whether there should be any amendments made to the functions of the Tenant Farming Commissioner, or whether the functions should remain unchanged. The current officeholder, Dr McIntosh, states in his response that all of the current functions remain relevant and should be retained. As can be seen in Table 11, 70% of respondents said the functions of the Tenant Farming Commissioner should remain unchanged.

Table 11: Should the functions of the Tenant Farming Commissioner be amended or remain unchanged?

Response	Number	Per cent
Functions should be amended	10	30.3%
Functions should remain unchanged	23	69.7%
	33	

Largely, respondents felt that the office of the Tenant Farming Commission is still in its infancy and, thus, it would be premature to amend the functions. They argued that a review of the functions should be conducted once sufficient time has passed to assess the effectiveness of the current functions. As one respondent said:

‘This is a relatively new role and it would appear to be being effective in improving the landlord/tenant relationship and making it more balanced. It is too early to make significant changes. Everything is working fine and the system should be allowed to settle down without meddling.’

Other respondents explained that there have been many legislative changes affecting the tenant farming sector and that time was now needed for tenants and landlords to become accustomed to the changes before further amendments are made. One respondent explained:

‘What is required is for a period of stability following the last Agricultural Holdings act to allow all parties to understand those changes and for the influence of this change is to be worked through. I think that there has been a very good start to this, but further change will create further uncertainty which will not be to the benefit of the sector’.

As can be seen in Table 11, 30% of respondents stated that the functions of the Tenant Farming Commissioner should be amended. Amendments were, largely, discussed in terms of the addition of functions, as opposed to the removal of functions.

7.1 Addition of functions

The current officeholder and all other respondents were asked whether there are any functions that they feel should be added to the Tenant Farming Commissioner. Their suggestions are set out below.

A greater role in dispute resolution

Some respondents suggested that the Tenant Farming Commissioner should have a greater role in dispute resolution. For these respondents, the Tenant Farming Commissioner should inquire into and arbitrate any disputes before they can be escalated to the Land Court. As one respondent said:

‘I would recommend where appropriate, alternative dispute resolution functions are added to the Land Commission's remit. How this is performed would require a bit of thought however I would hope that it would provide an additional layer of negotiation before a Land Court application and prove to be a more 'friendlier' face to aide agreements.’

While another said:

‘Give them [the Tenant Farming Commissioner] the power to sort out any dispute between landlord and tenant, to lessen burden on land courts and the expense incurred in any court proceedings.’

Indeed, many respondents were critical of the Land Court, deeming it an expensive and daunting prospect for both tenants and landlords. The Tenant Farming Commissioner is considered a more approachable mediator and greater dispute resolution powers would be welcomed.

Statutory powers to fine and/or sanction parties in breach of the codes of practice

Many respondents appear sceptical that the Tenant Farming Commissioner would have sufficient powers to resolve disputes between tenants and landlord. As mentioned previously, respondents believe that the Tenant Farming Commissioner should be given statutory powers to fine and/or sanction a tenant or landlord, where there has been a proven breach of the codes of practice.

The Tenant Farming Commissioner suggests that ‘consideration could perhaps be given to providing the TFC with the option of sanctioning, or imposing a financial penalty on, anyone found to have been in breach of a code.’

Greater involvement in legislative change

Some respondents suggested that the Tenant Farming Commissioner should have greater involvement in legislative change, specifically around issues concerning land reform and agricultural tenancy. One respondent said that the Tenant Farming Commissioner should have ‘the ability to shape further land reform where required and recommend, where codes are being flouted, that they [the codes of practice] become part of further land reform in agricultural tenancy legislation’. Similarly, another respondent felt that the Tenant Farming Commissioner should have ‘a duty to work with fellow Commissioners in promoting and identifying further land and tenancy reform to ensure fairness in a healthy tenanted sector and changes in land use policy.’

