Joint Industry Guidance on Game Management and the Management of Sporting Leases

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Introduction

During the Agricultural Holdings Legislation Review in 2014 a number of submissions were received concerning the potential for conflict between agricultural and sporting tenants occupying the same piece of land. A similar potential for conflict exists where the sporting rights are retained and exercised by the landlord, and the general consensus within the review group was that these are matters best addressed through codes of practice based on existing legislation.

Section 25 of the Land Reform (Scotland) Act 2016 includes a list of codes that the Tenant Farming Commissioner (TFC) might prepare in order to provide practical guidance to landlords, tenants and their agents. This includes the suggestion that there might be codes on "The Management of Sporting Leases" and on "Game Management". Recognising that it may be some time before an incoming TFC is able to consider this further, the industry bodies have decided to issue joint industry guidance in the interim under a combination of these headings, and to keep the guidance under review. The guidance relates only to the exercise of shooting rights – different legal principles apply to the exercise of other types of sporting rights (for example the right to fish for salmon).

The industry bodies are aware that there already exists a Code of Good Shooting Practice (CGSP) produced by the British Association for Shooting and Conservation (BASC) on behalf of a number of organisations including SL&E. The joint industry guidance makes full use of that code as an existing basis for the responsible management of land for sporting purposes. In addition a brief summary of the legal position on the exercise of sporting rights is given in appendix C as further background.

Core Principles

The guidance on game management and management of sporting leases is underpinned by six core principles –

1. Landlords who choose to exercise sporting rights over their land should ensure that the BASC Code of Good Shooting Practice is complied with at all times.

2. Landlords who enter into a sporting lease over some or all of their land should ensure that the lease requires the sporting tenant to comply with the BASC Code of Good Shooting Practice at all times.

3. The relationship between the party exercising the sporting rights and an agricultural tenant in respect of the same area of land should be based on a written Memorandum of Understanding (MoU), and where there is a sporting lease in place the landlord should also be party to the MoU.

4. Where the parties are ALL agreed that a MoU is unnecessary, they can jointly agree not to enter into a MoU.

5. The landlord, the sporting tenant (where there is one) and the agricultural tenant are responsible for ensuring that their employees and contractors adhere to the terms of the MoU at all times.

6. Where there is any dispute in relation to the exercise of sporting and agricultural rights, the core reference documents on which resolution is based should be the MoU and the BASC Code of Good Shooting Practice.

Basis of the Guidance

The guidance is built on an assumption of reason and reasonableness among all involved. It reflects relevant existing legislation (see appendix C) and applies to all agricultural tenancies.

The guidance focuses on the idea that conflict is most likely to be avoided if there is an annual discussion between the relevant parties confirmed by way of a written MoU, and that this includes a mechanism to address any issues and potential conflicts that arise during the year between the parties.

The industry bodies recognise that a great many parties exercising sporting rights have for generations maintained an effective working relationship with agricultural tenants on the basis of entirely informal dialogue. This guidance is not intended to intervene in the working of such relationships where they exist.

It is also acknowledged that the relevance of the guidance to a particular situation may depend on the scale of the sporting operations. The process below may not always be appropriate and the parties may not consider it necessary to enter into a formal MoU.

However if this guidance is not to be followed in its entirety then the parties should fully satisfy themselves, preferably in writing, that this is what they ALL wish to happen.

Content of a Memorandum of Understanding

The MoU should be a mutually beneficial agreement between the party exercising sporting rights and the agricultural tenant (and, where there is a sporting lease, the landlord). At a minimum the MoU should set out clearly the respective responsibilities, activities and outcomes that are expected of each party along with contact details for key relevant individuals. The MoU is not legally binding, but unreasonable failure to adhere to its terms would constitute a breach of this joint industry guidance.

The MoU should balance the rights of the party exercising the sporting rights with those of the agricultural tenant, and it should reflect the fact that both parties have rights over the land that carry equal weight and should be exercised without unreasonable interference. Where there is a sporting lease the landlord will not be exercising the sporting rights, but s/he should still be involved in discussions between the agricultural and sporting tenant and be a signatory to the MoU.

There is no definitive format for the MoU, and the parties involved should put in place whatever form of agreement they consider best suits their particular circumstances. In broad terms it should normally cover the following –

- General points of agreement such as arrangements for ensuring effective communication during the year, broad aims of shoot management, pest control arrangements (predators, rabbits), other areas of potential sensitivity and how these are to be managed, etc.

