



WELSH GOVERNMENT

**AGRICULTURAL TENANCY REFORM
CONSULTATION**

and

**CALL FOR EVIDENCE ON FARM
BUSINESS REPOSSESSIONS AND
MORTGAGE RESTRICTIONS OVER LET
LAND**

**Response by the
Agricultural Law Association
2 July 2019**



1.0 The Agricultural Law Association

1.1 Background

The Agricultural Law Association ('the ALA') was formed in 1976 and is the UK's largest inter-professional organisation devoted to the law and business of the countryside.

We focus on the law in a non-partisan, apolitical way in order to promote its knowledge, understanding and development among those who advise rural businesses.

The ALA comprises around 1450 members across the legal, surveying, accountancy, farm business consultancy professions together with academia and members with specific expertise in international trade and investment; with all principal professional firms and, uniquely, all other principal member organisations within the agriculture sector represented within the membership.

The ALA is a member of the Tenancy Reform Industry Group ('TRIG') and participated in the work of TRIG in 2017 and the working groups focussed on the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995.

The ALA is also a member of the following current sector cross organisation groups in the UK:

- Agricultural Representatives Bodies Group (Taxation)
- Scottish Land Commission – Tenant Farming Advisory Forum
- Land Partnerships Service – National Advisory Group

We are also the largest member association of the European Council of Rural Law.



1.2 Consultation Work by Members

This response is submitted on behalf of the ALA and its members and we look forward to working with the Welsh Government and other Government agencies and sector organisations on shaping the future policy for our sector.

Our responses to the specific Consultation proposals are framed with a general note as set out under 1.3 below.

1.3 The broader implications for the landlord tenant system

Whilst not unanimous across the ALA, members have warned that the Welsh Government should be very careful to avoid fundamentally changing the terms of existing contracts made between parties – effectively imposing retrospective legislation.

When this was done in respect of succession in 1976 it effectively deterred most landlords from granting any new tenancies at all.

Similarly, retrospective changes in Scotland have made letting unattractive with new lettings often granted for a limited duration. Landowners in Scotland therefore prefer to avoid granting a tenancy and will look to other land management arrangements.

The Landlord Tenant system in Wales has served the sector well, and the ATA is a useful and well-regarded tool which will be improved with the changes proposed in this Consultation and by TRIG.

We recognise that “bed blocking” is an issue in a limited number of holdings and agree that measures to address this might be helpful. However, we caution particularly that the proposal to make tenancies assignable will be seen by many landowners as a step too far.

There are other better options, particularly using fiscal incentives, which could secure the unblocking without damage to the supply of land to let.



Members have also expressed concern that legislative change to restrictions on changes of use by tenants (which could change the nature of the holding which was let to them on agreed terms) even if limited to changes that qualify for government support is also a fundamental issue. Such restrictions may have been made for very good reasons and if they restrict the rental value of the holding the landlord will bear the cost.

Some members have advised that, as with the proposal to make AHA tenancies assignable, this measure may have the unintended consequence of fundamentally affecting landowners willingness to let.

The suite of proposals in this Consultation must be considered 'in the round' i.e. what overall package, if legislative change is desired, will achieve the Government's objectives for the sector. Some of the proposals taken individually, without regard to wider implications, may act as an impediment to progress within the sector.

1.4 General References

Please note that the following abbreviations are used in our Response:

| | |
|------------------|---------------------------------|
| 'AHA' | Agricultural Holdings Act 1986 |
| 'ATA' | Agricultural Tenancies Act 1995 |
| 'TRIG' | Tenancy Reform Industry Group |
| 'ALA' | Agricultural Law Association |
| 'the Government' | Welsh Government |



2. SECTION ONE: PROPOSALS TO FACILITATE CHANGE

We note that the general policy aims of the Consultation proposals in this Section are to help facilitate structural change in the AHA sector and open up more opportunities for entrepreneurial next generation farmers with the appropriate skills.

Whilst we support the general policy aims, in consultation with our Members, it is clear that there is not a consensus of opinion for or against the proposals but that there is general note of caution against any legislative change that may unsettle the current legislative provisions of the sector.

