



House of Commons
Regulatory Reform Committee

**Proposal for the
Regulatory Reform
(Agricultural
Tenancies) (England
and Wales) Order 2006**

Sixth Report of Session 2005–06



House of Commons
Regulatory Reform Committee

**Proposal for the
Regulatory Reform
(Agricultural
Tenancies) (England
and Wales) Order 2006**

Sixth Report of Session 2005–06

*Report, together with formal minutes and
written evidence*

*Ordered by The House of Commons
to be printed 20th June 2006*

HC 1309
Published on 26th June 2006
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The Regulatory Reform Committee

The Regulatory Reform Committee is appointed under Standing Order No. 141 to consider and report to the House of Commons on proposals for regulatory reform orders under the Regulatory Reform Act 2001 and, subsequently, any ensuing draft regulatory reform order. It will also consider any "subordinate provisions order" made under the same Act.

Current membership

Andrew Miller (*Labour, Ellesmere Port & Neston*) (Chairman)
Gordon Banks (*Labour, Ochil and South Perthshire*)
Lorely Burt (*Liberal Democrat, Solihull*)
Mr James Gray (*Conservative, North Wiltshire*)
Stephen Hammond (*Conservative, Wimbledon*)
John Hemming (*Liberal Democrat, Birmingham, Yardley*)
Mrs Sharon Hodgson (*Labour, Gateshead East & Washington West*)
Mr Stewart Jackson (*Conservative, Peterborough*)
Dr Doug Naysmith (*Labour/Co-operative, Bristol North West*)
Mr Jamie Reed (*Labour, Copeland*)
Alison Seabeck (*Labour, Plymouth, Devonport*)
Mr Andrew Slaughter (*Labour, Ealing, Acton & Shepherd's Bush*)
Ms Angela C Smith (*Labour, Sheffield, Hillsborough*)
Mr Anthony Steen (*Conservative, Totnes*)

Criteria against which the Committee considers each proposal

Paragraph (6) of Standing Order No.141 requires us to consider any proposal for a regulatory reform order against the following criteria:

... whether the proposal—

- (a) appears to make an inappropriate use of delegated legislation;
- (b) removes or reduces a burden or the authorisation or requirement of a burden;
- (c) continues any necessary protection;
- (d) has been the subject of, and takes appropriate account of, adequate consultation;
- (e) imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;
- (f) purports to have retrospective effect;
- (g) gives rise to doubts whether it is *intra vires*;
- (h) requires elucidation, is not written in plain English or appears to be defectively drafted;
- (i) appears to be incompatible with any obligation resulting from membership of the European Union;
- (j) prevents any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise;
- (k) satisfies the conditions of proportionality between burdens and benefits set out in sections 1 and 3 of the Regulatory Reform Act 2001;
- (l) satisfies the test of desirability set out in section 3(2)(b) of the 2001 Act;
- (m) has been the subject of, and takes appropriate account of, estimates of increases or reductions in costs or other benefits which may result from its implementation; or
- (n) includes provisions to be designated in the draft order as subordinate provisions.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/regrefcom. A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are Mick Hillyard (Clerk), Stuart Deacon (Committee Specialist) and Liz Booth (Secretary/Committee Assistant).

All correspondence should be addressed to the Clerk of the Regulatory Reform Committee, Delegated Legislation Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 2837; the Committee's email address is regrefcom@parliament.uk.

Contents

Report	<i>Page</i>
Summary	3
Explanatory Report	5
Introduction	5
The Committee's remit	7
Extent of the proposal's application	7
Assessment of the proposed Order against the Standing Order No.141(6) criteria	7
Inappropriate use of delegated legislation	7
Proposal 1 – Expansion of the 'Livelihood Test' for eligibility for succession to a tenancy (article 5)	8
First new burden and the proportionality test	8
Fair balance and desirability	9
Necessary protection	9
Continuation of reasonable rights and freedoms	9
Proposal 2 – Amendment to provisions relating to the end of tenancy compensation	9
(a) Amendment to the Agricultural Holdings Act 1986 (article 6)	9
Second new burden and the proportionality test	10
Fair balance and desirability	10
(b) Amendment to the Agricultural Tenancies Act 1995 (articles 16 and 17)	10
Third new burden and the proportionality test	11
Fair balance and desirability	11
Necessary protection	11
Continuation of reasonable rights and freedoms	12
Proposal 3 – modernisation of arbitration procedures in Agricultural Holdings Act 1986 (articles 7, 9 and 10)	12
Fourth new burden, re-enacted burden and the proportionality test	13
Fair balance and desirability	13
Necessary protection	14
Continuation of reasonable rights and freedoms	14
Proposal 4 – Amendment of provisions for rent reviews (articles 3 and 8)	14
(a) Agricultural Holdings Act 1986	14
(b) Agricultural Tenancies Act 1995 (articles 14 and 15)	15
Fifth new burden and proportionality test	16
Fair balance and desirability	16
Necessary protection	16
Continuation of reasonable rights and freedoms	16
Proposal 5 – amendment of the Agricultural tenancies Act 1995 provisions on the application of the Agricultural Holdings Act 1986 Act to a tenancy (Articles 4 and 12)	17

Sixth new burden and the proportionality test	19
Fair balance and desirability	19
Necessary protection	19
Continuation of reasonable rights and freedoms	19
Proposal 6 – amendment of the limit on the notice period for termination of a tenancy (article 13)	19
Necessary protection	20
Continuation of reasonable rights and freedoms	20
Compatibility with obligations arising from membership of the European Union	21
Consultation	21
Estimates of costs, savings and other benefits	22
Other matters	23
Conclusion	23
Formal minutes	24
List of written evidence	25

Summary

Overall recommendation

We have examined the proposal for the Regulatory Reform (Agricultural Tenancies)(England and Wales) Order 2006 in accordance with Standing Order No. 141. We recommend unanimously that a draft Order in the same form as the proposal should be laid before the House.

Outline of the proposed Order

The purpose of the proposed Order is to amend the Agricultural Holdings Act 1986 and Agricultural Tenancies Act 1995 in order to remove burdens on the landlords and tenants of agricultural land and on persons appointed to arbitrate in disputes between them.

Summary of the Committee's findings on the proposal against the prescribed criteria

The proposal for the Regulatory Reform (Agricultural Tenancies)(England and Wales) Order 2006 was laid before the House by the Cabinet Office on 30 March 2006 on behalf of the Secretary of State for Environment Food and Rural Affairs. We have considered the proposal against the criteria set out in paragraph (6) of Standing Order No. 141 and report the following conclusions to the House.

Criterion (a): appropriate for delegated legislation

In our view the proposal appears to be appropriate for delegated legislation.

Criterion (b): removal or reduction of burdens

The proposal would remove or reduce a number of burdens.

Criterion (c): maintenance of necessary protection

We are satisfied that no necessary protection would be lost.

Criterion (d): adequate consultation

We consider the proposal has been the subject of, and appropriate account has been taken of, an adequate degree of consultation.

Criterion (e): charges on public revenues, payments to the Exchequer or any public authority

The proposal would not impose any requirements of this kind.

Criterion (f): retrospective effect

The proposal would not have retrospective effect.

Criterion (h): vires of the proposal

The proposal gives rise to no doubts as to whether it is *intra vires*.

Criterion (i): compatibility with membership of the European Union

We have seen no reason to consider that the proposal is incompatible with obligations arising from membership of the European Union.

Criterion (j): prevention of the exercise of rights and freedoms it would be reasonable to expect to continue

We consider that the proposal would not prevent the exercise of any right or freedom that any person could reasonably expect to continue to enjoy.

Criterion (k): new and re-enacted burdens are proportionate to the benefit which arises from them

We consider the new and re-enacted burdens imposed by the proposal would be proportionate to the beneficial effects which would arise from them.

Criterion (l): extent to which the order removes burdens or has other beneficial effects makes it desirable for it to be made

We consider the proposal meets the test of desirability in its removal and reduction of burdens.

Criterion (m): estimates of increases or reductions in costs or other benefits and the account taken of them

We consider the Department has made reasonable efforts to foresee the costs, savings and other benefits which could arise from the proposal.

Criterion (n): subordinate provisions

The proposal contains no provisions which are designated as subordinate provisions.

Explanation of the Committee's recommendation

In the remainder of this report we set out in more detail the basis on which we reached the conclusions and recommendation set out above.

Explanatory Report

Introduction

1. The proposal for the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006 was laid before the House by the Department for Environment, Food and Rural Affairs (Defra) on 30 March 2006.

2. The purpose of the Proposed Order is to amend the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995 in order to remove burdens on the landlords and tenants of agricultural land and on persons appointed to arbitrate in disputes between them.

