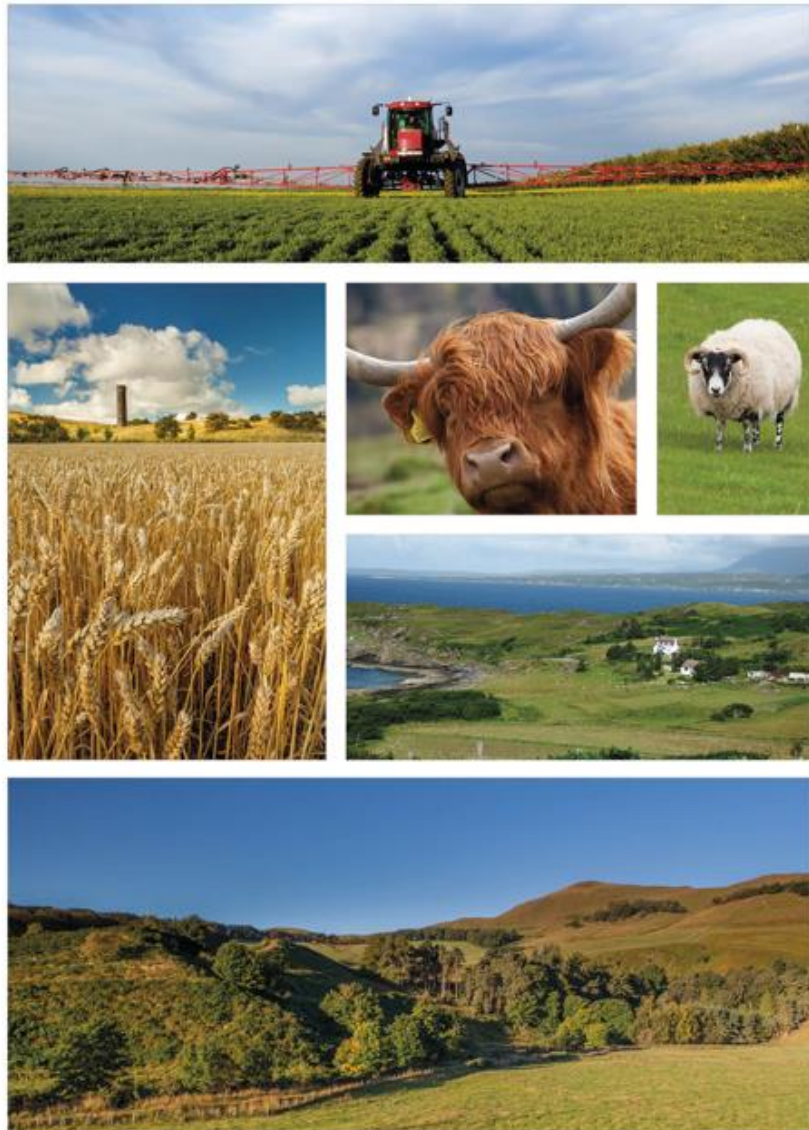


New Entrants to Farming Programme

Understanding Agricultural Tenancies for New Entrants



Author – Chloe McCulloch, SAC Consulting, Senior Consultant

In an attempt to reverse the decline in the number of agricultural tenancies available, several new types of tenancies have been created, first in 2003 by the Agricultural Holdings (Scotland) Act 2003, and then most recently with the Land Reform (Scotland) Act 2016.

The key features of the 'modern' types of farm tenancy are that they aim to be transparent and fair to the tenant, whilst providing landlords a route in which to be able to legally resume the farm in the future if they wish, and hence encourage the letting of farms.

NB – crofting tenancies are out with the scope of this note.

Key Points:

Always seek specialist legal advice before signing any tenancy agreement.