2.1 Proposal for new provision for an assignable Agricultural Holdings Act (AHA) Tenancy

2.1.1 Proposal 1 sets out the proposed new provisions for an assignment. As a matter of technical analysis, should the Government bring forward legislation to put this proposal into effect, we have no objections to the general provisions that are set out on page 5 of the Consultation.

2.1.2 However, we are concerned with the timetable for the assignment (as set out on page 6) where the process is frozen following the service of a counter-notice by the Landlord.

For example, if the Tenant has served a trigger notice on 'day 1 month 1' and the Landlord then serves a counter-notice on 'day 60 month 2' i.e. within the two months permitted to serve such notice, this in effect leaves 4 months remaining of the 6 months within which the Tenant has to assign the tenancy following service of the trigger notice. If we then assume that no agreement has been reached between the Landlord and the Tenant within the 6 months proposed for the parties to agree terms (and presumably complete the 'buy-out'), this leaves only 4 months for the Tenant to agree and complete an assignment to a third party tenant. This may be too short a period, assuming that is, that the Tenant has not already started the marketing of his tenancy to potential third parties in parallel with negotiations with the Landlord.



- 2.1.3 In respect of the assignment of the year to year tenancy subject to the provision of a non-contestable notice to quit on or after 25 years has expired, we suggest that careful consideration is given to what, if any, Land Transfer Tax and Capital Gains Tax would be chargeable on that assignment
- 2.1.4 We agree that if Proposal 1 was adopted, the provisions set out in Proposal 1a would also be required.
- 2.1.5 With reference to the proposal to introduce a new Business Competence Test, that same test should apply to potential assignees.
- 2.1.6 As a general comment, it is important that any legislative change recognises the importance of business compatibility between the Landlord and a potential assignee (in addition to economic considerations) particularly as tenanted holdings could form part of larger landscape scale environmental measures. In recognising that the aim of any legislative change is to improve productivity, a business competence test should be the minimum indicator of suitability of an assignee.
- 2.1.7 With reference to a tenancy that has been assigned through arbitration of third-party determination, it would suggest that this may not recognise the issue of compatibility outlined above and is likely to be deleterious to both parties and therefore sub-optimal in its performance.

2.2 Proposals to change AHA succession rights

- 2.2.1 As a matter of principle, we would urge caution against an approach to legislative changes that adopt specific proposals in isolation. The approach to succession must be considered 'in the round' with the other proposals contained within this Consultation and the legislation as it is written in the AHA. Any changes to the current succession rules must seek to adopt the most appropriate package of rules to reflect the sector now and in the future; particularly as family structures are sometimes different than those that were reflected by the legislation when the AHA came into force and effect.



- 2.2.2 It is also considered by our Members that the general rules for succession on retirement should mirror those rules that apply on death (as they currently exist and as may be amended by any new provisions).
- 2.2.3 We agree that Proposal 2 to remove the minimum age of 65 for succession on retirement applications could assist in bringing forward succession planning.
- 2.2.4 We agree that Proposal 3 to remove succession rights when the tenant reaches 5 years past the state pension age could assist in bringing forward succession planning subject to such provisions being consistent with legislation on equality and age discrimination; the working assumption in the context of this response being that the Government has concluded that these provisions would satisfy those requirements but clarification is requested in the Government's response to the Consultation submissions..
- 2.2.5 We agree that if Proposal 3 were implemented, 8 years would be adequate time for succession planning following the enactment of the legislative change before it should take effect.
- 2.2.6 The removal of succession rights should occur on the retirement or death of the surviving joint tenant.

2.3 Council farm retirement tenancies (smallholdings)

- 2.3.1 We agree with Proposal 4 to amend the AHA so that council farm retirement notices to quit can only be issued when the tenant has reached current state pension age subject to a general proviso that this would meet with equality and age discrimination law.



