# Agricultural Tenancies Bill [Bill 40,1994/95]

Research Paper 95/15

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The Agricultural Tenancies Bill (HL) had its Second Reading in the House of Lords on 28 November 1994. It had its Third Reading on 30 January 1995. The Bill would remove most of the statutory framework for farm tenancies and leaves them in a similar position to business tenancies. The Bill does not apply to Scotland.

**Christopher Barclay**
**Science and Environment Section**

**House of Commons Library**

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## I The Role of the Tenant Farmer

The tenant farmer has an important place in British history, at least since the late eighteenth century. Whereas some Continental countries had enormous numbers of small peasant holdings, in Great Britain the tenant farmer became the dominant type as smallholdings were merged and so many people moved to the cities in the 19th century. Such tenancies were of very varied sizes and operated beneath a top layer of large estates, often owned by aristocrats who did not want involvement in day to day management. At best, the relationship between an "improving" landlord and an intelligent tenant farmer could result in great improvements in agricultural practice - indeed in what was sometimes loosely called the "agricultural revolution".

It was gradually realised, however, that this relationship had weaknesses which freedom of contract could not eradicate. Landlords were much more powerful than tenants and were able to choose tenancy agreements unfavourable for the tenants, but which the tenants had to accept. It was not just the unfairness which mattered, but the fact that the agreements discouraged agricultural development. The bad landlord might do little to invest in improvement of the land. The enterprising tenant, however, might spend his own money to do so and then find himself evicted, perfectly legally without compensation for what he had spent. Alternatively, he might find that the only result of his investment and work was an increase in his rent, so the landlord gained all the benefit.

A series of laws therefore interfered with this freedom of contract, partly to ensure compensation and then later to increase security of tenure. For a century - from 1875 to 1976 - this trend continued. At its high point in 1976 agricultural tenancy law not only protected the tenant from eviction but guaranteed him the right to pass on his holding for two further generations. Since then the trend has been reversed, and the current Bill makes another move back towards freedom of contract.

The proportion of tenanted land declined dramatically over this century, particularly since the Second World War. Whereas in 1910 90% of agricultural land in England and Wales was tenanted, by 1990 this figure had fallen to 36%[1] with increasing numbers of small and medium-sized farmers owning their land as the large estates were broken up. These farms themselves often merged into larger holdings to gain economies of scale. The farms are worked together and the idea of letting them to tenants has little appeal. In addition, the greater security offered to tenant farmers was a strong disincentive to any landlord considering letting his farms, because if he or his children wanted to farm the land themselves at a later date, they would be unable to reclaim it.

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[1] MAFF News Release 12 February 1991

In deciding on a suitable legislative framework for tenant farming, it is necessary to decide whether the decline in the number of tenant farmers matters. In some areas the history of previous legislation is of little relevance, but it is important to see why so much law in this area was considered in its day to be necessary. In a sense, the question remains why agricultural tenancy should be a special form of relationship. One reason is that being a tenant farmer is the traditional way into the industry for an able farmer without inherited capital. Farmers who own their land often pass it down to their sons and it is difficult for a landless farmer to get started. If the tenanted sector continues to shrink, so the argument goes, or if tenancies are no longer viable because of the contract terms, this will throw farming even further into the hands of those who happen to have inherited farms, rather than those who are most talented at managing them.

It might seem that the argument implies that British agriculture is being mismanaged, but it is difficult to produce evidence on this point. There is, however, some concern that the changes of the future will require farmers to have a wider range of skills than their predecessors. It is unclear whether the industry will prosper in a world of increasing competition without allowing more landless talent to enter.

That argument is partly valid but is not necessarily the last word. The world of short-term contracts is replacing the world of jobs for life. Within farming, there are other forms of relationship of increasing importance, partly for tax reasons. Land may be farmed by farm management companies or the landlord may have a management contract with a farmer. Perhaps the landless farmer of the future will get started by working for a farm management company, then working land through a management contract. His security may come simply through his being good at the job and bringing in returns, rather through statutory protection.

