



Department  
for Environment  
Food & Rural Affairs

# **Agricultural tenancy consultation and call for evidence on mortgage restrictions and repossession protections for agricultural land in England**

**April 2019**



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Any enquiries regarding this publication should be sent to us at:

[agriculturaltenancies@defra.gov.uk](mailto:agriculturaltenancies@defra.gov.uk)

[www.gov.uk/defra](http://www.gov.uk/defra)

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# 1. Purpose of this consultation and call for evidence

1.1 We are seeking views on options for reform of agricultural tenancy law in England which could remove barriers to productivity improvements and facilitate structural change in the tenant farming sector. We are also calling for evidence and views on two matters:

- whether current restrictions on agricultural mortgages are a barrier to landowners wishing to let land; and
- whether there is a need to provide additional protections against the repossession of agricultural land for farm business borrowers who are unable to meet finance repayments under secured loans.

## 2. The consultation process and how to respond

### Who will be affected by these proposals?

2.1 This consultation on proposals for tenancy reform in England is directed at tenant farmers, agricultural landlords and the professions who advise them, including agricultural valuers, surveyors, lawyers, arbitrators and tenancy dispute resolution experts. The call for evidence questions are directed at farm businesses, agricultural landowners, professional advisors and financial organisations (banks and lenders) with interests in agricultural land.

### How to respond

2.2 The consultation period will commence on **9 April 2019** and will be open for responses for a period of 12 weeks. **The consultation period will close at midnight on 2 of July 2019.** We have asked you a number of specific questions throughout this document. If you have any other views on the subject of this consultation and call for evidence, which have not been addressed, you are welcome to provide us with these views in your response.

2.3 You can respond using the online survey here <https://consult.defra.gov.uk/ahdb-mentorship-and-agricultural-tenancies/agricultural-tenancy-consultation>. Or written responses can be emailed to [agriculturaltenancies@defra.gov.uk](mailto:agriculturaltenancies@defra.gov.uk) or posted to:

Defra

Agricultural Tenancies, Innovation, Productivity and Science Team  
Second Floor, Seacole Block  
2 Marsham Street  
London  
SW1P 4DF

## Confidentiality and data protection

- 2.4 A summary of responses to this consultation will be published on the government website at: [www.gov.uk/defra](http://www.gov.uk/defra). An annex to the consultation summary will list all organisations that responded **but will not include** personal names, addresses or other contact details.
- 2.5 Defra may publish the content of your response to this consultation to make it available to the public without your personal name and private contact details (e.g. home address, email address, etc.).
- 2.6 If you click on **‘Yes’** in response to the question asking if you would like anything in your response to be kept confidential, you are asked to state clearly what information you would like to be kept as confidential and explain your reasons for confidentiality. The reason for this is that information in responses to this consultation may be subject to release to the public or other parties in accordance with the access to information law (these are primarily the Environmental Information Regulations 2004 (EIRs), the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 2018 (DPA)). We have obligations, mainly under the EIRs, FOIA and DPA, to disclose information to particular recipients or to the public in certain circumstances. In view of this, your explanation of your reasons for requesting confidentiality for all or part of your response would help us balance these obligations for disclosure against any obligation of confidentiality. If we receive a request for the information that you have provided in your response to this consultation, we will take full account of your reasons for requesting confidentiality of your response, but we cannot guarantee that confidentiality can be maintained in all circumstances.
- 2.7 If you click on **‘No’** in response to the question asking if you would like anything in your response to be kept confidential, we will be able to release the content of your response to the public, but we won’t make your personal name and private contact details publicly available.
- 2.8 There may be occasions when Defra will share the information you provide in response to the consultation, including any personal data with external analysts. This is for the purposes of consultation response analysis and provision of a report of the summary of responses only.

2.9 This consultation is being conducted in line with the Cabinet Office “Consultation Principles” and be found at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

2.10 If you have any comments or complaints about the consultation process, please address them to:

Consultation Co-ordinator  
1C  
1<sup>st</sup> Floor, Nobel House  
17 Smith Square,  
London, SW1P 3JR.

Or email: [consultation.coordinator@defra.gsi.gov.uk](mailto:consultation.coordinator@defra.gsi.gov.uk)

## Confidentiality and questions about you

**1. Would you like your response to be confidential?**

- Yes
- No

**If you answered ‘Yes’ to this question please state what information you would like to be kept as confidential and explain your reasons for confidentiality.**

**2. What is your name?**

**3. What is your email address?**

**4. Please tell us who you are responding as, selecting from the following:**

- Tenant farmer
- Agricultural landlord
- Farmer (owner-occupier) / landowner
- Professional adviser (e.g. land agent, surveyor, lawyer etc.)
- Bank or financial institution
- Local Authority
- Industry trade body
- Non-governmental organisation/community organisation
- Academic / educational organisation / student
- Individual
- Other

**If responding for a business, trade body or other organisation please provide the name of the organisation you are responding for.**

**5. If you have an agricultural tenancy agreement or agreements what are they, please select from the following?**

- Agricultural Holdings Act agreement (AHA)
- Farm Business Tenancy agreement (FBT)
- Seasonal agreement of less than one year
- Grazing license
- Oral agreement
- Other
- I don't have an agreement
- Don't know

**6. Please indicate which location your response relates to, selecting from the following:**

- East of England
- South East
- South West
- East Midlands
- West Midlands
- North West
- Yorkshire and the Humber
- England
- Other (please state where)

**7. What is your age category?**

- Under 18
- 18-35
- 36-55
- 56-65
- 66-75
- Over 75

## 3. Introduction

### Background on agricultural tenancies

3.1 In England around a third of agricultural land is rented. Table 1 shows the numbers of holdings and area of land farmed under different types of tenure in England.

Table 1: Number of holdings and area by farm tenure type, England June 2017

	Number of holdings	% of holdings*	% of area
Wholly tenanted	14,000	13%	15%
Mixed tenure	36,000	34%	50%
Owner occupied	54,000	51%	35%

\* It is not possible to classify all farms.

Source: Defra, June Survey 2017

3.2 The opportunity to rent agricultural land offers a means of entry into farming for people with no family connections to land or insufficient capital to buy land, and it enables established farmers to grow in a flexible way by adding parcels of rented land to their business. It also offers landowners who may not want to farm all or part of their land themselves flexible opportunities to let land to suit their circumstances. This flexibility is a key part of the industry's ability to respond to changing markets and economics.

3.3 The relationship between landlords and tenants of agricultural tenancies is governed partly by the terms of their individual tenancy agreements, and partly by the framework of agricultural tenancy legislation. The two main pieces of legislation governing agricultural tenancies are:

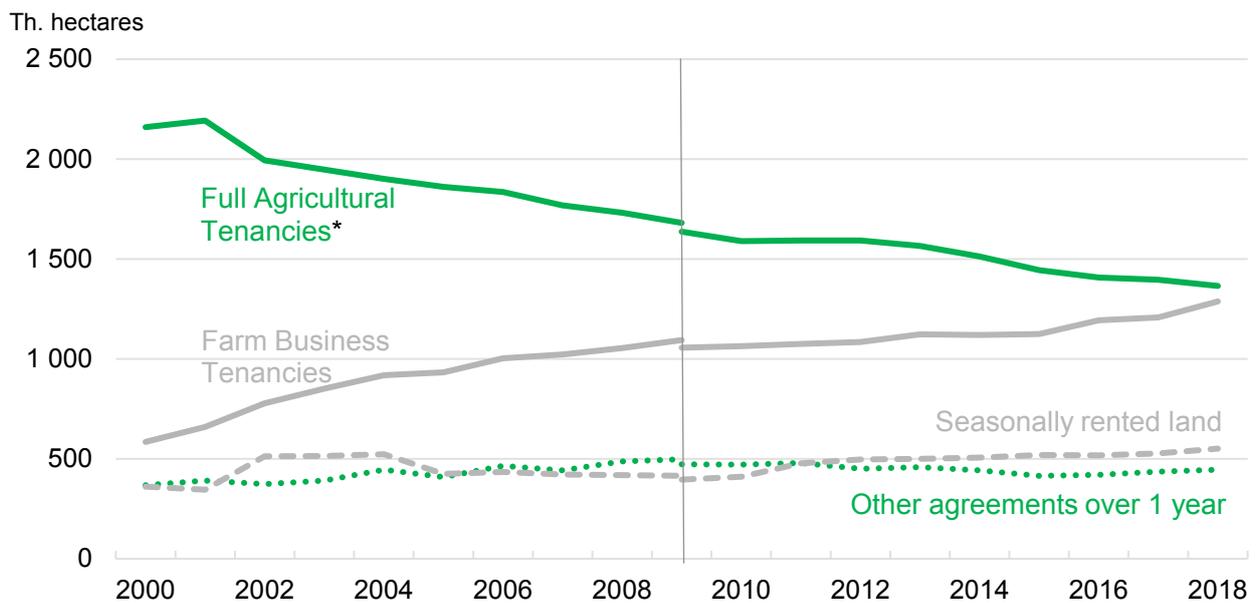
- **The Agricultural Holdings Act 1986** ("the 1986 Act"), which applies to agricultural tenancies entered into before 1 September 1995 (and those tenancies commencing after 1 September 1995, and which are subject to the provisions of section 4(1) of the 1995 Act and remain governed by the 1986 Act). In 2017 approximately 20,500 farms in England had an Agricultural Holdings Act (AHA) tenancy. These agreements covered 1.4m ha in England. These tenancies are subject to regulated rent, have lifetime security of tenure and most granted before 12 July 1984 also carry statutory succession rights for up to two generations of eligible close relatives on death or retirement of the incumbent tenant (except for council farm AHA agreements which do not have statutory succession rights).
- **The Agricultural Tenancies Act 1995** ("the 1995 Act"), which applies to most tenancies of agricultural land beginning on or after 1 September 1995 and are generally known as **Farm Business Tenancies** ("FBTs"). In 2017 approximately 18,200 farms in England had an FBT and FBTs with a term of a year or longer

covered 1.2m ha in England. FBTs provide a flexible framework, can vary in length and do not have statutory succession rights.