Provision of guidance

The Tenant Farming Commissioner notes that ‘there are many aspects of landlord and tenant relationships, and the associated agricultural holdings legislation, where a code is not necessary but where guidance, and information on particular topics, is helpful to the sector’. The provision of guidance documents is currently not listed in the functions of the Tenant Farming Commissioner. Regardless, eleven guides, explaining the legislation and providing information and guidance on landlord and tenant relationships, have been published. Dr McIntosh believes that the guides have been beneficial for the tenant farming sector. Clarification should, thus, be sought as to whether the current functions support the Tenant Farming Commissioner in producing guides, information and advice for landlords, tenants and agents.

Extending functions to other business arrangements

The current officeholder suggests, in his response, that consideration should be given to extending the role of the Tenant Farming Commissioner to cover other types of business arrangements affecting agricultural holdings. He notes that tenant farming is ‘but one of a number of ways in which those wishing to

farm, but have no land, can enter into an arrangement with those with land but who do not want to farm’.

The Land Commission and Tenant Farming Commissioner have actively developed and promoted alternatives to tenant farming, such as joint ventures and business partnerships. He suggests that ‘since these arrangements are becoming more common, and will undoubtedly give rise to the same difficulties and disputes inherent in the landlord/tenant model, there is a case for extending the role of the TFC to allow the functions to be exercised in relation to these other types of business relationships.’.

7.2 Removal of functions

Respondents were asked whether there are any functions that they feel should be removed from the Tenant Farming Commissioner. The majority of respondents did not feel that the removal of functions was necessary. For many, the Tenant Farming Commissioner has not been in place for long enough to judge the effectiveness of the current functions. As one respondent explained:

‘This is a new appointment and therefore should be left to run for another full year to let it settle in. In a year’s time, there will be a better opportunity to see what might improve the situation.’

Other respondents felt favourably about the existing functions and felt that removing them would be harmful to the tenant farming sector. As one respondent stated:

‘The use of the TFC's current functions have been immensely beneficial to the tenanted sector and removal of any of these functions would represent a retrograde step.’

Recommendations

The functions of the Tenant Farming Commissioner have been well received by stakeholders and require little amendment. Ministers are advised that all existing functions of the Tenant Farming Commissioner should, thus, remain in place.

Ministers may, however, wish to consider the addition and/or extension of the functions as set out in the following recommendations.

1. To foster compliance with the codes of practice, the Tenant Farming Commissioner should be granted the authority to sanction and impose financial penalties on anyone found to have been in breach of the codes of practice. This was, arguably, the most pressing issue for the majority of respondents. 25% of respondents disagreed or strongly disagreed that the Tenant Farming Commissioner has sufficient powers to prepare codes of practice, given that they are not legally enforceable. 23% of respondents disagreed or strongly disagreed that the Tenant Farming Commissioner has sufficient powers to inquire into alleged breaches of the codes of practice. The current officeholder, Dr Bob McIntosh, also notes his concern that rulings can be ignored and suggests that sanctions and financial penalties should be considered.
2. To continue the delivery of additional guides and information for landlords, tenants and agents, the provision and promotion of guidance, information and advisory documents should be added as a function of the Tenant Farming Commissioner. As discussed in 7.1, the Tenant Farming Commissioner has published eleven guides that were not originally specified in Section 24 (1) of the Land Reform (Scotland) Act 2016. These have been well received by the sector and the Tenant Farming Commissioner has sought clarification as to whether the Act supports this role.
3. To keep pace with the changing nature of the business arrangements of agricultural holdings, ministers should consider extending the remit of the Tenant Farming Commissioner to include alternative business arrangements, such as joint ventures and business partnerships. As discussed in 7.1, the Land Commission and Tenant Farming Commissioner have actively promoted these alternatives to tenant farming. It is, thus, likely that, as they become more common, similar disputes and difficulties will arise. Dr McIntosh requests that consideration be given to extending the role of the Tenant Farming Commissioner to cover other types of business arrangements affecting agricultural holdings.