3. The proposed Order would:

(Proposal 1) - Expand the range of activities from which relatives of a tenant of agricultural land could derive income without jeopardising any rights of statutory succession to a tenancy;

(Proposal 2) - Remove existing restrictions on the eligibility of parties to a tenancy agreement for compensation for improvements (in the case of tenants) or dilapidations¹ (in the case of landlords) at the end of that tenancy;

(Proposal 3) - Bring the provisions of the Agricultural Holdings Act 1986 relating to the management of the arbitration of disputes over tenancies into line with arbitration mechanisms of the Arbitration Act 1996;

(Proposal 4) - Amend statutory provisions which govern the holding of rent reviews for agricultural tenancies;

(Proposal 5) - Make it easier to add new land to an agricultural holding which is subject to a tenancy under the Agricultural Holdings Act 1986, without that necessarily voiding the existing tenancy agreement; and

(Proposal 6) - Abolish the upper limit of 24 months for a notice to quit a tenancy under the Agricultural Tenancies Act 1995, so that indefinitely long notice could be given.

4. Various related repeals and consequential amendments would also be made by article 18 and Schedules 1, 2 and 3 to the proposed Order.

5. The Department considers that the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995 in their present form have the effect of restricting the freedom of tenants to diversify their business into non-agricultural activities and also prevents parties to tenancies of agricultural land from otherwise restructuring holdings to the advantage of tenants, landlords and the protection and enhancement of the environment. The aim of the RRO is therefore to create “a more modern legislative framework which would encourage flexibility between parties and encourage opportunities for tenant farmer diversification”.

¹ “Dilapidations” means damage or disrepair to a rented property for which the tenant of the property will usually be liable.

In particular, it is intended that there be greater equality of operation as between tenant farmers and owner-occupiers in terms of their freedom to restructure and diversify their businesses.

6. The Department views this objective in a context of the historical development of agricultural tenancy legislation since the Second World War: unlike the post-war period, there is now no need to focus on increasing the quantity of food grown; EU farm subsidies are less related to agricultural production; diversification is an increasingly important part of ensuring the sustainability of many farms; and there are growing demands for land to be managed in a more environmentally sensitive way.

7. A series of Acts beginning with the Agriculture Act 1947 were passed in order to protect tenant farmers and to establish rights of succession to a tenancy where specified conditions were met, thus allowing succeeding generations to apply for a tenancy when the incumbent tenant retired from farming, or died.

8. The Agricultural Holdings Act 1986 (“the 1986 Act”) provides for rights of statutory succession in respect of tenancies granted before 12 July 1984, provided certain criteria are met, including that the successor has gained the major part of his income from agricultural work on the holding in the years immediately prior to application for succession. It also provides detailed machinery for rent reviews and related arbitration procedures. It establishes an Agricultural Land Tribunal to examine disputes between landlords and tenants relating to contested statutory succession and notices to quit.

9. In 1991 the Government undertook a public consultation on proposals further to reform and simplify agricultural tenancy legislation against the context of continuing decline in the availability of agricultural land to let. These proposals were jointly developed by the Government in association with a body representing agricultural landowners and tenants called the Tenancy Reform Industry Group (“TRIG”). Discussion between the Government and this Group led to the Agricultural Tenancies Act 1995 (“the 1995 Act”), which established Farm Business Tenancies. These tenancies permit tenants to diversify away from agriculture within the terms of their tenancy without the tenancy needing revision.² The Act also simplified the statutory dispute resolution machinery.

10. In 2001, the Defra commissioned Plymouth University to investigate how far the 1995 Act had succeeded in meeting its declared objectives:

- to encourage more lettings;
- to increase opportunities for new entrants;
- to promote economic efficiency by making the market for rented land more flexible and responsive to market forces.

² A Farm Business Tenancy is a tenancy which meets both business and agricultural criteria laid down in the Act. These require that all or part of the land in the tenancy is farmed for the purposes of trade or business and that the terms of the tenancy, use of the land and the nature of the activity carried out on the land are primarily or wholly agricultural.

11. The conclusion of the research was that the 1995 Act had not been successful in achieving the second and third objectives, largely because tenancies were too short for tenants to be encouraged to commit to long term investment.

12. In November 2002, the Government “re-convened” TRIG with an expanded membership to consider recommendations for legislative reform from the Plymouth University study and from the Government’s own Policy Commission on the Future of Farming and Food, which was established to report on lessons from the Foot and Mouth disease outbreak in 2001. TRIG reported in June 2003 and the Government accepted its recommendations for legislative reform, which are enshrined in this RRO proposal.

The Committee’s remit

13. The House has instructed us to examine the proposal against the criteria specified in Standing Order No. 141(6) and then, in the light of that examination, to report whether we recommend that the proposal should proceed, whether amendments should be made to it, or whether no Order should be made in the terms of the proposal.

14. Our discussion of matters arising from our examination is set out below. Where a criterion specified in Standing Order No. 141(6) is not discussed in the report, this signifies that we have no concerns to raise about that criterion. During our examination, we requested further information from the Department about two matters relating to the proposal and the text of our questions is contained in Appendix A to this report. The Department’s letter of response is reproduced as Appendix B.

Extent of the proposal’s application

15. The legislation affected by the proposed Order, the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995, both apply in England and Wales only, and the proposed Order will similarly apply only in England and Wales.

Assessment of the proposed Order against the Standing Order No.141(6) criteria

Inappropriate use of delegated legislation

16. In the light of its scope and intended effect the proposed Order appears to us to constitute an appropriate use of delegated legislation.

Proposal 1 – Expansion of the ‘Livelihood Test’ for eligibility for succession to a tenancy (article 5)

17. Section 36 of the 1986 Act establishes the right of any eligible person to apply for a new tenancy on the death of the incumbent tenant.³

18. Under the existing provision, statutory rights of succession can only be applied for where the applicant works on the land forming the holding. Work such as contract ploughing, or the supply of other agricultural services to other businesses is not eligible and to carry on such work could actually jeopardize eligibility. Prospective successors to an agricultural tenancy are therefore currently burdened by a provision that explicitly limits the circumstances of their eligibility for statutory succession rights and may constrain their freedom to earn income from activities other than agricultural work on land farmed by their family.

19. Section 41 of the 1986 Act makes provision for succession rights to be granted by the Tribunal where requirements of section 46 in respect of 5 years continuous or discontinuous derivation of income is not strictly satisfied but is, in the opinion of the Tribunal, “materially satisfied”. The same burdensome requirement in respect of the derivation of income from agricultural work on the holding applies.

20. Section 50 of the 1986 Act establishes a similar arrangement for eligible relatives to apply for and be granted succession to a tenancy when the incumbent tenant quits possession through retirement rather than by dying. Again, the same burdensome requirement in respect of the source of the applicant’s livelihood is imposed.

21. In order to remove the burden imposed on applicants wishing to succeed a deceased or retired relative in an agricultural tenancy, the Department proposes in article 5 of the Regulatory Reform Order (RRO) to insert a new provision into sections 36, 41(1) and 50 of the 1986 Act which will expand the definition of agricultural work for the purposes of the relevant sections to include agricultural work carried out by that person from the holding and any other work carried out by that person from or on the holding which is of a kind approved by the landlord in writing, following the coming into force of the Order. **We therefore agree a burden would therefore be removed from these prospective successors in tenancy.**

First new burden and the proportionality test

22. The Department proposes to create a new burden in the form of a requirement that agricultural and non-agricultural work carried out from the holding must be approved in writing by the landlord in order that it can be used to satisfy the livelihood test. The Department considers that the creation of this burden is proportionate to the benefits which arise from the enhanced freedom which article 5 of the RRO would establish for tenants and prospective successors to diversify their business activities within the context

3 An eligible person (who would be either one of a defined series of close relatives or a person who is not a relative but who has been treated as a child of the incumbent tenant) may apply for a new tenancy where, in the 7 years preceding the death, his or her principal source of livelihood for no less than 5 years continuously or in discontinuous periods together amounting to 5 years, derived from his agricultural work on the holding, or on part thereof, and that person is not the occupier of a commercial unit of agricultural land.

of less onerous and restrictive legal machinery governing statutory rights of succession to agricultural tenancies. **We agree.**

Fair balance and desirability

23. The Department considers that the overall benefits that it expects from the proposed Order, including the burdens that would be removed, make it desirable for the Order to be made. It considers that the proposal strikes a fair balance between the interests of those persons affected by the new burden described above and the public interest. **We agree.**

Necessary protection

24. As regards maintenance of necessary protection, the Department considers that expansion of the 'Livelihood Test' for eligibility for succession to a tenancy (article 5) would have no effect on protections. **We consider that no necessary protection would be lost.**

Continuation of reasonable rights and freedoms

25. Under proposal 1, any work carried out at or from the holding which is to count in terms of the livelihood test must have the prior consent of the landlord, which safeguards the rights of the landowner. Tenants would gain new rights in respect of their freedom to operate their business without putting succession rights to the tenancy in jeopardy. **On this basis, we consider the proposal would not remove the rights of any person.**

Proposal 2 – Amendment to provisions relating to the end of tenancy compensation

(a) Amendment to the Agricultural Holdings Act 1986 (article 6)

26. The 1986 Act makes provision for tenants to be eligible for compensation at the end of their tenancy for the cost to them of certain improvements made to the holding during that tenancy, or a previous tenancy which preceded it, and also includes provision to allow landlords similar rights in respect of dilapidations. However, the form of the existing provision in the 1986 Act is such that any land added to the holding has the effect of establishing a new tenancy, thus cancelling the relevant statutory rights to compensation on both sides for works/dilapidations prior to the date at which that new tenancy took effect.

