Law Commission
Reforming the law

Conservation Covenants



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The Law Commission

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CONSERVATION COVENANTS

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THE LAW COMMISSION

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THE LAW COMMISSION

CONSERVATION COVENANTS

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THE LAW COMMISSION

CONSERVATION COVENANTS

To the Right Honourable Chris Grayling, MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1
INTRODUCTION

INTRODUCTION

1.1 In this Report we recommend the introduction of a statutory scheme of conservation covenants in England and Wales. A conservation covenant is an agreement made between a landowner and a conservation body which ensures the conservation of natural or heritage features on the land. It is a private and voluntary arrangement made in the public interest, which continues to be effective even after the land changes hands.

1.2 Conservation covenants are in use in many places around the world, but they do not yet exist in the law of England and Wales. A number of limited statutory covenants can be created; one of the best-known of these is contained in section 8 of the National Trust Act 1937, which allows a landowner to agree with the National Trust certain restrictions on activities on the land. These covenants are used to good effect in a number of areas, many of which will be familiar to some of our readers. But their usefulness is limited. They can involve only obligations not to do something, and therefore cannot be used to guarantee positive conservation acts such as maintenance or cultivation, and they can be agreed only with the National Trust.[1]

1.3 The public interest in conservation, and the enthusiasm of landowners to protect important features on their land, requires something much wider than these limited arrangements; and there is a broad range of conservation bodies whose expertise could be drawn on in order to ensure the conservation of private land. The Law Commission consulted upon the introduction of conservation covenants from March to June 2013. We present here the outcome of that consultation, and of our research, in the form of recommendations to Government for reform and a draft Bill that would give effect to those recommendations.

1.4 This Chapter discusses briefly the situations in which a conservation covenant might be used, and outlines the structure of this Report and the recommendations we have made. We note the position as regards Welsh devolution, and we acknowledge the considerable assistance we have had from many individuals and organisations.

[1] A similar arrangement can be made with the Forestry Commission: see the Forestry Act 1967, s 5. Again, such covenants can only restrict the landowner's activities and cannot create positive obligations.

POTENTIAL USES FOR CONSERVATION COVENANTS

1.5 Here we give just three examples of how conservation covenants might be used; more discussion of the uses to which they may be put follows in Chapter 2.

Protecting woodland over the generations

> Example: The owner of an extensive family estate, much of which is forested and used by the public for hiking, intends to leave the land to her children. She wants to ensure that the forest is maintained and that public access continues, but she is not sure that her children – or future generations – would share those priorities.

1.6 Owners of land may want their property to remain within their family after their death, but at the same time ensure that their heirs will protect and maintain its special features. They face a dilemma between leaving the freehold to their heirs or to a conservation organisation; the latter option would deprive the heirs of the land. To solve this dilemma some landowners are using convoluted workarounds such as a transfer of the freehold estate to a conservation organisation which then leases the estate back to them. If a conservation covenant could be created, a landowner could bequeath the freehold to his or her heirs, subject to a conservation covenant held by a conservation organisation.

Selling heritage property

> Example: A heritage group has invested funds in buying and restoring a Tudor house. The organisation wishes to sell the property, but wants to ensure that the work it has undertaken, and the heritage value of the property, is preserved.

1.7 Situations arise where a public or voluntary sector organisation owns land with conservation value but wishes to sell it to a private purchaser. Such transactions help organisations to achieve conservation aims whilst providing a source of funding for future conservation work.

1.8 The difficulty is in finding a way to ensure that the purchaser and future owners maintain the conservation work already undertaken. The practice has been to grant long leases or to put in place complex and potentially ineffective arrangements using contractual agreements with purchasers. Conservation covenants would provide a simpler and more effective means of achieving these goals. The imposition of a conservation covenant as part of the sale would secure the commitment of future landowners, and preserve the conservation value of the site, thus protecting the investment of any public or charitable funds.

Protecting a biodiversity offsetting site

1.9 Biodiversity offsetting is the practice of compensating for harm caused by development to the conservation or biodiversity value of a site by providing an equivalent gain to conservation on another site.[2] It has been developed as a tool for environmental policy elsewhere in the world (for example, in Australia), and there is increasing commercial and political interest in the subject in this jurisdiction.