- Specific points of agreement such as the number of shoots per year, location of release pens, numbers of birds to be reared, cover crops to be grown by the agricultural tenant, car parking arrangements on shoot days, access routes, health and safety management, etc.

Where there is any history of conflict between the parties it may be helpful to set out a specific procedure to be followed in the event of a potential conflict arising. If felt necessary the MoU might also summarise the legal rights of each party with respect to sporting use of the land that they share.

Process for Agreeing a New Memorandum of Understanding

The guidance requires the party exercising the sporting rights, the agricultural tenant and (where there is a sporting lease) the landlord to agree a MoU and confirm annually their agreement to it. In the first year of a new shooting regime this may require the parties to dedicate some time to the process set out below, but thereafter it should involve little more than a brief annual conversation to confirm arrangements.

Where there is a sporting lease in place the landlord will still be a party to the MoU and should therefore be involved in the discussions relating to its content. The agricultural and sporting tenants may not have an existing relationship, and the landlord can sometimes play an important role in helping to ensure that a reasonable agreement is reached

Step 1 – Initial Exploratory Discussions

The process may be initiated by the party exercising the sporting rights or the agricultural tenant. If there is a sporting lease in place the landlord may also initiate the process.

The process should commence with an informal meeting between all parties in the early spring at which proposals for shoot management during the year ahead are explored. Most shooting leases run from 2nd February to 1st February, and for a new shoot step 1 should normally be completed no later than 1st April.

The issues that should be covered in the discussion will vary according to circumstances, and should focus on ensuring that exercise of the sporting rights does not conflict with agricultural land use and vice versa. This will normally include the following –

- Arrangements for ensuring the health and safety of both parties, their employees, families, shoot participants and the general public. This should include arrangements for ensuring relevant risk assessments in relation to both shooting and farming operations.
- Arrangement for ensuring animal welfare, including in relation to farm animals, pets, quarry species, wildlife and the implementation of relevant BASC codes of practice (snaring, trapping, lamping, picking up, etc).
- Arrangements for minimising any nuisance to the agricultural tenant, his employees, family and members of the general public arising from shooting operations.
- Arrangements for minimising any nuisance to the party exercising the sporting rights, his employees and shoot participants arising from agricultural operations.
- Arrangements to ensure adequate habitat and feed supplies for the quarry species in order to avoid conflict with agricultural use, including whether the agricultural tenant might grow cover crops on contract and where feeders are located.
- Arrangements to ensure that any rearing and release of game does not conflict with agricultural land use. This should include arrangements for ensuring implementation of the GWCT guidance on sustainable gamebird releasing.
- Arrangements to ensure effective access for shoot management and shooters, including car parking, keys for shared padlocks, feed and equipment storage, fencing adjustments, etc.
- Arrangements for agreeing the dates and times of shoots (recommended to be at least four weeks in advance of each shoot) so as to avoid conflict with essential agricultural operations and with other people who may be resident on the land.

Step 2 – Agreeing a New Memorandum of Understanding

Following step 1 the initiating party should draft a MoU to reflect the discussions above. In particular where areas of particular sensitivity have been identified (e.g. potential damage to crops, car parking for shooters), the MoU should set out in detail what those issues are and how they are to be addressed. The draft MoU should be sent to the other party (or parties where there is a sporting lease) within one month of step 1. Where step 1 has been conducted effectively the MoU will normally be agreed without further discussion.

Where there remain areas of uncertainty and/or disagreement the parties should meet again within one month to discuss the draft MoU and agree mutually acceptable amendments. The emphasis of these discussions should be on reasonable compromise, recognising that both the party exercising the sporting rights and the agricultural tenant have rights over the land in question which they must be able to exercise without unreasonable interference.

In some cases it may be helpful to involve a neutral third party in these discussions, and it may be necessary for the parties to meet more than once before an acceptable compromise is found.

Step 3 - Mediation

In a small number of cases it may not be possible to reach agreement on a MoU within a reasonable timeframe. Where no agreement has been reached by the time four months have elapsed since commencing step 1 the parties to the MoU should agree to appoint an independent trained mediator at shared cost to help. This may involve, if so agreed, an element of independent arbitration if the parties wish this to be the case, but there is no requirement for this to happen.