2.4 Changing succession eligibility criteria

- 2.4.1 There is a general consensus of our Members that the Commercial Unit Test is outdated and general support for its removal as set out in Proposal 5 but this support is subject to the introduction of improvements to the suitability test and the introduction of a Business Competence test as set out under Proposal 6.
- 2.4.2 There is, however, a risk that the introduction of the Business Competence Test will introduce more uncertainty and litigation into the succession process. It may be helpful to stipulate certain conditions that, if satisfied, give rise to a rebuttable presumption that the test is passed. For example, a degree level or equivalent qualification in agriculture or land management or equivalent CPD programme.
- 2.4.3 Removal of the Commercial Unit Test and the introduction of a new Business Competence test must take effect on same date. We suggest that there should be an additional proviso for Tribunal applications that have already been lodged with the Tribunal to continue to be determined on a pre-legislative change basis i.e. the existing 'old' rules would continue to be applied to that application.

2.5 Modernising and extending succession rights

- 2.5.1 As a general principle, where the Consultation proposes changes to adopt provisions for cohabitation, we suggest that there should be an overriding minimum length of co-habitation and tests for ensuring that the co-habitation is legitimate ('reasonable period' to avoid abuse of system)
- 2.5.2 It is not clear how the Government will define co-habitation in this context and further proposals are required in this instance to properly evaluate how this would be approached in law and particularly in cases of dispute.
- 2.5.3 We agree with Proposal 7 to amend the definition of close relative so that children (or those treated as children) of cohabiting partners can apply to succeed to an AHA tenancy.



- 2.5.4 We agree that the proposal that a cohabiting partner of the tenant should be included in the definition of a close relative of the tenant so that they would also be eligible to apply to succeed to an AHA tenancy
- 2.5.5 In respect of Proposal 8 to extend the definition of close relative so that nieces and nephews of the tenant could apply to succeed to AHA holdings in future, there is no clear consensus from our Members that shows support for this proposal.
- 2.5.6 Furthermore, if the Government were to bring forward new provisions for assignment of an AHA (as set out in Proposal 1), we do not consider that Proposal 8 would be required.
- 2.5.7 This highlights a common issue that arises from the Consultation proposals. It is our view that the proposals focussed on AHA tenancies cannot be looked at in isolation. If the Government concludes that legislative change is required, industry stakeholders and the Government need to consider carefully the most appropriate changes as a collective package.
- 2.5.8 We agree with Proposal 8 to extend the definition of close relative so that grandchildren of the tenant could apply to succeed to AHA holdings in the future, strictly subject to the provisions of this proposal that limits the term of that occupation. For example, where the grandchild succeeds as a first succession there would be no further succession rights available for a second succession.
- 2.5.9 In respect of the implication of Proposals 7 and 8 for joint tenancies, clear guidance on whether and in what form the consent of a joint tenant is required for such applications from within a wider category of potential successor will be required to mitigate any unintended consequences on the relationship between joint tenants; for example there may be situations where a 'clear' succession situation is muddled by the introduction of additional potential successors.



3. SECTION TWO: PROPOSALS TO FACILITATE PRODUCTIVITY, INVESTMENT AND ENVIRONMENTAL IMPROVEMENTS

3.1 Restrictive clauses in AHA tenancy agreements

- 3.1.1 The experience of our Members is that this is not an issue in practice as the parties will often negotiate a suitable amendment to the agreement.
- 3.1.2 Whilst we acknowledge that such a provision may provide for a formal procedure where there is a lack of communication between the Landlord and Tenant, such a change may interfere with sound and reasonably commercial approaches between the parties that do take place where changes are required., we do recognise that there could be circumstances where this may be a positive change in the legislation where the relationship between a Landlord and Tenant does not provide for a platform for this agreement to take effect.
- 3.1.3 If the Government were to bring forward a new provision as set out under Proposal 9 we agree that a suitable dispute resolution process would be required.
- 3.1.4 In addition to the test of reasonableness set out in the Consultation, consideration must also pay due regard to the affect on the Landlord's freehold interest. In considering whether a variation is reasonable, it is also possible that a change in use of the Holding has wider implications for the Landlord's estate beyond the holding itself; the working assumption being that if a request to vary a restrictive clause requires dispute resolution, there may be issues of value for the Landlord as reasons for withholding consent.
- 3.1.5 We do not consider that restrictive clauses in Farm Business Tenancy agreements are a problem that needs to be addressed.