1.10 Offsetting is relevant to the protection of biodiversity within the planning system. English and Welsh national planning policies require local planning authorities to follow the "mitigation hierarchy" when determining applications for planning permission for development which is likely to cause significant harm to biodiversity. This means that developers must, in the following order of priority:

(1) avoid the harm by locating the proposed development on an alternative site with less harmful impacts; or

(2) adequately mitigate the harm; or

(3) as a last resort, compensate for the harm.

1.11 Biodiversity offsetting is one way of providing compensation. If the developer can secure an appropriate offsetting measure on the same or a different site, this may enable the local planning authority to grant planning permission for the development. However, the use of biodiversity offsetting is inconsistent and there is as yet no national framework governing it.

1.12 In April 2012 the Department for Environment, Food and Rural Affairs ("Defra") began local two-year pilot schemes to assess the potential of biodiversity offsetting for the English planning system. The Department has since published a Green Paper which explores the details of a potential offsetting scheme for England.[3] It is not yet known whether biodiversity offsetting will become a compulsory element of the planning system; but we can give an example of how it might take place, and the part that conservation covenants could have to play.

> Example: A local planning authority is faced with a planning application for an affordable housing development. The proposed development site is a wild flower meadow. If the development were to go ahead the meadow would be destroyed completely. In this instance the planning authority is willing to grant planning permission, provided the damage caused to the meadow is offset by the creation and long-term maintenance of a similar site elsewhere.

[2] C Reid, "The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK" (2011) 23(2) *Journal of Environmental Law* 203, 214 to 215.

[3] Department for Environment, Food and Rural Affairs, *Biodiversity Offsetting in England: Green Paper* (September 2013).

1.13 The success of biodiversity offsetting in the illustration above depends upon there being a way of securing biodiversity on the offset site for the long-term future. Conservation covenants could be used to do this, whether the offset site is owned by the developer, by the local authority itself, or (more likely in the future) by a third party. The developer's offer to offset the biodiversity loss (whether by creating an offset site itself or by funding one held by the local authority or a third party) will be made more effective where the future of the offset site is secured by the conservation covenant made between the site owner and a responsible body.

1.14 The local planning authority could thus take the conservation covenant into account as a material consideration when determining the application for planning permission. It could conclude that an offset site, secured by a conservation covenant, would compensate for the harm caused to the wild flower meadow by the proposed development and that this was, therefore, no longer a basis for refusing planning permission as there was no net loss in biodiversity.

1.15 Biodiversity offsetting is a controversial topic, as yet undeveloped in England and Wales. We are well aware of the public debate about its effectiveness and the concerns to which it has given rise. Our contribution to that debate is to offer a legal mechanism to ensure that any offsetting that takes place is a long-term, sustained undertaking. It may be appropriate for there to be context-specific requirements. These should be considered by Government in the context of off-setting; we have listed in Appendix C some of the matters that might be considered.

THE LAW COMMISSION PROJECT

1.16 The Consultation Paper was published on 28 March 2013.[4] Consultation formally closed on 21 June. In all, we received 57 responses, most of which were very detailed and gave the views of bodies representing large numbers of individuals. The consultation generated a huge amount of useful information, and also revealed a great deal of support for the proposals. There is a list of all consultees (both those who responded to the consultation and those with whom we met) in Appendix B, which also sets out the acronyms used throughout this Report.

1.17 We also held a number of meetings before, during and after the consultation period, including:

(1) a public seminar in Cardiff, at which we explained and discussed the Commission's proposals;

(2) a presentation to the Housebuilders' Heads of Legal (the in-house legal teams of major developers);

(3) a round-table meeting in relation to the use of conservation covenants for biodiversity offsetting, attended by a range of groups involved with or interested in offsetting;

[4] Conservation Covenants: A Consultation Paper (2013) Law Com Consultation Paper No 211, referred to hereafter as "the Consultation Paper".

