

Explanatory Memorandum to the Agriculture (Model Clauses for Fixed Equipment) (Wales) Regulations 2019

This explanatory Memorandum has been completed by the Economy Science and Natural Resources Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Agriculture (Model Clauses for Fixed Equipment) (Wales) Regulations 2019. I am satisfied the benefits justify the likely costs.

Lesley Griffiths AM

Minister for Environment, Energy and Rural Affairs

26 September 2019

Part One – Explanatory Memorandum

1. Description

The Agriculture (Model Clauses for Fixed Equipment) (Wales) Regulations 2019 prescribes terms for the maintenance, repair and insurance of fixed equipment. These terms are deemed to be incorporated in every tenancy contract of an agricultural holding that falls under the Agricultural Holdings Act 1986 (the “1986 Act”), except where a written agreement by the parties specifies a different division of responsibilities. It also prescribes periods during which a referral to arbitration may be made where liability for fixed equipment is transferred.

2. Matters of Special Interest to the Constitutional and Legislative Affairs Committee

This Statutory Instrument, in exercise of the powers conferred to the Welsh Ministers by Section 7(1) and (2) of the Agricultural Holdings Act 1986.

3. Legislative Background

This instrument enacts the Agriculture (Model Clauses for Fixed Equipment) (Wales) Regulations 2019 and sets out responsibilities of the landlord and tenant for maintaining, repairing and insuring specified fixed equipment on agricultural holdings. It applies to agricultural holdings, governed by the 1986 Act, entered into before the 1st September 1995 and to some tenancies granted after this date, namely succession tenancies.

4. Purpose and Intent of the Legislation

The relationship between a landlord and their agricultural tenant is governed partly by the terms of their individual tenancy agreement and partly by agricultural tenancy legislation.

The agricultural tenancy sector is crucial to Wales’ rural economy and the proposed reforms will help maintain cohesive farming communities across Wales to include areas where the Welsh language is prevalent. The goals of the Wellbeing of Future Generations (Wales) Act include making Wales prosperous. These proposals have the capacity to contribute towards the development a rural economy which generates wealth, provides employment opportunities and one which is ecologically, economically and socially resilient whilst promoting and protecting heritage and culture.

This Statutory Instrument is part of the Welsh Government’s endeavour to simplify and update the regulation of farming businesses. The changes introduced by this instrument are supported by the Tenancy Reform Industry Group (“TRIG”) which includes representatives of tenant farmers, landlords and agricultural valuers.

The relationship between a landlord and their agricultural tenant is governed partly by the terms of their individual tenancy agreement and partly by agricultural tenancy legislation. Under the 1986 Act the Minister may make regulations allocating liabilities between landlords and tenants for the maintenance, repair and insurance of

fixed equipment on the holding. These are referred to as model clauses in the 1986 Act and were prescribed in the 1973 Regulations (amended in 1988).

The Government's policy objective is to allocate clear liabilities for fixed equipment so that agricultural holdings operate efficiently and productively and minimise disputes between landlord and tenant.

The 1973 Regulations are considered to be out of date by industry as they do not cover items now in common use, monetary caps are out of date, new technologies are not recognised and the drafting makes the liabilities difficult to understand. This instrument addresses these issues.

- a) New liabilities are included for items now in common use on holdings. For example, central heating, slurry and silage systems, renewable energy equipment, livestock handling systems and fixed equipment generating electricity or power;
- b) Monetary caps are updated to reflect current market costs. For example, the cap on tenant spend for minor repairs to roofs (renewing and replacing slipped, broken or cracked tiles or slates as the damage occurs) is increased from £100 to £500 to reflect the increased cost of carrying out such repairs since 1988;
- c) Existing liabilities are expanded or amended to include new items and deliver a more pragmatic split of responsibilities between the parties. For example, expanding the landlord's liability to repair or replace main and exterior walls to include frames and structural cladding and changing the liability for repairing the electrical supply system from the tenant to the landlord (as set out in the consultation section below); and
- d) Modernises the language and structure of the 1973 Regulations so the liabilities are easier to understand.

5. Consultation

The consultation, published on the 1 December 2016 and closed on 23 February 2017, sought the views on proposed changes to secondary legislation governing the repair and maintenance of fixed equipment and end of tenancy compensation, in relation to agricultural tenancies in Wales which are governed by the Agricultural Holdings Act 1986.

The proposals are designed to support the continued existence of an efficient and effective agricultural tenanted sector in Wales. Amendments to existing legislation aim to clarify regulatory requirements, such as liabilities between a landlord and tenant for fixed equipment on a holding. Other planned changes outline a method to calculate compensation payable to outgoing tenants as the current legislation does not adequately compensate tenants for the value of certain improvements they have made to the land. This, in turn, can encourage tenants to invest in and farm the land more sustainably in the last years of their tenancies.

