EXPLANATORY MEMORANDUM TO

THE AGRICULTURAL HOLDINGS (REQUESTS FOR LANDLORD'S CONSENT OR VARIATION OF TERMS AND THE SUITABILITY TEST) (ENGLAND) REGULATIONS 2021

2021 No. 619

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument applies to tenants and landlords with tenancy agreements governed by the Agricultural Holdings Act 1986 ("the 1986 Act"). It implements regulations that will apply to tenancies governed by the 1986 Act including:

- Regulations that establish 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 new financial assistance schemes delivered under the Agriculture Act 2020 Act ("the 2020 Act") or meet a statutory obligation; and
- Regulations that establish updated suitability test criteria that must be considered by the First-tier Tribunal (Property Chamber) Agricultural Land and Drainage Chamber ("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.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

6.1 **Disputes:** This is the first set of regulations under new section 19A of the 1986 Act, inserted by the 2020 Act. It establishes a mechanism for tenants to refer to arbitration (or third party determination where both parties agree) requests for landlord's consent to activities that are restricted under the terms of their tenancy agreement, or a variation of terms. The mechanism is only available when the tenant's request is for the purpose of applying for financial assistance under sections 1, 2(4) or 19 of the 2020 Act, or of meeting another statutory obligation.

6.2 **Succession:** Part 4 of the 1986 Act provides rights for up to two generations of close family relatives of the tenant to apply to the Tribunal to succeed to a 1986 Act tenancy agreement following the death or retirement of the tenant, subject to them meeting specific eligibility and suitability tests. Section 39(8) of the 1986 Act currently sets out the criteria that must be considered by the Tribunal when determining whether an applicant is a suitable person to become the tenant of the holding.

6.3 This instrument exercises for the first time the power in new section 39(8) of the 1986 Act, substituted by the 2020 Act conferring a power on the Secretary of State to make regulations in England specifying updated criteria that must be considered when determining a person's suitability to become a tenant of the holding. Part 3 of this instrument sets out those updated criteria in regulations which will come into force on 1st September 2024.

6.4 On 1st September 2024, paragraphs 10 to 16 of Schedule 3 to the 2020 Act will also be brought into force removing the commercial unit test in relation to applications under Part 4 of the 1986 Act. Paragraph 18 of Schedule 3 to the 2020 Act will also be brought into force on that date. This will complement the provision made by this instrument by applying the updated suitability test to applications by nominated successors.

7. Policy background

What is being done and why?

7.1 In England around a third of agricultural land is rented. The relationship between agricultural tenants and landlords is governed partly by the terms of their individual tenancy agreements, and partly by the framework of agricultural tenancy legislation which applies in England and Wales.

7.2 This instrument sets out regulations in England that apply to tenancy agreements governed by the Agricultural Holdings Act 1986 Act ("AHA Agreements") There are approximately 19,400 farms in England with an AHA agreement.

7.3 Part two of this instrument sets out a new dispute resolution process to help resolve tenant and landlord disputes on issues relating to restricted activities in AHA agreements. This is because most AHA agreements were negotiated and agreed over thirty to forty years ago in a very different policy environment from today and often include restrictions that prevent the tenant from changing the fixed equipment on the holding (such as putting in a slurry store or new building) or diversifying into non-agricultural activities (such as delivering environmental schemes) without first gaining consent from the landlord.

7.4 Whilst many landlords and tenants work together to negotiate and come to voluntary agreements regarding landlord consent to restricted activities without the need for recourse to dispute resolution, this is not the case for all tenancies. Evidence from the 2019 consultation[1] found that for some tenants restrictive clauses in their agreements written many years ago may now present a barrier to their ability to access future financial assistance schemes or meet new statutory obligations, particularly where their landlord might withhold consent without good reason, or may make their consent conditional on unreasonable demands (e.g. reducing the tenant's security of tenure).

7.5 To tackle this issue the government implemented reforms through the 2020 Act to provide tenants of AHA agreements with access to a new dispute resolution process, now delivered through this instrument, in order to resolve issues relating to restricted activities or a variation of terms, in such circumstances where the landlord may be unreasonably withholding consent and where the tenant needs resolution in order to access a financial assistance scheme delivered under the 2020 Act or meet a statutory obligation. Without recourse to this dispute resolution mechanism some tenants may be unfairly restricted from accessing income streams from new financial assistance schemes or may risk incurring penalties for being unable to meet a new statutory requirement.

7.6 Part two of this instrument sets out the details of this new dispute resolution process. It provides a balanced and fair approach for both parties giving certainty on the criteria and conditions that must be met in order for the tenant to make a referral to dispute resolution. The regulations also set out a clear process that must be followed by all parties whilst enabling expert arbitrators and third party professionals to assess the evidence and deliver expert determination on a case by case basis. The regulations have been developed in consultation with the Tenancy Reform Industry Group (TRIG") an expert advisory group to Defra on agricultural tenancy issues which includes representatives of tenant farmers, agricultural landlords and professional advisors.

7.7 The regulations provide an incentive for tenants and landlords to come to a negotiated agreement in order 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.

7.8 Part three of this instrument relates to succession provisions in the 1986 Act. The 1986 Act provides succession rights for up to two generations of eligible close relatives of a deceased or retiring tenant and sets out specific tests that succession applicants must meet in order to succeed. One of these tests is the suitability test which provides that the Tribunal when assessing succession applications must decide whether the applicant is a suitable person to become the tenant of the holding.