Make sure you understand:

- What 'fixed equipment' (e.g. fences, buildings, roads etc.) are provided by the landlord, and what your obligations are to repair, maintain or replace this.
- What the process is for a rent review and when you can expect the first review.
- What needs to happen at the end of the tenancy for it to be terminated.
- What would cause the tenancy to be terminated early.
- What the correct process is if you want to make an improvement to the holding (e.g. a new shed).
- What your rights are if the landlord wants to make an improvement to the holding.
- Whether you need consent to carry out any planned diversification, e.g. bed and breakfast, or horse livery.

If there is a schedule of condition for the farm make sure that, you are happy that this is accurate.

The types of tenancy seen today include:

- Grazing or Mowing Leases
- Short Limited Duration Tenancies (SLDTs)
- Limited Duration Tenancies (LDTs)
- Modern Limited Duration Tenancies (MLDTs)
- Repairing Tenancies
- 1991 Act Tenancies

Grazing or Mowing Leases

A grazing or mowing lease is a let of agricultural land only for grazing or mowing, and for a specified period not exceeding 364 days. A let of 365 days or more (including where a tenant, initially on a short grazing let, is allowed to stay in occupation for a longer period) or for a purpose other than grazing or mowing, for example taking an arable crop, would be considered in law to be a Short Limited Duration Tenancy (SLDT), and subject to the associated rules and legislation.

Short Limited Duration Tenancy (SLDT)

The Short Limited Duration Tenancy (SLDT) was created in 2003 and provides a way of permitting a range of agricultural operations (for instance the growing of an arable crop) within a relatively short, fixed term agreement.

An SLDT is created for a period of up to 5 years and there is no minimum term. The tenant has the right to freedom of cropping, and there is flexibility around rent review.

Assuming the tenant and landlord want to prolong the relationship then at the end of the period the SLDT can be extended to a full five years (where the initial term was shorter), or following this by a further five years by moving straight into year 5 of a 10 years Modern Limited Duration Tenancy (MLDT).

Limited Duration Tenancy (LDT)

The Limited Duration Tenancy (LDT) was created in 2003 alongside its shorter relative, the SLDT. **This type of tenancy has been replaced by the Modern Limited Duration Tenancy (MLDT).**

An existing LDT will have a minimum term of either 10 years (if created after 22 March 2011) or 15 years, if created before. There is no maximum period for an LDT.

Even though this type of tenancy is of a **limited duration** there is still a process to follow in order to bring it to an end involving two separate notices which must be issued within a stipulated timeframe (see below).

Granting a tenancy to a new entrant farmer can be an attractive alternative to planting land in forestry, or selling it. There can be substantial benefits over short-term or seasonal letting derived from the longer term interest that the tenant has in maintaining the land in good heart. Modern tenancy types allow for fixed term agreements of upwards of 5 – 25 years (or more) where, provided the correct termination procedure is carried out, the land can be resumed at the end of the term, if desired.

Modern Limited Duration Tenancy (MLDT)

A Modern Limited Duration Tenancy is a new type of tenancy introduced by the Land Reform (Scotland) Act 2016, but is essentially a modified version of the LDT designed to reduce the risk to a landlord in granting a new entrant a tenancy, and thus increase availability. The minimum term is 10 years, and there is no maximum term.

Specific characteristics of an MLDT include:

- Ability to include a **break clause** at the end of year 5 if the tenant is a new entrantⁱ and is either not using the land in accordance with the rules of good husbandry as defined in the Agriculture (Scotland) Act 1948, or is otherwise failing to comply with some other aspect of the lease. The tenant is also permitted, for any reason, to terminate the lease at the end of year 5. In both cases there is a stipulated notice procedure which must be followed.
- The landlord and tenant must agree the **fixed equipment** which is to be provided with the farm, and then the landlord must provide this within 6 months of the start of the lease (and in the agreed condition). The default position then is that the landlord will replace and renew fixed equipment whilst the tenant is obligated to maintain and repair – however in respect of the ongoing maintenance, replacement or renewal of equipment there is flexibility for the landlord and tenant to agree something different.
- Either the landlord or tenant can initiate a rent review, and upward only rent reviews are not permitted. However other than this there is flexibility for the lease to include whatever provision can be agreed between the tenant and landlord, for instance about the frequency of reviews, or and the factors which would be taken into account when considering the rent.
- The landlord's consent is required for any diversification away from agricultural activities.
- Sub-letting could be required but only if this is stated in the lease.