The proposed changes have been based on the recommendations of the Tenancy Reform Industry Group (TRIG), a non-statutory advisory body which represents the interests of agricultural landlords and tenants. The UK Government has enacted similar changes following public consultation in England in 2014 to reform the agricultural tenancy legislative framework. The proposed changes will ensure tenants and landlords in Wales are subject to the same regulatory requirements as farmers in England and are not disadvantaged when it comes to the repair and maintenance of fixed equipment and the calculation the level of compensation and the type of work for which compensation can be claimed for.

Consultation Period and Distribution

The consultation document was available on the Welsh Government website and was circulated directly to key stakeholders. Nine responses were received during the 12 week consultation period. All of these have been considered and analysed to provide the Welsh Government's formal response.

List of respondents:

- Agricultural Land Tribunal (Wales)
- Pontypool Park Estate Office
- Anonymous – Tenant Farmers
- The Tenant Farmers Association
- NFU Cymru
- CAAV (Central Association of Agricultural Valuers)
- Anonymous
- CLA – Country Landowners Association

6. Summary of Changes

The Agriculture (Maintenance Repair and Insurance of Fixed Equipment) Regulations 1973 (“1973 Regulations”) need modernising to include items now in common use, to update monetary caps set at 1988 values and to provide a more pragmatic split of some existing liabilities. Government intervention is necessary as the 1973 Regulations are deemed to be incorporated into every agricultural holding made under the Agricultural Holdings Act 1986. They need updating and modernising to be fit for purpose.

Objectives of the Regulations

The policy objective is to ensure an efficient and effective agricultural tenanted sector. The new instrument will clearly set out the division of liabilities between a landlord and tenant for fixed equipment on a holding. It replaces the 1973 Regulations and reduces the number of legislative instruments. The effect of these changes will be to simplify and modernise the legislative framework governing agricultural holdings in Wales.

The Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973 as amended (the “1973 Regulations”) allocate the responsibility between the landlord and tenant of an agricultural holding for maintaining, repairing

and insuring fixed equipment. The 1973 Regulations apply to agricultural tenancies governed by the Agricultural Holdings Act 1986 (the "1986 Act"). The 1973 Regulations were amended in 1988 and are out of date as:

- a) They do not prescribe the terms for the maintenance, replacement and repair of fixed equipment developed since the regulations were drafted and for items now in common use;
- b) They include fixed monetary caps which have not been updated since 1988; and
- c) A different division of liabilities for certain items would be more pragmatic for the parties concerned.

Regulatory Impact Assessment

Rationale for intervention

The 1973 Regulations are incorporated into tenancy agreements governed by the 1986 Act. No new tenancy agreements can be set up under the 1986 Act except under succession rules. For the agreements already in place in Wales, it is imperative that the 1973 Regulations are updated so that responsibilities are defined for items now in common use on holdings, monetary caps reflect current market costs and responsibilities for new technologies developed since the regulations were drafted are included. This will help to avoid disputes on where responsibility sits for the liabilities that might arise under a tenancy agreement, i.e. the landlord or tenant.

The rationale for government intervention can be divided into two broad categories. These are **unclear liability** and **outdated prices** as a result of the 1973 Regulations becoming out of date.

Unclear liability: the responsibility of liability for certain modern items is not specified in the 1973 Regulations. Unclear liability through outdated legislation may unnecessarily inhibit the efficient running of the farm, create uncertainty between landlord and tenant and lead to the following problems:

- Inequitable distribution of maintenance, repair and replacement costs between landlord and tenant. This will have financial and welfare impacts for individual parties. Welfare impacts will vary according to individual holdings depending on how uncertain liability is currently handled;
- It can generate disputes which incur cost to resolve. A dispute may also lead to repairs being delayed which can lead to further deterioration of fixed equipment;
- Health and safety may be compromised, e.g. neglect of testing gas and electrical systems; and
- Insufficient provision for immediate emergency repair to underground water pipes may lead to greater water damage costs than are necessary.

To modernise the 1973 Regulations this instrument adds new liabilities and makes changes to some existing liabilities.

Outdated prices: Fixed cash limits have not been updated since 1988 and do not reflect current prices. Outdated prices are currently found in two areas of the 1973 Regulations:

- Tenants have a duty of care to roofs and are liable to repair and replace broken, cracked or slipped roof tiles and slates, as the damage occurs, up to £100 a year. If the cost exceeds £100 the landlord is responsible.
- Where the landlord is liable to execute replacements but fails to act within 3 months of receiving written notice from the tenant, the tenant

may execute the replacement and recover the reasonable cost of that work up to £2,000 or their annual rent (whichever is less) per year.

