

## **Explanatory Memorandum to The Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (Wales) Regulations 2024**

This Explanatory Memorandum has been prepared by the Climate Change and Rural Affairs Group and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

### **Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (Wales) Regulations 2024. I am satisfied that the benefits justify the likely costs.

**Huw Irranca-Davies MS**

**Cabinet Secretary for Climate Change & Rural Affairs**

18 July 2024

## **PART 1**

### **1. Description**

The Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (Wales) Regulations 2024 ("the Regulations"):

- Introduce a new dispute resolution process relating to a tenant's request for landlord's consent to an activity that is restricted by the terms of their tenancy agreement, or to a variation of the terms, so that the tenant can meet a statutory obligation; and
- Update the suitability test criteria that must be considered by the Agricultural Land Tribunal ("the Tribunal") when determining whether an applicant tenant is a suitable person to succeed to a 1986 Act tenancy agreement following the death or retirement of the tenant.

### **2. Matters of special interest to the Legislation, Justice and Constitution Committee**

None.

### **3. Legislative background**

The Regulations are made pursuant to sections 19A and 39(8) of the Agricultural Holdings Act 1986.

Section 19A provides that Welsh Ministers may make provision through regulations to enable tenants to refer to arbitration or third-party determination requests for landlord's consent to activities that are restricted under the terms of their tenancy agreement or requests for a variation of terms, where that request relates the tenant applying for financial assistance under the power of support provisions under the Agriculture (Wales) Act 2023 (the 2023 Act) or meeting a statutory obligation.

Sections 39(8) provides that Welsh Ministers may make regulations specifying the criteria that must be considered when determining a person's suitability to become a tenant of the holding and to have regard for any views stated by the landlord on the tenant's suitability. The provision specifies that the regulations must relate to the person's capacity to farm the holding commercially to a high standard of efficient production and care for the environment. The provisions also specify that the regulations may include criteria such as the person's experience, training or skills in agriculture and business management, the person's health, financial standing and character and criteria relating to the character and condition of the holding and the terms of the tenancy.

The Regulations are subject to the negative procedure.

#### **4. Purpose and intended effect of the legislation**

Part 1 of these Regulations introduces a new dispute resolution process relating to a tenant's request for landlord's consent to an activity that is restricted by the terms of their tenancy agreement, or to a variation of the terms, so that the tenant can apply for financial assistance under the 2023 Act or meet a statutory obligation. This is because many leases under the 1986 Act include standard restrictive clauses that prevent the tenant from undertaking activities which could change the fixed equipment or land use on the holding without the tenant first gaining the landlords consent to the activity (e.g. erecting or altering buildings, investing in new fixed equipment, taking on other land or diversifying into non-agricultural activities such as environmental land management).

Many landlords and tenants work together effectively to negotiate and overcome issues relating to restrictive clauses without the need for recourse to dispute resolution. However, we understand this may not be the case for all tenancies and some tenants may find restrictive clauses written several years or decades ago now present a constraint on their ability to develop a productive and viable business.

There are no general provisions in the 1986 Act which enable a tenant to challenge through dispute resolution a restrictive clause in their lease.

We want to ensure that tenants of 1986 Act agreements (AHAs) are not unreasonably prevented from accessing financial support under the 2023 Act or complying with statutory obligations. The new process would provide an incentive for tenants and landlords to come to a negotiated agreement to avoid the costs of dispute resolution, whilst providing a legislative backstop and a means of resolution for those tenants who cannot reach a reasonable agreement with their landlord.

Part 2 of these Regulations update the suitability test criteria that must be considered by the Agricultural Land Tribunal ("the Tribunal") when determining whether an applicant is a suitable person to succeed to a 1986 Act tenancy agreement following the death or retirement of the tenant.

1986 Act tenancies entered into before 12 July 1984 carry succession rights on the death or retirement of the tenant for up to two generations of close family relatives, subject to some specific eligibility tests set out in the Act.