27. The Department considers that the effect of the form of the existing sections 69 and 73 and of Schedule 9 of the 1986 Act is to burden landlords and tenants of agricultural land with a requirement that, for compensation for works of improvement or dilapidations to be payable in respect of a previous tenancy, there must not be any addition to the land comprising any holding during a presently existing tenancy. In practical terms, the form of the current law creates an obvious disincentive for landlords and tenants to add any land to holdings currently tenanted as to do so would bring to an end their respective rights to compensation for value they may have lost or added to the relevant property during their tenancy.

28. It is proposed that article 6 of the Order should insert new wording into sections 69, 73 and Schedule 9 to the 1986 Act to apply their provisions to situations where the prior tenancy was of the whole or a substantial part of the land which is the subject of the new tenancy. This would relax the existing requirement that, for both parties' rights to compensation to subsist between successive tenancies held by the same person, the holding must remain geographically identical. **We agree that the effect of this would be to remove a burden.**

Second new burden and the proportionality test

29. The Department notes that it is possible to regard this particular element of the proposed Order as imposing a new burden on landlords and tenants in the form of the creation of liabilities for compensation for improvement or dilapidations in circumstances where an addition to the land comprising a holding would currently mean that such liabilities would be expunged. The explanatory statement records the Department's view that the new burden as described above is proportionate to the benefit which it believes will arise from the ability of landlords and tenants to restructure holdings without losing eligibility to compensation under the 1986 Act. **We agree.**

Fair balance and desirability

30. The Department believes that, in the context of the anticipated benefits of the proposed Order as a whole, the removal of the burden described above from those affected strikes a fair balance between the public interest and the interests of those affected by the new burden, and that these factors make it desirable for the Order to be made. **We agree.**

(b) Amendment to the Agricultural Tenancies Act 1995 (articles 16 and 17)

31. Sections 20 and 24(2) of the Agricultural Tenancies Act 1995 provide that a tenant may claim compensation for physical improvements and "intangible advantages" which give rise to an increase in the value of a holding, provided the landlord gave his prior consent to the improvement. If the landlord refuses consent, the tenant may take the matter to arbitration. The effect of the prior grant of consent or of a ruling by the arbitrator in favour of the tenant wishing to make the improvement is to make compensation payable at the termination of the tenancy. Section 20 of the 1995 Act provides that compensation shall be payable at the value equal to the increase attributable to the improvement at the termination of the tenancy, less any amount which it was agreed between landlord and tenant would be beneficially allowed to the tenant, or the amount of any grant made to the tenant for the completion of the relevant works out of public monies.

32. Currently there is no scope for the parties to make an agreement of their own as to the amount of compensation and the restriction of their freedom to decide on the amount payable is described as a burden on both parties. The practical effect of this current burden is described as being a reluctance of landlords to consent to works of improvement by their tenants, owing to their uncertainty as to how much the improvement might add to the value of the holding should the tenant decide to quit and seek compensation for his investment. **We agree that a burden has been correctly identified.**

33. It is proposed that article 16 of the Order should amend section 20 of the 1995 Act to establish that landlord and tenant may make an agreement in writing to fix an upper limit to the amount of compensation payable to a tenant under that Act in respect of value added to an agricultural property. Where such an agreement is made, the compensation payable would not exceed that amount or the amount of increased value added by the relevant improvement at the time of the termination of the tenancy, whichever is the lesser. If the parties involved were unable to reach agreement as to the amount of the limit of the compensation, the amount payable in compensation would be the cost to the tenant of making the improvements.

34. Article 17 makes further related amendment to section 24 of the 1995 Act, which makes provision in respect of the payment of compensation where the landlord resumes possession of a part of the holding during the lifetime of the tenancy. The proposed new provision provides that, where compensation has been paid on the surrender of a part of a holding, the compensation payable on the surrender of the remainder shall be reduced by the amount which has already been paid to the tenant in respect of the improvement carried out.

35. The Department describes these proposed provisions as having the effect of giving landlords and tenants a new contractual freedom to reach their own agreements on the level of end of tenancy compensation without reference to the basis for calculation laid down in the 1995 Act. **We consider that this amounts to the removal of a burden.**

Third new burden and the proportionality test

36. An insignificant new burden would be created in the form of the requirement that compensation limits agreed under the proposed new provisions must be in writing. The Department considers that the imposition of this new burden is proportionate. **The Department has correctly identified this burden and we agree that it is proportionate.**

Fair balance and desirability

37. The Department also believes that the proposals strike a fair balance between the public interest and the interest of those persons who would be compelled to consent in writing to the limitation of rights to compensation. These considerations make it desirable for the Order to be made. **We agree.**

Necessary protection

38. The Department has proposed that compensation for improvements or dilapidation should be payable in circumstances where the geographical extent of the holding has changed. Under the proposal, both landlords and tenants would therefore potentially incur a liability to which they are not currently exposed because the form of the existing provision means that compensation ceases to be payable if any new land is added to the holding. **We consider that the proposed change is wholly reasonable and the fact that a new financial liability is created in certain circumstances does not amount to the removal of necessary protection, since both landlord and tenants also gain enhanced protection where the relevant circumstances obtain.**

39. We also considered whether it might not be appropriate for the proposed Order to define the meaning of the term “substantial” as it is used in these amendments and the related extant provisions with greater precision, so as to make clear to all concerned when the proposed new provision would apply. We noted that a number of those who responded to the consultation were of this view and suggested to the Department that this might be accomplished by means of inserting a definition by means of a particular fraction or percentage of land with respect to area or value. In its full response to us, the Department told us that it had chosen not to define the term “substantial” in this way because i) the term was already widely used without a definition of this kind in agricultural tenancy legislation and was thought to work well and be widely understood without this further definition ii) given its use elsewhere it would not be helpful to amend it in the relevant locations within the 1986 Acts and 1995 Acts without also amending other instances in other legislation and iii) there were felt to be doubts about the *vires* of effecting such a change by means of the Regulatory Reform Act. **In view of these considerations, we agree that it would not be desirable to attempt a more precise definition through this proposed Order.**

40. The second element of this part of the proposal is that landlord and tenant should be empowered to make a written agreement fixing an upper limit to compensation payable to a tenant in respect of value added to a holding during his tenancy. Protection is maintained by virtue of the requirement that a landlord must consent to the works in relation to which compensation would be payable and by the provision that, if parties are unable to reach agreement on a level of compensation, the amount would be the actual cost to the tenant. **We therefore agree that no necessary protection would be lost.**

Continuation of reasonable rights and freedoms

41. The effect of the first element of the proposal (the “substantial part of the land” amendment) would be to remove an existing freedom from financial liability enjoyed by landlords and tenants. It could be argued that the existing freedom arises by virtue of a failure of the existing legislation and that given this, and in view of the benefits conferred on both sets of parties by this element of the proposal, it would be unreasonable to expect landlords and tenants to continue to enjoy these freedoms.

42. The proposed new power of landlords and tenants to agree an upper limit to compensation payable at termination of tenancy would not affect any existing right or freedom of either party.

43. **We consider that no reasonable rights or freedoms would be lost.**

Proposal 3 – modernisation of arbitration procedures in Agricultural Holdings Act 1986 (articles 7, 9 and 10)

44. Section 84 of and Schedule 11 to the 1986 Act make detailed provision for arbitration procedures for matters which that Act requires to be dealt with by arbitration, including disputes about rent reviews and disputes concerning notices to carry out certain works. The 1995 Act provides that matters requiring arbitration shall be addressed in accordance with procedures specified in the Arbitration Act 1996.