(4) a meeting in Edinburgh with lawyers, academics and officials to gather evidence about the use of conservation burdens in Scotland;

(5) a teleconference with an Australian academic with expertise in legal mechanisms for biodiversity offsetting; and

(6) a meeting with planning, conservation and legal staff from Warwickshire County Council.

OUTLINE OF THIS REPORT

1.18 Following this introductory Chapter, Chapter 2 explores the case for introducing conservation covenants in greater detail by reporting on what consultees told us about their potential uses, and on our research into their use in other jurisdictions. The Chapter concludes with a recommendation for the introduction of conservation covenants in this jurisdiction.

1.19 The subsequent Chapters focus on two issues that are central to our new scheme. Chapter 3 discusses the purposes for which a conservation covenant can be made, and in Chapter 4 we explain our recommendations about "responsible bodies", that is, the conservation bodies that will be able to be party to a conservation covenant and to take responsibility for ensuring that its terms are complied with.

1.20 In Chapter 5 we turn to the legal fundamentals of a new statutory scheme for conservation covenants. We explain who can create a conservation covenant, and the documents by which it will be created, including its proper execution. We also make a recommendation about the registration of conservation covenants, which will be the technical means of ensuring that they endure beyond the current ownership of the land. We go on to make recommendations about the transfer of conservation covenants from one responsible body to another, and about the role of the Secretary of State and Welsh Ministers as "holder of last resort" for conservation covenants if a responsible body ceases to exist, and some other technical issues including the application of the Bill to Crown land.

1.21 In Chapter 6 we look at the day-to-day management of land that is subject to conservation covenants (which will often involve management agreements running alongside conservation covenants), and we consider the difficult issue of enforcement and the necessary remedies in the event of a breach of the covenant by a landowner or by a responsible body.

1.22 Chapter 7 deals with the circumstances in which a conservation covenant might need to be modified (to change its terms), or might come to an end. Generally this will be done by agreement or by virtue of a provision in the covenant. We then make recommendations about the modification and discharge of conservation covenants by the Lands Chamber of the Upper Tribunal.

1.23 In the Consultation Paper we looked at a number of existing statutory covenants in England and Wales, including those provided for by section 8 of the National Trust Act 1937. We examined in the Consultation Paper whether they should be retained, or could be replaced by a system of conservation covenants. We have concluded that there should be no reform of the existing statutory covenants; we explain why in Chapter 8.

1.24 Chapter 9 contains a list of all our recommendations. Our Report then concludes with the draft Conservation Covenants Bill[5] and Explanatory Notes, which are set out in Appendix A. We have included some further Appendices, which support some of the matters discussed within the body of the Report. Appendix B provides a list of consultees; Appendix C sets out matters that are specific to biodiversity offsetting; Appendix D notes some of the matters that the non-statutory guidance accompanying the scheme might need to cover; Appendix E details the *American Law Institute Restatement of the Law (Third): Property (Servitudes)*; Appendix F lists the criteria used by the Scottish Ministers when designating conservation bodies under the Title Conditions (Scotland) Act 2003; finally, Appendices G and H respectively contain examples of conservation covenants used in New Zealand and Scotland.

IMPACT ASSESSMENT

1.25 Alongside this Report we have published an Impact Assessment which can be accessed through our website.[6] We are grateful to consultees who have provided a wealth of information about the costs and benefits of reform.

WALES

1.26 Our recommendations and draft Bill are designed for both England and Wales, although it is possible that our recommendations will be implemented separately in the two countries.

ACKNOWLEDGEMENTS

1.27 Our hearty thanks go to all who responded to our consultation.[7] Law reform is a collective effort and we are truly grateful to all who have put work, time and careful thought into answering and commenting on our questions. Lawyers, conservation professionals and members of the public all bring different and interesting perspectives to the table, all of which have played an important part in shaping our conclusions.

1.28 We are extremely grateful to the following individuals and organisations:

(1) The Wildlife and Countryside Link and the Heritage Alliance for undertaking a pre-consultation survey on conservation covenants, and their members whose responses made a valuable contribution to our work.

(2) The Woodland Trust for its support in assessing the impact of conservation covenants.

