

Negotiating Fulfilment of the Obligations of Landlords and Tenants

Recommended Guidance for Landlords and Tenants

published jointly by the
**National Farmers Union of Scotland
Scottish Land and Estates
Scottish Tenant Farmers Association**

in association with
The Scottish Government's Independent Adviser on Tenant Farming

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Introduction

Agricultural land is a finite resource. Ensuring that it is put to optimal productive use, which may include for woodland or environmental purposes, is a matter of considerable public interest which depends on there being associated with it the buildings and other fixed equipment required for this to happen. As long ago as 1947 the government set out in legislation (Agriculture Act 1947) basic “Rules of Good Estate Management” and “Rules of Good Husbandry” which emphasised the responsibilities of both parties to provide, improve, maintain and repair fixed equipment on the land.

The obligations of landlords and tenants are set down in law (1991 Act section 5 or in common law for pre 1949 leases where section 5 has not been imported) and in the lease itself (including any post lease agreements), but any system that depends on interpreting subjective words and expressions is open to dispute. One person’s repair is another’s renewal. What looks like fair wear and tear could be the result of irresponsible misuse. Finding a way through disagreements of interpretation should be a matter of common sense. Both parties have an interest in doing so. Yet all too often the lack of an established procedure for addressing such issues leads to indecision and delay, often continuing for many years with damaging consequences for individual tenanted farms and for Scottish agriculture.

The significance of this issue is widely recognised within the industry, and there is strong support from the NFUS, SLE and STFA for coordinated action to help resolve it. In the light of this the three bodies have decided to bring into immediate effect industry led guidance on an interim basis, and to keep this under review. The industry bodies believe that this guidance will provide a helpful model if the Scottish Parliament decides to take forward proposals in the Land Reform Bill 2015 for a code of practice on the obligations of landlords and tenants under a new Tenant Farming Commissioner.

Good Practice Principles

The guidance is underpinned by the following principles –

1. The landlord is obliged –
 - a. At the start of the tenancy to provide in a thorough state of repair such land, buildings and other fixed equipment as will enable the farm to be operated efficiently for the purposes for which it is let.
 - b. During the tenancy to effect such replacement or renewal of the land, buildings and other fixed equipment as may be rendered necessary by natural decay or fair wear and tear.
2. The tenant is obliged –
 - a. During the tenancy to maintain the land, buildings and other fixed equipment provided by the landlord in as good a state of repair (natural decay and fair wear and tear excepted) as they were in at the start of the lease.
 - b. During the tenancy to maintain any land, buildings and other fixed equipment provided, improved, replaced or renewed by the landlord after the start of the lease in the same condition (natural decay and fair wear and tear excepted) as when they were added.
3. The landlord and tenant are JOINTLY responsible for –
 - a. Establishing on a triennial basis a schedule of measures which they agree constitute fulfilment of their respective obligations for the next three years.
 - b. Agreeing a format for the schedule that they both consider is sufficiently unambiguous to suit their circumstances and needs.

- c. Ensuring that the agreed schedule is implemented in a timeous manner.
- d. Agreeing timeously any emergency additions to the schedule that may become necessary during the three year period (e.g. due to storm or accidental damage).
- e. Resolving any disputes relating to the schedule promptly, making use of mediation and/or binding arbitration where necessary.

(Note that obligation 1b transfers from the landlord to the tenant where a mutually agreed lease condition or post lease agreement to this effect is in force).

Basis of the Guidance

The guidance has no statutory basis and is built on an assumption of reason and reasonableness among all involved. It includes a separate procedure for retrospective catching up in situations where either or both parties have fallen behind with their obligations. Crucially given the inevitable subjectivity of decisions relating to obligations on the ground, it places considerable emphasis on the use of third party mediation, expert determination or arbitration in order to prevent destructive stalemates from arising. The guidance applies to 1991 Act tenancies and Limited Duration Tenancies.