3.4 The 1995 Act replaced the 1986 Act with a simpler, more flexible framework to encourage more agricultural lettings. Therefore the number of Agricultural Holdings Act (AHA) agreements is in natural decline and on current trends will cease to be a significant part of the tenanted sector by around 2050 (although a small number of AHA tenancies will continue beyond this into the next century (e.g. some final successions and company tenancies). However, in 2017 AHA tenancies still accounted for around 15% of farmland in England and therefore remain an important part of the tenanted sector for the near future. Data from the CAAV Agricultural Land Occupation Survey 2017 indicates that the majority (76%) of land that was occupied under AHA agreements which have then terminated are re-let as an FBT.

3.5 It is worth noting that many farmers both own and rent land, and often the rented land may be subject to a variety of different agreements, whether under an AHA and/or FBT agreement. Some farms may also have seasonal or grazing licences in place.

Table 2: Area of rented land by type of tenancy, England



Source: Defra, June Survey (\*Full Agricultural Tenancies are AHA tenancy agreements governed by the 1986 Act). To note, the vertical line at 2009 marks discontinuity in the data.

## Future agricultural policy context

- 3.6 In September 2018 the government published both the Agriculture Bill and the Future for Food, Farming and the Environment Policy Statement (2018)<sup>1</sup>, setting out our ambition for a new agricultural policy. We want our future policy and legislative frameworks to provide an enabling environment for current and future tenant farmers and agricultural landlords. We want to remove any barriers that inhibit the sector's ability to improve productivity, competitiveness, and sustainability, and be rewarded for the public goods they deliver.
- 3.7 The Policy Statement sets out our plans for phasing out Direct Payments to farmers in England during a seven year agricultural transition period as we bring in new agriculture policies. At some point during this period we will delink Direct Payments from the land, removing the requirement to farm in order to receive the final payments. This will give farmers more flexibility to plan for the future and should help facilitate structural change, opening up opportunities for new entrants to get into the sector. Some farmers could use the money to invest in their business without having to worry about the paperwork that accompanies the Basic Payment Scheme. Others may choose to use the money to diversify their activities or contribute to their retirement. This should facilitate restructuring and productivity improvements and should increase the ease with which new entrants, and those existing farmers wishing to expand, can acquire or rent land.
- 3.8 Tenanted council farm estates have for many years been a route into farming for new entrants offering start up and progression units to help people get a foot on the farming ladder. We want to encourage and support councils who want to rejuvenate their farm estates to offer more opportunities for new entrant farmers in future. We also want to support and encourage other landowners and organisations who are interested in creating similar opportunities for new farmers to start a business. This might include urban and peri-urban councils, land cooperatives or other community organisations, including those who can offer opportunities for innovative horticulture projects and businesses.

## Proposals for reforming agricultural tenancy law

### What we want to achieve

- 3.9 The aim of the proposals in this consultation is to ensure that the policy framework for agricultural tenancies is fit for the future, and will enable tenant farmers and agricultural

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<sup>1</sup> <https://www.gov.uk/government/publications/the-future-for-food-farming-and-the-environment-policy-statement-2018>

landlords to thrive as we move away from the Common Agricultural Policy (CAP) and implement a new agriculture policy. We want to ensure tenancy law does not stand in the way of tenants' and landlords' ability to adapt to changes, access new schemes, improve productivity and enable structural change.

3.10 Specifically we aim for agricultural tenancy policy and legislation to:

- Provide an enabling environment for sustainable productivity improvements and investment;
- 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
- Enable tenant farmers to access new agricultural and land management schemes.

3.11 We want to collect evidence and hear views on whether the proposals for changes to tenancy policy, legislation, and industry culture and practice will deliver this ambition.

## Why are reforms needed?

3.12 Most data show that productivity growth in our farming industry has failed to keep up with that of our major competitors. Low productivity growth reduces our industry's long-term ability to compete, grow new markets, have a prosperous farming sector and improve our environment. In recent years the rate of growth in total factor productivity<sup>2</sup> for UK agriculture has averaged only 0.9% a year as opposed to 3.5% in the Netherlands, 3.2% in the USA and 2.5% in France (average annual growth rates from 1964 to 2014)<sup>3</sup>. However, it should be noted that there are data limitations in these high level comparisons, low average productivity masks a diverse sector, with some farms that are highly productive and profitable combined with others that do not perform as well<sup>4</sup>. Some UK farming sectors perform well in international comparisons of costs of production (dairy and cereals), while others perform poorly (sheep, beef<sup>5</sup>).

3.13 Higher levels of productivity are a result of producing the same or greater output from fewer inputs. As a result, great productivity is often associated with competitiveness and profitability. However, it is important to recognise that only focusing on increasing yield and outputs per hectare can mask the bigger picture. For example, increasing crop outputs by using more fertiliser might not maximise profit and can also impact on the natural environment. Therefore, improving productivity in a way

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<sup>2</sup> Total factor productivity ("productivity") is a measure of how well inputs (e.g. land, labour, capital, machinery, supplies such as animal feed) are converted into outputs (e.g. crops, livestock, fruit and vegetables)

<sup>3</sup> AHDB Horizon report Driving Productivity Growth Together, January 2019 [https://cereals.ahdb.org.uk/media/1336355/Horizon\\_Driving-Productivity\\_WEB.pdf](https://cereals.ahdb.org.uk/media/1336355/Horizon_Driving-Productivity_WEB.pdf)

<sup>4</sup> Chapter 1.2 Productivity: Agriculture Bill: Analysis and Economic Rationales for Government Intervention [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/740670/agri-bill-evidence-paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740670/agri-bill-evidence-paper.pdf)

<sup>5</sup> AHDB Stocktake Report 2015 <http://beefandlamb.ahdb.org.uk/wp/wp-content/uploads/uploads/2015/11/Stocktake-report-2015-101115.pdf>

which is also environmentally sustainable is a key goal. Good environmental stewardship of our soils, water and air helps to improve the natural capital that underpins productivity growth.

3.14 A key driver for improving productivity performance is having people with the skills and entrepreneurial drive to implement new ideas in the sector. Barriers to entry and exit in the agriculture sector mean there is very little structural change, resulting in an ageing profile of farmers and limited opportunities for new entrants, who can bring new skills, ideas and innovation into the sector. In 2016 over a third (40%) of farm holders in England were over 65 and just 2% were under 35.

3.15 In 2017 Defra asked the Tenancy Reform Industry Group (TRIG)<sup>6</sup> what changes might be needed in future to help improve productivity growth and structural change in the tenanted sector. TRIG identified several areas of agricultural tenancy legislation which may present barriers to productivity and structural change, including:

- Succession provisions in the 1986 Act may be preventing skilled farmers from taking over a holding. Older AHA tenants with no successor have limited options to realise value from their tenancy agreement to help them retire, and so remain on the farm. Providing mechanisms to enable older AHA tenant farmers to retire or move on could make land available to be farmed by a more productive new tenant.
- Some landlords may be discouraged from offering longer-term lets because of the lack of provision in the 1995 Act to enable breaches of tenancy agreements (such as non-payment of rent) to be remedied quickly, rather than through the complex and costly forfeiture procedures.
- Some landlords may be discouraged from investing in holdings (e.g. putting up a new building) if the tenant's interest payments on investments the landlord has made are lost in the next rent review.
- Some tenants may be prevented from accessing future agricultural and land management schemes and undertaking activities that could lead to productivity and environmental improvements due to restrictive clauses in their tenancy agreement, often written decades ago.

3.16 The options for reforming tenancy law, proposed in this consultation, are aimed at tackling these problems and delivering our policy aim of creating an enabling environment for sustainable productivity improvements, facilitating structural change, and ensuring that tenants are able to access future land management schemes. However, in proposing any changes to legislation, we must ensure that there continues

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<sup>6</sup> TRIG is an industry advisory group to Defra, comprising representatives from the main tenant farming and landlord industry organisations as well as from professions that advise tenants and landlords. A list of TRIG members can be found in Annex 1.

to be necessary fair protection in the legal framework for both tenants and landlords, and that flexibility and confidence in the let sector remains.

3.17 In addition it is important to highlight the role of tenant landlord relationships in delivering the policy aims we are seeking. Where good relationships exist and tenants and landlords understand each other's businesses, both parties often work effectively together to resolve potential problems with no need for recourse to the legislative framework or dispute resolution procedures. However, the legislative framework remains the backstop when relationships are not working, hence the need to ensure it is fit for the future and will enable our policy goals to be delivered. Given the importance of effective relationships between landlords and tenants, there may be a role for non-legislative actions, such as disseminating industry best practice, guidance, training, and model agreements as an alternative to, or to complement, legislative reform. These non-legislative options are explored further in section 4 below.

## **Section one: proposals to facilitate structural change**

3.18 The proposals in this section focus on reforms to the 1986 Act to help facilitate structural change in the AHA sector and open up more opportunities for entrepreneurial next generation farmers with skills to drive productivity improvements.

