

# **The Process of Succession and Assignment**

## **Recommended Guidance for Landlords and Tenants**

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

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

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(with minor revision dated 29<sup>th</sup> February 2016)**

**NB: Every care has been taken to ensure that this guidance accurately reflects the provisions of current legislation. It is essential, however, that users obtain independent legal advice relevant to their particular circumstances before deciding to implement any part of the procedures outlined.**

## Introduction

Current legislation enables the tenant's interest in a 1991 Act lease to be assigned during the tenant's lifetime to certain persons, or passed to certain successors on the tenant's death. In such circumstances the landlord has limited rights to object to the transfer of the tenant's interest, mainly on the grounds that the proposed new tenant is not a suitable tenant or does not have a right of succession as defined in law.

The legislation relating to the assignation and succession of 1991 Act tenancies is complex and dealt with in particular by sections 10A, 11 + 12 of the Agricultural Holdings (Scotland) Act 1991. These provisions are expected to change with the passage of the Land Reform (Scotland) Bill 2015 as regards who has a right of succession, and the arrangements for wider family and non-family assignation.

A number of submissions to the Agricultural Holdings Legislation Review Group (AHLRG) in 2014 highlighted the complexity that exists, and noted that the rights of a landlord or tenant can sometimes be in jeopardy if they do not have access to good advice. Having considered this the AHLRG recommended in its final report "an immediate and urgent need" for a Code of Practice on Enabling Succession and Assignation under the auspices of a new Tenant Farming Commissioner.

The Scottish Government has responded to this recommendation by including provision in the Land Reform (Scotland) Bill 2015 for a Code of Practice on The Process of Succession and Assignation. Recognising that this is unlikely to come into effect for some time, the NFUS, SLE and STFA have jointly decided to bring into immediate effect voluntary guidance under the same title which they believe may provide a helpful model for a Tenant Farming Commissioner to consider in due course.

This guidance applies only to 1991 Act tenancies. Assignation of Limited Duration Tenancies is covered by different legislative provisions, and while the good practice principles below remain relevant other aspects of the procedure may not be applicable. Two slightly different procedures are described, one for a lifetime assignation and one for succession on death.

## Good Practice Principles

The purpose of the guidance is to set out a sequential process which should be applied when a tenant wishes to assign the tenancy, or when a tenancy is transferred to a successor following the death of the tenant. Fundamental to this is the need for both parties to have access to good advice.

The industry bodies consider it **essential** that both the landlord and the tenant seek separate legal advice in connection with the assignation or succession of 1991 Act tenancies to ensure that they are clear as to their legal rights and what must be done to ensure that these rights are not lost. The guidance is intended to supplement, not replace, good legal advice.

With this in mind the guidance is underpinned by two important core principles –

1. Each party has a duty to remind the other of the importance of obtaining independent legal advice.
2. Each party has a duty to avoid misleading the other with respect to his or her legal rights.

Both the landlord and the tenant should ensure that the two principles set out above are adhered to at every step during the assignation/succession procedures.

## **Basis of the Guidance**

The guidance is built on an assumption of reason and reasonableness amongst all involved. It sets out a systematic process for the transfer of a tenancy which is based on the current legislative framework. The guidance indicates which stages of the process are legally required, and which stages are good practice recommended by the industry bodies.

## **Procedure for Lifetime Assignment of the Lease**

Under current legislation (section 10A of the 1991 Act) the tenant has a limited statutory right to assign the lease during his or her lifetime to anyone who would be entitled to succeed to his or her intestate estate under the Succession (Scotland) Act 1964. "Intestate" is the term which refers to a situation where the deceased has not made a valid will.

In effect the potential assignees are therefore currently restricted to the spouse or one of the next of kin of the tenant. This right is subject to the consent of the landlord who may object on reasonable grounds, in particular if the landlord is not satisfied as to the suitability of the proposed new tenant.

The main steps in the recommended procedure where a tenant wishes to assign the lease during his or her lifetime are summarised in appendix A and are as follows -

### Step 1 – Written Notice

It will usually be helpful if, in the first instance, an informal conversation takes place between the tenant and landlord about the reasons for the tenant wishing to assign the tenancy and any reservations that the landlord may have in the circumstances.