(3) All those who attended the seminars in Cardiff, London and Edinburgh to share their specialist knowledge.

[5] Referred to hereafter as "the draft Bill".

[6] www.lawcom.gov.uk > A-Z of Projects > Conservation covenants.

[7] A list of consultees is provided in Appendix B.

(4) The planning, conservation and legal staff at Warwickshire County Council for their useful discussions with us.

(5) Jan Boothroyd and officials from the Royal Borough of Kingston upon Thames for sharing their expert knowledge with us.

(6) Professor Nancy McLaughlin, Professor Colin Reid and Professor David Farrier for providing us with an invaluable insight into the legal landscape in their respective jurisdictions of the USA, Scotland and Australia.

1.29 Finally, we thank those organisations that so generously hosted events at which we were able to present the consultation issues, namely the University of Cardiff, the Scottish Law Commission and Housebuilders' Heads of Legal.

CHAPTER 2
CURRENT LAW AND THE CASE FOR REFORM

INTRODUCTION

2.1 In this Chapter we consider in detail the case for the introduction of conservation covenants in England and Wales, and explain why we are recommending statutory provision to introduce them.

2.2 We begin by discussing the potential uses of conservation covenants in this jurisdiction. We then look again at the models of conservation covenants used around the world, but with particular focus on the Scottish scheme. We then explore the reasons why conservation covenants cannot be created under the current law, and the existing "workarounds" used to achieve the same ends. We conclude by setting out our general recommendations for a new statutory scheme of conservation covenants in England and Wales.

2.3 The discussion in this Chapter inevitably presupposes a view of what a conservation covenant is, and for this purpose we take it to be as described in Chapter 1: an obligation attached to land for conservation purposes, enforceable by a responsible body with an interest and expertise in conservation, and binding not only upon the landowner who made the covenant but also upon later owners of the land. Behind that general description lies a great deal of detail and a number of variables, which are discussed in the rest of this Report, but those are the broad outlines for the purposes of this Chapter's discussion of whether or not conservation covenants should be introduced.

USES FOR CONSERVATION COVENANTS

2.4 Consultation, research and the experience in other jurisdictions indicate that there are various potential uses for conservation covenants. These can be grouped into the following categories (although this list is not exhaustive):

(1) philanthropic uses;

(2) securing heritage and community assets;

(3) alternatives to purchase by conservation organisations;

(4) disposals of land by conservation organisations;

(5) payment for eco-system services and agri-environment schemes; and

(6) biodiversity offsetting.

2.5 The many different contexts that have been identified in which a conservation covenant might be used are testimony to the strength of interest that has been shown in a statutory scheme by consultees. Before we explore the proposed uses in more detail, some points of caution must be expressed. The effectiveness of a conservation covenant will depend greatly on the obligations contained within it, and the purpose those obligations seek to serve. Certain obligations will not be suited to a conservation covenant. It might not be appropriate, for example, to include short-term outcome-driven obligations in a conservation covenant because these may require regular variation to achieve the desired goal.

2.6 Similarly, one might think long and hard before setting out an ongoing payment obligation in an agreement that can be perpetual. Such obligations appear better suited to a personal contract between a landowner and a responsible body. Conservation covenants may be accompanied by such contracts, known as "management agreements", which can set out detailed provisions as to how the conservation objectives in respect of the land will be achieved. They could also contain provisions in respect of regular monitoring and enforcement,[1] for example terms which provide that the landowner will allow the responsible body access to the land, or that a failure by the landowner to carry out his or her obligations will entitle the responsible body to cease making specified payments and/or to carry out work itself.

2.7 A few consultees raised concerns regarding conservation covenants and incentives.[2] The Bar Council thought that conservation covenants could be used as a tax mitigation tool, whilst Professor Hodge suggested that conservation covenants could engage tax consequences because they have the potential to devalue an asset (land). We continue to take the view that there is no prospect of tax incentives being offered in relation to conservation covenants, and we do not want the Law Commission's recommendations to be regarded as offering a tax mitigation tool.

Philanthropic uses

> Example: A landowner has inherited extensive moorland which includes a crag much used by rock climbers. The landowner intends to leave the land to his children, but wants to ensure that the moorland is properly looked after and that the public continue to have access to the crag.