### **4. Proposal for new provision for an assignable Agricultural Holdings Act (AHA) tenancy**

#### **Current legislation, overview of policy issue and aim of proposals**

4.1 The 1986 Act currently provides life time security of tenure and, subject to relevant criteria being met, succession rights for eligible close relatives. But there is no provision for an AHA tenant to assign their tenancy agreement to a third party if there is no eligible successor to take over the holding. This means that some tenants can become 'stuck' on the holding. This may particularly be the case for tenants without an eligible successor, where the farmhouse is their home, and when they have limited financial means to retire. In these cases land is not being made available to other tenants, who may be able to farm it more productively. Insights from industry experts suggest that there could be an estimated 1,000-1,700 older AHA tenants with no successor who may be trapped in the sector in this way. Some landlords are tackling this issue by negotiating with their tenants to help them to retire by buying out their interest in the tenancy and / or providing them with alternative affordable retirement housing. However, not all landlords have the means or motivation to do this.

4.2 AHA holdings are often the larger equipped farms which could provide valuable business opportunities for entrepreneurial farmers wanting to progress and grow a farm business. The aim of the proposals below is to help facilitate structural change in the AHA sector by enabling older tenants who want to retire to realise financial value from their tenancy by allowing them to assign their tenancy for payment (subject to certain conditions as set out below) to a new third party tenant, unlocking the land for new tenants.

## 8. Do you agree that new legal provisions to enable a tenant to assign their tenancy to a third party tenant will help deliver the policy aim of facilitating structural change in the AHA sector?

Please select your answer from the following:

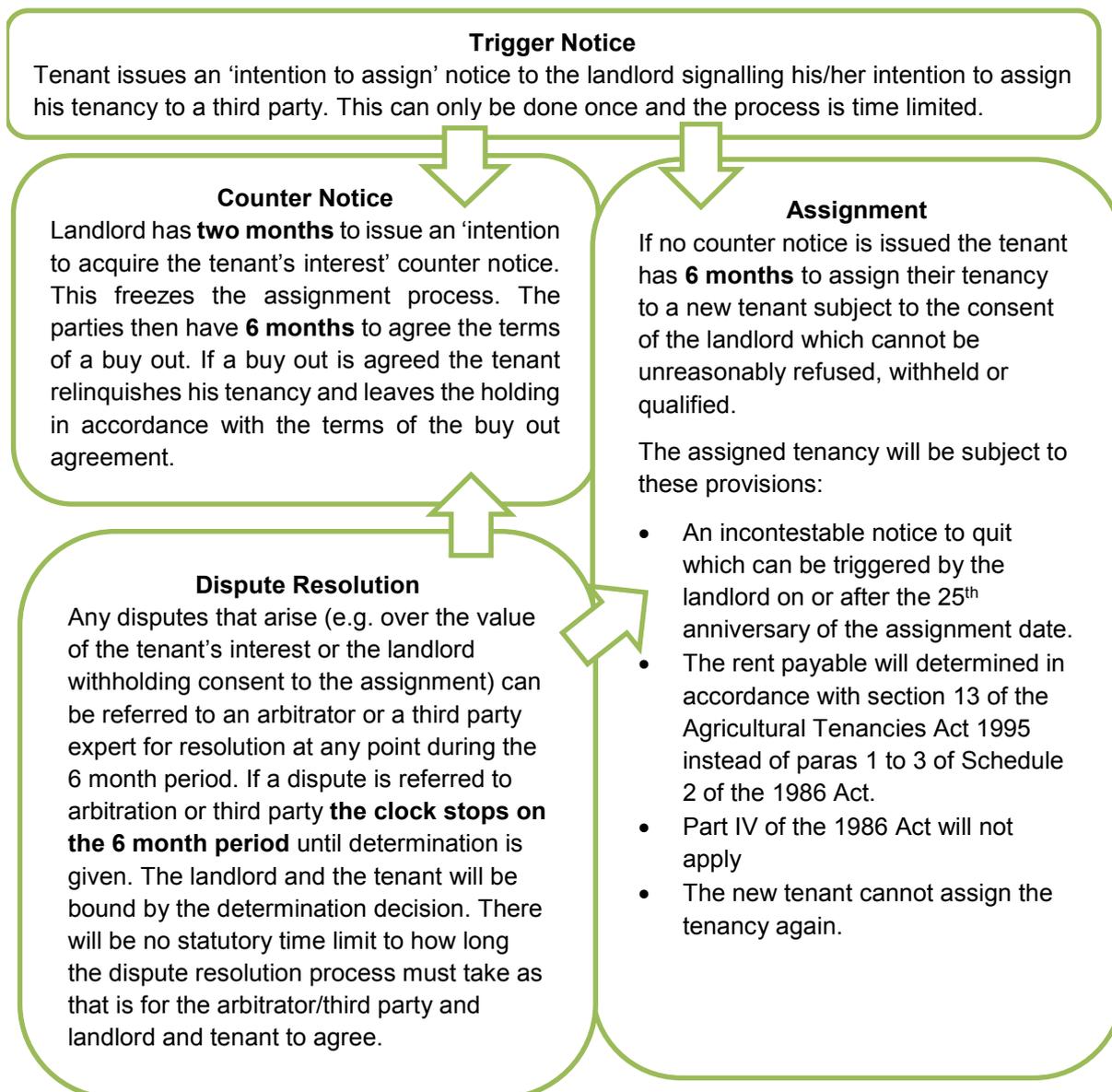
- **Strongly Agree**
- **Agree**
- **Don't know**
- **Disagree**
- **Strongly Disagree**

### Proposal 1:

4.3 The option is to insert new provisions in the 1986 Act to enable the tenant to assign their tenancy (for payment) to a new tenant. Assignment would be exercisable on a single occasion only and would be subject to a right for the landlord to pre-empt the assignment by negotiating to buy out the tenant and thereby terminate the tenancy. In addition, on assignment the tenancy would be subject to the following new provisions:

- A right for the landlord to serve an incontestable notice to quit on or at any time after the 25<sup>th</sup> anniversary of the assignment (so that the tenancy can be terminated by the landlord 25 years after assignment or later).
- The rent payable for the assigned tenancy will become open market rent, determined in accordance with section 13 of the Agricultural Tenancies Act 1995 instead of paras 1 to 3 of Schedule 2 of the 1986 Act.
- Part 4 of the 1986 Act will not apply (so that succession rights will not apply to the assigned tenancy).
- The new tenant cannot assign the tenancy again (assignment is a once only process).

4.4 In the case of a joint tenancy both tenants would have to agree to the assignment process before it can be triggered. We envisage the new mechanism might work as described in the flow chart below.



4.5 Under this option the landlord has the right to stop the process by buying out the tenant's interest to regain possession of the holding. If he does not he cannot unreasonably withhold consent to the assignment taking place. Determination over what might constitute a reasonable or unreasonable case for a landlord to withhold consent will be for the arbitration or third party expert process to decide, based on the circumstances and evidence of each individual case.

4.6 If the assignment proceeds, the landlord benefits from greater certainty over when the tenancy agreement will end (due to the ability to issue an incontestable notice to quit 25 years after the assignment date), a move to open market rent and a new tenant farmer who can see a business opportunity and wants to invest in a long term tenancy. The outgoing tenant benefits financially (either from the landlord buying him out or from payment for the assigned tenancy agreement) contributing to their retirement. The new

tenant benefits from the security of a long term agreement and new business opportunity.

4.7 Box 1, below, indicates some of the factors and issues to consider in relation to valuing the tenant's interest and the potential value of the assigned tenancy agreement.

## Proposal 1a:

4.8 This is a sub-option to proposal 1, with the aim of giving the landlord a greater role in the selection of the new tenant. This may be necessary as there could be circumstances where the landlord believes the proposed new tenant does not have suitable experience or qualifications, or where their farming plans and practices are not in line with the landlord's estate management aims and objectives.

4.9 This sub-option would insert an additional step into the process outlined for proposal 1, which would give the landlord the right to review the suitability of the proposed new tenant. The landlord would have a right to withhold consent to the assignment on the grounds that the proposed tenant and / or their business plan for the holding is not suitable. However, any dispute over the suitability of the proposed new tenant can be referred to arbitration or third party determination for resolution. All parties would be bound by the arbitrator's decision or third party determination decision.

4.10 Proposals 1 and 1a above set out the broad principles and outcomes that we are aiming to deliver from an assignable AHA mechanism. However, we recognise that the statutory process and mechanisms involved are complex and would require further analysis as part of any next steps and subject to the outcome of this consultation.

### **Box 1: Factors and issues for consideration in valuing a tenant's interest in an AHA holding and the value of a 25 year assignable AHA tenancy at open market rent**

**Tenant interest:** the question of what financial value a tenant might get from either a landlord buying out their interest to regain vacant possession of the holding will depend on each unique circumstance. However the following factors are likely to be a key consideration in the valuation of most cases:

- The life expectancy of the tenant (estimates of life expectancy are published by the Office for National Statistics in the National Life Tables<sup>7</sup>)
- The difference between the investment value of the vacant holding versus the investment value of the let holding (both will depend on size of holding, location, quality of land and quality of fixed equipment e.g. farmhouse, buildings, etc.)