7.9 Following industry feedback that the current suitability test was not fit for purpose and needed updating the 2019 consultation included a proposal to update the suitability test. Most respondents agreed with the proposal supporting the view that an updated suitability test which includes consideration of business management skills and experience alongside farming skills will help to deliver increased professionalism and

[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873260/agricultural-tenancy-consult-gov-response1.pdf

improved productivity in the sector. To deliver this the government implemented reforms through the 2020 Act enabling the Secretary of State to make regulations in England setting out updated suitability test criteria.

7.10 Part three of this instrument sets out the updated suitability test criteria. The suitability test regulations provide for a modernised test that will help to deliver increased professionalism and productivity in the sector by including experience, training, and skills in business management alongside farming experience, training and skills. For example, applicant tenants will need to demonstrate to the Tribunal that they have the capabilities and capacity to farm the holding commercially, with or without other land, taking into account the need for high standards of efficient production and 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 the candidates they would be willing to grant the tenancy too.

7.11 The suitability test regulations provide clear criteria so applicants have certainty on the standard they must meet, whilst enabling the Tribunal to take into account all relevant matters on a case by case basis, including the views of the landlord on the suitability of the applicant.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Consolidation is not needed as this instrument is not an amending instrument.

10. Consultation outcome

10.1 Defra consulted on the changes delivered in these regulations as part of a wider public consultation on agricultural tenancy reforms in 2019. The 2019 consultation was delivered as an online survey and a downloadable consultation document and through regional consultation events. Defra received 147 responses to the online consultation document from a mixture of tenant farmers, agricultural landlords and professional advisors and the consultation events were attended by approximately 190 people including a mixture of tenant farmers, agricultural landlords, and professional advisors.

10.2 The 2019 consultation included a proposal to provide tenants and landlords of AHA agreements with a new mechanism to resolve disputes relating to restrictive activities. Many respondents (56%) agreed with the proposal. It was frequently noted that the dispute mechanism is needed for tenant farmers only because restrictions in tenancy agreements apply to tenants and not to landlords. Those who agreed with the proposal held the view that the new dispute resolution provision is needed as a legislative backstop for tenants where restrictions in their agreements could prevent them from undertaking non-agricultural activities in future such as delivering environmental land management schemes or meeting new statutory obligations.

10.3 Those who disagreed with the proposal commented that tenants and landlords have entered into agreements freely and changes to agreements should be done through voluntary negotiations and not dispute resolution.

10.4 In response to feedback gathered through the consultation, the government amended the proposal to re-focus the new dispute mechanism on ensuring that tenants of AHA agreements are not unreasonably prevented from accessing future financial assistances schemes or meeting statutory obligations. The government also committed to developing the details of the dispute resolution process in consultation with industry (working with TRIG) so that the interests and views of both tenants and landlords are taken into account. Between November 2020 and May 2021 the government has continued to consult and engage with TRIG on the development of the dispute resolutions regulations.

10.5 The consultation also included a proposal to update and modernise the 1986 Act suitability test. The majority of respondents (81%) agreed with the proposal and agreed that experience and skills in business management need to be considered alongside farming skills in future to help deliver improved productivity and increased professionalism in the sector. Many responses noted that more work is needed with industry to develop the criteria for the new test, so it is clearly defined and consistently applied. In response to this consultation feedback the government committed to developing the new suitability test regulations in consultation with TRIG. Between November 2020 and May 2021 the government has continued to consult and engage with TRIG on the development of the suitability test regulations.

10.6 The full government response to the 2019 consultation on the suitability test and the dispute resolution proposals can be found in sections 3 and 4 of the published government response document at this link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873260/agricultural-tenancy-consult-gov-response1.pdf

11. Guidance

11.1 Agricultural tenancy agreements are private contracts and tenants and landlords are likely to seek professional advice on their specific circumstances in relation to these regulations. As such it is not appropriate for government to issue guidance, however, industry led guidance will be developed by TRIG and be widely accessible to tenants, landlords and professional advisors through trade bodies including the Tenant Farmers Association, the National Farmers Union, the Country Business and Land Association, the Royal Institute of Chartered Surveyors, the Agricultural Law Association and the Central Association of Agricultural Valuers.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because not many businesses will be affected. The regulations will impact a small subset of tenanted farm businesses with AHA agreements. Most tenants and landlords will negotiate solutions to avoid dispute costs so we expect the dispute regulations will only be used by a small number of tenant farmers as a last resort where negotiations have broken down. The suitability test regulations update an existing legislative provision and so

do not bring in a new regulatory burden. In addition, they will impact a small subset of tenanted businesses who have succession rights and who also have family successors who may apply to succeed to the AHA holding.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to delay the coming into force date of the modernised suitability test to three years after the regulations are made so that tenants and their successors have adequate time to prepare and plan for the new suitability test criteria.

13.3 The final decision on what action to take to assist small businesses is based on feedback from the 2029 public consultation[2] where most respondents agreed that three years between making and commencing the new suitability test regulations is necessary to enable tenanted businesses to prepare for the change.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is through ongoing engagement with industry representatives through TRIG and officers of the Tribunal to gather feedback and evidence on the use and impact of the regulations which will feed into regular reviews of the regulations.

14.2 A statutory review clause is included in the Regulations.

15. Contact

15.1 Jenny Barker at the Department for Environment, Food and Rural Affairs, Telephone: 02080267456 or email: Jenny.Barker@Defra.gov.uk can be contacted with any queries regarding the instrument.

15.2 Tim Mordan, Deputy Director for Agri-Food Chain Innovation, Productivity & Science at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Victoria Prentis MP, Parliamentary Under Secretary of State for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873260/agricultural-tenancy-consult-gov-response1.pdf