45. The Department considers that arbitration procedures set out in the relevant provisions of the 1986 Act are now outdated, being consolidations of legislative requirements dating back to 1948. It reports that the provisions in the 1986 Act lead to unnecessary delays in completing the process of arbitration and are of such a specific or prescriptive nature as to prevent parties from making arrangements for arbitration of their own choosing. In particular, the Department notes that the 1986 Act requires that arbitration shall be carried out in formal hearing, without the possibility of settlement on the basis of written representations, and that the 1986 Act imposes mandatory deadlines for various processes, rather than leaving such matters to be agreed by the parties, or fixed by the arbitrator. More specifically, the Department notes that the provisions require that the President of the Royal Institute of Chartered Surveyors (“RICS”) must appoint arbitrators for rent reviews no earlier than 4 months before the next termination date following the date of the demand on which the tenancy of the holding could have been determined by notice to quit.

46. It is proposed, in article 7, 9 and 10 of the Order, variously to amend section 84 of the 1986 Act and to repeal Schedule 11 so as to apply the arbitration procedures of the Arbitration Act 1996 to all questions currently considered under those provisions. The Arbitration Act 1996 gives the arbitrator a greater discretion over matters such as time limits and whether or not a formal hearing will be required. The time limit before which the President of RICS cannot make appointments in respect of the arbitration of rent reviews would be abolished. Insofar as the arbitration procedures under the 1996 Act are less prescriptive, they are less burdensome to the contesting parties and to the arbitrator. **We therefore agree the amendments proposed amount to a reduction in a burden.**

47. In amending section 84 of the 1986 Act, article 7(2) of the proposed Order would re-enact the existing burden whereby, in a dispute about an amount of compensation an arbitrator must award compensation in accordance with the amount agreed by the parties, where such an agreement has been struck, and cannot in these circumstances override that agreement and determine the amount of the compensation himself.

Fourth new burden, re-enacted burden and the proportionality test

48. The Department states that a new burden is created in the form of the application of procedures under the 1996 Act to situations presently subject to arbitration under the 1986 Act, albeit the new burden is less onerous than that which is replaced. **We agree.** The Department believes that the new burden, being less onerous than that which it replaces, is proportionate. Similarly, the re-enacted burden which requires that an arbitrator, where parties agree on a level of compensation, must fix compensation at the level they have agreed, is considered to be proportionate. **We agree.**

Fair balance and desirability

49. The Department considers that the proposed Order would replace one system of arbitration with another which is familiar to landlords and tenants, and which it regards as more flexible. In this, it considers that the proposals strike a fair balance between those affected by the creation of the new burden and the public interest, and that the legislative change proposed makes it desirable for the Order to be made. **We agree.**

Necessary protection

50. The Department proposes to apply arbitration procedures in the Arbitration Act 1996 to all matters currently subject to arbitration machinery provided under the relevant parts of the 1986 Act. Arbitration will remain available to resolve disputes about relevant matters. **We are content that no necessary protection would be lost.**

Continuation of reasonable rights and freedoms

51. Although the proposal would discontinue the availability of arbitration procedures under the 1986 Act, these would be replaced by those in the Arbitration Act 1996, which are available in all of the same circumstances.

52. **We therefore agree that no rights or freedoms would be lost.**

Proposal 4 – Amendment of provisions for rent reviews (articles 3 and 8)

(a) Agricultural Holdings Act 1986

53. Section 12 of and Schedule 2 to the 1986 Act make provision for rent reviews. Paragraph 4 of Schedule 2 provides that arbitration of a rent review cannot be demanded unless there are three or more years between the date on which the new rent would become payable and one of:

- the date of commencement of the tenancy;
- the date of the last increase or reduction in the rent;
- the date on which an arbitrator's decision that a rent should remain unchanged formally took effect.

54. Section 12(2) of the 1986 Act provides that the arbitrator shall determine the rent to be payable at the date of the question being referred to him, although the rent which is determined will not be payable until the next termination date.⁴

55. The Department identifies an existing burden in the effect that addition of land to an existing holding has in establishing a new tenancy. In the context of Schedule 2, if land is added to a holding, no rent review is possible until three years have elapsed since the time that that addition of land has taken effect. This is viewed as the imposition of a burden on both the parties involved.

56. The Department considers that the effect of the provision in section 12(2) as described above is to place a burden on both parties in an agricultural tenancy because the date of appointment of the arbitrator is chosen more or less by chance, which makes it difficult for both parties to predict the amount of rent which he will determine will be payable in

⁴ Next termination date is defined as the earliest date at which a notice to quit the tenancy could have effect, if that notice was given on the date of the demand for arbitration.

future, bound as he is to set that amount with reference to the date of his own appointment. **We agree with this analysis.**

57. It is proposed that article 8 of the Order should insert new provision into Schedule 2 of the 1986 Act to provide that, if an existing tenant is granted a new tenancy to which the 1986 Act applies by virtue of new provision in section 4(1)(g) of the 1995 Act, and the rent payable under the new tenancy is unchanged from that payable under the previous tenancy (except for any increase or reduction attributable solely to an adjustment of the boundaries of the holding), the date on which any new rent becomes effective must be at least three years following the previous increase or reduction in rent or arbitrators direction in respect of rent payments during the life of the previous tenancy.

58. The effect of the proposed provision is seen as being the removal of the burden of the requirement re-starting the three year period before a rent review, each time the borders of a holding are changed. Landlords and tenants would benefit practically by having more control over the date by reference to which rents are determined and will thus be better able to predict the amount of future rents. **We agree that the effect of the proposed provision would be to remove a burden as described.**

(b) Agricultural Tenancies Act 1995 (articles 14 and 15)

59. The existing section 9 of the 1995 Act provides that landlord and tenant do not have to subject their tenancy to rent review, provided that it is a condition of the tenancy agreement that the rent is not to be reviewed, or is to be varied by an amount specified in the agreement, or is to be varied by reference to a formula which does not preclude a reduction in rent and which does not permit the exercise of judgement or discretion in the setting of the revised rent. Where these conditions do not apply, the requirements of the 1995 Act are similar to those in the 1986 Act and either party may demand a rent review every three years. Either party may decide to take a contested rent review to arbitration, where the arbitrator must set the rent on the basis of rental values prevailing on the open market. He may not take any account of any previous agreement made by the parties themselves as to criteria which should inform the rent review.

60. The Department considers that the effect of the existing provision is to restrict the freedom of parties to agricultural tenancies to make binding agreements as to a method of determining the outcome of a rent review. Even where parties have previously agreed that a review should be referred to an independent expert, either party may subsequently depart from this and require the matter to be referred to statutory arbitration. It considers that the effect is to “limit opportunities for rent reviews to be determined other than by arbitration” and that an arbitrator is prevented from considering rent review criteria previously agreed upon by parties who now contest the rent review.

61. Article 14 of the proposed Order would amend section 9 of the 1995 Act so as to allow parties to a tenancy agreement to agree to opt out of the Act’s provisions which require a rent review, provided that the tenancy agreement is not one which permits the rent to be raised but not reduced, and automatically to disapply those provisions where the agreement makes express provision for an automatic reference of rent reviews to an independent expert whose decision is final. These proposed new provisions of the 1995 Act would only have effect on tenancy agreements made subsequent to the entry of the Order

into force. By permitting rent reviews to be carried out with greater freedom, and to take place in ways defined by agreement rather than by statutory provision, an existing burden is removed.

62. It is also proposed to amend section 13(2) of the 1995 Act to permit an arbitrator to refer to any relevant criteria when determining a rent, excepting only criteria which preclude a reduction in the rent, thus removing a burden in the form of the present explicit restriction on his powers created by the extant section 13(2). **We agree that burdens have been correctly identified and would be removed.**

Fifth new burden and proportionality test

63. The Department considers that, as the proposal that parties whose tenancy agreement permits the determination of rent reviews by reference only to criteria which may result in increased rents would be unable to make use of the new provisions, a new burden is created. It would affect parties to those tenancy agreements and arbitrators of rent reviews. The Department also takes the view that the creation of the new burden is proportionate to the benefits it identifies as likely arise through the proposal. **We agree.**

Fair balance and desirability

64. The Department believes that the proposal achieves a fair balance by allowing parties to greater freedom to strike contracts on their own terms while protecting them against rent reviews that might otherwise be determinable only in an upwards direction. The removal of burdens is seen as making the proposed Order desirable. **We agree.**

Necessary protection

65. Under the existing law, adding land to a holding held in a 1986 Act tenancy creates a new tenancy and has the effect of making it impossible to review rent until three years have elapsed. The proposed new provision would allow rent payable under the new tenancy so established to be the same as that payable under the previous tenancy, except for increases or decreases related solely to alterations in the size of the holding. Any new rent would not become due until three years after the previous increase, reduction or arbitrator's direction took effect.

66. It is proposed to amend the 1995 Act so that parties to a tenancy under that Act can opt out of the provisions requiring a rent review, provided the tenancy is not one which permits only rent increases, and if the tenancy agreement requires automatic reference of rent reviews to an independent expert who can make a binding decision.