**Market value of a 25 year assigned AHA tenancy:** the question of what financial value there might be in a 25 year AHA agreement at an open market rent is very difficult to predict. It will depend on a range of factors including the economic conditions for agriculture and market conditions for let land at the time, plus factors such as size, location, quality of land and condition of the holding and its fixed equipment. In current market conditions where land prices are high and let land is in short supply farmers looking for progression to a larger more secure holding may see value in the chance to acquire access to land for a secure period (although there is no evidence at present that a longer term FBT commands a higher rent than a shorter one of an equivalent tenancy). Also, there may be situations where a neighbouring farmer might pay more for secure access to AHA land where it would complement or add value to his land or business. The individual situation regarding compensation for tenant improvements and liability for remedy or dilapidations will also impact on the value a prospective tenant might place on an assignable AHA agreement.

**Tax:** the outgoing tenant will also need to consider in advance what tax might be payable (e.g. capital gains tax, stamp duty land tax etc.) out of any lump sum they might receive from either a landlord buy out or from assignment.

**Retirement:** whether a lump sum from either a buy out or assignment will be enough to enable the current tenant to retire will again depend on the individual circumstance. However, the cost of alternative housing suggests that only tenancies of larger AHA holdings would be likely to generate sufficient value to be of material assistance with retirement.

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<sup>7</sup> National life tables are produced annually for the United Kingdom and its constituent countries. They provide period expectation of life statistics. Period life expectancy is the average number of additional years a person can be expected to live for if he or she experiences the age-specific mortality rates of the given area and time period for the rest of his or her life. The latest life tables for England can be found here:

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/datasets/nationallifetablesenglandreferencetables>

Although where the tenant has other assets they can draw on and a private pension / or savings, the ability to realise value from their tenancy agreement might then make a positive additional contribution to their overall retirement package.

**9. Do you agree with proposal 1 to implement new legal provisions to enable a tenant to assign their AHA tenancy to a third party, subject to the conditions described?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't know**
- **Disagree**
- **Strongly Disagree**

**10. Do you agree that proposal 1a is needed in addition to proposal 1 so that landlords have a role in reviewing the suitability of the new tenant?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't know**
- **Disagree**
- **Strongly Disagree**

**11. Please provide any other comments including evidence of the likely benefits and impacts of these proposals.**

## **5. Proposals to change AHA succession rights**

### **Current legislation, overview of policy issue and aim of proposals**

5.1 The 1986 Act sets out the circumstances in which close family relatives can succeed a tenant after their retirement or death (for those tenancies that commenced before 12 July 1984). The 1986 Act includes a series of succession eligibility tests, which must be met. There is currently no upper age limit or cut-off date for when succession applications on death or retirement can be made. However, succession applications on retirement cannot currently be made before the age of 65. This means that farmers are unlikely to think about retiring and handing over their tenancy agreement before

the age of 65, even if they'd like to. Coupled with a culture of farming long past retirement age, this can delay the handover of land to the next generation of farmers looking to bring new ideas, skills and innovation to the holding.

5.2 In 2016, the median age of farmers in England was 60, 40% of farmers with AHA tenancies were over 65 and only 9% were under 45 (which is similar to the wider farming population). Defra's 2017/18 Farm Business Survey<sup>8</sup> indicates that 57% of farm businesses in England had no succession plan in place either because they had no nominated successor (24%), or it was too early to provide an answer (24%), or they were unsure of the intention at the time of asking (9%). The findings are similar for those with AHA tenancies.

5.3 We want to bring about a change in behaviour and encourage earlier succession planning so that holdings are passed on sooner to the next generation, where appropriate. This would unlock potential productivity improvements through the new skills and ideas that the next generation of tenant farmers can bring to the AHA sector. The proposals outlined below aim to tackle these issues by removing the minimum age of 65 for succession on retirement applications (so succession on retirement can be applied for at any age) and removing all succession rights when the tenant reaches 5 years past the state pension age (this is the age at which you can start to claim pension payments from the government)<sup>9</sup>.

## Proposal 2:

5.4 This option is 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. This would mean that tenants can decide to retire and hand over to their successor at any age.

## 12. Do you agree with proposal 2 to remove the minimum age of 65 for succession on retirement applications?

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**

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<sup>8</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/667291/fbs-farmaccountsengland-17july17.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667291/fbs-farmaccountsengland-17july17.pdf)

<sup>9</sup> Details of your state pension age can be found at: <https://www.gov.uk/state-pension-age> and at <https://www.gov.uk/government/news/proposed-new-timetable-for-state-pension-age-increases>

- Disagree
- Strongly Disagree

## Proposal 3:

5.5 This option is 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 5 years past the state pension age. For example, if the state pension age is 67 succession rights on death and retirement would no longer be available for potential family successors when the current tenant reaches age 72. We recognise that these proposals have the potential to affect the plans that tenants or their families have in mind for the future and that discussions about succession and decisions over the future of a family business can be complex and take time to consider. We therefore propose that if this option is taken forward the change would not take effect until eight years after the legislation is enacted. This would give businesses time to prepare for the change and undertake any necessary succession planning before the cut-off age is reached.

**13. Do you agree with proposal 3 to remove succession rights when the tenant reaches 5 years past the state pension age?**

**Please select your answer from the following:**

- Strongly Agree
- Agree
- Don't Know
- Disagree
- Strongly Disagree

**14. If proposal 3 were implemented, do you agree that to give adequate time for succession planning it would be necessary to allow 8 years following the enactment of the legislative change before it should take effect?**

**Please select your answer from the following:**

- Strongly Agree
- Agree
- Don't Know
- Disagree
- Strongly Disagree

**15. If you do not agree that 8 years notice is an appropriate amount of time to wait before the legislative change takes effect please indicate what time period, if any, should be given in your view.**

**16. How should any removal of succession rights operate in the case of joint tenancies? For example where joint tenants are different ages should the age limit (after which succession would cease to be available) be linked to the age of the youngest tenant?**

**17. Please provide any other comments including any evidence you have of the likely benefits and impacts of proposals 2 and 3 and whether there are alternative options that we should consider.**

## **6. Council farm retirement tenancies (smallholdings)**

### **Current legislation, overview of policy issue and aim of proposals**

6.1 In recent years, the provisions of the 1986 Act have become out of date with policy changes to the state pension age (this is the age at which you can start to claim pension payments from the government). Currently the 1986 Act enables local authority landlords of smallholding farms to issue a retirement notice to quit when their tenant reaches 65, so that the farm can be re-let to a new entrant (as set out in Schedule 3 Case A<sup>10</sup>). However, recent changes to state pension age mean that it will no longer be fixed at 65. From 2019 state pension age will increase to reach 66 by October 2020 and further increases are planned to increase it to 67 between 2026 and 2028. Case A applies only where the tenancy agreement refers to it and so long as it is a “smallholding.”

6.2 Therefore the specified age of 65 for retirement notices to quit in relation to council farm retirement tenancies is no longer in line with state pension age policy. This means that a council farm tenant could be issued with a retirement notice to quit before they are eligible to draw their state pension which could leave a gap in their pension income for a few years. The aim of the proposal below is to update the 1986 Act to ensure the

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<sup>10</sup> To note that Case A applies only where the tenancy agreement specifically refers to it and where the holding is a smallholding as defined by part III of the Agriculture Act 1970.

provisions that apply to council farm retirement notices are kept in line with current state pension policy.

## Proposal 4:

6.3 The option is to amend Schedule 3 Case A of the 1986 Act so that a retirement notice to quit can only be served by a smallholding authority landlord on a council farm tenant when they have reached the earliest age that they can be in receipt of the state pension.

**18. Do you agree with proposal 4 to amend the 1986 Act so that council farm retirement notices to quit can only be issued when the tenant has reached current state pension age?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**19. Are there any operational or other implications of this proposal, for example for joint tenancies, that we need to consider?**

## **7. Changing succession eligibility criteria: repealing the 'Commercial Unit Test' and updating the 'Suitability Test'**

### **Current legislation, overview of policy issues and aim of proposals**

7.1 The 1986 Act provides succession rights to AHA holdings on death or retirement of the tenant for up to two generations of close family relatives, subject to specific eligibility tests that are set out in the Act. One of the eligibility tests is the '**Commercial Unit Test**' which states that if the applicant already occupies a commercial unit of agricultural land they cannot succeed to an AHA tenancy. A commercial unit of agricultural land is defined in the 1986 Act as 'a unit of agricultural land which is capable, when farmed under competent management, of producing a net annual income of an amount not less than the aggregate of the average annual earnings of two full-time, male agricultural workers aged twenty or over'. This test, with its

complexities and anomalies, is now out date with current policy aims of improving farming productivity by encouraging the transfer of land into the hands of skilled commercial farmers (regardless of whether they are already in occupation of other land or not). Therefore intervention may be needed to remove this regulatory barrier so that productive commercial farmers can succeed to AHA holdings in future.

- 7.2 Another succession eligibility test is the **‘Suitability Test’** which states that the Tribunal<sup>11</sup> assessing succession applications must decide whether the applicant is a suitable person to become the tenant of the holding. In making that decision the 1986 Act directs the Tribunal to have regard ‘to all relevant matters’ including the applicant’s training and practical experience of agriculture, their age, physical health and financial standing, and the views of the landlord on the suitability of the applicant.
- 7.3 Industry feedback is that this test is out of date and sets a low standard of suitability. It does not, for example, include the requirement for potential tenants to demonstrate that they have good business management skills, which is linked to better farm performance (in 2016/17 the top 25% of farm performers were 2.5 times more likely to engage in business management practices such as business planning<sup>12</sup>). Given our policy objectives of improving farming competitiveness and productivity, it may be important to modernise the suitability test to set higher business competence standards in future. The aim of modernising the test would be to ensure that succession applicants have the skills and credentials that would place them on a tenancy shortlist if there was an open market tender for the AHA holding.
- 7.4 The proposals below aim to ensure that commercially successful and skilled tenants can succeed to AHA holdings by removing regulatory barriers and modernising succession eligibility criteria.