Terminating an LDT or MLDT

The termination requirements to bring an LDT or MLDT to an end at the end of the stated term are the same.

Notice 1 must be served between 2 and 3 years before the termination date.

Notice 2 must be served between 1 and 2 years before the termination date.

(And there must be at least 90 days between those two notices).

What happens if notice is not given in the correct timescales differs however, in an LDT the term is extended by, initially, a further 3 years. In an MLDT the term is extended by 7 years.

It is recommended that you seek legal advice as to the notice requirements of your own tenancy.

Repairing Tenancy

The Repairing Tenancy is an entirely new feature of the Land Reform (Scotland) Act 2016 and sets out to provide a means for a tenant to take on a potentially run-down farm and bear the cost of improvements. This type of tenancy has a relatively long minimum term and no obligation on the landlord to provide fixed equipment.

A repairing tenancy will be for a period of at least 35 years including an initial 'repairing period' of at least 5 years, during which time the tenant will "improve the land comprised in the lease in order to bring it into a state capable of being farmed...in accordance with the rules of good husbandry...".

The provisions for termination, continuation and extension are the same as for an MLDT.

It is permitted to have a break clause in the tenancy but this can only be triggered before or at the end of the repairing period. From the end of the repairing period the tenancy can only be brought to an end before the term if the tenant is either not using the land in accordance with the rules of good husbandry as defined in the Agriculture (Scotland) Act 1948, or is otherwise failing to comply with some other aspect of the lease – i.e. similar grounds for early termination as the MLDT.

Secure Heritable Tenancies (the '1991 Act Tenancy')

Before 1991 there were many different forms of heritable tenancy, the rights and obligations in which were dictated by the legislation (and fashion) when these tenancies were originally created, often several generations previously. A change in legislation in 1991 effectively brought all of these arrangements together, thereafter to be referred to as 'a 1991 Act Tenancy' and governed by a single set of regulations, for instance in connection with assignation and succession of the tenancy, rules around tenant's improvements etc.

The key feature of the 1991 Act tenancy is that this is a secure, heritable tenancy which, provided the correct legal procedure is followed at the time, can be passed on to subsequent generations. Over recent years there have been changes to the rules by which these tenancies are governed, in almost all cases increasing a bias towards the tenant. The most recent changes add the potential for tenancies to be assigned to others in the tenant's lifetime, as well as to increase the range of people to which the tenancy can ultimately be left in the event of the tenant's death.

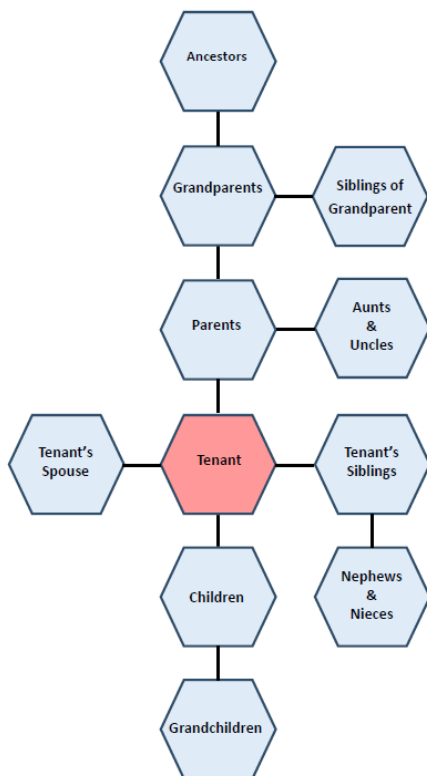
Since 2003 it has not been possible to inadvertently create a secure heritable tenancy - it is still possible to create one but it must be explicitly stated that this is the case and the landlord would have to do so in the knowledge that they are unlikely to ever have possession of their farm again in the future. However the most recent changes to the legislation could provide additional opportunities for new entrants in the form of:

- **Being assigned a tenancy from a relative**
Holders of 1991 Act tenancies can now assign their tenancy to a relative (i.e. during their lifetime), and there very limited grounds for objection by the landlord.
- **Being the successor to a 1991 Act tenancy**
The class of relative to which a 1991 Act tenancy can be left have been increased substantially (for instance this would now include descendants of the tenant's brother or sister in law)ⁱⁱ, and the grounds on which a landlord can object are limited, particularly in respect of 'near relatives'ⁱⁱⁱ
- **Taking over a tenancy from a 'stranger' as a new entrant or progressing farmer.**
Where a tenant hasn't a member of his close or wider family to which he wants to assign or bequeath a tenancy, he has the option of effectively selling his right to an incoming farmer provided they are classed as either a new entrant or 'progressing' farmer.

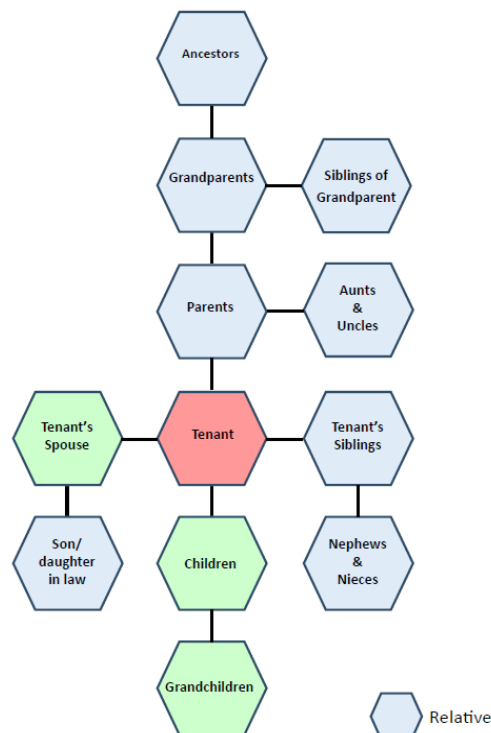
Who can be assigned or succeed a tenancy?

The diagram below shows the current situation – the potential assignee could be any one of those listed in the Succession (Scotland) Act 1964 depending on who is alive at the point of succession.