3.2 Removing barriers to landlord investment in AHA holdings

- 3.2.1 The proposal seeks to minimise/remove the risk of a landlord losing any return on investment through the next rent review. This could be a potential barrier, although evidence from our Members suggests that this does not commonly arise.



- 3.2.2 However, on balance, a new provision would provide for a more commercial arrangement between the parties with the Landlord acting as the funder and as such with some security on the return from that investment
- 3.2.3 If the Government wished to adopt such a change, it would do no harm but its effect on improving the productivity of the sector would be limited.
- 3.2.4 The mechanism for ring fencing the payment by the tenant of rent needs to be considered more fully with relevant stakeholders.

3.3 Introducing short notices to quit for new Farm Business Tenancies of ten years or more

- 3.3.1 The nature and intention of the ATA when it came into force was to revitalise a reducing tenanted sector. In the main, the legislation succeeded in that respect.
- 3.3.2 However, we recognise that in certain circumstances, the legislation does prevent consideration of longer terms where for example, the landlord's objectives are ultimately for an alternative use of the subject land in the future but with some uncertainty of the timescale for that alternative use.
- 3.3.3 Our members' experience is that this remains the principle circumstance where shorter term agreements of 2 years or less are adopted by the parties in order for the landlord to fulfil their obligations under say an option agreement for non-agricultural use.
- 3.3.4 However, we remain unconvinced that shorter notice provisions should only apply to agreements of ten years or longer. There may be other commercial reasons why the parties agree a shorter-term agreement but the issues of potential non-agricultural use still remain; hence a shorter term of 2 years or less being the preferred term of lease to accommodate that issue.
- 3.3.5 We therefore conclude that if shorter term notices are provided for under the ATA, that these should apply for any term of over 2 years.



3.3.6 Our members' experience in respect of forfeiture is that whilst this may appear a cumbersome arrangement, in practice the process works to achieve repossession of the holding in instances where, for example, the tenant has failed to meet its obligations to pay rent or has become insolvent.

3.3.7 With the stated policy aim of correcting a legislative disincentive and de-risking longer term agricultural lettings for landlords, we would not object to a change in legislation to provide for alternative means of terminating the tenancies; with forfeiture remaining an option for the landlord.

3.3.8 Our response to the Consultation under Proposal 11 is set out below:

| | Strongly agree | Agree | Don't know | Disagree | Strongly disagree |
|---|-----------------------|--------------|-------------------|-----------------|--------------------------|
| Death of the tenant | Y | | | | |
| Non-payment of rent by the tenant | Y | | | | |
| Landlord has planning permission to develop land on the holding for non-agricultural use | Y | | | | |

3.3.9 In consideration of other breaches that may be included, this is an area where further work by the TRIG would, in our view, assist the Government with any proposal to bring forward this change.

3.3.10 One additional instance where short notice provisions may prove helpful is in instances where the tenant has allowed unauthorised waste to be brought onto the holding.



There is some difficulty in the definition of instances of unauthorised waste coming onto the holding given the wide extent of fly-tipping in rural areas, but there are instances, however limited they may be in practice, where a tenant has been complicit in allowing waste to come onto the holding.

- 3.3.11 A thorough assessment by TRIG to consider other breaches that would benefit from short notice procedures should be undertaken for further consideration with the Government.
- 3.3.12 In addressing issues, principles and calculations that should be taken into account when considering the issue of compensating a tenant for any loss of land resulting from a notice to quit land that has planning permission for non-agricultural use, the terms of tenancies under the ATA are a matter for commercial negotiation between the parties to the agreement.

We do not consider that it is appropriate for the legislation to interfere with those commercial arrangements and we would not support a basis for statutory compensation beyond the current provisions of the ATA.

3.4 To enable the ALTW to take on additional functions

- 3.4.1 It is important that there are effective mechanisms available to resolve disputes in relation to tenancies but also that those mechanisms are cost-effective for both landlords and tenants.
- 3.4.2 The ALTW provides a valuable service in dispute resolution in this area and one of its advantages is that it does not charge fees for its services. This is in contrast to arbitrators who charge an hourly rate for their services, the costs of which are sometimes significant.
- 3.4.3 It is important that the ALTW has the necessary expertise on its panel to deal with the disputes under its jurisdiction and if its functions were extended due regard would have to be made to the expertise of those on its panel and the expertise needed recruited.