## Proposal 5:

- 7.5 This option is to repeal section 36(3)(b) and section 50(2)(b) of the 1986 Act to remove the ‘Commercial Unit Test’ from succession provisions so that a close family relative who already occupies a commercial farm would be eligible to succeed to an AHA holding in future (if they meet the other eligibility provisions set out in the 1986 Act). All provisions and regulations relating to the ‘Commercial Unit Test’ would also be repealed, for example removing the requirement for Defra to lay the Units of

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<sup>11</sup> The Tribunal is the First-tier Tribunal (Property Chamber) Agricultural Land and Drainage Chamber <https://www.gov.uk/courts-tribunals/first-tier-tribunal-property-chamber>

<sup>12</sup> See slide 27 of the Future Farming and Environment Evidence Compendium: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/683972/future-farming-environment-evidence.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683972/future-farming-environment-evidence.pdf)

Production Order and provide net annual income assessments, as these would no longer be needed.

## 20. Do you agree with proposal 5 to remove the 'Commercial Unit Test'?

Please select your answer from the following:

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

## Proposal 6:

7.6 This option is to replace the current 'Suitability Test' provisions with a new Business Competence Test, by amending section 39(2) and amending section 39(8) of the 1986 Act so that the Tribunal has to take into account the following matters when deciding if the applicant tenant is competent and suitable to succeed to the tenancy:

- That (disregarding offers of rent) the applicant would reasonably be expected to be shortlisted for the tenancy by the landlord if they applied in an open market tender
- The applicant's level of training, experience, capability and agricultural business management skills
- The applicant's health, financial standing and character
- The character and situation of the holding
- The terms of the tenancy
- The provision and standard of the landlord's equipment
- The landlord's views as to the suitability of the applicant
- The expectation that the holding is to be farmed commercially to a high standard of efficient production and care for the environment and kept in a condition to enable such standards to be maintained in the future.

7.7 We recognise that if this change is taken forward potential successors will need adequate time to prepare. We would therefore propose that the change should take effect 3 years after enactment of the legislative change.

## 21. Do you agree with proposal 6 to modernise the suitability test?

Please select your answer from the following:

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**

- **Strongly Disagree**

**22. Do you agree that 3 years is adequate time before this proposed change to the suitability test comes into force?**

- **Yes**
- **No**

**23. If you answered 'No' to question 22, what time, if any, do you feel is needed for businesses to prepare for this proposed change?**

**24. Please provide any additional comments including any evidence you have of the likely benefits and impacts of proposals 5 and 6.**

## **8. Modernising and extending succession rights**

### **Current legislation, overview of policy issues and aim of proposals**

8.1 The 1986 Act provides rights for eligible close relatives to succeed to an AHA tenancy (for those tenancies that commenced before 12 July 1984). However, the definition of a close relative has not been updated for many years and is viewed by some industry stakeholders as being out of date with modern family structures. The current definition of a close relative includes a husband, wife, brother, sister or civil partner of the tenant and their children or those treated as children by the tenant in relation to marriage or civil partnership. It does not include a cohabiting partner of the tenant, the children of a cohabiting partner of the tenant or those treated as children by the tenant in relation to cohabitation. This means that children that have grown up and worked on the farm as part of the family business but whose parents are not married or in a civil partnership are not able to succeed to the tenancy. Therefore, there may be a case to update and clarify the provisions so that children (and those treated as children) of cohabiting partners have the same succession rights as children of married and civil partnership couples. The aim is to modernise and clarify the close relative definition so that children (and those treated as children) of cohabiting partners have the same succession rights as children of married and civil partnership couples.

8.2 In addition the current close relative definition does not include nieces, nephews or grandchildren of the tenant. Therefore, even if they have had a close working involvement with the farm business they are not eligible to succeed to an AHA tenancy. There may be a case for considering extending the definition of a close

relative to include nieces, nephews and grandchildren, so that younger members of the family can succeed to the tenancy and continue to grow and improve the family farm business.

## **Proposal 7:**

8.3 This option is to amend section 35(2)(d) and section 49(3)(d) of the 1986 Act to include children or those treated as children by the tenant in relation to cohabitation. This would mean that children (or those treated as children) of cohabiting partners would in future be eligible to apply to succeed to an AHA holding (subject to them meeting the other eligibility tests set out in the 1986 Act). Consideration might also be given to including the cohabiting partner of the tenant in the definition of a close relative so they are given the same succession rights as married and civil partnership couples. Whilst there is no legal definition of cohabitation, an application in this case (as in all cases) would still have to satisfy the other eligibility tests including the livelihood test which requires that the applicant successor has worked on the holding for not less than 5 years (section 36(3)(a) of the 1986 Act).

**25. Do you 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 holding tenancy?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**26. Do you agree 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 holding tenancy?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

## Proposal 8:

8.4 This option is to amend and extend section 35(2) and section 49(3) of the 1986 Act to include nieces, nephews and grandchildren of the tenant in relation to marriage, civil partnership and cohabitation so that they would be eligible to apply to succeed to an AHA holding in future.

8.5 In recognition that this could potentially extend the tenant's family occupation of the holding for many years we propose that in relation to succession applications by grandchildren the new succession right should also be subject to a new provision for the landlord to be able to issue an incontestable notice to quit 25 years on or after the succession date and become subject to open market rent (so the rent payable would be subject to section 13 of the Agricultural Tenancies Act 1995 instead of paras 1 to 3 of Schedule 2 of the 1986 Act). This would provide a new opportunity for relatives from a younger generation to continue the family business whilst giving the landlord certainty over when the tenancy would end and the benefit of an open market based rent.

**27. Do you agree with 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?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**28. Do you 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 future?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**29. Are there any operational implications of proposals 7 and 8 for joint tenancies that we need to consider?**

**30. Please provide comments including any evidence you have of the likely benefits and impacts of proposals 7 and 8.**

# Section two: proposals to facilitate productivity, investment and environmental improvements

## 9. Restrictive clauses in AHA tenancy agreements

### Current legislation, overview of policy issue and aim of proposals

- 9.1 The 1986 Act sets the framework within which individual AHA agreements have been negotiated and agreed between landlords and tenants. Most AHA agreements were written and agreed twenty to thirty years ago in a different commercial environment and many include standard restrictive clauses to prevent the tenant or landlord from undertaking certain activities that might change the fixed equipment or land use on the holding without first gaining agreement from the other party (e.g. erecting or altering buildings, taking on other land, sub-letting, working off the holding or diversifying into non-agricultural activities).
- 9.2 Many landlords and tenants are able to work together effectively to negotiate and overcome issues relating to restrictive clauses without the need for recourse to dispute resolution. For example, tenants often work with their landlords to agree diversification plans and to enable them to enter into Countryside Stewardship schemes. However, we understand that this may not be the case for all tenancies and some tenants and landlords may find that restrictive clauses written many years ago now present a barrier to their ability to develop a productive and viable business going forward. In addition, as we leave the CAP and move towards new agriculture policies some tenants and landlords may find that restrictive clauses limit their ability to fully participate in opportunities offered by future schemes, such as those aimed at improving farming productivity or environmental land management, if the other party (landlord or tenant) is not willing to consent to the activities involved.
- 9.3 There are no general provisions in the 1986 Act that enable a tenant or landlord to challenge and vary a restrictive clause in their tenancy agreement. Currently, the only provision enabling either party to apply to vary the terms of their tenancy agreement is in relation to the specific issue of the amount of land that has to be kept as permanent pasture (as set out in section 14 of the 1986 Act 'variation of terms of tenancies as to permanent pasture').

9.4 Therefore, it may now be necessary to provide tenants and landlords with a new mechanism to challenge and vary clauses that restrict their activity on a case by case basis, where either party feels they present an unreasonable barrier to business development or to accessing future schemes to help improve farming productivity and deliver public goods.

**31. Do you agree that restrictive clauses in AHA agreements is a problem that needs to be addressed?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**32. Are restrictive clauses in Farm Business Tenancy agreements a problem that might also need to be addressed?**

**Proposal 9:**

9.5 This option is to insert a new provision in the 1986 Act to enable either party (tenant or landlord) whose activity is restricted by a clause in their tenancy agreement to serve a notice on the other party referring that restriction to dispute resolution (either arbitration or third party determination) in order to vary it. Any disputes will be settled according to whether the proposed variation to the tenancy agreement and activity to be undertaken is reasonable, including whether the activity / variation:

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

**33. Do you agree with proposal 9 to enable restrictive clauses in AHA agreements to be challenged and varied through a dispute resolution process?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**

- **Disagree**
- **Strongly Disagree**

**34. Please provide additional comments including evidence of the extent to which restrictive clauses may be a problem or not, and the likely benefits and impacts of this proposal.**

## **10. Removing barriers to landlord investment in AHA holdings**

### **Current legislation, overview of policy issue and aim of proposals**

10.1 The 1986 Act provides rights for the landlord or tenant to request a rent review every three years. The current rent review provisions mean that if the landlord finances an investment in the holding (for example, to upgrade fixed equipment and infrastructure) he risks losing any economic return on that investment through the statutory rent review process. This is because any investment return charges agreed between the landlord and the tenant can currently be viewed as an obligation of the tenancy and may be deemed relevant to any case for a rent reduction. Feedback from industry stakeholders indicates that this may be discouraging landlords from investing in AHA holdings. The aim of the proposal below is to remove this legislative barrier by ensuring that in future the return on a landlord's investment in the holding is explicitly excluded from rent review considerations. This may help to unlock landlord investment in the AHA sector helping to drive productivity improvements and could be particularly helpful where the tenant cannot easily access other sources of investment finance.