## II The History of British Agricultural Tenancy Law

Until 1875 the only statutory provisions were for the benefit of landlords so that the position of tenants was unsatisfactory. In addition, it was widely believed that agricultural progress was held back because tenants had no incentive to invest in improvements in the land since the benefit went to the landlords. The ***Agriculture Holdings (England) Act 1875*** introduced a statutory code of compensation and also a disputes procedure through the medium of referees and an umpire, with a right of appeal to the county court. This Act also gave the tenant the right to remove fixtures, in certain limited circumstances. This can be a problem in agricultural tenancy, because the tenant farmer may want to put up a barn or milking parlour that he could later dismantle and take with him at the end of the tenancy. The great limitation of the Act was that it allowed contracting-out for the application of its provisions, with the result that landlords almost invariably exercised their right to do so. This position

was rectified by the ***Agricultural Holdings (England) Act 1883***, which largely re-enacted the 1875 Act and extended it, as well as preventing contracting-out. This Act also extended the period of notice given to an annual tenant from half a year to a full year, except where the agreement between the parties provided otherwise.

The ***Agricultural Holdings Act 1900*** supplemented the 1883 Act by introducing an arbitration procedure in two alternative forms, for use where the tenancy agreement itself did not provide for a disputes procedure. The procedure for arbitration before a single arbitrator has many similarities to the code applying today. This Act was further amended and supplemented by the ***Agricultural Holdings Act 1906***, which introduced for the first time such provisions as a right for a tenant to compensation for damage by game, freedom of cropping, compensation for disturbance and a right for either party to call for a record of condition of the holding. The law was consolidated into the ***Agricultural Holdings Act 1908***. By now, the tenant's compensation provisions were, in many respects, similar to those applying today, but there was still no security of tenure beyond that introduced in the 1883 Act. The 1908 Act was amended in 1913 and 1914 and also by Part II of the ***Agriculture Act 1920***. There were two further amending Acts in 1921, so that by 1923 there was a need for a further consolidation, the ***Agricultural Holdings Act 1923***. This became known as "the Magna Carta of Agriculture".

According to ***Scammell and Densham's Law of Agricultural Holdings (7th ed)*** p.4 :

> By now the law relating to compensation for improvements and tenant rights had developed to its modern state though it has been further developed recently with sod-fertility and milk quota compensation claims being added to the body of outgoing tenants' claims. The harsh doctrine of the common law that, although trade fixtures could be removed, this should not apply to agriculture, had been alleviated. There was still, however, no security of tenure.

The ***Agriculture Act 1947*** provided some statutory security of tenure. Most of the Act was repealed and re-enacted in the ***Agricultural Holdings Act 1948***, which was then subject to numerous amendments in the Agriculture Act 1958 and the ***Agriculture (Miscellaneous Provisions) Acts*** *of 1949, 1954, 1963, 1968 and 1976*, along with the partial consolidation measure, the ***Agricultural Holdings (Notices to Quit) Act 1977.*** According to Scammell and Densham, "1976 provided another major landmark which was almost as far reaching in its consequences as the 1947/8 legislation." The right to apply for a new tenancy in succession on the death of a sitting tenant was introduced. This extended to up to two generations of tenant.

The law of succession as introduced in 1976 needed substantial refinement and improvement after it had been in operation for a comparatively short time. This came in 1984. The ***Agricultural Holdings Act 1984*** was primarily designed to implement a package of reforms

to stimulate and encourage landowners to relet agricultural land. It dealt mainly with rent and succession. On rent it aimed to deal with a problem whereby farmers accepted high rents either because of profits from other land farmed as owner-occupiers or because they believed that inflation would reduce the real value of the rent. A by-product of this phenomenon was that sitting tenants were confronted with demands for steeply rising rents which could not be funded from the farming of their holdings. A new formula was therefore introduced whereby the arbitrator entrusted with the fixing of the rent for an individual holding had to take into account numerous factors including the productive capacity of the holding and its related earning capacity. The 1984 Act abolished the succession for all new lettings. Succession on retirement upon the tenant reaching the age of 65 or becoming permanently incapacitated was also introduced. The ***Agricultural Holdings Act 1986*** was a consolidation measure.