Step 4 – Resolution

It is possible in a few very rare cases that agreement will not be reached between the parties to the MoU despite all of the above. In some circumstances a party may have recourse to law if their legal rights are potentially infringed, and they may consult the BASC for guidance (see BASC code of shooting practice page 15) if they believe that a proposal is not compatible with the BASC code.

Ultimately this guidance depends on all parties exhibiting common sense and reasonableness in resolving difficult issues, but where a genuine impasse occurs that cannot be resolved by other means it is recommended that the parties agree to submit their dispute to voluntary independent arbitration and that they agree to abide by the findings of the arbiter appointed.

Process for Reconfirming a Memorandum of Understanding

Where significant changes are anticipated to an existing shoot, or where there has been a change of agricultural tenant or the party exercising the sporting rights, it may be necessary to re-commence the procedure at step 1, but where an existing MoU is simply being revised/renewed by the same parties little more than an annual spring telephone conversation will usually be adequate. This should take place as early as possible in the shoot year, and in any event no later 1st June.

Dealing with an Alleged Breach of a Memorandum of Understanding

During the course of the shooting year there may arise circumstances in which one party feels that another has not kept to the terms of the agreed MoU. Usually this will be a mistake or error of judgement that is easily resolved informally, but occasionally a more serious disagreement can arise,

either because of a difference of interpretation of the MoU or (very rarely) due to deliberate breach. In such cases a more structured resolution process may be required.

In the first instance every effort should be made by the two parties to resolve matters informally, perhaps by involving an independent third party to help if appropriate. In addition and where the dispute is between two tenants (agricultural and sporting), it may be useful to involve the landlord in helping to resolve the matter. Where resolution proves impossible through informal means, the parties should agree to refer the matter to independent mediation (and if necessary arbitration) at shared cost.

Where there is a sporting lease then both the agricultural and the sporting tenant have a clear legal relationship with the landlord. Where there is a dispute it may therefore be the case that one of the tenants would seek a resolution from the landlord in the first instance (rather than directly against the other tenant). For example if the agricultural tenant's crop were to be damaged by game then s/he might have a claim against the landlord under agricultural holdings legislation (see appendix C).

Maintaining a Record of Process

The industry bodies are aware that under the terms of the Land Reform (Scotland) Act 2016 there will in due course be established a position of Tenant Farming Commissioner with a remit to prepare codes of practice, including a code relating to the management of sporting leases and another relating to game management. The industry bodies see their new guidance as potentially providing a basis for such codes, and they are anxious that it operates in an equivalent manner.

