Consultation Response

AGRICULTURAL TENANCIES CONSULTATION

Department for Environment Food and Rural Affairs Consultation

Date: 2 July 2019

INTRODUCTION

The Country Land and Business Association (CLA) welcomes the opportunity to respond to this consultation exercise. The CLA has some 30,000 members in England and Wales engaged in all aspects of rural land ownership and the rural economy. Our members own or manage around half the rural land in England and Wales and more than 250 different types of businesses.

The CLA has consulted widely throughout the membership through workshops, digitally, and our extensive national committee structure and the county branch committees. The CLA acknowledges and appreciates the fact that DEFRA and the Welsh Government are looking at these issues simultaneously. It is hoped that any legislation that arises from these consultations will mirror each other so as to avoid any cross-border differences and difficulties.

There is general consensus that whilst some measures might be seen as positive, it is questionable as to whether this is a suitable moment to be making changes. The UK is on the cusp of possibly making huge changes to our markets and trading partners. It is a time of great uncertainty, when landlords and tenants need to be communicating and supporting each other, not fearing adverse effects of changes in the law.

In recent decades the industry has come together and devised ways to bring about reform with agreement, with a cross industry grouping since the 1970s which evolved into the Tenancy Reform Industry Group. This method has been shown to be hugely successful. It tackled the huge ramifications of the introduction of succession rights, that had come about in a last-minute bargain struck by Plaid Cymru, which were curtailed then in 1984.

The industry continued to work together and developed the legislation that provided the framework for the farm business tenancy, namely the Agricultural Tenancies Act 1995. This legislation has proved to be a huge success and confidence in the lettings market has grown steadily. Most recently TRIG was called to meet at the request of George Eustice MP, Minister at DEFRA and charged to look at possible areas of reform. There was an acknowledgement of the success of the ATA 1995 and the emphasis was on a desire to look at guidance and education to help parties get the best out of the legislation. By this point DEFRA had made it clear that consensus was no longer required and that proposals of ideas should be made to the Minister to choose from rather than the industry being allowed to devise and develop agreed solutions.

The consultation sets out the desired goals as being: -

- To provide an enabling environment for sustainable productivity improvements and investment;
- To facilitate structural change and support new entrants and next generation farmers so the sector has the skills and talent needed to thrive in the future; and
- To enable tenant farmers to access new agricultural and land management schemes.

These are laudable objectives but in reality, there is little in this consultation that is going to deliver the step change that the Government envisages. On the contrary, there is a risk of damaging the landlords' interest in the let land sector.

This consultation notes that productivity growth across UK agriculture averages only 0.9% a year – much lower than many other competitor nations. Members challenged this and questioned if increased productivity alone was a measure of success in a post-Brexit world. This is a particularly important question that required further exploration when you consider the emphasis placed on sustainability and delivering payment for public goods.

When the Government speaks of ensuring that the policy framework for agricultural tenancies is fit for the future, it is not possible to deliver this if changes are made to the Agricultural Holdings Act 1986 that will prolong its impact. That cannot be acceptable to landlords. Current forecasts show that AHAs will continue to be in existence at the turn of this century and beyond. No measures should be implemented now that would see an increase in the longevity of the AHA. The Government's focus should be to move the parties away from the inflexible and highly regulated AHA framework to a more market responsive farm business tenancy framework.

It should be remembered that a key distinction between the two types of agricultural tenancy is the method of calculation of rent and the difference that creates. Under the AHA the productive capacity of a holding suppresses the rent and this is further exacerbated by the minimal recognition of the value of the farmhouse/cottages to the tenant. The landlord has a high cost of maintenance for these farmhouses and cottages, which are mainly of traditional construction and not easy to modernise. The regulatory demands on landlords providing residential accommodation increase year on year.

This leads to a lack of investment by the landowner across the whole holding including the farmhouse and cottages. The low rent encourages an ageing farmer to not consider retirement, as in many cases it can be more expensive to rent a modest house in the village than a whole farm with a farmhouse. Change is needed to raise AHA rents into line with FBT rents in order to eliminate the disparity and encourage investment. It is a misperception to see rent as dead money for it is the rent that pays for future investment.

With FBTs in most cases the rent is assessed with reference to the open market rental value of holdings being let as FBTs. This demonstrates the true rental value of agricultural land. The AHA rent review process allows you to use comparables, but only those let on the same terms.