2.8 Our focus in the Consultation Paper was on the philanthropic use of conservation covenants. This envisaged conservation covenants being used in situations akin to that described above. In such instances a landowner could be forced, under the current law, to choose between leaving the land to his or her heirs or to a conservation organisation. In the context of a potential sale, the landowner might simply refuse to sell the land in an attempt to preserve its conservation value.

[1] We discuss the matter of management and enforcement in detail in Chapter 6.

[2] The RSPB, the Bar Council, and Professor Hodge.

2.9 We suggested that conservation covenants would enable landowners to negotiate a sale subject to certain obligations aimed at preserving the conservation asset by creating a conservation covenant before sale. The landowner could do so in negotiation with the responsible body before marketing; alternatively the terms of the conservation covenant could be discussed and negotiated with both the responsible body and a prospective purchaser. Similarly, a testator could bequeath the freehold to a family member, subject to a conservation covenant held by a third party conservation organisation.

2.10 Consultees confirmed that there is potential for this sort of use of conservation covenants.[3] The Woodland Trust, which has set up a transfer and lease-back scheme in order to address the lack of legal mechanisms for conservation obligations,[4] provided us with information about an actual case where it could use a conservation covenant:

> An elderly gentleman had intended to give the Trust an area of woodland which formed part of his farm. The wood was part of a larger block and was only accessible via private land including the farm. Crucially, the wood would be inaccessible to the public, and difficult for the Trust to access for management purposes. Giving the land to the Trust is currently the only way the landowner could achieve his objective to safeguard the woodland.

2.11 If a conservation covenant were available, ownership of the wood could remain with the rest of the farm (and pass to the landowner's heirs), and the landowner could agree a conservation covenant with the Trust. The landowner would achieve his goal of safeguarding the woodland, and the management of and public access to the site could be ensured because the latter points could be addressed in the terms of the covenant or an accompanying management agreement.

Heritage and community assets

Example: A farmer, who is also a keen amateur archaeologist, permits a local archaeological society to undertake a dig on his land. The society has found artefacts, which both the farmer and the society want to remain in the land.

[3] The Game and Wildlife Conservation Trust, the Salmon and Trout Association, the Forestry Commission, and the Woodland Trust. Alison Finn, a private landowner, also wrote to us about an area of her estate that she would like to protect, but is finding it difficult to do so: "I have created a trust in my will for both my Victorian House and the pasture meadow on the Isle of Ely that I am steward of on behalf of the family … , but I am aware that it is limited in duration unless I am buried there ... , so almost certainly I would use the proposed legislation … ."

[4] See http://frontpage.woodland-trust.org.uk/clt/index.asp.

2.12 A conservation covenant could also be a means of managing heritage and community assets.[5] In this instance the landowner could agree, within a conservation covenant, to refrain from activities that were likely to damage or result in the removal of the artefacts. That covenant would bind future owners of the land.

For conservation organisations, as an alternative to purchase

> Example: A wildlife charity identifies a plot of land as containing the habitat of a native bird species. It makes a financial offer to the landowner in return for the land being maintained as a habitat; the landowner agrees.

2.13 In the Consultation Paper we suggested that a conservation covenant could be used as a way of protecting land without a conservation organisation having to buy the freehold. Currently, a transfer of the freehold or the grant of a long lease is sometimes the only workable way of achieving these objectives.

2.14 Appetite for such use was confirmed by the RSPB,[6] the Wildlife Trusts and the National Trust. For example, the Wildlife Trusts saw a role for conservation covenants in developing its Living Landscapes scheme:[7]

> It is on the land outside of Wildlife Trust nature reserves and other protected sites, that conservation covenants could be of most benefit. Some landowners are keen for their land to be maintained for wildlife but at the same time for it to remain within their family into the future, rather than selling or gifting it to a conservation organisation. A conservation covenant between the landowner and a Wildlife Trust would ensure this could happen and it would also contribute to the restoration of the natural environment.