The tenant is then legally required to send the landlord formal notice in writing of his or her intention to assign the tenancy along with details of the proposed assignee, the terms upon which the assignment is to be made, and the date on which it is to take effect.

The written notice should provide the landlord with as much information as possible on which to base a judgement as to the suitability of the proposed assignee, and in particular should provide reassurance as to the incoming tenant's ability to (i) pay the rent that will be due, and (ii) properly manage and maintain the land in accordance with the rules of good husbandry.

### Step 2 – Landlord's Response

The landlord should respond to the tenant in writing within 30 days of the tenant giving notice, either consenting to the assignment or giving reasons for withholding consent in as much detail as possible.

The permissible grounds for withholding consent are contained in section 10A of the 1991 Act, and include that the proposed tenant would not have the ability to pay the rent or pay for maintenance of the land, or have the skills or experience to farm the land in accordance with the rules of good husbandry.

In legal terms if the landlord does not respond formally to the tenant within 30 days of the tenant giving notice then the landlord is deemed to have consented. However as a courtesy the landlord should always respond at this stage. Where a reply from the landlord is not received the tenant should, again as a courtesy, confirm to the landlord that consent is being assumed.

### Step 3 – Revised Written Notice

The tenant may accept that the landlord has reasonable grounds for objecting to the assignation. Alternatively, if the tenant still wishes to proceed with the assignation, the tenant is legally entitled to apply to the Land Court to determine whether the landlord's grounds for objection are reasonable.

Rather than make an application to the Land Court at this stage, the industry bodies recommend that the tenant should resubmit the written notice to the landlord, clarifying and setting out in more depth the reasons why the tenant considers that the proposed assignee is not precluded under the terms of section 10A of the 1991 Act. In particular the industry bodies recommend that the tenant should address all the reasons given by the landlord at step 2 for withholding consent.

### Step 4 – Revised Landlord's Response

If the tenant has resubmitted the notice to the landlord with clarification as above, the industry bodies recommend that the landlord should respond to the tenant in writing within 30 days either consenting to the clarified proposal or sustaining the withholding of consent.

If agreement cannot be reached at this stage the industry bodies encourage the landlord and tenant to jointly consider the options open to them to resolve the situation. Professional mediation (at shared cost) is the method that is recommended by the industry bodies at this stage.

### Step 5 – Professional Mediation

The process of mediation allows the landlord and tenant to work towards a resolution of the dispute with the assistance of a neutral person. It can be arranged quickly and will usually be less costly than other methods of dispute resolution. The outcome of mediation will usually be either that the landlord agrees to the assignation or that the landlord's grounds for objection are accepted by the tenant.

### Step 6 – Resolution

It may not be possible for the parties to reach agreement through mediation. In such cases the tenant may apply to the Land Court.

### **Procedure for Succession to the Lease on Death**

Under section 11 of the 1991 Act the tenant has a limited statutory right to bequeath the tenancy to his or her son/daughter-in-law or any one of the persons who would be, or would in any circumstances have been, entitled to succeed to the tenant's estate on intestacy under the Succession (Scotland) Act 1964. This statutory right does not override any provision in the lease prohibiting such a bequest.

It may sometimes be helpful if clear and mutually acceptable provision is made in the tenant's will for succession to the tenancy in order to minimise uncertainty and delay on death. Where a tenant has not made a valid bequest under section 11, or where the bequest has been declared null and void, the tenancy must be dealt with as intestate estate.

In such circumstances the executors must transfer the tenancy within one year. The lease can be transferred without the landlord's consent to a person who is entitled to succeed to the estate on intestacy under the Succession (Scotland) Act 1964 or claim legal rights or prior rights from the deceased's estate. This is a narrower class of people than those who can be passed a tenancy by

bequest. The lease can be transferred to a person outwith these categories with the landlord's consent. Pending transfer the executors are responsible for fulfilling the tenant's lease obligations.

Tenants should be aware that where the named successor of a deceased tenant in a bequest, or a successor under the intestate procedure, is not a "near relative" as defined in the legislation then the landlord will have the right to issue an incontestable notice to quit to that successor.

The main steps in the recommended procedure where a tenancy is succeeded to on death are summarised in appendix B and are as follows -

#### Step 1 – Written Notice

It will usually be helpful if, immediately following the tenant's death, an informal conversation takes place between the executors and the landlord in order to clarify the provisions of the tenant's will (if any) and any reservations that the landlord may have in the circumstances.