3.5 Procedural reforms to AHA succession law

3.5.1 Our response to the Consultation under Proposal 12 and additional technical comments are set out below:

| | Strongly agree | Agree | Don't know | Disagree | Strongly disagree |
|--|--------------------|-------|------------|----------|-------------------|
| Enabling agreed successions without an application to the Tribunal | see below comments | | | | |
| Removing technical obstacles to joint successions | see below comments | | | | |
| Clarifying the position for male widowers of a deceased tenant | Y | | | | |
| Improving the process between delayed Tribunal decisions and the operation of end of tenancy claims | Y | | | | |

Enabling agreed successions without an application to the Tribunal

3.5.2 Our working assumption is that this proposal is referencing s37(1)(b) enabling an agreed succession on death if the successor is the sole remaining *applicant for such a direction*. If it is saying they do not actually have to be an 'applicant', but just someone who would be, that, in our opinion, is sensible. However, that is not what this Proposal says; s37(2) enables agreed succession tenancies before death and expressly deems a tribunal direction under s.39 to have been made.



- 3.5.3 One issue with this deregulatory proposal is the protection of the rights of all potentially eligible close relatives. If, by agreement, the Landlord grants a succession tenancy following death to one of the children of the applicant, what happens to the right of the spouse or another child? Further consideration is required. Should a proviso that there is no undetermined succession application to the Tribunal at the time of the agreed grant, or that the succession tenant should have been expressly nominated by the deceased, be included?

Removing technical obstacles to joint successions

- 3.5.4 We are not convinced that joint succession tenancies “do not count” as such in the case of the agreed grant of a new joint tenancy by way of agreed succession (neither s37(4) and (5) of the AHA (nor s4(1)(d)/(2A) of the ATA)) appear to prohibit the ‘other’ joint tenant on a new tenancy from being the previous tenant).
- 3.5.5 The only occasion where this would be an issue is where there is an *assignment* of a pre- 12 July 1984 tenancy or a *variation* - a *Trustees of Saunders v Ralph* scenario or an implied surrender and regrant. However, a *new* joint tenancy could be a new AHA by way of ‘agreed succession’ under s4(1)(d) ATA and would not seem to fall foul of s37(8) as it is post 1984.

4. SECTION THREE: NON-LEGISLATIVE OPTIONS

- 4.1 We agree that the non-legislative options outlined in Section 3 should be considered as a way of delivering the policy aims of facilitating structural change and enabling productivity improvements in the tenanted sector.
- 4.2 Subject to the knowledge of those advising the parties to an agreement as well as the parties themselves, a change in culture in the way in which the parties approach the objectives for the management of the Holding, could have as much of an effect as a package of legislative changes; notwithstanding some useful legislative change to ease the operation of the law governing the tenanted sector.
- 4.3 Limitations in the productivity of the tenanted sector can arise where the parties do not understand each other’s objectives, particularly where the holding has been occupied by the same tenant or their family for a significant period of time.



- 4.4 A change in the approach to how parties deal with the Holding is required and, in our view, would assist in meeting the Government's objectives for the sector.
- 4.5 We suggest that TRIG is tasked with providing a framework for delivering the non-legislative options for further consideration with the Government.
- 4.6 There is a significant role (and need) for professional advisers to provide and facilitate discussions and strategies to assist with succession, retirement and/or restructuring as a standard business practice; optimising outcomes for all parties, and which are not conducted in a high-stress environment.