2.15 Professor Hodge mentioned the recent interest in a "landscape-scale" approach to conservation, which could be facilitated by the use of conservation covenants so as to ensure the protection of connected areas of land.

[5] A possibility raised by the Institute for Archaeologists, the Institute of Historic Buildings, and the War Memorial Trust.

[6] Although the RSPB did note that in certain contexts it would still be desirable or necessary to take the land into direct ownership rather than entering into a conservation covenant with the landowner.

[7] The Wildlife Trusts are leading 150 Living Landscape schemes around the UK, working with and helping people to restore wildlife to whole landscapes. Each Living Landscape scheme covers a large area of land often encompassing several Wildlife Trust nature reserves and other important wildlife areas.

2.16 The usefulness of a conservation covenant in this context will depend on its nature. For example, a conservation covenant would be cheaper than outright purchase of land where relatively simple obligations were needed such as: maintaining wild bird cover over farmland, preventing shooting close to sensitive sites, or a wildlife friendly buffer around existing sites. On the other hand, there will be circumstances when outright ownership of a site is the best and most viable option given the extent of the objectives.

For conservation organisations wishing to dispose of property

> Example: A heritage group has invested funds in buying and restoring a Victorian house. The organisation wishes to sell the land but ensure that the work it has undertaken, and the heritage value of the property, are preserved.

2.17 We noted in the Consultation Paper that an organisation might wish to sell property that it has purchased and invested in, but ensure that the work it has undertaken is preserved. In such circumstances a covenant could be agreed as part of the sale of the property to secure the commitment of future owners to its preservation. This potential use was confirmed by a number of consultees, including the RSPB, the Wildlife Trusts, Link, English Heritage, the National Trust, and Natural Resources Wales.

2.18 English Heritage has provided us with extremely comprehensive information on this particular use. It could see three specific circumstances when it would be minded to impose a conservation covenant upon the transfer of a site:

(1) when taking ownership of a property for the purpose of rescuing it from disrepair or possible ruin;

(2) when working in partnership with other agencies and grant-giving bodies to regenerate complicated heritage sites with a variety of potential future uses; and

(3) when providing funds to a suitable body such as an archaeological or building preservation trust to assist in the acquisition of a heritage property.

2.19 In each instance the purpose of the covenant would be to safeguard public investment in the property, and to ensure public access and appropriate maintenance in the future.

Payment for eco-system services and agri-environment schemes

> Example: A landowner's decision to remove an area of woodland upstream of a river which passes near homes has contributed to localised flooding. After negotiations, the landowner agrees to adopt different land management practices, restoring and maintaining the woodland in return for a yearly payment.

2.20 Such arrangements are essentially a form of "payment for eco-system services" (or "PES").[8] PES has become an increasingly important feature of environmental policy in recent years.

2.21 Pre-consultation discussion suggested that conservation covenants could be used to provide a secure way of making sure that a payment to a landowner, for eco-system services provided, is well spent and produces the desired outcome. A recent Defra Best Practice Guide on eco-system services (which gathers together principles on how payment for eco-system services arrangements should work) highlighted conservation covenants as a possible mechanism for use by public or private groups seeking to deliver eco-system services under a legal agreement.[9] A number of consultees also raised this possibility during consultation.[10] For instance, the Central Association of Agricultural Valuers pointed to a particular example in the context of flood mitigation and defence:

> We are currently examining a proposal from a water company to block drainage ditches on an upland mire in order to make the mire retain more water, which should mitigate flood risk and improve water quality further down the catchment, paying for long term environmental management for its commercial benefit. The proposal would change the farming practices on the land in the very long term, if not permanently. The private individual may be the landowner who farms the land himself, the tenant who does so, or the landlord of such tenants. He is willing to provide the necessary management of the land in return for payments, but at present the proposal lacks a suitable legal vehicle which will bind the parties for the appropriate length of time. A conservation covenant would suit this situation very well.

2.22 South West Water also told us of a PES project in Pickering, North Yorkshire. This scheme has reduced flood risk whilst also providing better water quality, habitats for wildlife, and soil protection through a mixture of land management measures (including flood storage bunds and debris dams) and woodland creation.