4. To further encourage good relations among landlords and tenants of agricultural holdings and their agents, the Tenant Farming Commissioner may adopt the additional function of providing mediation services, where the relationship between tenants, landlords and agents has deteriorated but codes of practice have not necessarily been breached. As discussed in 7.1, some respondents called for the Tenant Farming Commissioner to have a greater role in dispute resolution. At present, it is a function of the Tenant Farming Commissioner to prepare codes of practice on matters pertinent to relations between tenants, landlords and agents. The Tenant Farming Commissioner must also inquire into alleged breaches of the codes of practice. A mediation service may, therefore, be used where there are disputes that do not necessarily involve a breach, or for other issues not currently covered by a code of practice.
5. Where not already happening, the Tenant Farming Commissioner should be consulted on matters of land reform and agricultural tenancy legislation. As discussed in 7.1, the issue of the Tenant Farming Commissioner's role in legislative change was raised by some respondents. There is no evidence to suggest that the Tenant Farming Commissioner is not consulted on legislative matters. It may offer assurance to stakeholders, however, if this was added as a function of the Tenant Farming Commissioner.

Appendix 1

Scottish Government Review of the Functions of the Tenant Farming Commissioner (TFC)

Submission by Bob McIntosh, the Tenant Farming Commissioner

a) Prepare codes of practice on agricultural holdings.

This is an important function of the TFC and 6 codes have been published to date. Each has been extensively consulted upon with the key stakeholder organisations and all have been published jointly with these organisations to ensure buy in and support from key interest groups.

Feedback has been positive, and I am often contacted by landlords, tenants or agents to check whether their proposed actions are consistent with the code or to ask whether the other party is acting in a manner that is consistent with the code. Indications are that the codes are modifying behaviour and helping to avoid conflict. I am often conscious of the fact the codes cannot trump the law. It is sometimes frustrating to be unable to say that something should or should not happen because to do so would be to put the code at odds with what the law allows or forbids but this is perhaps inevitable.

Preparation and publishing of codes is a key function of the TFC and I see no need to change the wording or intention behind this function.

There are many aspects of landlord and tenant relationships, and the associated agricultural holdings legislation, where a code is not necessary but where guidance, and information on particular topics, is helpful to the sector. I have therefore published 11 guides which explain, in layman's terms, the implications of various aspects of the relevant legislation and which provide information on such issues as how to complain about the conduct of an agent and how to better understand different ways of forming relationships between landlords and tenants. These guides are not the subject of the consultation

process prescribed for codes, but appear to have been welcomed by the sector.

Strictly speaking, these are not codes and therefore it could be argued that the production of guides is outside the remit of the TFC.

Clarity that the TFC can produce guides, information notes and provide general advice to the sector, in addition to the production of codes would be helpful.

b) Promote the codes of practice.

Section 28 of the Act provides a comprehensive list of ways in which the codes can and should be promoted.

No change to this function required.

c) Inquire into alleged breaches of the codes of practice.

The ability to allege a breach of a code, leading to an inquiry by the TFC, and the publication of a determination, appears to be a powerful driver of compliance. However, while the TFC can impose a fine on anyone unreasonably refusing to provide relevant information to the inquiry, the TFC cannot impose any form of penalty on someone found to be in breach. A fear of being “named and shamed” is potentially therefore the only reason for seeking to avoid breaching a code. It has to be accepted, therefore, that it is open to any company or individual to care little about any reputational damage and to ignore any recommendation made by the TFC in a report of an inquiry. This risks negating the value of the ability to allege that a breach has occurred.

I have taken the view that it is unhelpful to the development of good landlord and tenant relationships to have a situation where a dispute leads to a formal allegation of a breach and therefore, rightly or wrongly, where an allegation of a breach becomes a possibility I have attempted to resolve the issue through discussion and mediation. However, the ability to allege a breach remains an important part of the process.

The processes for making an allegation, and for the TFC's handling of the allegation are well covered in sections 29 to 35 of the Act. Until a few allegations have gone through the full process it is difficult to say whether these provisions need any amendment but they seem to be comprehensive and appropriate.