Insufficient fixed annual cash limits will reduce the incentive for tenants to carry out appropriate maintenance work. For the maintenance of roof tiles and slates, the £100 limit is a crude method to distinguish between repairs that might be considered minor or major.

Over time the fixed limit will push maintenance originally considered the responsibility of the tenant onto the landlord. Tenant cost recovery claims for replacements are likely to cost more today than in 1988 for the same work done. Whilst tenants can make claims of any size, the landlord is only required to pay back a maximum of £2,000 per year. A claim of more than £2,000 can be paid back over multiple years, tying up tenants' capital which might have otherwise been spent in more productive ways. The current cash limits may also pose the following problems:

- Low annual cash limits may incentivise tenants to undertake only partial repairs which may deteriorate and lead to large future repairs or replacement costs which could have been avoided; and
- Productivity may fall if delayed repairs reduce functionality of fixed equipment.

Policy Options

Option 1

Do Nothing:

Leave the 1973 Regulations unchanged. This will result in them becoming further out of date and may lead to more disputes.

Option 2

Update and consolidate this instrument:

This is the preferred option. It has the support of all key industry bodies who asked for this change and it has the support of the majority of the responses to the public consultation. It will resolve the current problems of outdated monetary caps and unclear liabilities for fixed equipment now in common use on holdings. This will also bring Welsh legislation in line with other UK administrations.

Summary of Preferred Option

The preferred option is to make the following changes to the 1973 Regulations:

- 1) Update the schedule of equipment and responsibility for liability between landlord and tenant. This includes the provision of new liabilities and amends some existing liabilities to extend their scope and/or change liability for those items;
- 2) Update the tenant's duty of care for broken, cracked and slipped tiles from £100 to £500 per year.

- 3) Remove the existing monetary cap so the tenant can recover in full the 'reasonable cost' of any replacements they make.

Changes to the 1973 Regulations were compared against a baseline of doing nothing. Doing nothing will result in the 1973 Regulations becoming further outdated and exacerbate current issues strengthening the rationale for intervention. The frequency of disputes is expected to rise, health and safety risks will increase and maintenance of fixed equipment will decline.

Updating the schedule of equipment and responsibility for liability and modernising cash limits presents the most effective way to overcome unclear liability and outdated prices. There are two limitations of this preferred approach. Firstly, it cannot reliably future proof the instrument as new technologies and fixed equipment develop. Secondly, updating the fixed cash limit for the care of roofs will not account for changes to the cost of maintenance in the future. However, a cash limit must be retained to delineate minor repairs.

7. Costs and Benefits

The Regulations are not expected to result in an additional economic cost but instead result in a redistribution/transfer of costs between landlords and tenants. There is no information available on how often the existing Regulations have been used and so it is not possible to determine the scale of the transfer.

No familiarisation costs are expected. This is because tenants and landlords will already need to refer to the schedule to identify current liabilities.

Tenants will now be responsible for paying up to £500 a year (an increase from £100 in 1988) to repair and replace broken, cracked, or slipped roof tiles or slates as damage occurs. Landlords will benefit from no longer being responsible for repairs to broken and slipped tiles which cost between £100 and £500.

The removal of an annual fixed cash limit for tenants to recover costs from landlords will prevent some landlords benefitting by keeping capital in assets more productive than the holding's fixed equipment. This will generate a cost to a small number of landlords who use this regulation for such a purpose. There is a corresponding benefit to tenants as the removal of the fixed cash limit ends the opportunity cost of tenants having capital tied up in unproductive assets.

This instrument will remove unclear liability and reduce the likelihood of disputes occurring. Benefits may arise from improvements to health and safety standards and timelier repair of fixed equipment. The latter may lead to farm productivity benefits and lower costs. These perceived benefits are difficult to quantify.

The responsibility for repairs and replacements for both the landlord and tenant can be found at **Annexes A and B**.

There is no perceived cost to Welsh Government by implementing this legislation.

Conclusions

In conclusion, Option 2 offers the greater benefit to the tenanted farming sector.

8. Sector Impacts

Impacts on Local Government

The changes in legislation will result in local authorities facing increased costs from having to compensate outgoing tenants on local authority farms at the going market value for a larger number of improvements eligible for end-of-tenancy compensation. This is consistent with private landlords.

Impact on Voluntary Sector

There are no foreseen impacts on the Voluntary Sector.

Impact of Small Business

As with Local Government, the impact on small businesses will be positive as tenants will have a clear guide as to their roles and responsibilities. It will also give them greater confidence in investing in farm infrastructure.

Duties / Impact Assessments

An Integrated Impact Assessment has been carried out. With limited available data no negative impacts have been foreseen in equality, Welsh language or biodiversity; the Welsh Government's three mandatory areas for assessment.