**35. Do you agree that the risk of a landlord losing any return on investment through the next rent review is a barrier to landlord's investing in AHA holdings?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

## Proposal 10:

10.2 This option is to amend section 3 of schedule 2 of the 1986 Act (the statutory rent review provisions) to add new provisions that direct the arbitrator or third party expert to explicitly disregard from the rent review determination process the following:

- any improvement that has been financed wholly or partly by the landlord
- any payment due from the tenant to the landlord under written agreement that is to pay a return to the landlord for any finance they have provided (either wholly or partly) for an improvement to the holding.

10.3 In addition, the 1986 Act provisions would be amended to clarify that any improvement resulting from the landlord's investment is to be regarded as a landlord improvement at the end of the tenancy.

**36. Do you agree with proposal 10 to exclude the landlord's return on investment from rent review considerations?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

## 11. Introducing short notices to quit for new Farm Business Tenancies of ten years or more

### Current legislation, overview of policy issue and aim of proposals

11.1 Farming is a long-term business and feedback from some industry stakeholders indicates that there is a lack of opportunity for tenants to access longer-term lets, for example of ten years or longer. This may mean that tenants do not have the security they need to make longer-term investments in sustainable land management practices and productivity improvements. Recent data from the CAAV's Agricultural Land

Occupation Survey 2017<sup>13</sup> indicates that the average length of FBTs is nearly 4 years, and when seasonal lettings of a year or shorter are excluded the average is just under 5 years. However, larger and better-equipped holdings, such as those with a house and buildings, were let for longer terms and on average for 9 years.

11.2 One of the reasons landlords may be reluctant to enter into longer term agreements (without a landlord break clause) is the lengthy procedures that must be followed to end a tenancy if the tenant defaults on the agreement, such as by not paying the rent. Hence landlords often lean towards shorter tenancies or include a landlord break clause to minimise their exposure to the risk of a tenant defaulting. In addition, some landlords may want the flexibility to potentially develop land on the holding for non-agriculture use in future, and so are unwilling to offer longer terms due to lengthy termination procedures.

11.3 Currently the 1995 Act provides that a fixed term tenancy of two years or longer can be terminated by either party giving a minimum of 12 months' written notice to the other party. If the tenancy is not validly terminated, it continues as a statutory periodic tenancy from year to year. To terminate such a periodic tenancy, the landlord or tenant must also give a minimum of 12 months' notice before the end date of the periodic tenancy. The only other legal recourse the landlord has to end the tenancy and regain possession of the holding (e.g. when the tenant is in breach of contract) is to apply to the courts using forfeiture procedures which can be a lengthy, costly and an uncertain process for them. Feedback from industry stakeholders is that these lengthy termination procedures act as a disincentive to landlords letting for longer terms.

11.4 The policy aim of the proposal below is to encourage more landlords to offer longer-term lets of ten years or longer by providing them with shorter termination procedures in specific circumstances, such as non-payment of rent, death of the tenant, or when the landlord has planning consent to develop land on the holding for non-agricultural use. The policy goal is to facilitate and encourage investment in productivity improvements and environmental outcomes in the tenanted sector by increasing the availability of longer-term lets (which give tenants more security to make those investments) by correcting a legislative disincentive and de-risking longer-term agricultural lettings for landlords.

**37. Do you agree that providing new shorter termination procedures for FBTs of ten years or longer will encourage more landlords to offer longer-term lets, which would facilitate and encourage more tenants to invest in improving productivity and the environment?**

**Please select your answer from the following:**

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<sup>13</sup> The Annual Agricultural Land Occupation Survey for Great Britain 2017

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**38. Are there other options that would encourage landlords to let for longer terms that we should consider?**

## **Proposal 11:**

11.5 This option is to insert provisions into the 1995 Act to give landlords that let new FBTs for a period of ten years or longer, and without a landlord break clause, new rights to issue shorter notices to quit (as an alternative to, but not a replacement for, forfeiture) in the specific circumstances as described below:

- i. **Non-payment of rent:** where the tenant has not paid the rent the landlord will be able to issue a notice to pay and a notice to quit, giving the tenant **2 months in which to pay** the rent and a **3 month notice to quit** (the notice to pay and notice to quit can be amalgamated and issued together). The tenant will have the right to serve a counter notice up to **1 month** after the landlord's notice to pay, challenging liability and/or seeking further time of up to a further **3 months** to pay the rent. The notice to quit takes effect 3 months after service, unless the tenant pays the rent within the 2 months' notice to pay period, or applies for further time before the notice to quit takes effect, in which case up to a further 3 months can be permitted. Disputes can be referred to arbitration or third party determination within 1 month of the tenant's counter-notice, and the effect of the notice to quit will be suspended during the dispute resolution period.
- ii. **Death of the tenant:** on the death of the tenant the landlord will be able to issue a **12 month notice to quit** to terminate the agreement and regain occupation of the holding. In these circumstances the 12 months' notice to quit will not be linked to the end date of the periodic tenancy. This will give the deceased tenant's representatives time to conclude affairs and hand back the holding to the landlord within the 12 month period. The tenant's representatives have one month from the issue date of the landlord's notice to refer disputes to arbitration or third party determination and/or apply for more time. The effect of the notice to quit would be suspended during the dispute resolution period.
- iii. **Planning consent for non-agricultural use:** if the landlord has planning consent and wishes to remove land from the holding for non-agricultural development they will be able to issue a **6 month notice to quit to the tenant** to vacate the land that has been granted planning permission. The landlord must have planning permission for non-agricultural use and any farmhouse which is the tenant's home will be excluded from these new provisions. Where the

landlord has planning permission for non-agricultural use for only part of the land on the holding, a part notice to quit can only be issued where there is a clause in the tenancy agreement permitting it. The tenant has 1 month from the issue date of the landlord's notice to quit to refer disputes to arbitration or third party determination and/or apply for more time. The effect of the notice to quit would be suspended during the dispute resolution period. It is envisaged that statutory compensation provisions should be available to the tenant to compensate for the loss of land and impact on their business. We are interested in views on the most appropriate basis for awarding compensation in these circumstances.

11.6 We are also interested in views on whether any other serious breaches of the tenancy agreement by the tenant, in addition to non-payment of rent, should be considered for inclusion in any new provisions for shorter notices to quit. For example, in the event that the tenant becomes insolvent, sub-lets all or part of the land covered by the tenancy agreement, or any other serious breaches where the tenant should be given notice to remedy, and if they do not remedy be given a notice to quit.

**39. Do you agree with proposal 11 to provide shorter notice to quit procedures for new FBTs of ten years or longer in each of the specific circumstances in the table below?**

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

**40. Other than non-payment of rent should any other serious breaches of the agreement by the tenant be included in any future provisions for shorter notices to quit?**

- Yes
- No

**41. If you answered 'Yes' to question 40, what other breaches do you think should be included and what notice periods should be applied in those circumstances?**

**42. What issues, principles and calculations 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?**

**43. Please provide any additional comments, including evidence, of the likely benefits and impacts of proposal 11.**

## **Section three: procedural reforms - updating and improving the operation of AHA tenancy law**

### **12. Timetable for using third party dispute resolution in AHA rent reviews (technical correction)**

#### **Current legislation, overview of policy issue and aim of proposals**

- 12.1 For many years, arbitration was the only dispute resolution process open to landlords and tenants of AHA tenancy agreements. Arbitration can be a costly and time consuming process. Therefore, in the Deregulation Act 2015, Defra delivered reforms to enable third party determination to be used (where both parties agree) as an alternative, lower-cost route to resolve tenancy disputes.
- 12.2 However, an unforeseen consequence of the provision which introduced third party resolution into the AHA rent review process has resulted in a requirement that the appointment of a third party to resolve a rent review dispute must be made 12 months ahead of the rent review date. As the parties do not know if they will have a dispute to settle 12 months ahead, this requirement is impractical and means the change to enable the option for use of third party resolution in rent reviews has been ineffective and unusable by industry.
- 12.3 The aim of the proposal below is to make a technical correction so that the original policy intention of the 2015 reforms, to enable third party resolution as an alternative and lower-cost option to arbitration in rent review disputes, can be used effectively by industry in future.

#### **Proposal 12:**

- 12.4 This option is to amend section 12 of the 1986 Act to remove the requirement that a third party expert has to be appointed 12 months ahead of the rent review date. Instead, it will enact a procedure so that where both parties agree to use a third party, the appointment can take place at any point in time prior to the rent review date. This will bring timescales for appointment of a third party in line with the timescales for appointing an arbitrator for arbitration proceedings. This will make third party determination a useable alternative, as originally intended by the 2015 reforms.

**44. Do you agree with proposal 12 to enable a third party expert to be appointed to resolve a rent review dispute at any time ahead of the rent review date?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

## **13. Updating the Agricultural Holdings (Fees) Regulations 1996**

### **Current legislation, overview of policy issue and aim of proposals**

13.1 Under the 1986 Act the Royal Institution of Chartered Surveyors (“RICS”) is designated as the organisation that landlords and tenants can apply to for the appointment of an independent arbitrator to resolve disputes that may arise in relation to agricultural tenancies governed by the Act. The 1986 Act also provides that arbitration appointments made by RICS are subject to a prescribed fee which is set out in regulations. This is either paid for by the applicant (so either the tenant or the landlord) or in the case of requests for RICS to appoint a person to make certain records (for example records on the condition of the holding and its fixed equipment) the fee is shared equally by the tenant and landlord.