The current function and associated provisions remain relevant but consideration could perhaps be given to providing the TFC with the option of sanctioning, or imposing a financial penalty on, anyone found to have been in breach of a code.

d) Prepare a report on the operation of agents of landlords and tenants.

This report was prepared in accordance with section 36 of the Act. The implication was that this was a one-off report but there is interest in the survey being repeated in the future as a means of monitoring whether the situation has improved.

The function should remain to enable the study to be repeated in the future.

e) Prepare recommendations for a modern list of improvements to agricultural holdings.

This task was completed in accordance with section 37 of the Act but it is expected that the list will require updating again in the future.

The function should remain so that the Scottish Government has the option of asking the TFC to review the list again in the future.

f) Refer for the opinion of the Land Court any question of law relating to agricultural holdings.

This function has not been formally exercised to date but it remains a useful option for the TFC in circumstances where uncertainty over interpretation of relevant legislation has implications for a significant number of people. It should not be used to enable an individual to gain access to free legal advice.

Though not yet exercised, the function is relevant and should remain.

g) Collaborate with the Land Commissioners in the exercise of their functions to the extent that their functions relate to agriculture and agricultural holdings.

There are a number of areas where the interests of the TFC and the Land Commissioners overlap. Since the TFC is a member of the Land Commission, and the staff supporting the TFC are employees of the Land Commission, it has not proved difficult to maintain effective communication and collaboration.

This function is important and should remain

h) Exercise any other functions conferred on the Commissioner by any enactment.

This has not been an issue to date but it remains a relevant function.

Other Issues

The functions of the TFC are intended to improve relationships between landlords and tenants of agricultural holdings. It is becoming increasingly clear the conventional landlord/tenant arrangement is but one of a number of ways in which those wishing to farm, but have no land, can enter into an arrangement with those with land but who do not want to farm. The Land Commission and the TFC have been active in developing and promoting alternatives to the conventional model, such as joint ventures and business partnerships. Since these arrangements are becoming more common, and will undoubtedly give rise to the same difficulties and disputes inherent in the landlord/tenant model, there is a case for extending the role of the TFC to allow the functions to be exercised in relation to these other types of business relationships.

Summary

- 1. All of the current functions remain relevant and should be retained.**
- 2. Consideration should be given to extending the role of the TFC to cover other types of business arrangements affecting agricultural holdings.**
- 3. Clarification should be sought as to whether the current provisions in the Act support the role of the TFC in producing guides, information notes and the giving of general advice to landlords, tenants and agents.**
- 4. Consideration should be given to enabling the TFC to impose some form of penalty or sanction on anyone found to be in breach of a code.**

Dr Bob McIntosh

Tenant Farming Commissioner

29th January 2020

Appendix 2: List of organisations

The following organisations were sent, by email, an invitation to complete the survey:

- Scottish Tenant Farming Association
- Scottish Land & Estates
- National Farmers Union Scotland
- Scottish Agricultural Arbiters & Valuers Association
- Royal Institution of Chartered Surveyors
- Agriculture Law Association
- Scottish Government.

The following organisations responded to the survey:

- Scottish Tenant Farming Association (two responses received)
- Scottish Agricultural Arbiters & Valuers Association Council
- Davidson & Robertson
- Forestry and Land Scotland
- Luffness Mains Farming
- Alexander Simpson Ltd
- Buccleuch

One anonymous response was also received from an organisation.



© Crown copyright 2020

You may re-use this information (excluding logos and images) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or e-mail: 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.

The views expressed in this report are those of the researcher and do not necessarily represent those of the Scottish Government or Scottish Ministers.

This document is also available from our website at www.gov.scot.
ISBN: 978-1-83960-649-6

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for
the Scottish Government
by APS Group Scotland
PPDAS715366 (03/20)
Published by
the Scottish Government,
March 2020



Social Research series
ISSN 2045-6964
ISBN 978-1-83960-649-6

Web Publication
www.gov.scot/socialresearch

PPDAS715366 (03/20)