Where the executors transfer the tenancy according to the terms of a bequest then the legatee is legally required, within 21 days following the date of the tenant's death, to give the landlord formal notice that he has succeeded to the tenancy and the date on which this took effect. It is strongly recommended by the industry bodies that the notice is given in writing.

Where the executors transfer the tenancy as intestate estate then the transferee is legally required, within 21 days following the date of the transfer, to give the landlord formal notice that he has succeeded to the tenancy and the date on which this took effect. Again the industry bodies strongly recommend that the notice is given in writing.

The written notice should provide the landlord with as much information as possible on which to base a judgement as to the suitability of the proposed tenant, and in particular should provide assurance as to his or her ability to pay the rent that will be due and properly manage and maintain the land in accordance with the rules of good husbandry.

If the successor does not give valid notice to the landlord, the lease may be deemed to have terminated.

#### Step 2 – Landlord's Response

The landlord should respond in writing within one month of the proposed successor giving notice, either confirming the succession or objecting and giving reasons for doing so in as much detail as possible (usually focusing on experience, financial resources and/or the character of the successor). The landlord can object to the successor on any reasonable ground.

If the landlord does not respond formally within one month the landlord's right to object lapses. However as a courtesy the landlord should always respond at this stage. Where a reply from the landlord is not received the tenant should, again as a courtesy, confirm to the landlord that consent is being assumed.

#### Step 3 – Revised Written Notice

Where the landlord has issued a counter notice to a transfer by bequest, the legatee has a legal right to go to the Land Court and seek an order which confirms that the legatee has been the tenant from the deceased's death. On the other hand where the landlord has issued a counter notice in response

to a transfer under the intestate process, it is up to the landlord to apply to the Land Court to obtain an order to terminate the lease and establish that his or her grounds of objection are reasonable.

Rather than either party making an application to the Land Court at this stage, the industry bodies recommend that the proposed successor should respond by resubmitting the written notice to the landlord clarifying in more depth his or her suitability as a successor. In particular the revised written notice should carefully address all the reasons given by the landlord for objecting at step 2.

#### Step 4 – Revised Landlord’s Response

If the proposed successor has resubmitted the notice to the landlord with further clarification, the industry bodies recommend that the landlord should respond to the proposed successor in writing within one month either confirming the succession or sustaining the objection.

If agreement cannot be reached at this stage the industry bodies encourage the landlord and the proposed tenant to jointly consider the options open to them to resolve the situation. Professional mediation (at shared cost) is the method that is recommended by the industry bodies at this stage.

#### Step 5 – Professional Mediation

The process of mediation allows the landlord and proposed successor to work towards a resolution of the dispute with the assistance of a neutral person. It can be arranged quickly and will usually be less costly than other methods of dispute resolution. The outcome of mediation will usually be either that the landlord agrees to the proposed successor or that the landlord’s grounds for objection are accepted by the proposed successor.

#### Step 6 – Resolution

It may not be possible for the parties to reach agreement through mediation. In such cases the proposed successor (if the tenancy was transferred under a valid bequest) or the landlord (if the tenancy was transferred as intestate estate) may apply to the Land Court.

### **Maintaining a Record of Procedure**

The industry bodies are aware that under the terms of the Land Reform (Scotland) 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 the process of succession and assignation. 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 following this guidance, to maintain a concise written record of key dates and associated notes for stages 1 – 6, 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 C.