67. **We consider that no necessary protection would be lost.**

Continuation of reasonable rights and freedoms

68. The proposal would not affect the right of parties to seek a rent review, except insofar as parties would lose the right to go to arbitration where they had previously agreed that it should be referred to an independent expert who would have a power of final judgement. The Department considers it would be reasonable to remove this existing right, as "in these

circumstances a party would be reneging on an earlier agreement to settle the issue other than by arbitration”.⁵

69. We agree that no reasonable right or freedom would be lost by the operation of this voluntary opt-out.

Proposal 5 – amendment of the Agricultural tenancies Act 1995 provisions on the application of the Agricultural Holdings Act 1986 Act to a tenancy (Articles 4 and 12)

70. In general, agricultural tenancies which began on or after 1 September 1995 are Farm Business Tenancies under the 1995 Act. However, section 4(1) of the 1995 Act provides that the 1986 Act shall continue to apply to some tenancies created after that date. These include tenancies with the following characteristics:

- i. tenancies which have been established on a basis of ‘agreed succession’ where part IV of the 1986 Act is explicitly to apply to the tenancy; and
- ii. tenancies which have been granted following an implied surrender and re-grant of an existing tenancy.

71. The 1986 Act permits landlord and tenant to agree on succession to a tenancy on the death or retirement of the tenant for the time being, and this is then treated as an enforceable statutory succession for the purposes of that Act. Section 4(2) of the 1995 Act defines what is meant by an “agreed succession”.

72. In paragraph 2.5.3 of its statement, the Department notes that the legal doctrine of implied surrender and re-grant means that some agreements between landlord and tenant have the effect of ending an existing tenancy and establishing a new one, even though they may take the form of agreement about terms of the original tenancy. Agreements which add new land to an holding or which extend the agreed period of an existing tenancy both have this effect.

73. The effect of the existing section 4(1)(f) of the 1995 Act is to apply the 1986 Act to a new tenancy created by an implied surrender and re-grant. If however the parties explicitly agree to create a new tenancy, that tenancy will be subject to the 1995 Act, unless it falls within one of the other categories reserved to the 1986 Act. The practical result is that if the parties agree to the creation of a new tenancy on the addition of new land to a holding, that new tenancy can only extend to the additional land.

74. It is stated that this provision creates uncertainty as to whether section 4(1)(f) of the 1995 Act applies only in circumstances where variation to a tenancy has the effect of implied surrender and re-grant without the contracting parties being aware of it, or also encompasses any deliberately implied surrender and re-grant which occurs as the result of conscious design. The Department indicates that it believes the intention of the then Government in 1995 was that section 4(1)(f) should apply only in instances of unwitting surrender and re-grant of tenancy.

5 Explanatory statement, paragraph 2.4.24

75. The Department considers that the burden in this case arises because section 4(1)(f) of the 1995 Act prevents parties to a contract agreeing to add land to the relevant holding and also agreeing that the new tenancy of the consolidated holding that would arise thereby shall be subject to the provisions of the 1986 Act. This is because the Department considers that section 4(1)(f) only applies in instances of implied surrender and re-grant, and where that situation is created “merely because of a purported variation” in the terms of the previous tenancy. In practice, it records that parties to tenancy agreements under the 1986 Act tend to agree a separate tenancy under the 1995 Act of land which is added to a holding, to prevent the 1995 Act otherwise applying in respect of the tenancy of the entire holding. The results of this are said to be that there are numerous ‘composite’ holdings now existing comprising areas of land subject to different tenancies under separate statutory regimes.

76. A further burden is identified by the Department in the presently obscure language of section 4(2) of the 1995 Act, which supplies the definition of an “agreed succession” which must be met if a tenancy is to be subject to the 1986 Act. The complexity and lack of clarity of the definition have tended to mean that parties and their advisers will refer cases involving agreed succession to the Agricultural Land Tribunal for the sake of certainty even where no disagreement exists between them. The lack of certainty in this situation gives rise to a burden. **We accept the Department’s argument that burdens of the nature described are imposed by these provisions.**

77. Article 12 would amend Section 4(1)(f) of the 1995 Act so that the 1986 Act would apply where a tenancy under that Act existed over the whole or a substantial part of the relevant holding, and an agreement between the parties other than a new tenancy gave rise to implied surrender and re-grant. A new section 4(1)(g) will apply the 1986 Act to tenancies where the tenant previously held a tenancy of all or a substantial part of the holding under that Act and a contract between the parties expressly provides that the 1986 Act should apply.

78. In order to prevent the use of the 1995 Act so amended to add land incrementally over time to a holding and avoid the “whole or part” requirements, a new section 4 (2B) would be added to the 1995 Act, and a new section 4(2C) would define ‘substantial’ for the purposes of the section as substantial either in value or in area.

79. There would also be amendment to section 4(2) of the 1995 Act to clarify when a case amounts to an agreed succession.

80. The Department considers that proposal 5 would remove the current burden which prevents parties from agreeing to increase the size of a holding without thereby having their tenancy agreement subjected to the 1995 Act. In permitting this, the proposal reverses a policy decision taken by the Government in 1995.

81. The proposed new definition of an agreed succession in section 4(2) of the 1995 Act is seen as removing the existing burdensome need to refer the issue to the Agricultural Land Tribunal in order to achieve legal certainty. **We agree with the Department’s description of the way in which these burdens would be removed and reduced.**

82. Insofar as parts of the sections 4(2) and 4(1)(f) of the 1995 Act as described above are re-enacted, there is some re-enactment of existing burdens, subject to modifications as described.

Sixth new burden and the proportionality test

83. The Department recognizes that a new burden would be created by the requirement that where the amended sections 4(1) (f) and (g) were to apply, the original holding would have to, on the date the Order comes into effect, comprise a substantial part or all of the new holding. The Department considers that the burden created is proportionate to the benefits the proposed Order would bring in the form of increased freedom to restructure agricultural land holding. **We agree.**

Fair balance and desirability

84. The Department is of the view that the proposal strikes a fair balance in assisting the development of a sustainable agriculture industry, and the reduction in other burdens and other benefits make it desirable for the Order to be made. **We accept this.**

Necessary protection

85. It is proposed to permit parties to add more land to a holding without thereby automatically forfeiting their tenancy under the 1986 Act. It is also proposed to clarify when an agreed succession would occur. Given that the position of contracting parties would not be affected except where those parties explicitly so agree, the Department considers that no necessary protection would be lost. **We agree.**

Continuation of reasonable rights and freedoms

86. The proposal would give landlords and tenants enhanced freedom to enlarge holdings without there being a loss of the capacity to retain a tenancy under the 1986 Act.

87. **We consider that no reasonable right or freedom would be lost.**

Proposal 6 – amendment of the limit on the notice period for termination of a tenancy (article 13)

88. Sections 5(1), 6(1)(c) and 7(1) of the 1995 Act require that a notice to terminate a Farm Business Tenancy must be given at least 12 months but no more than 24 months prior to the date on which it will have effect. This amounts to a burden since it prevents landlord and tenant from agreeing a longer notice period, which might be beneficial to the planning of both parties.

89. It is proposed that article 13 of the Order should amend the relevant sections of the 1995 Act to remove any reference to an upper limit to the notice period, thus removing a burden affecting both landlords and tenants. **We accept that a burden has been correctly identified and would be removed.**

Necessary protection

90. We asked the Department whether it considered either party to a tenancy might be disadvantaged by provision allowing notice to quit to be given some years before it was to take effect. In its reply, the Department noted that the 1995 Act allows Farm Business Tenancies to run either for a fixed term, or from year to year (a ‘periodic tenancy’). Where such a tenancy is initially for a fixed term of more than two years, it converts to a periodic tenancy contract from year to year, unless terminated by written notice by either party to it. The Department indicates in its letter that the policy aim of removing restrictions described above is to permit the establishment of fixed term contracts in which the parties by mutual consent fix the notice period for longer than two years. This is seen as aiding the business planning and security of both parties.

91. The effect of the proposal is therefore to allow parties to agree a tenancy contract from which they cannot withdraw for periods longer than two years. Once agreed, such a contract could not be terminated with any notice shorter than the specified term. A year to year contract could also be terminated with any notice of longer than 12 months, up to an indefinitely long period. If a tenancy agreement itself does not specify the notice, notice could be given for any period longer than 12 months, and once given either party would be able to shorten it by serving a notice with a more proximate effective date, down to the minimum notice of 12 months.

92. Under the proposal, it will be open to parties to agree a tenancy contract with a minimum period of notice of more than two years, up to any length of time. However, as Department notes, the ability to do this could reasonably be regarded as a matter of freedom of contract and “a party who agrees a minimum notice period of 5 years is in no worse a position than a party who agrees a 5 year tenancy without a break clause ... in general terms, the longer the notice period, the more certainty there is for both parties”.