The guidance assumes a typical agricultural lease where the landlord is responsible for replacing and renewing worn out assets and the tenant is responsible for keeping working assets in good order through effective maintenance and repair. In cases where there may be alternative arrangements agreed within the lease or through a post lease agreement (PLA), the guidance should be adapted to accord with whatever legal arrangement prevails.

The industry bodies recognise that a great many landlords and tenants have for generations agreed fulfilment of their respective obligations on the basis of entirely informal and sometimes relatively casual dialogue. This guidance is not intended to intervene in the working of such relationships where they exist, but if this guidance is not to be followed in its entirety then the two parties are advised to fully satisfy themselves, in writing if at all possible, that this is what they both wish to happen.

Procedure for Fulfilling Obligations Retrospectively

The guidance accommodates the possibility that in some situations the fulfilment of obligations may have been allowed to get out of date, and it recognises that on some tenanted farms a systematic approach may never have been taken to the issue. This may have resulted in a significant backlog of work, which in turn may lead to the potential for dispute as to the respective responsibilities of landlord and tenant for dealing with any dilapidations that have arisen.

The procedure for fulfilling obligations retrospectively is distinct from that for timeously fulfilling obligations going forward, although the two issues should normally be looked at together. This allows for the possibility that it may take longer to reach agreement on fulfilling obligations retrospectively, in which case the two parties can press on with agreeing and addressing obligations going forward while taking a bit more time to consider and resolve any difficult issues of a retrospective nature.

The main steps in the recommended procedure is summarised in appendix A and are as follows –

Step 1 – Initiating a Review of Obligations

The procedure should be initiated by either the landlord or the tenant through preliminary informal contact. The conversation should include an outline discussion of the main areas of obligation that may require to be updated retrospectively together with some exploration of each party's expectation

as to their responsibility to contribute. Where a significant backlog is involved the discussion should include some exploration of affordability and possible staging of any major expenditures.

Within one month of initial informal contact an on farm discussion should be convened unless both parties agree that this is not required. While attendance may often be delegated to professional intermediaries, it is important that both the landlord and tenant feel that if necessary the opportunity to discuss matters in person will be made available. The aim of the discussion is to fully explore and if possible resolve any issues of potential disagreement, so that a written proposal can then be prepared to the satisfaction of both parties.

Step 2 – Written Proposal

Within one month of the on farm discussion the initiating party should write formally to the other setting out clearly what is proposed for both the landlord and the tenant in order to bring obligations up to date. This should include an indication of timescales, noting where appropriate any extended timing that is proposed in order to help address affordability challenges. In some circumstances either the landlord or the tenant may offer to pay for part of the other's obligations in return for an appropriate adjustment to rent.

The most common area of difficulty is likely to be where wear and tear could have been exacerbated by a lack of maintenance, thereby potentially placing an unfair obligation on the landlord to replace or renew. In such circumstances the proposal should describe and fully justify how the obligation is to be paid for, and it might suggest a fair contribution from the tenant to replacing or renewing the item in question if a lack of maintenance is agreed to have been a contributory factor.

A copy of this joint industry guidance should be included with the written proposal to ensure that both parties follow the same procedure, and a careful note should be kept by both parties confirming that each step has been fulfilled (see appendix B). These notes may, by agreement, be subject to inspection by the Scottish Government's Independent Adviser on Tenant Farming at a later date (see below).

Step 3 – Written Response

Within one month of step 2 the receiving party should respond in writing either accepting the proposal or setting out in as much detail as possible any proposed changes. This may include suggested amendments and/or conditions, and where there are serious reservations these should be fully explained. If necessary a second on farm meeting should be convened to aid further discussion.

Step 4 – Revised Written Proposal

Within one month of receiving the written response the initiating party should send a revised written proposal to the other, addressing all points raised in the written response and amending the original proposal in a manner that seeks to resolve these to the mutual satisfaction of both parties.

Step 5 – Revised Written Response

In most cases the time allowed for steps 1, 2, 3 and 4 should be sufficient for amicable agreement to be reached. In a small number of situations the complexity of issues involved, and/or the nature of interpersonal relations, may require a more prolonged discussion. This should last no longer than the time required for a second iteration of steps 3 and 4, and it may be helpful to involve in the discussion a third party who is respected by both landlord and tenant.