[8] A comprehensive definition is provided in Department for Environment, Food and Rural Affairs, *Payment for Eco-system Services: A Best Practice Guide* (May 2013) p 9.

[9] Department for Environment, Food and Rural Affairs, *Payment for Eco-system Services: A Best Practice Guide* (May 2013) pp 64 to 65.

[10] Professor Reid, the Central Association of Agricultural Valuers, Charles Cowap, the National Farmers' Union, South West Water, the Game and Wildlife Conservation Trust, the Country Land and Business Association, Professor Farrier and Professor Hodge.

2.23 The difficulty that the parties face in such instances is finding a means of ensuring that the medium- to long-term obligations, both restrictive and positive, are fulfilled in return for payment. This is less problematic when the land is in the hands of the original landowner: a personal contract should suffice. The challenge is how to ensure the landowner's successors in title continue to comply with the obligation. Conservation covenants would provide a secure way to ensure the long-term fulfilment of the ecosystem service. The potential for expanding the use of PES in England and Wales is considerable, particularly in the context of water quality and flood risk management. Conservation covenants represent a means of delivering this.

2.24 Several consultees have also highlighted the potential use of conservation covenants in rural settings,[11] where landowners may be eligible for grants and other funding in exchange for conservation action taken on their land. As the Central Association of Agricultural Valuers pointed out:

> Conservation covenants could be used by landowners to secure long term management strategies for their land. We see the potential for this market place as lying beyond and outside the possibilities offered by relatively temporary and defined EU and government subsidy schemes. At present, an English Higher Level Environmental Stewardship Scheme agreement runs for only 10 years on terms set by the Government within the EU's Rural Development Regulation. A landowner keen to secure a longer term benefit tailored to his land might seek to partner with a responsible body in order to obtain support and income for a specific management regime, such as managing upland grassland as hay meadows; or perhaps to manage the land for the benefit of a species such as the grey partridge.

2.25 We note elsewhere[12] that there are disadvantages to the inclusion in the terms of a conservation covenant of long-term payment obligations on the part of the responsible body. What is envisaged here is a conservation covenant involving a payment in the short term, and conservation activity in the long term. Without a conservation covenant, it may be impracticable to secure long-term conservation management in return for an up-front payment.

Biodiversity offsetting

2.26 At an early stage in the project, we became aware of the potential for conservation covenants to be used to deliver biodiversity offsetting. Offsetting has gained traction in environmental policy elsewhere in the world, and there is increasing interest in the subject.

[11] The Central Association of Agricultural Valuers, Professor Farrier, and Professor Hodge.

[12] Para 2.6, above.

2.27 Offsetting already has some recognition in European Union environmental law. For example, the Environmental Liability Directive[13] and its implementing legislation in England and Wales[14] require operators whose occupational activities damage water, land or protected habitats or species to provide "primary remediation" by restoring the damaged natural resources or impaired services to their baseline condition. To the extent that this cannot be fully achieved, the operator must undertake "complementary remediation" to provide a similar level of natural resources or services, which can be done on a different site.

2.28 Offsetting is also relevant to the protection of biodiversity through the planning system. English and Welsh national planning policies require local planning authorities to follow the "mitigation hierarchy" as one way of providing compensation.[15] For instance, if the developer can secure an appropriate offsetting measure on the same or a different site, this may enable the local planning authority to grant planning permission for the development. However, its use is currently inconsistent and there is no national framework governing it.[16]

2.29 Defra has undertaken a pilot programme in respect of offsetting. The pilot schemes were delivered by local authorities around the country, on a voluntary basis, with the aim of assessing the potential of offsetting within the planning system in England.[17]

2.30 Defra has since set out a proposed scheme for offsetting in England in a Green Paper.[18] In that paper Defra has clearly indicated that it considers there to be a part for conservation covenants to play in the long-term protection of offset sites.[19]

2.31 As part of our pre-consultation work we met with Dr Tom Tew of the Environment Bank, whose business is promoting and enabling biodiversity offsetting. Dr Tew explained that, in the absence of conservation covenants, the Environment Bank was experiencing real difficulties when trying to ensure the long-term management and conservation of offsetting "receptor sites". Accordingly, the Environment Bank takes the view that there is a crucial role for conservation covenants to play in an offsetting framework.