One succession eligibility test is the 'Suitability Test' in section 39(8) of the 1986 Act. The regulation sets out the criteria that an applicant tenant must meet in order to be deemed suitable by the Tribunal to succeed to an AHA tenancy agreement. The regulation provides that the Tribunal must have regard to all relevant matters including (but not limited to) –

- a) the extent to which the applicant or each of those applicants has been trained in, or has had practical experience of, agriculture,
- b) the age, physical health and financial standing of the applicant or each of those applicants, and
- c) the views (if any) stated by the landlord on the suitability of the applicant or any of those applicants.

The Welsh Government believes the current test sets a low standard of suitability. It does not, for example, include the requirement for potential tenants to demonstrate they have good business management skills, which is linked to better farm performance. Given the importance of improving farming competitiveness and productivity, the Regulations modernise the suitability test to set higher business competence standards in future. The aim of modernising the test is to ensure succession applicants have the skills and credentials to successfully manage an AHA holding.

## **5. Consultation**

The Welsh Government consulted on the changes in these Regulations in 2019 as part of a wider public consultation on agricultural tenancy reform. In total 33 responses were received from agricultural tenants, landlords and stakeholders.

Most respondents (79 per cent) agreed or strongly agreed that a formal dispute resolution procedure, binding on both parties, was needed. Some felt it could facilitate better discussions and negotiations between landlord and tenant. Two respondents were of the view the provision should be extended to Farm Business Tenancies (FBTs) governed by the Agricultural Tenancies Act 1995 (1995 Act).

Those who disagreed (18 per cent) felt the proposal could interfere with the terms of agreed contracts, and others felt a landlord's right to maintain restrictive clauses for genuine reasons (including non-business reasons such as landscape, amenity, visual appearance and environmental reasons) should not be unreasonably restricted.

A few respondents were of the view the proposal should only apply to tenants, given landlords are not restricted in the same way.

Welsh Government took powers through the UK Agriculture Act 2020 and the Agriculture (Wales) Act 2023.

Most respondents (78 per cent) also agreed or strongly agreed that the Suitability Test should be modernised. Those who agreed felt it could increase professional standards across the industry by ensuring successors are those best equipped to develop successful farming businesses whilst maintaining and enhancing the natural environment.

A few respondents (18 per cent) strongly disagreed or disagreed with the proposal with one respondent stating it could be a barrier to new entrants unless alternative assurances could be provided e.g. training programmes, mentors or experience from other sectors.

Of those who agreed with the proposal, many said the new test will need clearly defined and robust criteria to provide certainty to potential successors, the Tribunal and agents advising the parties.

Some respondents suggested the new criteria should include the applicant's level of training, experience, willingness and ability to manage land sustainably, enter into sustainable land management schemes and undertake continuing professional development. Others raised concerns about the landlord's role in gauging the suitability of the tenant where there had been a breakdown in the landlord-tenant relationship.

Many respondents felt Welsh Government should undertake further work with the industry to develop criteria for the new test before it is changed.

The majority of respondents (80 per cent) agreed three years would provide adequate time for potential successors to prepare for the change.

In response, the Welsh Government committed to work with TRIG and wider industry stakeholders to determine the specific details of the new criteria.

The consultation also asked respondents for their views on non-legislative options to deliver the proposed policy aims, including publication of best practice guidance. Whilst most respondents were supportive (70 - 84 per cent), an overwhelming majority thought this should be in addition to tenancy law reform (92 per cent).

The consultation documents and a summary of the responses are available at: <https://gov.wales/agricultural-tenancy-reform>.

## **PART 2 – REGULATORY IMPACT ASSESSMENT**

### **1. Options**

#### **Option 1 – Do Nothing**

Maintaining the status quo was considered. Without recourse to this dispute resolution mechanism some tenants may be unreasonably prevented from complying with statutory obligations, risking financial penalties for the tenant and impacting on our ability to deliver against our key strategic objectives e.g. in relation to public health issues associated with agricultural emissions.