9. Competition Assessment

Please see **Annex C**

10. Post Implementation Review

The Welsh Government will monitor the impact of the regulations and will gather data regarding farm tenancies in Wales. The Welsh Government will continue to have a dialogue with key stakeholders in order to collate feedback on the impact of the new legislation and consider future changes to the regulatory regime. Amendment to the policy and legislation may be considered following the UK's exit from the European Union.

Guidance will be issued once the new regulations come into force.

Annex A

The **landlord** must repair or replace the following parts of the farmhouse, cottages and farm buildings;

- roofs, bargeboards, fascias and soffits, eaves guttering and downpipes;
- chimney stacks, chimney linings and chimney pots;
- main walls and exterior walls, however constructed, including structural frames and cladding;
- interior repair or decoration made necessary as a result of structural defect to the parts specified in paragraphs (a), (b) and (c);
- walls and fences of open and covered yards and garden walls;
- floors and floor joists;
- ceiling joists and timbers;
- exterior and interior staircases and fixed ladders (including bannisters or handrails) of the farmhouse and cottages;
- doors, windows and skylights and their frames and sills but not door and window furniture including sash cord, locks, fastenings and glass and glass substitute unless the repair or replacement of glass or glass substitute is a consequence of the condition of the doors, windows, skylights or their frames;
- roof and wall insulation; and
- fireplaces, firebacks and firebricks.
- The landlord must repair or replace the following water and drainage systems—
 - underground water supply pipes, wells, boreholes, reservoirs and all connected underground installations (excluding removable covers and tops);
 - sewage disposal systems including septic tanks, filtering media, and cess pools (excluding removable covers and tops);
 - reed beds for water and sewage treatment; and
 - slurry, silage and other effluent systems excluding anaerobic digesters (excluding removable covers and tops).
- The landlord must repair or replace the following gas, electrical and safety detection systems—
 - gas pipes, fixed liquid petroleum and gas tanks;
 - the electrical supply system including the consumer board but excluding sockets, switches, light fittings and similar electrical furniture; and
 - fire and carbon monoxide detectors and alarms.
- In respect of sub-paragraph (3)(b), the landlord must—
 - have the electrical supply system regularly inspected, maintained and serviced;
 - keep full records of any work carried out; and
 - make the records of work available to the tenant if the tenant asks to see them.
- The landlord must replace anything specified in paragraph 9(1) (tenant's liability to repair) which has worn out or become incapable of repair unless the tenant is liable to replace it under paragraph 9(3).

Annex B

The **tenant** must repair and leave clean and in good tenantable repair, order and condition the farmhouse, cottages and farm buildings together with the following (which are in or upon the holding, or which during the tenancy may be erected or provided upon the holding)

- fixtures and fittings (including fitted kitchens);
- space heating and water heating systems (including the repair of any boiler but not its replacement), ranges, grates;
- drains, sewers, gulleys and grease traps;
- manholes and inspection chambers;
- water supply systems and fittings situated above ground (including pipes, tanks, cisterns, sanitary fittings and drinking troughs), pumping equipment, and hydraulic rams whether above or below ground;
- fences, hedges, field walls, stiles, cattle grids, gates and posts, and garden and yard doors;
- bridges, culverts, ponds, watercourses, sluices and ditches;
- roads and yards;
- fixed equipment generating electricity, heat or power (including solar panels, heat pumps, wind turbines and anaerobic digesters) which is wholly for the use or benefit of the tenant;
- vehicle fuel and oil tanks;
- radon pumps;
- insulation on water pipes; and
- livestock handling systems and sheep dips.
- The tenant must repair or replace and leave in good tenantable repair, order and condition the following—
 - door and window furniture including sashcords, locks and fastenings, glass and glass substitute except for glass or glass substitute which requires repair or replacement as a consequence of the condition of the door, window, skylight or their frames;
 - removable covers to any manhole, inspection chamber, sewage disposal system, slurry, silage or other effluent system excluding anaerobic digesters;
 - electrical sockets, switches, light fittings on or outside the surface of walls, ceilings and floors excluding switches that are part of the consumer board;
 - signs and notices; and
 - all broken or cracked roof tiles or slates and all slipped roof tiles or slates, as the damage occurs, providing that the reasonable cost of the work does not exceed £500 in any one year of the tenancy.
- the tenant must repair or replace and, upon repair or replacement, adequately paint or otherwise treat with effective preservative material as may be proper, all items of fixed equipment, and to do any work, where such repair, replacement or work is rendered necessary by the wilful act or negligence of the tenant or of any of the tenant's household members or employees; and

- the tenant must replace anything which has worn out or otherwise become incapable of repair if its condition has been brought about by or is substantially due to the tenant's failure to repair it.

Annex C

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No