The law provides security of tenure for tenancies granted for less than one year or more than two years. In *Gladstone .v. Bower (1960) 2 QB 384, (1960) 3 All ER 353,* a tenancy of eighteen months was considered and it was ruled that this was not covered by the existing legislation and, therefore, there was no security of tenure granted. At the time it was believed that this was a drafting oversight which would be corrected in further legislation. However, the more recent legislation on agricultural tenancies has not corrected this anomaly. The term Gladstone-Bower tenancies thus refers to tenancies of more than one but less than two years.

Ministry consent tenancies are allowed in section 5 of the 1986 Act, which empowers the Minister to give prior consent to the grant of a tenancy of an agricultural holding for a term of not less than two and not more than five years, without automatically granting full statutory protection for life. It will, nevertheless, come within the definition of an agricultural holding and will, therefore, attract all the other provisions of the agricultural holdings legislation, for example as to compensation on quitting.

## III The Government Plans

The Government issued a consultation paper on this topic in 1991[2]. The idea at this stage was to move to freedom of contract for all new tenancies and remove almost all statutory requirements concerning security, notice to quit, or rent reviews. This plan had some support. The magazine Big Farm Weekly[3] reported that almost half of farmers supported total freedom of contract within a reformed landlord and tenant system. It noted with surprise that nearly a third of those farmers on wholly-tenanted units favoured the move to total freedom.

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[2]MAFF News Release 12 February 1991
[3]7 May 1992

However, there was also strong opposition from the National Farmers Union and others who argued that tenant farmers would be in too weak a position to resist rent increases and other oppressive contracts. They would have no incentive to improve the land and the future of the industry would suffer.

Revised plans were announced, and then further revisions in a MAFF News Release of 6 October 1993.

There were four main parts to the reform. First, a new class of tenancy would be created, the Farm Business Tenancy, which would actively encourage diversification away from agriculture. Second, there would be greater freedom for parties to negotiate their own tenancy agreement. Third, there would be three statutory safeguards. There would be compensation for tenant improvements, based on market value at the end of the lease. There would be a unilateral right to arbitration for resolution of disputes over compensation. There would also be a clear notice procedure that a tenancy is about to run out. This would require a year's notice to be given. The fourth main part of the reform would provide fallbacks which would only apply if a tenancy agreement is silent. This would enable rent reviews to take place at least every three years, and establish that the basis of the review would be open market values.

These proposals offered more safeguards to tenants, but at first the National Farmers Union complained that there was no formula for rent reviews[4]. However, after further consideration the NFU welcomed the changes. On 7 December the NFU announced that it agreed with three other farming groups (the Country Landowners Association, the Tenant Farmers Association and the National Federation of Young Farmers' Clubs) to call for legislation based upon them at the earliest opportunity. The NFU (and its President Mr Naish, now Sir David) commented :

> Earlier this year, Agriculture Minister Gillian Shephard had outlined her ideas for change which were unacceptable to the NFU. Agricultural tenants would have been bereft of the basic security provided by legislation to all other tenants. As part of the deal the NFU will accept that there should be no provision for a minimum term. "However, we believe that the strong legal framework, including provisions on rent reviews, compensation and disputes procedures, provides a satisfactory basis for new tenancies," said Mr Naish.

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[4] NFU News 6 October 1993

The Farmers' Union of Wales (FUW) stood out alone against the proposed changes [5]. Their comments included the following points.

> FUW policy is working-life tenancies to end when the tenant reaches 65 years of age. (Such tenancies are frequently used by County Councils when letting their smallholdings.) Fiscal incentives are also required, plus a close scrutiny of the way grazing agreements and Gladstone v Bower agreements are currently used.
>
> Specific concern about the proposals; apart from the issue of minimum term, there is no reference to the environment, no reference to "farms" or "holdings" (only land) and no need for agreements in writing which might cause uncertainty and misunderstanding. Provision for compensating tenants for improvements would be of little effect in short-term agreements.
>
> It must be stressed that farming is a long-term enterprise - particularly in the case of a traditional livestock farm. One has to plan ahead and make considerable investment in stock, machinery, quota rights etc. With short term lets, tenants would face constant uncertainty, unable to plan ahead...
>
> There is a danger that, with short-term lets, onerous terms could be imposed. There is also a danger that entrants would accept any terms in their desperation to enter the industry (as witnessed by the high number of applicants for Council holdings).
>
> If it were possible to let farms and land on a short-term basis, then we fear that land could be exploited for short-term gain but would result in long-term detriment to the land. This might well have repercussions for the environment and the countryside in general.