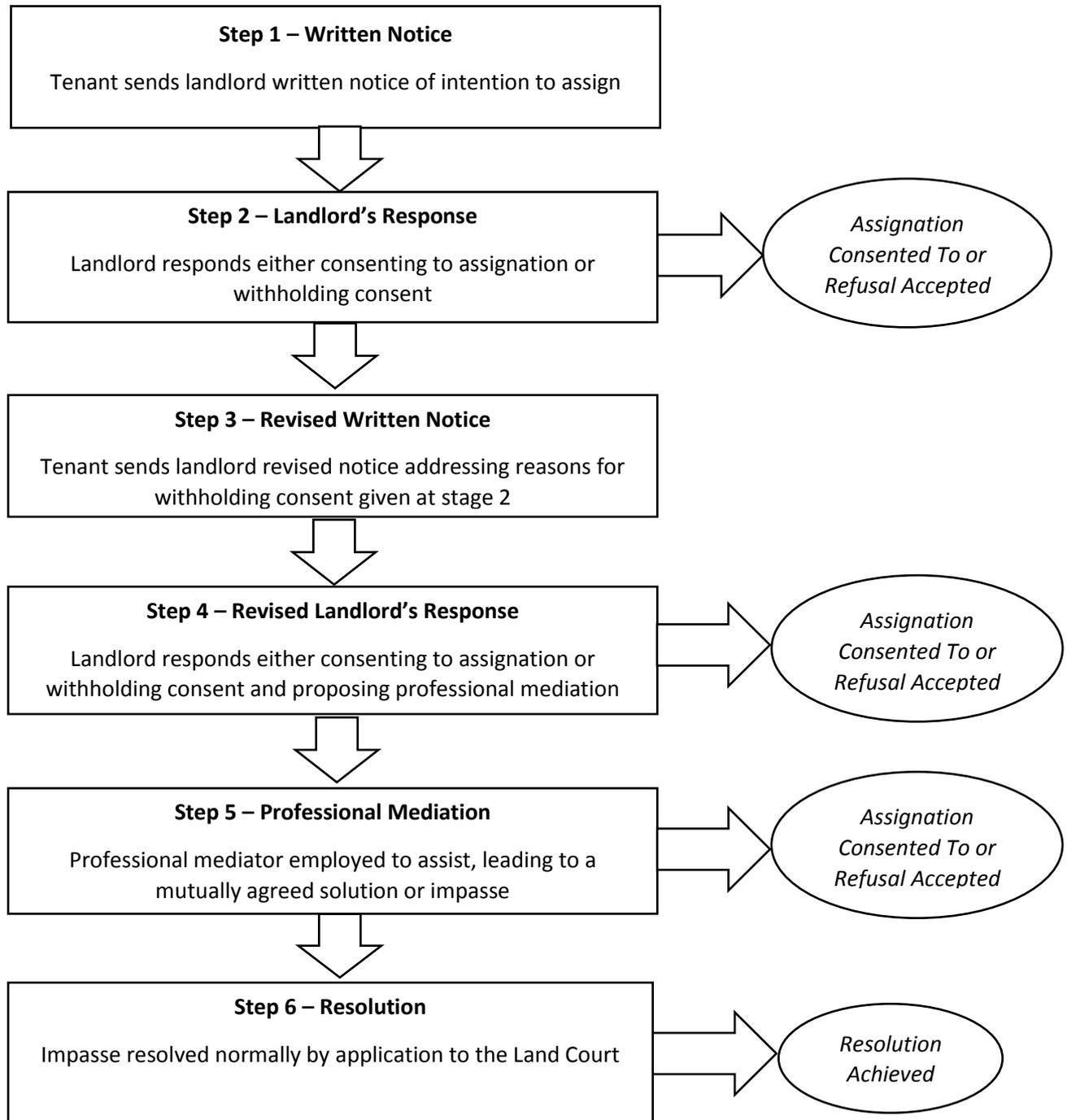
### **In Summary**

The guidance separates the matter of enabling lifetime assignation of a tenancy from that of ensuring a smooth succession to the tenancy on death. In both circumstances it asks all landlords and tenants