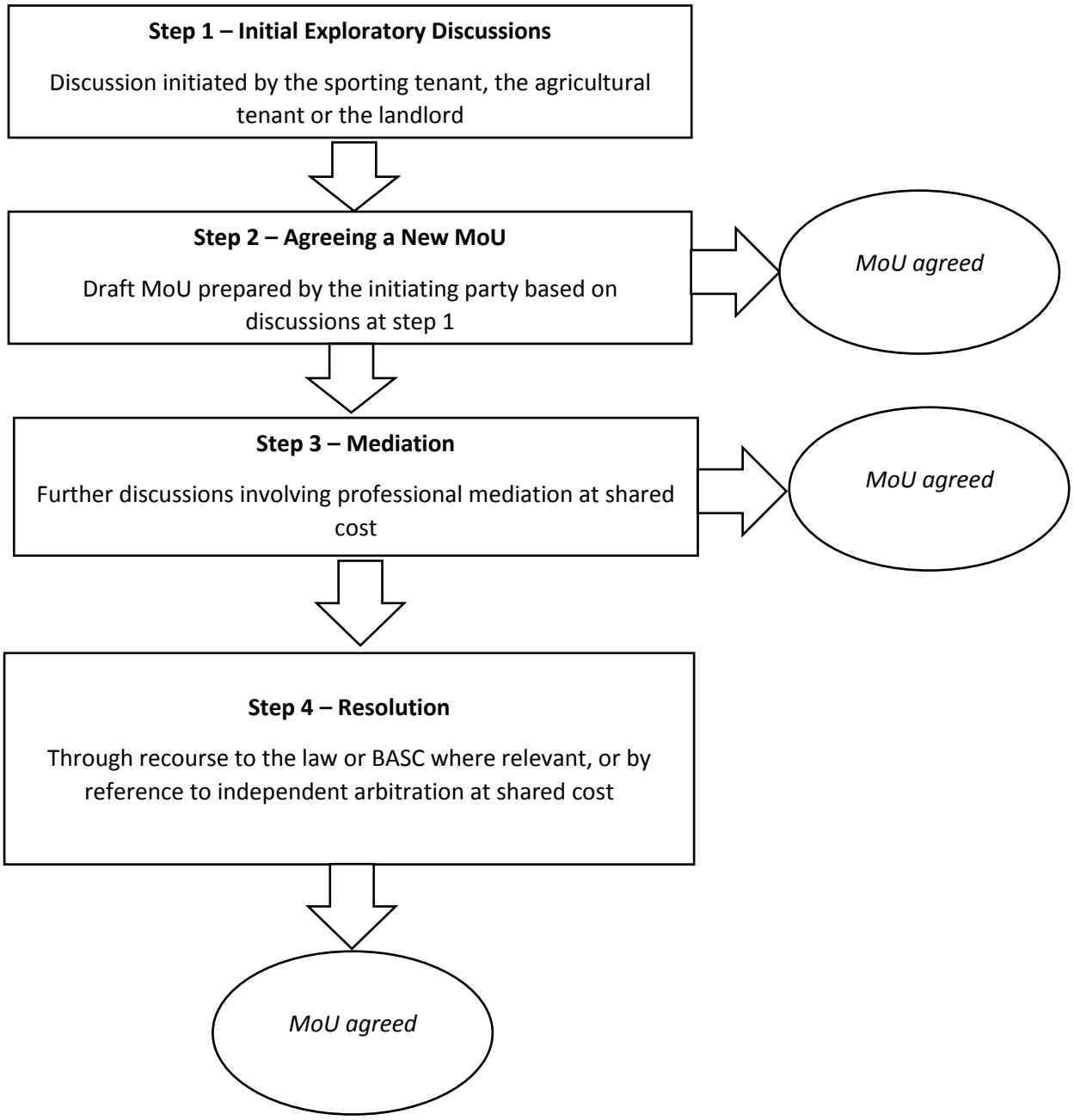
All landlords, agricultural/sporting tenants and professional intermediaries are therefore asked, while following this guidance, to maintain a concise written record of key dates and associated notes for stages 1 – 4 and to be willing on request and in confidence to make this record available to the Scottish Government's Independent Adviser on Tenant Farming so that he is in a position to undertake a risk based compliance audit should the industry bodies collectively ask him to do so. A pro-forma Record of Procedure is given in appendix B.

In Summary

The guidance sets out a simple process whereby an appropriate MoU can be developed and agreed between a party exercising sporting rights, an agricultural tenant and the landlord where there is a sporting lease in place. It recognises that once such a MoU has been agreed it will usually be a simple matter for the two parties to renew it annually unless significant changes are to be proposed. A brief mechanism for resolving alleged breaches of the MoU during the shooting year is also outlined. The guidance is based on current legislation.

Statutory arrangements continue to apply. Landlords' and tenants' statutory rights are unaffected. The guidance seeks simply to provide an effective framework whereby the potential for conflict on land used by different parties for sporting and agricultural purposes can be minimised.

Appendix A – Flow Chart Showing Procedure for Agreeing a New Memorandum of Understanding



Appendix B – Pro-Forma Record of Procedure

Step 1 – Initial Exploratory Discussions

- Date of informal discussions?

Step 2 – Agreeing a New MoU

- Date draft MoU sent to other party/ies?
- Copy on file?
- MoU agreed?
- Record of agreement on file?
- Decision to proceed to step 3?

Step 3 – Mediation

- Date mediator appointed?
- Record of appointment on file?
- Date(s) of mediated discussions?
- MoU agreed?
- Record of agreement on file?
- Decision to proceed to step 4?

Step 4 – Resolution

- Date of reference to legal resolution?
- Record of outcome on file?
- Date of reference to the BASC?
- Record of outcome on file?
- Date of reference to voluntary independent arbitration?
- Record of outcome on file?
- MoU reached?

Appendix C – Summary of the Main Relevant Legislative Provisions

Please note that this is an outline of the law relating to game and is intended to be used as a rough guide only. Before acting on any of the information given below you should consult the relevant legislation or seek independent legal advice.