In addition, the suitability test criteria would remain unchanged and the status quo would be maintained. As a result, it is anticipated the candidate best suited to meeting current and future challenges might not necessarily be successful. This could have a minor negative impact on our ability to deliver against our key strategic objectives if the new criteria are to influence selection.

Finally, AHA tenants in Wales would be at a disadvantage to tenants in England where The Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (England) Regulations 2021 have already been implemented.

#### **Option 2 – Do Minimum**

A potential alternative to making legally binding regulations would be for Welsh Ministers to issue non-statutory guidance.

This would mean Welsh Ministers issuing guidance on resolving disputes and relevant matters the Tribunal may wish to consider when determining succession applications. The guidance would not be underpinned by a statutory instrument.

#### **Option 3 – Make new regulations that would introduce a new dispute resolution mechanism and update the suitability test criteria**

The regulations would enable AHA tenants to refer to dispute resolution any clause in their lease which restricts their ability to access financial support under the Agriculture (Wales) Act 2023 or comply with statutory obligations and would update the suitability test criteria. The details of the dispute resolution mechanism and revised suitability test criteria have been developed by TRIG and have already been implemented in England. TRIG agreed these provisions should be taken forward in Wales as well.

*The preferred option is Option 3. This implements recommendations of the Tenancy Reform Industry Group (TRIG) and outcomes of our 2019 tenancy reform consultation.*

### **2. Costs and benefits**

The Agricultural Holdings Act 1986 applies to agricultural tenancy agreements

entered into before 1 September 1995 and to certain tenancies (principally succession tenancies) granted after that date specifically excluded from the application of the Agricultural Tenancies Act 1995 (ATA). According to Rural Payments Wales (RPW) Administrative Data there were approximately 1,700 BPS claimants with AHA leases covering approximately 98,500 hectares of land in 2021. This is equivalent to approximately 11% of BPS claimants and 8 % of total BPS claimed area.

The AHA:

- provides security of tenure for the tenant by imposing restrictions upon any notice given by the landlord, generally seen to provide the equivalent of lifetime security;
- provides some with opportunities for up to two successions, subject to the applicant meeting statutory tests;
- regulates many of the terms of the tenancy;
- provides compensation between the tenant and landlord in various circumstances; and
- provides for a variety of other miscellaneous matters.

The Act provides three methods of resolving disputes between landlords and tenants, namely:

- a) the Agricultural Land Tribunal;
- b) arbitration or third-party determination; and
- c) the courts.

Arbitration or third-party determination is the primary method of dispute resolution under the Act, although the Tribunal handles succession applications and most notices to quit. Most disputes, particularly those governed by practical agricultural considerations, are compulsorily referable to arbitration under the Act.

#### **a. Option 1: Do nothing**

This option would maintain the status quo or business as usual. This is the baseline against which the relative costs and benefits of the alternative option is assessed.

Some stakeholders, particularly those identifying with tenants, are of the view there may be an increase in the number of disputes arising between tenants and landlords resulting from transition from the Basis Payment Scheme to future support for farmers. Welsh Government has committed to work with stakeholders to ensure scheme payments are distributed fairly and are accessible to all. Therefore, there should be no additional costs or benefits associated with this 'do nothing' option.

#### **b. Option 2: Do Minimum**

Under this option, the Welsh Government would produce and publish two pieces of non-statutory guidance. One aimed at helping tenants, landlords and their advisers take a positive and practical approach to reviewing and agreeing requests to vary agricultural tenancy agreements. The guidance would build on the Tenancy Reform

Industry Group (TRIG) [Code of Good Practice for projects, schemes or works requiring landlord's consent in agricultural tenancies](#). Parties are unlikely to be immediately familiar with this Code, therefore there are not expected to be any additional familiarisation costs.

The other would provide guidance to the Tribunal on attributes required by a suitable person to farm a holding successfully to a high level of productivity and care for the environment. The Tribunal members would familiarise themselves with the guidance at their annual training event. Therefore, there are no additional familiarisation costs expected with this option.