93. We note that the proposed provision would permit contracting parties to be ‘locked in’ to a tenancy for more than two years, although this could only be by their mutual consent. While we recognize that circumstances could conceivably arise in which a contract so entered into might subsequently give rise to difficulties for either of the parties to it, we accept that it must ultimately be for individuals to consider their own best interests before entering contracts. We have concluded that both parties need to exercise a degree of caution before entering contracts without a break clause or which provide extended notice to quit, and that a great advantage is likely to arise for both landlords and tenants in general by allowing them the increased certainty and security that contracts with longer notice periods can offer.

94. We consider that no necessary protection would be lost.

Continuation of reasonable rights and freedoms

95. The effect of the proposal would be to grant landlords and tenants an enhanced freedom in respect of the capacity to agree a notice period for the termination of a tenancy that is longer than 24 months.

96. We consider that no reasonable right or freedom would be lost.

Compatibility with obligations arising from membership of the European Union

97. The Minister has indicated that he does not believe that there is any incompatibility between its proposed Order and the European Convention on Human Rights. He has also indicated that it considers the proposed Order would not be incompatible with any obligation resulting from the membership of the European Union. **We have found no reason to consider that any element of the proposal is incompatible with obligations arising from membership of the European Union.**

Consultation

98. The six proposals embodied in this proposed Order reflect the outcome of discussions with a body of “key industry Stakeholders” and “representatives from the wider rural community”, the Tenancy Reform Industry Group (TRIG). Discussion between the Government and this body in 2002-3 led to proposals for the reform of the 1986 and 1995 Acts from TRIG, which the government accepted and which formed the basis for proposals to legislate by means of a Regulatory Reform Order.

99. The Department published a consultation on the proposals on 30 September 2004 and the consultation ran until 24 December 2004. The consultation document was sent directly to 97 organisations and was made available on the Defra website.⁶

100. Responses were received from 20 of the consultees. The Department records that, while there was general support for the proposals as set out in the consultation document, there were also persuasive suggestions for the proposals to be amended in two key respects. These were that i) further simplification of the proposal to amend procedures relating to retirement notices and ii) further to amend the rent review provisions in the 1986 Act so that rents would be determined as at the term date of the tenancy.

101. The Government was in agreement with these suggested amendments to the proposal but issued a further consultation document to all those originally consulted on 31 March 2005, with a deadline for responses of 29 April 2005. 13 of those consulted responded, again giving general support to the revised proposals.

102. The Department records that responses to both consultations were discussed with TRIG and with the agreement of that body a number of amendments were made to the original proposals, and these changes are described at paragraph 1.24 of the explanatory statement.

103. We note that majority of those consulted by the Department appear to be bodies representative of the interests of landholders, or which might be thought to have a greater familiarity with that interest than with the interests of tenant farmers. Nonetheless, we consider that this has not affected the fairness of the consultation, given that it will not have been easy to identify an equal number of representatives for the tenanted sector and in view of the high quality and even-handedness of approach of those responses which were received.

6 www.defra.gov.uk/corporate/consult/tenancy-reform/consultation.pdf

104. We are content that the Department has made appropriate efforts to consult those affected by the proposal and that appropriate account has been taken of their responses.

Estimates of costs, savings and other benefits

105. The Department has addressed the costs, savings and other benefits it believes would arise from its proposal under the description of each element of the proposed Order in the explanatory statement; it has also produced a Regulatory Impact Assessment for the proposal attached to the statement as Annex E.

106. In general terms, the Department considers that the proposal would have the benefits of providing landlords and tenants of agricultural land with a more flexible legislative regime to govern the letting of land, with greater freedom to reach agreement with respect to specific matters rather than having their freedom constrained. Specific changes which the proposal would enact would remove legal barriers to tenant farmers diversifying their business activities, and make it easier to reach agreements leading to the enlargement and improvement of holdings. No overall figures are offered for costs and savings likely to arise for the tenanted farming sector in England and Wales, although the Department notes that roughly one third of agricultural land in England and Wales is tenanted. In 2004, the Government produced figures indicating that there are 25,833 wholly rented holdings and 40,353 mixed tenure holdings. The proposals would therefore affect a substantial number of businesses, their owners and their employees. The Department considers that the proposals would have the effect of promoting equity and fairness, because they would remove some of the restriction which affect tenant farmers, and to which farmers who occupy land which they themselves own are not subject.

107. In relation to particular elements of the proposal, we note the following points:

108. **Proposal 2** – This element of the proposed Order would increase the potential liabilities of both landlords and tenants, but the concomitant of that is that that would both equally benefit from enhanced rights to compensation. Where parties might in future be unable to agree a limit to compensation to be paid to a tenant for improvements made at his expense during his tenancy, the proposal provides that an arbitrator may be asked to fix a limit. The Department estimates that the work required to do this would amount to £300 - £600, and that such an expense would be worthwhile if it made it possible to carry out improvements to a holding that would benefit both landlord and tenant.

109. **Proposal 5** – This element of the proposed Order would remove the present need in some instances to go to a Tribunal to determine whether a tenancy can be subject to an agreed succession. The Department states that 120 such cases are currently considered by the Tribunals each year; they have not been able to forecast how many of these cases could be avoided because of the proposed Order. The Department believes that costs for proceeding under the legislation revised as proposed, where the parties involved agree to make use of the new provisions, would probably be similar to those paid under current legal machinery.

110. In respect of Proposals 1, 3, 4 and 6, the Department considers there are unlikely to be any compliance costs.

111. We consider that the proposals have been the subject of, and taken appropriate account of, estimates or increases or reductions in costs or other benefits which may result from their implementation.

Other matters

112. We do not believe that the Order taken as a whole gives rise to any difficulties. But we noted that, in presenting this proposed Regulatory Reform Order to the House, the Department adopted a structure for its explanatory statement in which each of the six major elements of the Order are described in turn, with each of the tests and conditions in the Regulatory Reform Act applied to each of the six elements in sequence. Only after each element has been discussed in relation to each test does the statement move onto the next part of the proposed Order. This structure makes obvious sense when a proposed Order consists of several separate and distinct elements and seems to be increasingly common with Regulatory Reform Order explanatory statements. We have ourselves used that structure in making our report to the House.

113. While the structure has its merits, we wish to note that it is important for departments to demonstrate that they have applied the tests to the entirety of a proposed Order's effects, and not merely to its individual elements. The Regulatory Reform Act generally requires that the responsible Minister be of the opinion that the Order does not have a given problematic or undesirable effect. Analysing the Order in terms of its individual elements allows a clarity of description and narrower focus, which is beneficial in terms of precision and detail. However, this approach needs to be complemented by evidence that the individual elements have also been assessed collectively. It is possible for elements of a legislative change not to be problematic in themselves but, in their effect one upon another, to give rise to unintended consequences. In short, the explanatory memorandum needs also to consider the tests as they address the Order as a whole.

114. We ask that, where Departments describe a proposal in terms of a sequence of individual related elements they are careful also to show that the overall effect of the proposed Order in relation to the necessary tests has been fully considered and that no issues of difficulty would arise.

Conclusion

115. We recommend unanimously that a draft Order in the same form as the proposal should be laid before the House.

Formal minutes

Tuesday 20 June 2006

Members present:

Andrew Miller, in the Chair

Dr Doug Naysmith
Alison Seabeck

Ms Angela C Smith

The Committee deliberated.

Draft Report [Proposal for the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 115 read and agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Report.

Ordered, That the Appendices to the Report be reported to the House.

[Adjourned till a day and time to be fixed by the Chairman.]

List of written evidence

- | | |
|---|----|
| A Letter from the Committee Specialist to the Department for Environment, Food and Rural Affairs | 26 |
| B Letter from the Department for Environment, Food and Rural Affairs to the Committee Specialist | 27 |

Appendix A

Letter from the Committee Specialist to the Department for Environment, Food and Rural Affairs

Proposal for the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006: request for information

Thank you for the helpful presentation made by officials from Defra yesterday on the subject of this RRO proposal.

The Committee considered the proposal and decided to seek your further comments on two points. The issues which concern the Committee are set out below, under the indicated category for consideration in the Regulatory Reform Act and the Committee's Standing Order.

Whether the proposal has the effect of continuing any necessary protection as required in Section 3(1)(a) of the Regulatory Reform Act 2001 (S.O. No 141(6)(c))

1. Article 6 of the proposed Order would amend section 69 and 73 and paragraph 5 of Schedule 9 to the Agricultural Holdings Act 1986 to provide that landlords and tenants do not lose their rights to compensation at the end of a tenancy where land is added to the holding, thus creating a new holding and new tenancy, provided the historic holding comprises the whole or a substantial part of the new holding. The Committee notes that a significant number of those consulted on this element of the proposed Order believed that it would be helpful to define the term "substantial" in terms of the historic component part of the new holding with greater precision, so as to avoid doubts as to when the proposed new provision created by article 6 would apply.