The most recently published statistics published by DEFRA state that in 2017 the average rent for an AHA tenancy was £170 per hectare and for an FBT was £227 per hectare. Whilst the AHA discount here is averaging as £57 per hectare, the discrepancy is greater for the landlord, as the AHA tenancy is more likely to include a farmhouse, for which there is minimal recognition in the rental formula.

Proposal 1
To enable an AHA tenant to assign their tenancy for payment to a new tenant.

This is the most contentious of the suggestions for reform and the least developed. It is unclear as to whether it would achieve the Government's objectives, whilst at the same time it bears the risk of damaging confidence across the whole let land sector. There needs to be much more thought given to this proposal before or if it is taken any further, as was stated by the CLA at the time of discussions within TRIG.

Such a mechanism could be used to circumvent the usual succession criteria or to enable lifestyle occupiers which would result in tenants that would not meet the DEFRA aspirations as set out in this consultation exercise.

The CLA is supportive of a mechanism that enables the ageing tenant to retire from an AHA tenancy and leave the holding. This, however, should not be done in a way that is to the landlord's disadvantage. There are considerable concerns within the membership over this suggestion. It is very unlikely that it will enable new entrants to move into the industry, when they are already facing the necessary expenditure for stocking and equipping a holding and then on top of that are required to find a premium. It is generating concern amongst members as the point of regaining control on the land is pushed back even further (potentially extending the AHA beyond 3 generations). This anxiety weakens confidence in the letting of agricultural land. The legacy of the 1986 Act still endures with landlords cautious of unwittingly granting long term security and thereby relinquishing control over what happens over their land for generations. This proposal does nothing to counter those fears.

The proposal is not sufficiently developed to give an idea of the valuation methodology that would identify the sum needed to be paid by a landlord to acquire the tenant's interest. This should only include the value of the existing tenancy subject to the life expectancy of the current tenant. It should not reflect the difference between the investment value of the vacant and the investment value of the let holding, nor any potential uplift in value because the tenancy may have gained assignment rights. In addition, the assessment of the premium to be paid by the incoming tenant to the outgoing will be based an as yet unknown market rent.

There are landlords managing estates who have been working towards a point when they can regain possession of a holding and incorporate that land into their plans for their whole estate. These plans often include and would benefit their more productive farming tenants. This is not unreasonable and may result in better more efficient, more environmentally friendly management of the holding – but ultimately it will be for the landowner to decide and his/her property rights should not be adversely affected. These interests need to be balanced and accommodated.

The risk is that a new tenant will take over, quite possibly a large farming enterprise, and will not take account of the bigger context for the landowner and the estate of which the holding forms part. For instance, the landowner may have plans to enhance the environmental value and/or farm it more efficiently. The assignee's objectives might be entirely contrary and damaging to these plans.

This creates an opportunity to consider whether the farmhouse is still required to be let with the holding. There needs to be a balance between what is required for the management of the holding and the wider objectives of the landowner.

Any dispute requiring resolution under this proposal should be referred to the First Tier Tribunal because of the long-term nature of the proposal.

There must be a guarantee with this proposal that the assigned tenancy would have the benefit of 100% APR in the same way as any new tenancy, whether an FBT or AHA, created from September 1995. TRIG determined that this was an integral part of the proposal.

Under this proposal, the payment of a premium for an assignment will mean that the incoming tenant will need to consider whether this will take them into the Stamp Duty Land Tax regime – a tax that the incoming tenant might have to pay. Assignment of the tenancy for a premium is the disposal of an interest in land by the tenant, for capital gains tax (CGT) purposes. The tenant will need to consider his/her liability for CGT and the availability of relief which will also mean incurring the costs of professional tax advice.

This is an opportune moment to simplify the stamp duty land tax (SDLT) position for farm tenants by excluding the grant, surrender or assignment of an agricultural tenancy from SDLT. In our view this would be a major simplification for those advising on agricultural tenancies, and will reduce the compliance costs for the parties concerned whilst having little impact on the revenue raising potential of SDLT. This is particularly relevant for tenants wishing to take on a longer-term farm tenancies of over 7 years as consideration will have to be given to any potential SDLT liability on the granting of such longer-term tenancies. The need to pay SDLT may act as a deterrent to tenants taking on longer term arrangements.

Proposal 1A
This sub-option would give the landlord the right to review suitability of the proposed new tenant.