13.2 The prescribed fee is currently set in the Agricultural Holdings (Fees) Regulations 1996<sup>14</sup> at £115 (VAT does not apply) and has not been updated since 1996. Therefore the fee that RICS can charge has remained unchanged for 23 years, whilst RICS’ costs of managing the appointments process have increased. The costs to RICS include regular and robust assessments, interviews, and performance monitoring of arbitration panel members, and rigorous quality control procedures, in addition to administrative costs of staff salaries, office space and computer technology. These costs have increased significantly in the 23 years since the prescribed appointment fee was last updated.

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<sup>14</sup> <http://www.legislation.gov.uk/uksi/1996/337/made>

- 13.3 As such RICS are now cross-subsidising the statutory agricultural appointments service with income from other business streams. It is therefore necessary to review the prescribed fee regulations with a view to ensuring the service can operate in future on a cost recovery basis as set out in HMT guidance 'Managing Public Money' chapter 6 on fees, charges and levies<sup>15</sup>. This guidance also states that there may be scope for charging more or less than a full cost recovery fee, provided that Ministers choose to do so, parliament consents and there is full consultation.
- 13.4 During 2015 RICS engaged informally with members of TRIG to discuss what an appropriate prescribed fee for the arbitration appointments service might be, if it were to be updated. This included comparing fees for other professional appointment services such as those provided by the Central Association of Agricultural Valuers, the Royal Institute of British Architects and the Institute of Chartered Accountants in England and Wales, which ranged from £100 to £250. Bearing in mind that this is a public service and not currently subject to competition, a fee of £175 was seen by industry as an appropriate level in 2015 for the prescribed arbitration appointments service fee.
- 13.5 However, more time has passed since that assessment, with costs for delivering the service continuing to increase. Therefore, RICS now estimate that in order to more adequately recover the costs of running the statutory appointments service in future a prescribed fee of £195 would be an appropriate fee going forward.
- 13.6 Currently RICS is the only organisation named in statute to which tenants and landlords can apply for the appointment of an independent arbitrator to resolve disputes relating to tenancies governed by both the 1986 Act and the 1995 Act. Therefore, we are also interested in views on whether there would be any benefits in exploring reforms to the current provisions in the 1986 Act and the 1995 Act so that other qualified professional organisations could in future also provide a service for appointing independent arbitrators to resolve tenancy disputes under both Acts.

## Proposal 13

- 13.7 This option is 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 to ensure the costs that RICS incur from delivering the service are more adequately covered in future. We also propose that in future the Agricultural Holdings (Fees) Regulations are subject to a review every five years so that the level of the fee is reviewed more regularly and updated where needed.

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<sup>15</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/454191/Managing\\_Public\\_Money\\_AA\\_v2\\_-jan15.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454191/Managing_Public_Money_AA_v2_-jan15.pdf)

**45. Do you agree with proposal 13 that the prescribed fee for appointing an arbitrator or record keeper under the 1986 Act should be updated to £195?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**46. If you do not agree that the fee should be updated to £195 what level of fee do you feel is appropriate and why?**

**47. Please provide views on the benefits or impacts of enabling other qualified professional organisations (alongside RICS) to provide a service for appointing independent arbitrators to resolve agricultural tenancy disputes governed by the 1986 Act and the 1995 Act in future.**

## **14. Procedural reforms to AHA succession law**

14.1 In addition to the more substantive policy reforms to 1986 Act succession provisions (outlined above in section one) TRIG identified the need for some procedural changes to assist the practical operation of succession provisions which are set out in Part IV and Schedule 6 of the 1986 Act.

### **Proposal 14**

14.2 This option is to take forward the procedural reforms described below (I – IV) which are recommended by industry experts to improve the operation of the 1986 Act succession provisions.

- I. **Enabling agreed successions without an application to the Tribunal<sup>16</sup>:** this proposal is to amend section 37 of the 1986 Act so that in future where both parties agree to a succession and record it as such (without an application having been made to the Tribunal for that succession) that it should be protected as a succession and count as a succession. This broadens options for parties who are in ready agreement to a succession by ensuring that a properly drawn up, voluntary written agreement between them can count as a succession without requiring an application to be made to the Tribunal. This will save time and costs for both parties and for the Tribunal.
- II. **Removing technical obstacles to joint successions:** this proposal is to amend section 37 of the 1986 Act so that in future the provisions expressly recognise that the previous tenant may be a joint tenant in the succession tenancy. Currently, this does not count as a succession even if all parties intend it to be, which limits the opportunities for practical agreements between parties where the continuing involvement of the previous tenant is valued. This change will remove technical obstacles to practical succession arrangements.
- III. **Clarifying the position for male widowers of a deceased tenant:** this proposal is to amend section 36(4) of the 1986 Act which makes express provision for a deceased tenant's wife so that in future it refers to all surviving spouses (i.e. wife or husband) and civil partners. This is a small technical updating to help clarify the provisions in relation to both female and male spouses of a deceased tenant.
- IV. **Improving the process between delayed Tribunal decisions on succession and the operation of end of tenancy claims:** sometimes succession applications can be complex and take a long time to determine, which can have knock-on effects for end of tenancy arrangements and claims. This proposal seeks to address this by amending section 43 (restrictions on the operation of a notice quit on death of the tenant) and section 44 (provisions for the landlord to obtain the Tribunal's consent to operation of notice to quit) of the 1986 Act. Where there is a late Tribunal determination to a succession application, the following circumstances would apply:
  - Where the Tribunal has refused a succession application, the provisions should allow the Tribunal to be able to determine a period of time in which the applicant can remain on the holding solely in order to effect an orderly departure (where the applicant requests this)

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<sup>16</sup> The Tribunal is the First-tier Tribunal (Property Chamber) Agricultural Land and Drainage Chamber <https://www.gov.uk/courts-tribunals/first-tier-tribunal-property-chamber>

- In the event of a delayed tribunal decision, parties will still be able to make enforceable end of tenancy claims and the time limits for the procedures for tenant's fixtures can still work.

**48. Do you agree with proposal 14 to deliver each of the procedural reforms listed below to improve the operation of the 1986 Act succession provisions?**

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

**49. Please provide additional comments including evidence of the likely benefits and impacts of these procedural reforms.**

## Section four: non legislative options

### 15. Non legislative options

15.1 Many of the sorts of disputes that the proposals in this consultation are seeking to address (particularly around retirement, succession, and restrictive clauses) are able to be resolved, in many cases, through discussion and agreement between landlords and tenants. The role of professionals who advise landlords and tenants is also important in finding solutions. Greater knowledge exchange, guidance and case studies, detailing how landlords and tenants have successfully found solutions, could help change industry culture and encourage wider uptake of best practice approaches. Options for these non-legislative approaches are detailed below. These could be considered as alternatives to changes to tenancy law where they can deliver the same outcomes more effectively, or they could work alongside legislative changes to enhance the delivery of our policy aims.

15.2 Government and industry leaders could to work together to deliver the following activities:

#### Retirement / Succession planning

- Develop guidance and case studies on the benefits of early succession and retirement planning, including examples of negotiated retirement solutions for older AHA tenants with no successor.
- Signpost sources of advice to encourage more tenants to consider handing over the holding to the next generation in a timely way, and change the culture of farming long past retirement age.
- Raise awareness of how changes to agricultural permitted development rights might be used to enable landowners to develop housing for rural workers.
- Raise awareness of changes to the National Planning Policy Framework, which supports the construction of isolated dwellings where there is an essential need for a rural worker, including those taking majority control of a farm business, to live permanently or near to their place of work in the countryside.
- Develop guidance and case studies to show how negotiation can result in solutions to succession disputes which offer benefits to both parties. This could include guidance on negotiating a surrender of an AHA tenancy whilst agreeing a new long term FBT with the tenant's successor, who may not otherwise be eligible to succeed (e.g. a grandchild/niece/nephew of the tenant or a relative that is already a commercial farmer).

## Restrictive clauses

- Develop best practice guidance, case studies and model terms of how landlords and tenants can work together to review and agree to vary restrictions in AHA agreements. This could focus on situations where restrictions might prevent productivity or environmental improvements, or limit the ability for either party to access future agricultural or environmental land management schemes.

## Longer term FBTs

- Raise awareness of the potential benefits of longer-term FBT agreements for both landlords and tenants. Develop best practice guidance, case studies and model agreements to encourage more creative use of the FBT framework to agree longer-term tenancies rather than defaulting to shorter-term agreements.

**50. Do you agree the non-legislative options outlined above in section 4 should be considered as a way of delivering our policy aims of facilitating structural change and enabling productivity improvements in the tenanted sector?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**51. Should the non-legislative options outlined above be considered as an alternative to the tenancy law reform proposals set out in this consultation, or be considered in addition to tenancy law reform proposals?**

**Please select your answer from the following:**

- **Instead of tenancy law reform**
- **In addition to tenancy law reform**
- **Neither**
- **Don't know**

**52. Please provide any other comments including evidence of the likely benefits and impacts of the non-legislative options listed and any other options you think should be considered.**

## Section five: call for evidence

### 16. Call for evidence on the impact of mortgage restrictions over let land

#### Background and overview of issue

16.1 From the 1 September 1995, section 31 of the Agricultural Tenancies Act 1995 had the effect of restricting the ability of a landowner with a mortgage over their agricultural land to grant any tenancies on that land without first gaining permission from their mortgage lender.