5. SECTION FOUR: CALL FOR EVIDENCE

5.1 Call for evidence on the impact of mortgage restrictions over let land

- 5.1.1 The general view of our Members is that it is appropriate that a mortgage lender should have an interest in the dealings in land and any agreement for third party occupation.
- 5.1.2 For example, any occupation or use of the land that could potentially lead to a reduction in the freehold asset value would have a direct impact on the mortgage lender's interest; where the security for lending was based on a different set of circumstances. For example, where the land was occupied by the owner at the time of the lending and approval of security and the owner since seeks to subsequently let the land to a third party.
- 5.1.3 Whilst our members suggest that issues with procedure or the time taken to obtain mortgage lender consent can sometimes frustrate the process of a letting, our Members do not consider the current restrictions to be a barrier.
- 5.1.4 We do not agree that consideration should be given to repealing section 31 of the ATA so that in future landowners can grant agricultural tenancies on mortgaged land without gaining prior consent from their mortgage lender.



5.2 Call for evidence on procedures relating to repossession of farm businesses.

- 5.2.1 Additional measures would compound artificiality in the lending market. If operational productivity is to be optimised across a business unit then competent financial management should be core to its success including the ability to service debts.
- 5.2.2 Subscription to voluntary codes of practice for lenders should be encouraged and awareness raising for both parties is important.
- 5.2.3 The ability for lenders and clients to engage in independent resolution is important in maintaining the free price discovery for access to capital.

6. LEGISLATION: THE AGRICULTURE BILL

- 6.1 In consideration of the proposals raised in this Consultation, we acknowledge that the draft Agriculture Bill (which incorporates transitional powers for Wales) has not, at the time of submitting this response, progressed beyond the House of Commons Committee Stage; with a date for the next stage (Report Stage and 3rd reading) in the Commons yet to be announced.
- 6.2 We note from the latest Notice of Amendments to the draft Agriculture Bill, amendments in respect of Financial Assistance ('Financial Assistance: agricultural tenancies (No.2)'), Agricultural Tenancy Reform and the definition of Agriculture ('Agriculture: definition and principles').
- 6.3 As part of this response, and as submitted in our response to the 'Brexit and our Land' consultation in 2018, specifically, the definition of 'Agriculture' takes many forms (as reviewed in a paper prepared by Luc Bodiguel and Michael Cardwell '*Evolving definitions of agriculture for an evolving agriculture*' published in 2005 in Conveyancer and Property Lawyer (ref: [2005] Conveyancer 419-445) which provided commentary on the wide ranging and varying definitions of agriculture in the UK and France).



- 6.4 As key examples of the need for clear definitions of key terms, the definition of Agriculture in the AHA and the definitions of Good Estate Management and Good Husbandry as found in the Agriculture Act 1947, do not include reference to environmental management.
- 6.5 We consider that consensus of definition is required across many areas of legislation to better define Agriculture to assist the farming sector and provide certainty on policy and the application of the principles in any proposed policy and to avoid unnecessary ambiguity.

7. TAXATION

- 7.1 In 2017, as part of the work undertaken by TRIG, a specific working party was tasked with considering what taxation measures may influence and support improvements in the tenanted sector.
- 7.2 We recognise that this Consultation has not specifically raised questions on taxation but taxation will have an impact on investment decisions and general land management strategy.
- 7.3 We therefore annex the final report of the TRIG Working Group on Taxation to this response and recommend that this is given further consideration by the Government and HM Treasury.

8. CONCLUSION

- 8.1 The introduction of significant additional legislative complexity to an already complicated landscape should be approached with caution.
- 8.2 If legislative change is desired by the Government, in our view any proposed change should:
- Seek to identify demonstrable productivity improvements at an industry level of scale before implementing change.



- Be considered in the broader policy context - particularly alongside the introduction of a new Agriculture Act (and any forthcoming Wales Agriculture Bill) and the 25 Year Environment Plan - what is the quantum of change the industry can successfully process at any one time and is it possible to fully measure the impact of any one policy if several are introduced over a relatively short time frame?
- 8.3 Although the Consultation relates to tenancy issues only, it is important to note that many landlords and new entrants are exploring other business structures and additional understanding/engagement on these will be important in improving the productivity within the sector.
- 8.4 With reference to the DEFRA consultation on agricultural tenancies running in parallel to this Consultation, there is concern, particularly in the case of cross border holdings, for different approaches to the AHA and ATA by the respective Governments.
- 8.5 We therefore urge the Welsh Government and DEFRA to consider carefully how any legislative change might be applied to avoid unnecessary divergence of approach to legislation governing the sector.

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