The CLA sees this as an important step that would be essential to such a process.

The landlord/tenant relationship is extremely important and the thought of having an entirely new tenant imposed without any input from the landlord is extremely concerning to many members. Co-operation is essential for such a relationship to work particularly in the long-term context envisaged here.

In addition, this proposal needs to consider the landlord's interest not just the suitability of the potential tenant.

Proposal 2
To amend the 1986 Act by repealing section 51(3) to remove the minimum age of 65 for when succession on retirement applications can be made.

We strongly agree with the proposal to remove the minimum age of 65 for succession on retirement applications.

Proposal 3
To amend the 1986 Act to remove the right for close family relatives to apply to succeed to an AHA tenancy once the current tenant reaches five years past the state pension age.

We agree with the proposal to remove succession rights when the tenant reaches 5 years past the state pension age if not achievable sooner.

If eight years is required to allow sufficient time for planning then we strongly agree but would like to see it take effect as soon as possible.

Proposal 4 (County Farms)
To amend schedule 3 Case A of the 1986 Act so that a retirement notice to quit can only be served by a local authority landlord on a council farm tenant when they have reached the earliest age they can be in receipt of the state pension.

The CLA agrees with this proposal.

Proposal 5
To remove the commercial unit test.

The CLA opposes this measure. It was quickly evident at the time of introduction in 1976 that the consequences of the succession provisions of the AHA were extremely damaging to the rental market of agricultural land. Having been created in 1976 they were eliminated as a default in new tenancies created from July 1984. From the outset, one of the few restrictions on being able to establish a right of succession was (in simple terms) that if you already occupied a commercial unit you would not be entitled to an AHA on the advantageous terms it bequeaths. To remove this test is disadvantageous to the AHA landlords and would unfairly impact on their property rights. If anything, measures should be taken to ensure the test is up to date and effective. The criteria should be re-examined as to whether it should be the wages of one rather than two agricultural workers and whether the test should be applied to both the existing tenant and any potential successors to ensure the test is not open to abuse.

It is disingenuous to argue that the commercial unit test is incompatible with the policy objectives of improving farming productivity by encouraging the transfer of land into the hands of skilled commercial farmers. What it is doing is allowing the next generation of farmer to continue with the same advantageous terms that are not available to a wider pool – it is only theirs by reason of their birth. It is not for the landowner to supply land to an agricultural business at a discounted rate to those who already run commercial agricultural businesses. Even at the introduction of succession rights it was recognised this was a benefit that should not be available to those sufficiently well-established on other land. This runs counter to the expressed aim of wanting to encourage new entrants into the industry.

It is still the case that strong applicants will be able to negotiate for an FBT and will have an advantage over outsiders. The evidence is that by far the majority of land that has been let on AHAs will be relet once it has come back to the landowner.

Proposal 6
To replace the current 'Suitability Test' provisions with a new Business Competence Test. This is aimed at ensuring that suitable skills are held by the next generation of tenant.

This is to be strongly welcomed but it will not change the fact that the pool of potential applicants is very small and limited to family ties – perhaps not the best basis for a modern agricultural industry.

The CLA agrees that if this proposal is taken up it would be appropriate to have a period of three years' notice before it would take effect.

Modernising and extending succession rights.

Proposal 7
To amend the definition of close relative so that the children of cohabiting partners can apply to succeed to an AHA tenancy.

The CLA is neutral on this – reflecting the mixed views of the membership and not wishing to prolong the lifetime of the AHA in any way. There is always the prospect of an FBT being available.

To include a cohabiting partner of a tenant in the definition of a close relative. The consultation paper states this partner would still need to satisfy the livelihood test which requires that the applicant has derived his/her income from work on the holding for 5 out of the previous 7 years. The CLA agrees with this proposal on the proviso that the cohabiting partner is not given the status of spouse or civil partner and thereby does not benefit from section 36(4) AHA 1986. The applicant will also then need to satisfy the 'business competence test'.

Proposal 8
To extend the definition of close relative to include nieces and nephews and grandchildren.

This might be acceptable when looking at the children of joint tenants, when occasionally a child will be ruled out if their parent dies before succession is sorted out, but not beyond that small number. The child whose parent has died out of turn would need to already be a potential successor at the time of that death and the subsequent uncle/aunt's death. The CLA strongly disagrees to any further widening of the pool of potential applicants.