Step 6 – Professional Mediation

In the rare cases where further discussions fail to produce agreement it is likely that professional mediation will be required, at shared cost. Step 6 should involve further discussion and revision as in steps 3 and 4, but facilitated through a professional mediator with a knowledge of the issues involved. The choice of mediator is crucial to success, and care should be taken to appoint someone in whom both parties have complete confidence. A number of firms of professional intermediaries offer services of this nature.

Step 7 – Resolution

In exceptional circumstances it may not be possible to reach agreement through negotiation. Both parties have an interest in avoiding (and a duty to avoid) the deterioration to land, buildings and other fixed assets that can occur when agreement about respective obligations cannot be reached and delays ensue. In order to avoid further delay step 7 therefore involves voluntary agreement to refer the disagreement to expert determination, or failing that binding arbitration at shared cost using a mutually agreed arbitrator.

Where even this cannot be agreed the industry bodies may be asked to nominate an arbitrator instead. It is incumbent on both parties to fully adhere to the decision of the arbitrator once reached.

Procedure for Fulfilling Obligations Going Forward

Responsibility for ensuring that obligations are fulfilled routinely and timeously is a shared one, falling on tenant and landlord jointly. An integrated programme of maintenance, repair, replacement and renewal is essential in order to ensure that the holding's productive capacity remains optimal. For this reason the procedure for fulfilling obligations going forward is built around a triennially devised schedule of measures that the two parties agree to undertake in partnership.

The main steps in the recommended procedure is summarised in appendix A and are as follows –

Step 1 – Initiating a Review of Obligations

The procedure should be initiated by either the landlord or the tenant through preliminary informal contact. The conversation should identify in broad terms all areas where action to fulfil obligations is likely to be required by either the landlord or the tenant during the next three years. In most cases this will be linked to a triennial rent review discussion.

Within one month of initial informal contact an on farm discussion should be convened unless both parties agree that this is not required. While attendance may often be delegated to professional intermediaries, it is important that both the landlord and tenant feel that if necessary the opportunity to discuss matters in person will be made available. The aim of the discussion is to fully explore and if possible resolve any issues of potential disagreement, so that a written proposal can then be prepared to the satisfaction of both parties.

Step 2 – Written Proposal

Within one month of the on farm discussion the initiating party should write formally to the other setting out clearly what is proposed for both the landlord and the tenant over the next three years in the form of a three year schedule. This should include an indication of timing, and where appropriate should signal options for further discussion (for example where a building requires to be renewed but

might be replaced with something more elaborate in return for an adjustment to rent). The schedule should be at a level of detail that avoids a risk of ambiguity.

In some cases the schedule may link individual obligations during the three year period to a longer term agreed framework if this exists – for example that the tenant repaint external timberwork at 10 year intervals or that the landlord replace fencing on a 25 year cycle. Where an obligation is likely to involve significant expenditure for either party it is important that the proposal is realistic about affordability. This may mean scheduling a particular obligation over a defined but extended period.

A copy of this joint industry guidance should be included with the written proposal to ensure that both parties follow the same procedure, and a careful note should be kept by both parties confirming that each step has been fulfilled (see appendix B). These notes may, by agreement, be subject to inspection by the Scottish Government's Independent Adviser on Tenant Farming at a later date (see below).

Step 3 – Written Response

Within one month of step 2 the receiving party should respond in writing either accepting the proposal or setting out in as much detail as possible any proposed changes. This may include suggested amendments and/or conditions, and where there are serious reservations these should be fully explained. If necessary a second on farm meeting should be convened to aid further discussion.

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Within one month of receiving the written response the initiating party should send a revised written proposal to the other, addressing all points raised in the written response and amending the original proposal in a manner that seeks to resolve these to the mutual satisfaction of both parties.