Q 1 Please explain why the department believes it is appropriate to leave the meaning of the term "substantial" with reference to area or value of the historic component of a new holding established by incorporation of additional land in a holding subject to a tenancy under the Agricultural Holdings Act 1986 without specific definition, such as might be provided by, for example, a definition based on a particular fraction or percentage of the area or value of the holding.

2. It is proposed that article 13 of the Order should amend sections 5(1), 6(1)(c) and 7(1) of the Agricultural Holdings Act 1995, to abolish the existing upper limit of 24 months for the service of a notice to quit a tenancy of a Farm Business Tenancy.

Q 2 Please indicate i) whether the department considers a notice to quit served for a period greater than two years could validly be revoked or amended by the party who served it, or overridden by a notice from the other party specifying a shorter period; and ii) whether the department considers any disadvantage may arise for parties to a tenancy where notice to quit is served with an effective date some years in the future, and if not, why not.

I would be grateful to receive your response to these questions, together with any additional information which the department believes would be helpful to the Committee not later than 6 June 2006.

17 May 2006

Appendix B

Letter from the Department for Environment, Food and Rural Affairs to the Committee Specialist

Proposal for the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006: response to request for information

Thank you for your letter of 17 May seeking further information regarding the above Regulatory Reform Order (RRO).

The Committee has requested clarification on two points in order to establish whether the proposals maintain any necessary protection as required in Section 3(1)(a) of the Regulatory Reform Act 2001. The Committee highlighted the changes that would be introduced by Article 6 of the proposed Order and asked:

Q1 Please explain why the department believes it is appropriate to leave the meaning of the term “substantial” with reference to area or value of the historic component of a new holding established by incorporation of additional land in a holding subject to a tenancy under the Agricultural Holdings Act 1986 without specific definition, such as might be provided by, for example, a definition based on a particular fraction or percentage of the area or value of the holding.

The term “whole or substantial part” is already in use in agricultural tenancy legislation and is familiar to the industry and practitioners. It originates from section 18 of the Agriculture (Miscellaneous Provisions) Act 1976, which introduced the provisions on statutory succession. The “whole or substantial part” terminology is currently used in Section 34(1)(b)(iv) of the 1986 Act dealing with succession rights. This section provides that succession rights apply where a tenancy was granted to a person who immediately before 12 July 1984, was the tenant of the holding or of any agricultural holding which comprised “the whole or a substantial part” of the land comprised in the holding. Section 35 of the Act defines “related holding” for the purposes of the succession provisions, using the same term.

The term “whole or substantial part” is also used in section 4(1)(f) of the Agricultural Tenancies Act 1995⁷. Where land has been added to or removed from a holding, section 4(1)(f) of the 1995 Act provides that the 1986 Act will continue to apply to the tenancy provided that certain conditions are met, including the condition that the original holding constitutes the whole or a substantial part of the land comprised in the new holding. Where succession rights applied to the original tenancy, these will continue to apply to the new tenancy (by virtue of s.34 of the 1986 Act).

Article 6 would amend sections 69, 73 and paragraph 5 of Schedule 9 to the Agricultural Holdings Act 1986. The changes proposed serve two separate and distinct purposes. The use of the term “substantial” is common to both sets of amendments. However the considerations that apply to each are different and I will deal with them separately.

Proposed Article 6 paragraphs (1), (4) and (6) amendments

Paragraphs (1), (4) and (6) of Article 6 to the RRO amend sections 69(1), 73(1) and paragraph 5(1) of Schedule 9 to the Agricultural Holdings Act 1986. They insert the words “or in any agricultural holding which comprised the whole or a substantial part of the land comprised in the holding”.

7 The authors of Scammell and Densham’s Law of Agricultural Holdings, 8th edition, comment on s.4(1)(f) at p.908: “Provided that a substantial part of the new holding was also in the old tenancy, section 4(1)(f) is capable of operating. What is substantial will be a matter of fact in each and every case, but it does not necessarily mean that the additional land must amount to only a small percentage of the new holding: the wording is a substantial part, not *the* substantial part.”

To put these proposed changes into context, they relate to a tenant's right to compensation for improvements to the holding on the "termination of the tenancy" and "on quitting the holding" provided for at section 64 of the 1986 Act. Section 69 of the 1986 Act addresses the problem where the tenant remains on the holding for more than one tenancy. In this case a tenant may carry out an improvement during the first tenancy, but may not quit the holding until the termination of the second tenancy. Section 69 provides that the tenant is not deprived of his right to compensation in these circumstances. Section 73 provides for similar provisions in respect of a landlord's right to compensation for tenant dilapidations. Schedule 9 repeats these provisions, in relation to old improvements.

As the 1986 Act is currently drafted, our view⁸ is that the right of a tenant or a landlord to compensation only applies where the tenant has remained "on the holding", i.e. the same holding. If the holding has become smaller or larger, then it would not be the same holding and the tenant or landlord would lose the right to compensation. Article 6 therefore amends the 1986 Act to ensure that tenants and landlords do not lose the right to compensation where there has been a change to the holding, provided that the original holding comprises "the whole or a substantial part" of the land comprised in the new holding.

The protection provided by sections 69(1) and 73 of the 1986 Act comes into play when successive 1986 Act tenancies are created as a result of the application of section 4(1)(f) of the 1995 Act. It is therefore necessary to ensure that all these related provisions continue to operate in concert. If we were to change the terminology used in sections 69(1) and 73 of the 1986 Act, parallel changes would need to be made to the related 1986 and 1995 Act provisions.

When the RRO was being prepared we did consider amending section 4 to define "substantial part" in section 4(1)(f) by reference to either area or value. However, we were advised that such an amendment would be outside the vires of the Regulatory Reform Act, unless we created a separate category for those who vary a tenancy knowing that the variation will have effect as a surrender and regrant (see paragraph 2.5.5 of the Explanatory Document) and applied the amended definition to that category only. Our view was that this distinction would be difficult to apply in practice because it is not always possible to distinguish between those who knowingly effect a surrender and regrant and those who do so unwittingly. Further, those who wish to benefit from the "area or value" definition can do so using a written contract of tenancy under the new provisions at section 4(1)(g) of the 1995 Act.

As we are not proposing to change section 4 of the 1995 Act generally to define substantial in terms of "area or value", it is not possible to change the wording of the related 1986 Act provisions. As a result the proposed changes made by paragraphs (1), (4) and (6) of Article 6 to the RRO, of necessity, follow the existing "whole or substantive" part terminology used elsewhere in the legislation.

Proposed Article 6 paragraphs (2), (5) and (7) amendments

Paragraphs (2), (5) and (7) of Article 6 to the RRO insert a new section 1A at sections 69, 73 and Schedule 9 to the Agricultural Holdings Act 1986. These amendments are consequential on the proposed new section 4(1)(g) to the 1995 Act. These amendments ensure that a landlord or tenant does not lose right to compensation where a new 1986 Act tenancy has been created under section 4(1)(g) of the 1995 Act. Similar consequential amendments are also made to sections 34, 35 and 49 of the 1986 Act to ensure that succession rights are continued in relation to new tenancies created by use of new section 4(1)(g).

During the preparation of the RRO, we discussed with the Tenancy Reform Industry Group (TRIG) whether the term "substantial" should be defined more precisely e.g. by including a figure or percentage. TRIG were against this approach, as they considered that a more precise definition would lead to parties devising specific arrangements to ensure they fell whichever side of the dividing line was most advantageous. They were concerned that this would detract from the business led approach to restructuring that they were seeking to foster. However, TRIG thought there would be some merit in specifying that "a substantial part" could mean by area or value.

8 This is also the view of the authors of Scammell and Densham's Law of Agricultural Holdings (8th edition), at p.374.

When we consulted 4 of the 20 the responses to the original consultation exercise specifically suggested that “substantial by reference to either area or value” should be defined with greater precision. We reviewed these comments with TRIG when we examined all the responses to the consultation exercise, and concluded that the initial TRIG reservations about specifying a fixed boundary remained valid.

While (as noted above) we were advised that it would be outside the vires of the Regulatory Reform Act to define “substantial part” by reference to area or value in relation to section 4(1)(f) of the 1995 Act, we were advised that there were vires to do so in relation to the proposed new section 4(1)(g) of the 1995 Act (which applies where there is a written contact of tenancy which states that the 1986 Act is to apply). We concluded that, although we could not amplify the use of the term “substantial part” everywhere that it is used in the 1986 and 1995 Acts, it would nevertheless be helpful and appropriate to do so in new section 4(1)(g) of the 1995 Act, and would implement one of TRIG’s recommendations.