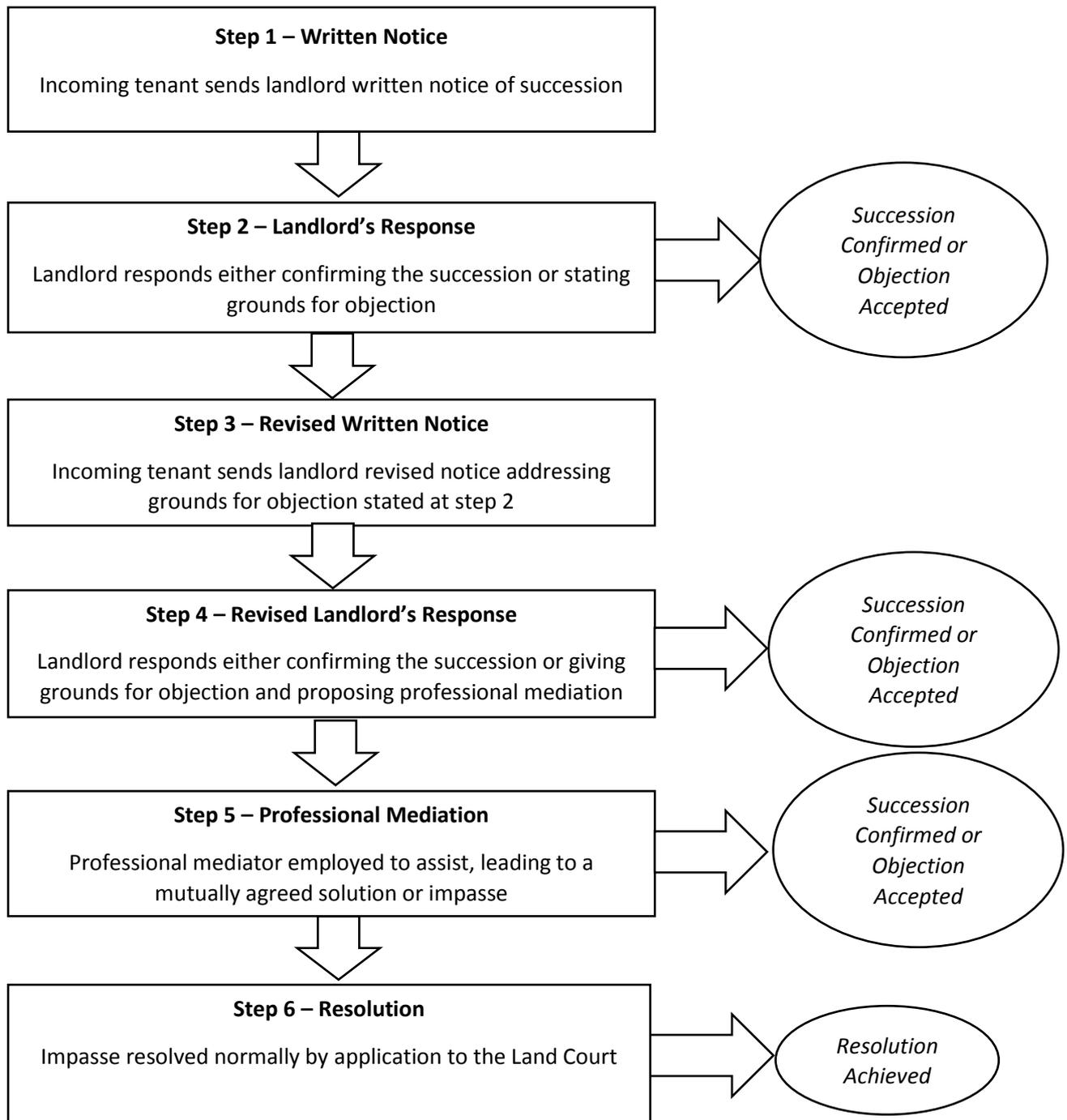
(including proposed successors) to follow a simple step by step procedure in order to ensure that both parties are able to pursue their reasonable aspirations in a fair and systematic manner.

Statutory arrangements for assignation and succession continue to apply. Landlords' and tenants' statutory rights are unaffected, and the **essential** importance of both obtaining independent legal advice is emphasised. The guidance seeks simply to provide robust encouragement and an effective framework in order to minimise any risk that the rights of either party might be put in jeopardy as a result of inadequate access to good advice and/or an overly hurried process.

**Appendix A - Procedure for Lifetime Assignment of the Lease (incorporating both the legislative framework and the voluntary recommendations of the industry bodies)**



**Appendix B - Procedure for Succession to the Lease on Death (incorporating both the legislative framework and the voluntary recommendations of the industry bodies)**



## **Appendix C – Pro-Forma Record of Procedure**

### Step 1 – Written Notice

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

### Step 2 – Landlord’s Response

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

### Step 3 – Revised Written Proposal

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

### Step 4 – Revised Landlord’s Response

- Date sent/received?
- Copy of revised landlord’s response attached or on file?
- Agreement reached and procedure completed?
- If not what action taken to agree and arrange professional mediation?

### Step 5 – Professional Mediation

- Date and details of mediator agreed?
- Agreement reached and procedure completed?
- If not what action ensure resolution?

### Step 7 – Resolution

- Date of application to the Land Court?
- Copy of resolution attached or on file?