There would be a one-off cost to Welsh Government, which is estimated to be approximately £3,700. This would be met from Welsh Government departmental budgets.

<b>Staff Grade</b>	<b>Staff cost<sup>1</sup></b>	<b>Daily Rate (£) (divided by 220)</b>	<b>Days</b>	<b>Sub-total (£)</b>
Deputy Director sign off	£127,981	£582	0.5	£291
Legal services, Grade 7	£92,844	422	2	£844
Policy lead, Higher Executive Officer	£57,059	£259	10	£2,590
<b>TOTAL</b>				<b>£3,725</b>

1. Welsh Government average staff cost figures for 2023-24. Figures include on-costs.

### *Dispute resolution*

Based on responses to the consultation, it is anticipated non-statutory guidance would be followed by most agricultural tenants, landlords and their advisers. However, it is likely such tenants, landlords and their advisers are those who would have come to a negotiated agreement anyway. Welsh Government considers guidance alone would be unlikely to change the behaviour of those already acting unreasonably.

### *Suitability Criteria*

The Tribunal is required to take account of all relevant matters, including the criteria set out in Section 39(8) of the 1986 Act when determining an applicants suitability to succeed to a 1986 Act tenancy agreement following the death or retirement of the



tenant.

Welsh Government could issue guidance regarding considerations it considers relevant; however, these would not be underpinned by statute. As a result, if the Tribunal were to reject an applicant expressly based on criteria within non-statutory guidance, the applicant would likely have grounds to challenge the decision. As such, this option is unlikely to achieve the desired impact.

For these reasons, the option of dealing with the matters covered by these regulations through guidance alone has been discounted by the Welsh Ministers as there are no discernible advantages over the preferred option.

### **c. Option 3: Amend the 1986 Act**

#### *Dispute resolution*

The Regulation implements a recommendation made by TRIG as part of its 2017 review of the 1986 Act.

The group acknowledged many AHA agreements contain clauses often written a long time ago that could prevent a tenant from undertaking reasonable change.

There are currently no general provisions in the 1986 Act which enable a tenant to challenge through dispute resolution a restrictive clause in their lease. As a result, some AHA tenants may be unfairly restricted from accessing financial assistance under the 2023 Act or complying with statutory obligations, risking financial loss and/or penalties for the tenant and impacting on our ability to deliver against our key strategic objectives.

This option will enable AHA tenants to refer to dispute resolution requests for landlords' consent to an activity that is restricted by the terms of their tenancy, or to a variation of the terms, where no agreement in respect of the request has been reached with the landlord. The request must be made for the specified purpose of complying with a statutory obligation or accessing financial assistance under the 2023 Act.

Supporting tenants, who may otherwise have been restricted, to bring their farm up to compliance, and access financial assistance will help improve the financial position of the business, whilst securing the delivery of public goods. This will have benefits for the rural economy whilst helping deliver on several Welsh Government key strategic aims in relation to the climate emergency and 'net zero' ambition, public health issues associated with agricultural emissions and reversing the decline in biodiversity.

Where agreement cannot be reached, disputes can be referred to an independent arbitrator or third party expert (where both parties agree). The regulations contain conditions that ensure a fair and balanced approach is taken between tenants and landlords' interests.

Making the amendment may increase the total number of disputes that arise. For each new case there will be a cost to business that may be borne either by the landlord, the tenant or both (depending on the nature of the case).

There will be time costs to each individual, however this will vary on a case-by-case basis. The undisclosed nature of many negotiations and disputes that have arisen between agricultural tenants and landowners to date make it impossible to identify the true number and associated costs. It is also impossible to know the exact number of new disputes that will arise because of this provision and quantification risks excessive misjudgement.

However, we anticipate the proposal will only impact a small subset of the AHA sector. We expect in most instances the new process will provide an incentive for tenants and landlords to come to a negotiated agreement to avoid the costs of dispute resolution, and the proposed amendment encourages prior negotiation. The provisions will only be relied upon as a last resort by a very small minority who cannot reach negotiated agreements.