When looking at these amendments, it is important to remember that a change in the structure of a holding would be carried out by agreement between the parties. In particular a change to the holding where the parties sought to apply the 1986 Act under the proposed section 4(1)(g) of the 1995 Act would require a new written contact of tenancy.

The Committee also highlighted the changes that would be introduced by Article 13 of the proposed Order and asked:

Q2 Please indicate i) whether the department considers a notice to quit served for a period greater than two years could validly be revoked or amended by the party who served it, or overridden by a notice from the other party specifying a shorter period; and ii) whether the department considers any disadvantage may arise for parties to a tenancy where notice to quit is served with an effective date some years in the future, and if not, why not.

Article 13 of the proposed Order amends sections 5(1), 6(1)(c) and 7(1) of the Agricultural Tenancies Act 1995 by removing the upper limit of 24 months for the service of a notice to quit a Farm Business Tenancy (FBT).

The Agricultural Tenancies Act 1995 introduced the concept of a FBT. A FBT can run for a fixed term e.g. 2, 5 or 15 years, or for a period, e.g. from year to year. Section 5 of the Act makes special provision for a FBT of more than 2 years. A tenancy for a shorter fixed term will end automatically on the term date. However where a tenancy is for more than 2 years the tenancy will run its course and will then continue as a tenancy from year to year, unless either party serves a written notice. Section 6(1) specifies the requirements that a notice to quit a tenancy from year to year must meet. This includes the requirement to serve the notice at least 12, and less than 24 months, before it is to take effect. Section 7(1) provides that a notice to quit, given in pursuance of a provision in the tenancy agreement (i.e. a break clause in a fixed term tenancy), must be given between 12 and 24 months before it is to take effect.

The Tenancy Reform Industry Group noted that some landlords and tenants wished to set up a “rolling tenancy”. Under such an arrangement a tenancy would run for an initial (say) 5 year term and then continue on a 5 yearly rather than an annual basis. The 24 month upper limit on notice periods effectively precluded such an arrangement even where both parties agreed such an arrangement should be established. In some individual cases TRIG reported that “novel” tenancy agreements had been established in an attempt to get round the 24 month limit. TRIG considered that for certain landlords and tenants rolling tenancy agreements would be attractive. In view of this the Group recommended that such arrangements should be legitimised by removing the 24 month upper limit on notice periods. TRIG considered that this would ensure that if the parties agreed a 5 year notice period in a tenancy that otherwise operated from year to year, they would know that there was at least 5 years before the tenancy could be determined.

Can a notice to quit served for a period greater than two years be revoked or amended by the party who served it, or overridden by a notice from the other party specifying a shorter period?

Once a valid notice to quit has been served it cannot be revoked or amended. However, where such a notice has been served the parties could, if they wished, agree to surrender the tenancy before the end of the notice period. Conversely they could agree to start another tenancy at the end of the notice period. They could also serve notice to terminate earlier under a break clause, if there is one in the tenancy agreement. In most cases a FBT will include a break clause enabling either party to withdraw from the tenancy agreement at specified break points having served the appropriate notice. It is also usual for a FBT to include provisions to terminate the tenancy in exceptional circumstances, for example the death or incapacity of the tenant, or where a tenant fails to pay the rent. Further, under common law, where a notice to quit has been served, a second notice can validly be served taking effect earlier than the first notice.⁹

As article 13 of the RRO is drafted, it removes the upper limit of 24 months, but retains the minimum notice period of 12 months. Unless parties agree otherwise in the tenancy agreement, the effect of common law and sections 6 and 7 of the 1995 Act as amended would be that a landlord or tenant could serve a series of notices, each taking effect earlier than the last, until the minimum 12 month notice period under the 1995 Act is reached.

Under the 1995 Act as currently drafted, the parties cannot agree to a minimum notice period beyond 2 years in the tenancy agreement, as a notice must be served less than 24 months before the date on which it is to take effect. They cannot therefore establish a rolling tenancy as highlighted by TRIG. However, following the proposed change it will be possible for the parties to include a minimum notice period in excess of 2 years in the tenancy agreement. This will give them the certainty that the tenancy cannot be terminated for at least the minimum notice period, at any time during the tenancy. Any notice that does not meet the minimum period specified in the tenancy agreement would be invalid under the terms of that agreement. For example if the parties agree a three year minimum notice period, a notice given two years before taking effect would be invalid under the tenancy agreement. However, they could not agree a minimum notice period of less than 12 months, as a notice given less than 12 months before taking effect would still be invalid under the Act.

The proposed amendment to section 5 of the 1995 Act allows a notice to terminate a fixed term tenancy of more than two years at the end of the fixed term, to be given at any time before the last 12 months of the fixed term, and not just in the 12 - 24 month window before the term date. If a notice is not served, then the tenancy will continue as a tenancy from year to year. A notice issued under section 5 of the 1995 Act cannot be amended or revoked as there are no provisions in the Act allowing parties to do so. A notice issued under section 5 can only have effect at the end of the fixed term whenever it is served. Consequently the termination date cannot in practice be brought forward by the issue of a second subsequent notice. This is different to the position in relation to notices served under sections 6 & 7 of the 1995 Act where the termination date of an ongoing tenancy could be brought forward by the issue of a second subsequent notice, where the tenancy agreement does not specifically preclude this.

Will any disadvantage arise for parties to a tenancy where notice to quit is served with an effective date some years in the future, and if not, why not?

As explained above, where the tenancy agreement is silent as to the notice period, either party will be able to serve a subsequent notice to quit taking effect earlier than the original notice to quit until the minimum 12 month notice period is reached. This ensures that changes in the circumstances of parties can be catered for. In view of this the Department does not consider that abolishing the upper limit of 24 months will disadvantage either party.

Where parties choose to agree an extended minimum notice period under the amended provisions, that is a matter of freedom of contract. Freedom of contract is a central theme of the 1995 Act and consequently the parties already have considerable freedom to agree terms in relation to fixed term tenancies. They can agree fixed term tenancies for any length of term without a break clause. A party who agrees a minimum notice period of say 5 years is in no worse a position than a party who agrees a 5 or 10 year tenancy without a break clause. If a notice to quit is served and circumstances change, parties are still free to agree a surrender (or to

⁹ Thompson v. McCullough, [1947] K.B. 447, CA, at 447, 452; cited in Woodfall on Landlord and Tenant at para 17.267.

commence a new tenancy when the current tenancy terminates). In general terms the longer the notice period, the more certainty there is for both parties. The Department considers that the proposal to remove the 24 month limit is entirely consistent with the freedom of contract concept which underpins the approach to FBT's in the 1995 Act.

The change is also consistent with the business led approach to restructuring which is at the heart of a number of the changes proposed in the RRO. However, as with other situations where the parties are free to agree terms, it is usual for the parties to seek professional advice, although there is no obligation on them to do so.

6 June 2006

Reports from the Regulatory Reform Committee in the last Session of Parliament

Session 2004-05

First	Proposal for the Regulatory Reform (Joint Nature Conservation Committee) Order 2005	117
Second	Proposal for the Regulatory Reform (Registration of Births and Deaths) (England and Wales) Order 2004	118
Third	Proposal for the Regulatory Reform (Prison Officers) (Industrial Action) Order 2004	148
Fourth	Draft Regulatory Reform (Joint Nature Conservation Committee) Order 2005	270
Fifth	Draft Regulatory Reform (Prison Officers) (Industrial Action) Order 2005	271
Sixth	Draft Regulatory Reform (Trading Stamps) Order 2005	272
First Special	Operation of the Regulatory Reform Act 2001	273
Seventh	Draft Regulatory Reform (Execution of Deeds and Documents) Order 2005	429
Eighth	Draft Regulatory Reform (National Health Service Charitable and Non-Charitable Trust Accounts and Audit) Order 2005	430
Ninth	Draft Regulatory Reform (Fire Safety) Order 2005	495
Second Special	Government Response to the Committee's First Special Report of Session 2004-05: Operation of the Regulatory Reform Act 2001	431

All reports are available from The Stationery Office.

Reports from the Regulatory Reform Committee in the present Session of Parliament

Session 2005-06

First	Proposal for the Regulatory Reform (Forestry) Order 2006	729
First Special	Legislative and Regulatory Reform Bill	878
Second	Proposal for the Regulatory Reform (Public Service Vehicles) Order 2006	879
Third	Draft Regulatory Reform (Forestry) Order 2006	880
Second Special	Government Response to the Committee's First Special Report of Session 2005-06: Legislative and Regulatory Reform Bill	1004
Fourth	Regulatory Reform (Fire Safety) Subordinate Provisions Order 2006	1005
Fifth	Proposal for the Regulatory Reform (Registered Designs) Order 2006	1142