What is game?

Game does not have a clear definition in Scots law but the term normally refers to wild birds and animals which are killed for sport and then eaten by humans. Game belongs to no-one until it is caught.

Species normally considered to fall within the definition of game are pheasants, partridges, black or red grouse, ptarmigan, wildfowl (most species of wild duck and geese), snipe, woodcock and hares. Deer will also be treated as falling within the definition of game for the purposes of this summary. Pigeons and rabbits are vermin and are not considered to be game.

What rights does a landowner have in respect of game?

A landowner has the right to kill and take game on their own land within the applicable season and the right to prevent others from doing so. A landowner only has the right to take game over his own land, and he is not entitled to follow game outside his own boundaries.

Can a landowner let sporting rights to a third party?

It is accepted in Scots law that the right to take or kill game can be leased to a third party. However, unlike leases of land, the lease may not be enforceable against a successor landowner. This means that if the land is sold, the lease may not be binding on the new owner.

It is possible for a landowner to grant the right to occupy land for agricultural purposes to one party (for example under a secure 1991 Act tenancy or a fixed term tenancy) and the right to take and kill game to another party.

Where there is a sporting lease in place, the relationship between the landlord and the sporting tenant will be governed by the terms of the lease.

What rights does an agricultural tenant have in respect of game?

An agricultural lease will usually include a reservation of sporting rights in favour of the landlord. However, even if the lease does not explicitly reserve the sporting rights, this is implied and the landlord still has the right to kill and take game. An agricultural tenant does not have the right to take and kill game unless that right is specifically granted.

Agricultural tenants are given limited rights under statute. An example is the right to kill rabbits (see below). Although an agricultural tenant does not have a general right to take game, the tenant does have the right to scare game off crops and take actions which reduce game provided that they fall within good husbandry, for example, clearing gorse (such actions must be fair and reasonable).

Where there is an agricultural tenant, the landlord should not take actions which are inconsistent with the rights of the agricultural tenant. The landlord should exercise his/her rights in the manner that was in the contemplation of the parties at the start of the agricultural lease, including the way in which sporting rights are exercised.

The agricultural tenant is also entitled to deal with vermin as he pleases (in so far as not protected by statute).

What is the nature of the relationship between a sporting tenant and an agricultural tenant?

The sporting tenant and agricultural tenant have different rights over the same area of land. However, there is no direct contractual relationship between a sporting tenant and agricultural tenant.

Under the law of delict, either party may be found to be liable for damage caused to the other by an unreasonable action (for example, if the sporting tenant introduced a large amount of game to the land which caused damage).

Who has the right to kill rabbits?

Rabbits do not fall within the definition of game.

At common law, both the landlord and the agricultural tenant have the right to kill rabbits. The Ground Game Act 1880 also grants the occupier of land (including an agricultural tenant) the right to kill rabbits and hares to protect crops.

Who has the right to kill deer?

Deer are here included in the definition of game. The landowner has the right to kill deer and this right would normally be reserved to a landlord where there is an agricultural lease in place. This right can also be let to a third party under a sporting lease.

The killing of deer is regulated by the Deer (Scotland) Act 1996. Section 26 allows the occupier (who may be an agricultural tenant) to kill deer in order to prevent damage to woodlands or agricultural production.

Deer, like other game, can only be killed in certain seasons. SNH has the power to authorise the killing of deer outside the usual season where the deer are causing damage to woodlands or agricultural production, and usually SNH does so each year through a general authorisation.

What rights of compensation does an agricultural tenant have in respect of game?

Section 52 of the Agricultural Holdings (Scotland) Act 1991 gives secure 1991 Act tenants the right to compensation where the tenant has sustained damage to his crops by game where the tenant does not have the right to take and kill the game causing the damage. This right only applies to damage caused by deer, pheasants, partridges, grouse and black game.

The tenant must have served notice on the landlord in accordance with section 52 and must give the landlord a reasonable opportunity to inspect the damage in place. The tenant will be entitled to compensation for the damage if it exceeds an amount of 12 pence per hectare. The tenant's right to compensation is against the landlord, not the sporting tenant though a landlord liable for compensation can in turn claim against their sporting tenant.

The statutory provision does not extend to ground game because the tenant has the right to deal with ground game under the Ground Game Act 1880.