This assessment relies on advice from industry experts who estimate the provisions may give rise to five to ten new disputes per annum (1% of AHA agreements) necessitating the appointment of arbitrators. Most disputes (99%) are settled without the need for full arbitration, with only 1% going through the entire process. This would equate to at most one dispute going to full arbitration per annum.

Arbitrators may be appointed directly by the parties concerned where they can reach agreement on who that should be, or failing agreement, a person appointed by the Agricultural Law Association (ALA), Central Association of Agricultural Valuers (CAAV) or the Royal Institution of Chartered Surveyors (RICS). The Agricultural Holdings (Fee) Regulations 1996 currently sets the appointment fee at £195.

Expert advice from CAAV estimates the average cost of full arbitration is approximately £25,000. This includes the cost of an arbitrator's time and associated fees for legal representation.

Costs are reduced where arbitrators are appointed but agreement reached between parties without the need for full arbitration. CAAV estimate this to be in the region of £15,000 per case, mainly through avoided legal fees.

Expert determination is a cheaper and quicker alternative to arbitration. Rather than parties presenting their case to an arbitrator appointed on a unilateral reference, they agree to appoint a third party who should have expertise in the issue over which there is disagreement. This person reviews the evidence and decides how to settle the dispute. The decision is binding and can only be appealed or challenged in exceptional circumstances. The process usually takes three to six months and is estimated to cost £5,000 on average according to TRIG's assessment in 2014 to inform the Deregulation Act 2015. This will have risen to approximately £6,700 based on the

Bank of England's inflation calculator<sup>1</sup>.

Based on data from the Office for National Statistics (ONS)' Annual Survey of Hours and Earnings (2023), the average cost per hour of a farmer's time is £14.95 (average for all employees in the agriculture, forestry and fishing industry, excluding overtime pay). Identifiable time in disputes could reasonable be estimated at 15 hours of tenant time. Taking into account 30% on costs, this equates to approximately £290 per dispute. At the higher end of the scale, industry experts advise compulsory purchase assessments often now see farmer time at £35/hour. Including 30% on costs, this would equate to approximately £680 per dispute. The same range of costs is assumed for landlord time on the basis the majority of landlords are private owners, rather than traditional institutions or Local Authorities. Identifiable landlord time could reasonably be estimated at 5 hours per dispute, making the range of costs £90-£230 per dispute.

There will also likely be minor administrative costs to Welsh Government associated with communicating the changes through channels such as the Gwlad quarterly newsletter and existing networks. It is assumed there will be no familiarisation cost to arbitrators or experts as they will already be familiar with the changes in England.

Based on the above assumption, we estimate the total cost to business to be between £90.5k and £169k per annum from implementation through secondary legislation as set in Table 1. Exact costs will differ depending on the number and nature of disputes that arise.

**Table 1: Estimated costs**

Type	Range of costs per case	Number of cases	
		Scenario with assumed negotiated cases	Scenario with assumed expert determined cases
Full arbitration	£25,000	1	1
Negotiated	£15,000	9	0
Expert determination	£6,000	0	9
Tenant time	£290 - 680	10	10
Landlord time	£100-230	10	10
TOTAL		£169,100	£90,500

For some, the costs and time required to go through the process could deter individuals and businesses from utilising the provisions. Only those who perceive the likely benefits to be greater than the costs will consider arbitration as a viable option. However, we anticipate the provisions will act as an incentive for tenants and landlords to come to a negotiated agreement to avoid the costs of dispute resolution, whilst providing a legislative backstop to those who cannot reach a reasonable

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<sup>1</sup> [Inflation calculator](#) | [Bank of England](#)

agreement.

On balance, this option is deemed to provide a fair and proportionate approach. It limits the circumstances in which tenants may seek to overturn restrictive clauses in their leases and ensures a balanced approach is taken to the interests of both landlords and tenants. Whilst there is some cost to business, this is anticipated to be minimal as the main benefit of the regulations will be to incentivise tenants and landlords to come to a negotiated agreement.