## IV How much difference will the new legislation make ?

A recent survey suggests that few tenants actually receive the long-term protection available under current legislation. The 18th annual survey by the Central Association of Agricultural Valuers concluded that more than half the area of tenanted land where occupation changed in 1993 was relet on short-term agreements, where security of tenure would not apply[6]. Some people argue that reform of agricultural tenancy law would not make much difference in

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[5]Agricultural Tenancy Law Reform : Observations and Comments, November 1994
[6]*Farmers Weekly,* 21 January 1994

practice, since there are perfectly legal ways of letting land at the moment which do not give the tenant farmer the very long-term security of tenure. However, the Royal Institute of Chartered Surveyors believes that the new law will immediately free nearly one million acres of farmland for rent for periods of up to 5 years or more. This would represent nearly 10% of the rented sector in England and Wales. According to the Financial Times (18 October 1994).

> Mr Martin Lowry of the institution said a survey of 148 rural chartered surveyors in the summer showed that the legislation would benefit the entire agricultural sector. He said : "More farms to rent will allow new blood, some of it from a non-agricultural background, into the industry, bringing on a fresh generation of entrepreneurial farmers." Under the Agricultural Holdings Act 1986 any tenancy longer than two years entitles the tenant to stay for life. This has led landowners to resort to a variety of short-term arrangements covering about a quarter of all tenanted land. Mr Lowry said such deals were "time-consuming, complex and don't lead to well-farmed land"...Concern has been expressed in some quarters that landowners will opt for short-term leases. Mr Lowry said this fear should be allayed by the survey's findings that 61% of new rentals would be for 10 years or more.

Similar estimates were made in a survey by Strutt and Parker (*Farmers' Weekly*, 25 November 1995).

Until recently it was generally agreed that the tax position offered a powerful disincentive to any landowner thinking of letting land. The treatment of let farmland under inheritance tax was unfavourable, so that the landowner was better off choosing an alternative arrangement for having the land farmed (perhaps under a management contract) and preserving his inheritance tax position. This is now to change.

On 27 January 1995, it was announced that the Chancellor of the Exchequer had decided to table amendments to the Finance Bill modifying the existing inheritance tax relief for transfers of agricultural property[7]. The amendments would :

> increase the rate of relief for transfers of let farmland from 50% to 100%, and
>
> ensure that land used for the cultivation of short rotation coppice counts as agricultural property.

The Minister of Agriculture welcomed the announcement [8] :

> I have no doubt that this change will enhance yet further the reforms we are seeking in the Agricultural Tenancies Bill. It will have real and positive

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[7] Inland Revenue Press Notice 27 January 1995
[8] MAFF News Release 27 January 1995

> benefits for the tenanted sector by helping to make more rented land available, and so encourage new entrants to farming.

However, income tax is also important and the Farmers' Weekly (25 November 1994) reported agricultural consultant Gary Markham as saying that too much attention had been paid to inheritance tax.

> But a bigger disincentive, says Mr Markham, is that landowners lose their Schedule D tax status when they lease out their property. Under this provision, all manner of business expenses - such as phone bills, vehicles, NFU subscriptions and farmhouse repairs - can be set against tax. The land is also exempted from VAT when sold. Tenanted land, which comes under Schedule A, has few of these benefits. Only expenses directly related to the maintenance of the land can be claimed by the landowner. Even though there is a slim chance that inheritance tax reliefs could be put on to an equal footing...Mr Markham advises farmers to stick with farm management agreements for the other tax benefits.

## V The Bill

**Clause 1** defines the "farm business tenancy" whose creation is the main purpose of the legislation. The tenancy must meet business conditions and either agricultural or notice conditions. The business condition is that the land should be farmed for the purposes of a trade or business, while the agricultural condition is basically that the tenancy should be primarily or wholly agricultural. The notice condition basically requires that notice is given that the tenancy is to be a farm business tenancy. This wording is intended to allow farms containing some business activities to qualify and therefore to encourage diversification away from agriculture.