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In most cases the time allowed for steps 1, 2, 3 and 4 should be sufficient for amicable agreement to be reached. In a small number of situations the complexity of issues involved, and/or the nature of interpersonal relations, may require a more prolonged discussion. This should last no longer than the time required for a second iteration of steps 3 and 4, and it may be helpful to involve in the discussion a third party who is respected by both landlord and tenant.

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In the rare cases where further discussions fail to produce agreement it is likely that professional mediation will be required, at shared cost. Step 6 should involve further discussion and revision as in steps 3 and 4, but facilitated through a professional mediator with a knowledge of the issues involved. The choice of mediator is crucial to success, and care should be taken to appoint someone in whom both parties have complete confidence. A number of firms of professional intermediaries offer services of this nature.

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the disagreement to expert determination, or failing that binding arbitration at shared cost using a mutually agreed arbitrator.

Where even this cannot be agreed the industry bodies may be asked to nominate an arbitrator instead. It is incumbent on both parties to fully adhere to the decision of the arbitrator once reached.

Procedure for Fulfilling Emergency Obligations

As far as possible it will be simpler and more easily managed (not least in terms of budgeting) for all obligations to be fulfilled through a planned three year schedule. On occasions, however, there may be an emergency need to agree an additional obligation on one or both of the parties arising from an unexpected event (usually accidental or storm damage). In such cases it will normally be a simple matter to agree an amendment to the current three year schedule, but where this proves difficult the full procedure for obligations going forward (including mediation/arbitration if necessary) should be implemented as above.

Maintaining a Record of Procedure

The industry bodies are aware that under the terms of the Land Reform Bill 2015 there may in due course be established a position of Tenant Farming Commissioner with a remit to prepare codes of practice, including a code relating to negotiating fulfilment of the obligations of landlords and tenants. The industry bodies see their new guidance as potentially providing a basis for such a code, and they are anxious that it operates in an equivalent manner.

All landlords, tenants and professional intermediaries are therefore asked, while working to this guidance, to maintain a concise written record of key dates and associated notes for stages 1 – 7, 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.