Current situation - assignment

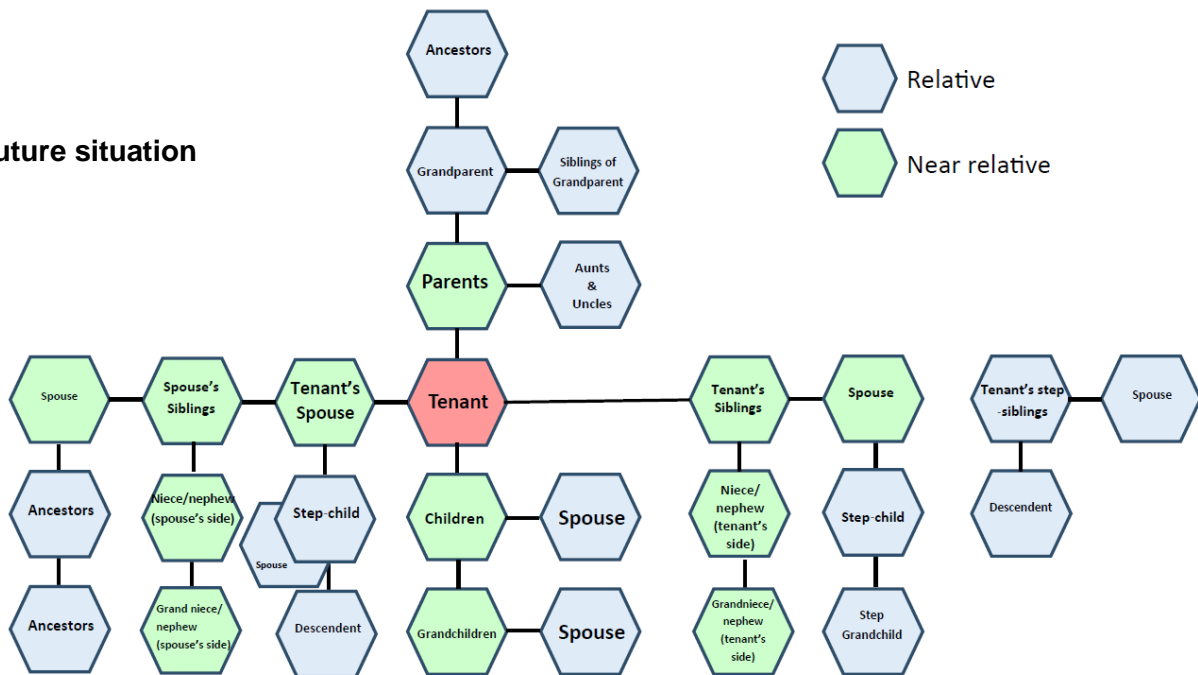


Current situation - succession



The future situation, as per the Land Reform (Scotland) Act 2016 will be:

Future situation



Tenants Improvements

Tenants are entitled to compensation at way go (when you give up the farm) for qualifying improvements they've made whilst occupying the holding under an SLDT, LDT, MLDT (the rules around compensation for improvements through a Repairing Tenancy are still to be confirmed).

To qualify for compensation the improvements must either be qualified by the current Tenant's Improvements Amnesty (running now until 12 June 2020 but **only applicable to improvements completed before 13 June 2017**) or have followed the correct procedures for either seeking consent or providing notice (and not proceeding with the improvement until the statutory period for the landlord to object has elapsed).

It important to understand the requirements to seek consent or give notice for the type of improvement and tenancy you have, and make sure these are correctly fulfilled – this includes ensuring that notices are given in the correct format and you solicitor can advise).

At way go the qualifying improvements will be valued on the basis of their worth to a hypothetical incoming tenant. Some types of improvements (e.g. slurry stores) are not classed as improvements but would be a tenant's fixture and there is a different process for agreeing whether the landlord will purchase the item, or it is to be removed by the tenant.

Further Information

<https://landcommission.gov.scot/>

Land Reform (Scotland) Act 2016

<http://www.legislation.gov.uk/asp/2016/18/contents/enacted>

Agricultural Holdings (Scotland) Act 2003

<http://www.legislation.gov.uk/asp/2003/11/contents>

ⁱ For the purposes of the MLDT, a new entrant is someone to which none of the following statements apply:

- A tenant of an LDT, MLDT or 1991 Act tenancy;
- A smallholder/crofter;
- A tenant under an SLDT with continuous occupation for 3 years or more;
- A tenant who owns more than 3 ha of agricultural land.

ⁱⁱ Any person who would be, or would in any circumstances have been, entitled to succeed to the tenant's estate on intestacy by virtue of the Succession (Scotland) Act 1964;

A spouse or civil partner of a child of the tenant;

A spouse or civil partner of a grandchild of the tenant;

A spouse or civil partner of a brother or sister of the tenant;

A brother or sister of the tenant's spouse or civil partner;

A spouse or civil partner of such a brother or sister;

A child, including a stepchild, of such a brother or sister;

A grandchild, including a step grandchild of such a brother or sister;

A stepchild of the tenant;

A spouse or civil partner of such a stepchild;

A descendant of such a stepchild;

A stepbrother or stepsister of the tenant.

ⁱⁱⁱ A parent of the tenant;

A spouse or civil partner of the tenant;

A child of the tenant;

A grandchild of the tenant;

A brother or sister of the tenant;

A spouse or civil partner of such a brother or sister;

A child of a brother or sister of the tenant;

A grandchild of a brother or sister of the tenant;

A brother or sister of the tenant's spouse or civil partner;

A spouse or civil partner of such a brother or sister;

A child of such a brother or sister; and

A grandchild of such a brother or sister.