There are AHA landlords waiting to take control of their land at the earliest possible moment – there are a multitude of reasons why and what they will do, but these will be a combination of developing economic benefit in conjunction with improving the agricultural output and environmental gains.

To extend the number of potential applicants is to interfere with the landlord's property rights adversely. This will not attract new entrants into the industry but will enhance the existing tenanted sector's grip on the available agricultural land.

Section 2: Proposals to facilitate productivity, investment and environmental improvements.

Proposal 9
To create a new provision in the 1986 Act to enable either party to have an issue over a clause in the tenancy restricting an activity referred to dispute resolution.

We have serious concerns about this proposal. There is no real reciprocity here nor a recognition that there was a point when the parties intentionally entered into a contract on these terms. This is not something that came about by chance. It is also the case with succession tenancies that the parties have an opportunity to revisit the terms of the tenancy at that point in time. Every tenant has agreed the terms of the tenancy that they currently hold.

There is no guarantee that the following criteria will ensure that the interests of the landlord are sufficiently protected. The questions posed are: -

- Will the variation enable the full and efficient farming of the holding and /or improve agricultural productivity? or
- Will it secure environmental improvements? or
- Will it enable access to agricultural funding schemes and environmental land management schemes? and
- Will not significantly alter or damage the character of the holding?

Another category that will protect the tax position of the landowner is needed here, to ensure the tenancy remains with the definition of agriculture for capital taxation, planning regulation and non-domestic rates. There should be recognition that this mechanism should not be used to lift any non-alienation clauses, also the need to consider long term interest as opposed to short term benefit of complying with a new scheme or marketing opportunity.

To extend this to include farm business tenancies would further undermine the law of contract. It is argued by some that FBTs are generally short term which means such a measure is unwarranted and should go no further. The CLA suggests that DEFRA does not consider extending this to restrictive covenants in FBTs.

Proposal 10

The CLA strongly agrees with the proposal to exclude the landlord's return on investment from rent review considerations.

Proposal 11
Introduction of short notices to quit for new FBTs of 10 years or more.

The CLA strongly agrees with this proposal. But it is likely to be more effective in encouraging longer tenancies if it includes all tenancies longer than 2 years.

It should also apply to a 'material' breach of covenant and insolvency of the tenant.

There are other hurdles that will deter a tenant from entering into a longer-term tenancy that could be addressed in this process.

Letting land for more than 7 years requires registration of the lease with HM Land Registry, which is the responsibility of the tenant. This is an additional unnecessary burden to be borne by tenants which will therefore require them to use the services of a solicitor and significantly increase the cost of negotiating the lease. Failure to do so within two months of completing the tenancy agreement will mean that the legal estate in the lease will not pass to the tenant who will be treated as only having an equitable interest until registration and only takes effect as an agreement for a tenancy. The tenant will also need to consider whether SDLT is payable and complete the relevant paperwork.

Looking just at the initial term of a tenancy is oversimplistic as many tenancies will then evolve into annual periodic tenancies and continue for some years thereafter.

Compensation should be payable when notice is less than twelve months in addition to the usual crop loss payments. The rules for compensation under the 1986 Act were devised to recognise the average time it would take to find a replacement for the land lost. Nowadays there is greater availability of land and thus the need for compensation is diminished except where the annual cropping cycle is interrupted mid-season.

Section 3: procedural reforms – updating and improving the operation of AHA tenancy law.

Proposal 12
To amend section 12 of the 1986 Act to remove the requirement that a third party expert has to be appointed twelve months ahead of the rent review date.

The CLA strongly agrees.

Proposal 13
To update the Agricultural Holdings (Fees) Regulations increasing the prescribed fee that RICS can charge for the service of appointing an arbitrator or person to make records under the 1986 Act to £195 and to ensure there is a review every five years to ensure the fee can be updated when necessary.

The CLA agrees but it is important that this service is monitored and improved where possible.

Proposal 14
To facilitate procedural reforms recommended to improve the operation of the 1986 Act succession provisions.

These are uncontroversial and are seen favourably by the CLA.

Section 4: non legislative options

Retirement/succession planning

These measures could prove more fruitful than any legislative reform and the CLA would like to assist in the development of such resources.

Restrictive Clauses

Negotiation and constructive work between landlords and tenants are far more likely to bring about enduring change that works for both parties.