**Clause 2** excludes from being farm business tenancies those granted before the Act comes into force and those tenancies to which the Agricultural Holdings Act 1986 (ie the current law) applies. This includes tenancies granted as part of the succession arrangements during the 1976 to 1984 period when the three generation succession rule applied.

**Clause 3** defines how the notice conditions in Clause 1(4) continue to apply when one fixed-term tenancy is substituted for another one, but the new one has an earlier term date.

**Clause 4** details the cases where the Agricultural Holdings Act 1986 (ie the current law) continues to apply.

**Clause 5** provides that tenancies for more than two years continue from year to year unless terminated by notice. From the landlord's point of view, if he makes a mistake in the granting of notice to quit the worst that can happen is that he retains the tenant for another year. Under current legislation, a mistake may result in unintentionally granting a tenant security of tenure for life.

**Clause 6** lays down the conditions for giving a valid notice to quit for a tenancy from year to year. Basically notice must be given between one and two years before the tenancy is to end.

**Clause 7** lays down the notice requirements for a notice to quit for a tenancy of more than two years. The time period required for notice is the same as for shorter tenancies.

**Clause 8** lays down the tenant's right to remove fixtures and fittings. This has historically been a key issue in agricultural law, because of the need to provide an incentive for improvement.

**Clauses 9 - 14** deal with rent reviews. This is an area where changes were made during the consultation process, apparently at a late stage. The original proposals[9] contained two paragraphs proposing freedom of contract.

> 13 The rent formula and rent review provisions in the 1986 Act are particularly complex. To allow greater flexibility it is proposed that the parties should be able to agree their own arrangements, in order to suit their particular circumstances. No provisions on rent would be laid down in the new legislation.
>
> 14 As with other business tenancies, there will be no special disputes procedures. The parties would be free to decide to have matters determined by arbitration, rather than by the courts, if they wish.

The later version of the proposals contains a section on rent reviews and the right to arbitration over the level of rent. The Bill really contains provisions similar to those for business tenants under Part II of the *Landlord and Tenant Act 1954*. The point of the law is partly to avoid disputes in areas where tenancy agreements might be silent and partly to strengthen the position of the tenant who is accepted as being in a weaker bargaining position than the landlord.

The whole area is highly sensitive. Tenants in a whole range of activities - including retailing -complain that after they accept a tenancy their rent can be steadily increased leaving them with little option but to pay up regardless or quit on unfavourable terms. Yet it may be the tenant's enterprise and hard work which generates the extra income to be siphoned off by the

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[9]MAFF News Release 12 February 1991

landlord. However, if legislation prevents the market from setting the level of rent, landlords can always simply choose not to let their land.

**Clause 9** states that the rent review part of the bill applies unless it is specifically excluded by the tenancy agreement. The importance of the Clause is that this part of the Bill does not introduce mandatory rent control since the landlord can write an agreement to exclude it. However, tenancy agreements may be silent on the point, in which case action in the Courts might be necessary in the absence of this provision.

**Clause 10** gives either the tenant or the landlord the right to refer the level of rent to arbitration.

**Clause 11** deals with the review date in a particular case.

**Clause 12** covers the appointment of an arbitrator.

**Clause 13** deals with the level of rent, which is "the rent at which the holding might reasonably be expected to be let on the open market by a willing landlord to a willing tenant". In addition, the arbitrator is specifically enjoined not to increase the rent as a result of the tenant's improvements.

**Clauses 15 - 27** deal with compensation for the tenant on termination of a farm business tenancy. As noted above, this topic is not merely a matter of equity but also determines the level of investment and productivity growth in this section of the industry.

**Clause 17** states that a tenant is only eligible to compensation in respect of any tenant's improvement if the landlord has given his consent in writing to the improvement. However, **Clause 19** provides a right to go to arbitration if the landlord fails to give this consent or attaches unreasonable conditions to it.

**Clause 20** lays down what the value of the compensation should be, and **Clause 22** gives the right to the tenant or landlord to go to arbitration in case of disagreement.

**Clauses 23-27** contain supplementary provisions with respect to compensation.

The remaining clauses are miscellaneous and supplemental, mainly containing further detail of the right to go to arbitration in the case of disputes between landlord and tenant.