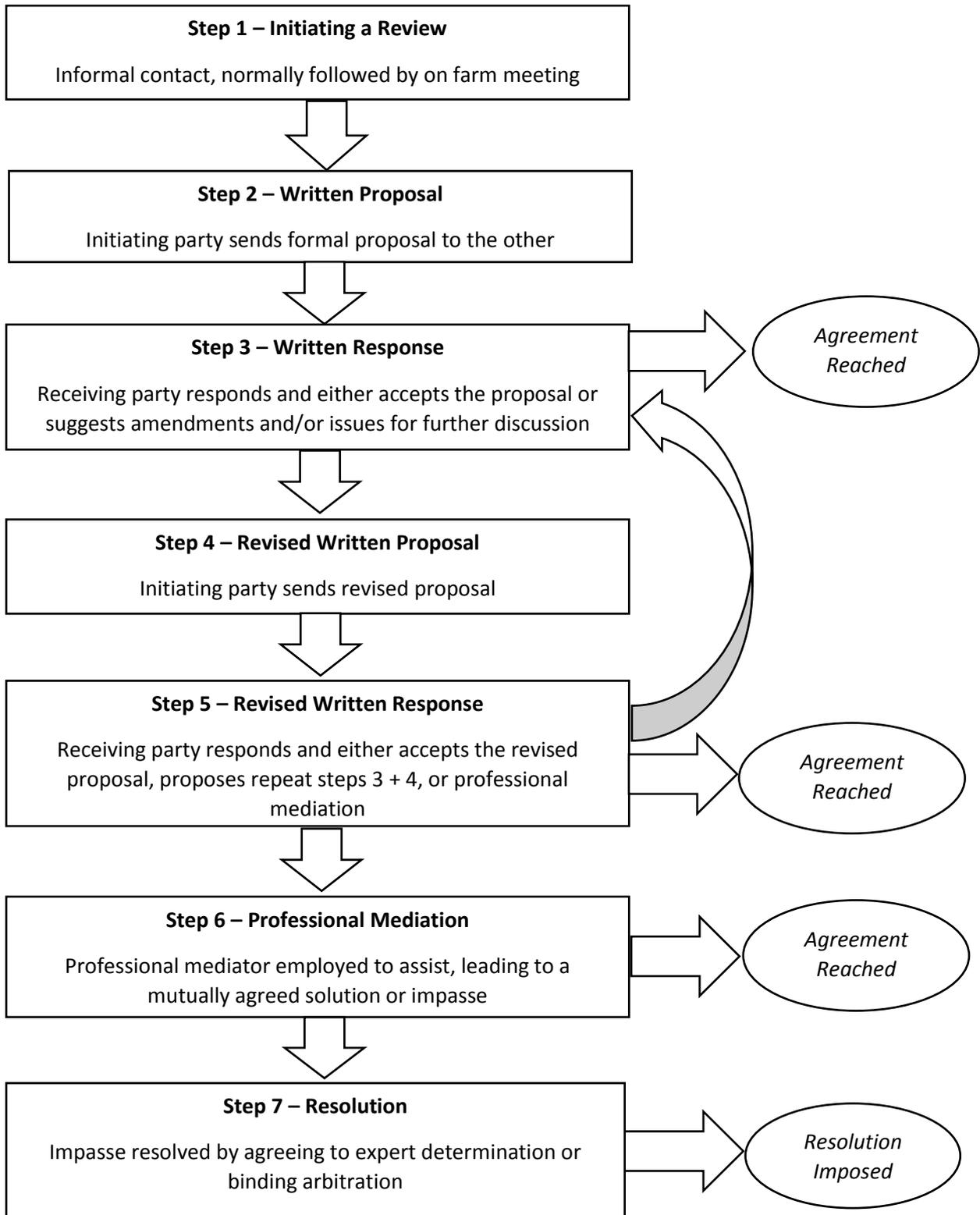
In Summary

NFUS, SLE and STFA are concerned about the risk of sub-optimal productivity on leased farms where the obligations of landlord and tenant are not being fulfilled on a timely and thorough basis. Recognising that the Land Reform Bill 2015 contains proposals for a code of practice designed to address this, the three organisations have decided to jointly issue interim industry led guidance as a precursor to any action that may in due course be taken by the Scottish Government.

The guidance separates out the matter of retrospective fulfilment of past obligations from that of ensuring a systematic and planned approach to fulfilling obligations going forward. In both circumstances it asks all landlords and tenants to follow a simple step by step procedure in order to ensure that obligations are brought up to date and then kept that way.

Statutory arrangements for non-fulfilment of obligations continue to apply. Landlords' and tenants' statutory rights are unaffected. The guidance seeks simply to provide robust encouragement and an effective framework in order to minimise any risk to the industry that may arise from the potential for uncertainty or conflict around landlords' and tenants' obligations.

Appendix A – Flow Chart Illustrating the Procedures for Fulfilling Obligations Retrospectively and for Fulfilling Obligations Going Forward



Appendix B– Pro-Forma Record of Procedure

Step 1 – Initiating the Review

- Date contact made?
- By who?
- Date of on farm meeting?
-

Step 2 – Written Proposal

- Date sent/received?
- Copy of written proposal attached or on file?
- Agreement reached and procedure completed?
- If not what action taken to ensure constructive further discussion?

Step 3 – Written Response

- Date sent/received?
- Copy of written response attached or on file?
- Agreement reached and procedure completed?
- If not what action taken to ensure constructive further discussion?

Step 4 – Revised Written Proposal

- Date sent/received?
- Copy of written proposal attached or on file?

Step 5 – Revised Written Response

- Date sent/received?
- Copy of written response attached or on file?
- Agreement reached and procedure completed?
- If not what action taken to repeat steps 3 and 4 or arrange professional mediation?

Step 6 – Professional Mediation

- Date and details of mediator agreed?
- Agreement reached and procedure completed?

Step 7 – Resolution

- Date of referral to expert determination or binding arbitration?
- Copy of resolution attached or on file?