Longer term FBTs

Again education, guidance and information will assist in the building of confidence of both parties leading to longer term arrangements.

Particularly now in a time of uncertainty and insecurity non legislative measures are more likely to bring about positive changes with all parties having confidence that they have chosen the right solution for their situation rather than having change imposed on them.

Section 5: call for evidence.

This is a call for evidence on the impact of mortgage restrictions over let land.

This is not a subject we have any particular expertise on.

MEMBER RESPONSES

A Classic summary from a member: -

- We have 3 AHA tenancies on our Estate in England. 2 are now in combination with 2 FBTs as the farms are well managed and we were happy to support the farmers' efforts to expand and benefit from various economies of scale.
- The 3rd is a sole AHA. The tenant is a very nice man, unmarried, in his mid-60s and living in a 3 bedroom house, he is first succession following his father who died over 30 years ago. He gets more in BPS than he pays in rent and owing to his personal circumstances has very few outgoings and a free house to live in. The farm is extremely unproductive and poorly maintained. Arable fields have been grassed over and the farm is significantly under-grazed – there are long periods of the year where no livestock are evident. Thistles and nettles are plentiful across many of the fields and many fences are in bad order.
- I am keen to unblock the farm and would be happy to bring in a new tenant or more likely work with a young innovative farmer to revive the farm on a contract farming or shared farming basis – either way a more commercial agreement where both sides are motivated to invest time and money to improve productivity.
- In general I am more in favour of shared farming/contract farming agreements as it seems to me that they are more likely to promote investment which over time should improve productivity.
- I do not completely follow the argument that tenants need long term security as those that do a good job and work well with their landlord should be well looked after (lower rent/more partnership) and it is in the landlords interest to invest in developing the farming business – it is they that are more likely to have access to capital for investment. In my experience many AHA farms are hindered by protections given to long standing and possibly less able farmers that are protected from the normal realities of business by AHA rules. I therefore strongly disagree with any proposals to expand the succession rights and reduce further a landlord's rights to enter into sensible commercial farming agreements as flexibly as possible.
- I am in favour of any measures that might help older farmers move on/retire as I am also a big supporter of trying to help new entrants and young farmers enter the industry. Obviously these measures need to be designed to enable retirement with good grace.

Comments from another member: -

It is a common belief that all tenants are impoverished, trapped and down trodden!

At ………. , of the 5 tenants who have retired since 1993 all bar 1 had their own family landholdings two of which would be valued at between £5m to £10m.
Of the current 7 AHA tenants all of them either own or their family own land and property themselves outside the holding they rent from us.

One has bought a number of parcels of land in the last 10 years or so and has at least twice set the record value for land in the district at £14,000 and £17,000 per acre.

One has his own gin business.

Four have or have had their children at private school.

The joint tenants of one of the holdings are a father of 95 years old and his son c 65. The 65 year old is a photographer and hasn't 'actively' farmed himself for c 30 years. The holding is farmed by another son, c 65, who has the tenancy on a further 450 acres.

One of the holdings, 200 acres, is farmed by the son of the tenant who milks c 750 cows on this holding and via FBTs and contract farming arrangements.

The legislation granting succession rights to tenants resulted in the landlord being unable to arrange his or her business as they wished. This could have been in respect of commercial or indeed tax aspects.

In addition, whilst the original tenant was obviously found to be suitable it didn't necessarily follow that their successors were. Moreover, they may not have had the same attitude to the landlord tenant relationship that the original tenant did.

As an example, we took a 240 acre farm back in hand in 1996 when the second successor, third tenant, died. Apart from a small amount of FYM which was spread on a two acre field the only fertiliser used on the whole holding each year was 7 tonnes of nitrogen. Consequently, almost all the soil indices were 0 or 1 and it took several years to re-establish them to acceptable levels. The farm was basically in the same state as it was in the 1930s when the family first took it on.

If it is found that more tenancies need to be provided isn't it more equitable that the burden should be borne by those landowners who don't currently provide tenancies? Those who currently provide AHAs have after all had their businesses compromised for the last two generations.

Furthermore, if the State requires tenant's rights to be extended at the expense of the private landowner it follows that such provision should be awarded charitable status.

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DEFRA has had the benefit of hearing the observations of members who attended the DEFRA workshop at the CLA office in Belgrave Square. We understand these comments have been noted and logged as part of the consultation exercise.

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