16.2 We are asking for evidence and examples of why such restrictions over mortgaged agricultural land are necessary for banks and lenders. We are also interested in gathering evidence on the extent to which such mortgage restrictions might be a barrier and disincentive to letting out agricultural land and therefore may limit opportunities for agricultural tenancies in future.

16.3 If there is evidence that mortgage restrictions are a barrier to agricultural tenancies, there may be a case for exploring the option of repealing section 31 of the ATA 1995. This would mean that in future landowners entering into a mortgage agreement over agricultural land are able to grant tenancies over that land without needing to gain permission from their mortgage lender first. We are interested in exploring the potential benefits and impacts of this option on the finance sector and for agricultural landowners/landlords.

**53. Please provide evidence or examples of why it might be important for mortgage lenders to restrict the ability of a landowner to grant agricultural tenancies on mortgaged land without the permission of their mortgage lender?**

**54. Do you have evidence or examples of whether the current mortgage restrictions for letting land are a barrier to landowners offering agricultural tenancies?**

**55. Do you agree that consideration should be given to repealing section 31 of the Agricultural Tenancies Act 1995 so that in future landowners can grant agricultural tenancies on mortgaged land without gaining prior consent from their mortgage lender?**

**Please select your answer from the following:**

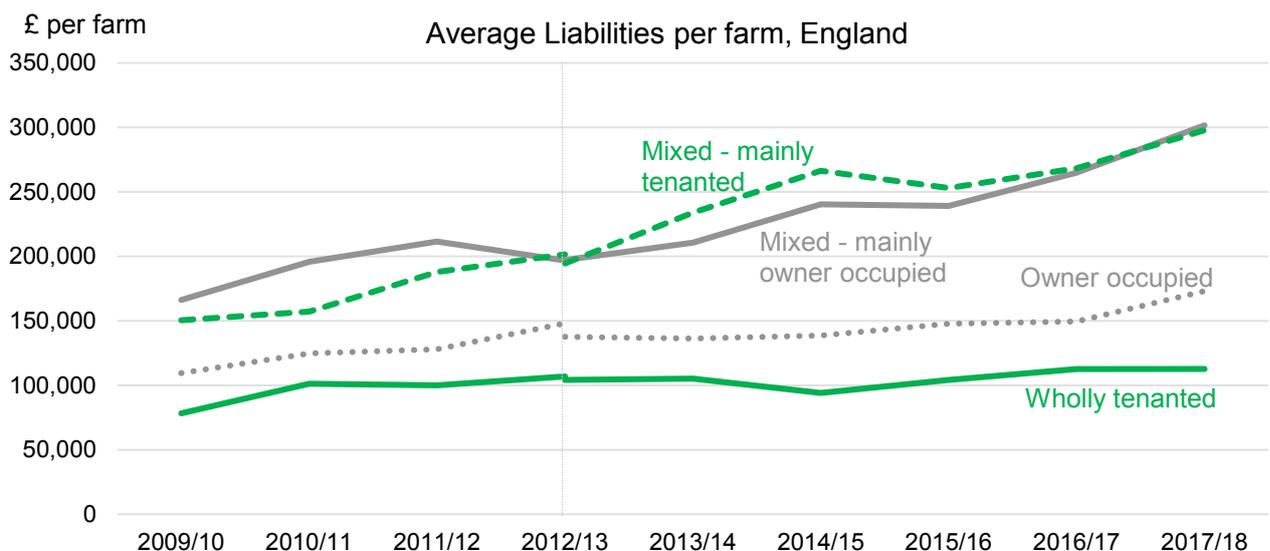
- Strongly Agree
- Agree
- Don't Know
- Disagree
- Strongly Disagree

56. Please provide any additional comments including evidence of the likely benefits and impacts of considering removing mortgage restrictions over let land in future.

## 17. Call for evidence on procedures relating to repossession of agricultural land

### Background

17.1 Many farm businesses rely on loans and other forms of finance for start-up costs, business expansion, or to invest in new equipment and infrastructure. The agricultural sector is a major area of business activity for the UK Financial Services industry. At the end of December 2017, the stock of lending by UK banks to the agricultural sector totalled around £15.5 billion, up nearly £600m on a year before<sup>17</sup>. The chart below shows that average levels of debt for farm businesses have been increasing in recent years, particularly in the mixed tenure sector.



<sup>17</sup> Bank of England, Bankstats Table A8.1

Source: Defra, Farm Business Survey<sup>18</sup>

17.2 Compared to many other small business sectors, the profitability of the agriculture sector is more vulnerable to external factors, such as extreme weather events and animal disease outbreaks. This and other factors increase the risk that levels of agricultural production, and therefore farm income, do not materialise as forecast. For farm businesses that rely on loans and finance, the effect of these external factors is to increase the risk that they are, even temporarily, unable to meet repayment requirements.

## Repossession proceedings for unincorporated businesses

17.3 In the event of missed loan repayments, the process for lenders to recover debts depends on the status of the borrower and purpose of borrowing. When companies become unable to meet loan repayments, they have the opportunity for company rescue via administration. Unincorporated businesses, such as sole traders or partnerships (a large majority of agricultural businesses in England are structured in this way), do not have the same option. In this case, failure to meet repayments can result in the appointment by the lender of a Receiver, with powers to take possession of the assets on which borrowing is secured. This appointment is made under the terms of the lending agreement rather than by means of a court order.

17.4 Arrangements are different for home-owners and for businesses with a mortgage of land which consists of or includes a dwelling-house. Provisions set out in section 36 of the Administration of Justice Act 1970 (the AJA) mean that mortgage lenders are only able to repossess a home or a business premises that includes a dwelling-house if the court grants permission through a possession order. The court has a number of options for providing the mortgage-holder with further opportunity to meet repayments before eviction proceedings can commence. This might include changing the regular amount paid to the lender, or delaying the next payment. However the provisions of section 36 of the AJA does not include agricultural land where there is no dwelling-house.

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<sup>18</sup> The vertical line at 2012/13 marks discontinuity in the data

## Voluntary Standards of Lending Practice and personal bankruptcy and insolvency

17.5 The financial services sector has put in place voluntary Standards of Lending Practice<sup>19</sup> that cover commercial loans, overdrafts and mortgages. These include, for example, a commitment to lend responsibly and treat borrowers fairly and reasonably at all times. They deal specifically with lenders' obligations in the event of financial difficulty. However not all lenders may be aware of and signed up to voluntary codes of practice, for example secondary lenders. There are also personal bankruptcy and insolvency procedures and practices which may also be relevant for unincorporated farm businesses that may get into financial trouble.

## Agricultural land

17.6 Due to the volatility that farm businesses often face, and changes as we start to move out of the CAP and into our future farming policy, it is timely to consider whether existing procedures for taking possession of agricultural land in relation to unincorporated farm businesses (in cases where the defaulted loan does not fall within the provisions of section 36 of the AJA referred to at paragraph 17.4 above) are appropriate and fair for both parties. We are requesting views and evidence on whether this is an issue that needs addressing, and whether there might be a need for introducing additional measures that give farmers more opportunity to meet repayment requirements before the commencement of any possession proceedings of their agricultural land.

17.7 An option for creating additional protections could be to require lenders to apply to a court for a possession order before they are able to take forward possession proceedings. This would allow the court to consider any extenuating circumstances and possibly provide the farm business with more time to meet the repayment requirements depending on the evidence in any given case. We are asking for views on this.

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<sup>19</sup> <https://www.lendingstandardsboard.org.uk/the-standards-for-business-customers/>

**57. Do you have examples or evidence of how farmers may be particularly vulnerable to repossession of their agricultural land now or might be in the future?**

**58. Are there any differences or impacts that should be considered in relation to the procedures and practices for repossession of agricultural land compared to the procedures and practices for repossession of assets in other sectors where businesses are unincorporated?**

**59. Do you think that additional measures to provide owners of agricultural land with additional protections as part of repossession proceedings, possibly similar to those afforded to owners of dwelling-houses, should be considered?**

**Please select your answer from the following:**

- **Strongly Agree**
- **Agree**
- **Don't Know**
- **Disagree**
- **Strongly Disagree**

**60. Please provide any additional comments, including evidence of the likely impacts and benefits of considering policy changes to strengthen legal protections for the owners of agricultural land in relation to repossession procedures?**

## **What happens next?**

The closing date for this consultation is midnight on **2 July 2019**. Responses received by this date will be analysed and taken into account by Ministers in their consideration of future policy and legislative changes. Further analysis of the benefits, impacts and legal implications and complexities of the proposals will also be undertaken and considered alongside the responses to this consultation as part of our policy development process. A summary analysis of responses to the consultation will be published within 12 weeks of the closure of this consultation.

**During the consultation, if you have any enquiries, please contact: [agriculturaltenancies@defra.gov.uk](mailto:agriculturaltenancies@defra.gov.uk)**

# Annex 1: Member organisations of the Tenancy Reform Industry Group

Independent Chair, Adkin

Agricultural Law Association

Association of Chief Estate Surveyors

Central Association of Agricultural Valuers

Country Land and Business Association

Defra

Farmers Union of Wales

Fresh Start Land Enterprise Centre

National Farmers Union

National Federation of Young Farmers Clubs

Royal Institution of Chartered Surveyors

Tenant Farmers Association

Welsh Government