### *Suitability Test*

Amending the suitability criteria was recommended by TRIG in its 2017 review of the 1986 Act.

The main aim of the review was to identify options for improving the productivity of tenancies governed by the 1986 Act. Productivity in this sense was defined as the most efficient use of resources to produce outputs the market will buy.

It was suggested the current suitability test sets a low bar of suitability and needed revising to encourage letting into the hands of the most productive and innovative.

The group identified the key factors influencing business performance and productivity were skills, training and education. The group noted the 2014 Agri Taxation Review by the Irish Republic which found that a trained farmer had on average a 12 per cent higher output than an untrained farmer.

Under the revised criteria, applicants will need to demonstrate to the Tribunal that they have the capabilities and capacity to farm the holding commercially, with or without other land, to a high standard of efficient production and with care for the environment. The regulations also provide that the Tribunal must be satisfied that if the applicant had applied in an open competition for a similar tenancy agreement a prudent and willing landlord could reasonably be expected to shortlist the applicant as among those to whom they would be willing to grant the tenancy.

The new criteria are clear, providing applicants with certainty on the standard they must meet, whilst enabling the Tribunal to consider all relevant matters on a case-by-case basis, including the views of the landlord on the suitability of the applicant.

**Table 2: Succession Cases per year**

<b>Year</b>	<b>No. Cases</b>
2017-2018	12
2018-2019	19
2019-2020	13
2020-2021	6
2021-2022	8 (to date)

Not all AHA tenancies have succession rights or family successors eligible to succeed to the holding. According to the CAAV's 2019 land occupation survey succession tenancies followed 15% of all 1986 Act tenancies that ended in England and Wales. Coupled with the fact it is not possible to create new 1986 Act tenancies (except in limited situations), the sector is in natural decline. Based on current trends it will cease to be a significant part of the let sector by 2050. The potential benefits of this option will only be realised whilst AHA succession tenancies exist.

Based on the figures above, the Tribunal determine on average 12 succession applications per year. This equates to less than 1% of the AHA sector.

The changes are not anticipated to introduce any *additional* financial costs or lead to an increase in succession applications. They do not introduce a new regulatory burden, as they simply update existing requirements which already exist under current law. Although, the changes set a higher standard expected from future successors.

Stakeholders advise most applicants will have already prepared for the changes since the Welsh Government published its response to the tenancy reform consultation September 2021. Those who do not currently meet the new criteria may have to identify and pay for relevant training. Most agricultural colleges and training providers include relevant skills as standard as part of their courses and programmes. Also, programmes such as Farming Connect provide access to relevant training and skills development for free or at a very low cost. Furthermore, the regulations will not come into force until 1 September 2024, to ensure adequate time to plan and prepare.

The Tribunal and advisers will already be familiar with the new criteria, which replicate those already implemented in England via the Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (England) Regulations 2021.

Each potential successor will need time to familiarise themselves with the new criteria.

Based on data from the Office for National Statistics (ONS)' Annual Survey of Hours and Earnings (2023)<sup>2</sup>, it is assumed that the average cost per hour of a farmer's time is £14.95 (average for all employees in the agriculture, forestry and fishing industry, excluding overtime pay). If familiarisation were to take two hours, the administrative cost to the AHA sector would be approximately £470 (taking into account 30 per cent on costs).

### **3. Competition Assessment**

These Regulations are not expected to impact on levels of competition in Wales or the competitiveness of Welsh businesses.

The coming into force date of the new suitability test is delayed, providing tenants and their successors time to prepare and plan for the new criteria.

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<sup>2</sup> Estimates for 2023 (provisional) of Earnings and hours worked, by industry and occupation . Available at: [Earnings and hours worked, by industry and occupation: ASHE Table 29 - Office for National Statistics \(ons.gov.uk\)](https://ons.gov.uk/earningsandhoursworkedbyindustryandoccupation/ashe-table-29)

#### **4. Post implementation review**

The impact of the regulations will be monitored through ongoing engagement with TRIG and the Tribunal.