[13] Directive on environmental liability with regard to the prevention and remedying of environmental damage 2004/35/EC, Official Journal L 143 of 30.04.2004, p 56.

[14] Environmental Damage (Prevention and Remediation) Regulations 2009, SI 2009 No 153; Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009, SI 2009 No 995.

[15] Para 1.10, above.

[16] Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Background* (July 2011) para 11.

[17] Department for Environment, Food and Rural Affairs, *Biodiversity offsetting – Background* (July 2011) para 55; Department for Environment, Food and Rural Affairs, *Biodiversity Offsetting Pilots – Information Note for Local Authorities* (March 2012) para 24.

[18] Department for Environment, Food and Rural Affairs, *Biodiversity Offsetting in England: Green Paper* (September 2013).

[19] Department for Environment, Food and Rural Affairs, *Biodiversity Offsetting in England: Green Paper* (September 2013) para 46.

2.32 In the Consultation Paper we described how we envisaged offsetting operating. We considered two aspects.

(1) A landowner/developer applies for planning permission to undertake development. That development will cause environmental harm, which will need to be compensated. The tools for enabling the developer to commit money or resources to offsetting the environmental harm, and thereby to increase the likelihood that planning permission will be granted, already exist in planning legislation.

(2) Obligations on an offset site need to be created. This means that the owner of the offset site – whether the developer or, more likely, a different owner – needs to agree to carry out certain activities to develop or maintain the site's environmental value, and to refrain from undertaking certain activities to maintain that value. It is here that we envisaged a conservation covenant could be used: to secure permanent and binding obligations on an offset site.

2.33 The Consultation Paper explained that to deliver the second half of the equation – creating obligations on an offset site – some existing mechanisms were available to local authorities involved in the pilot programme:

(1) planning conditions imposed by a local authority;[20]

(2) planning obligations (often referred to as "section 106 agreements") entered into by a developer and a local authority;[21] and

(3) the Community Infrastructure Levy ("CIL"), which allows local authorities to impose a charge relating to development within their areas.[22]

2.34 Prior to publication of the Consultation Paper, some stakeholders – in particular the Environment Bank, as discussed above – told us that conservation covenants would, in their view, be a better way of securing an offset site, owing to perceived difficulties with the existing tools available.

[20] Town and Country Planning Act 1990, ss 70 and 72.

[21] Town and Country Planning Act 1990, s 106. Section 106 has been prospectively repealed, and new provisions substituted, by the Planning and Compulsory Purchase Act 2004, but the repeal and substitution are not yet in force.

[22] See Planning Act 2008, s 205 and Community Infrastructure Levy Regulations 2010, SI 2010 No 948 (as amended).

Consultation about the use of conservation covenants in the context of offsetting

2.35 At the point of consultation the precise practical and legal mechanics of offsetting were by no means fully worked out. Consultation thus presented an opportunity to gather information on the use of existing legal mechanisms to deliver offsetting, and to investigate and confirm initial views as to the need for, and superiority of, conservation covenants. We therefore invited views from consultees on:

(1) how long-term biodiversity offsetting activity can currently be secured on an offset site;

(2) whether existing methods for securing biodiversity offsetting activity are satisfactory;

(3) whether conservation covenants would be a useful addition to the methods available to deliver biodiversity offsetting activity; and

(4) what advantages conservation covenants might offer relative to existing methods.[23]

2.36 In examining consultees' views, we drew together consultation responses received to the questions above, as well as views expressed to us in stakeholder meetings; this includes a meeting we convened in June 2013 for interested stakeholders to discuss the potential role of conservation covenants in offsetting. We also met with planning, legal and conservation officers from Warwickshire County Council, a pilot local authority in the Defra trial.

2.37 Consultees confirmed that section 106 planning obligations and planning conditions could be used in offsetting; so could chains of covenants. A section 106 planning obligation was the instrument most frequently referred to.[24] Some consultees also had experience or knowledge of the use of planning conditions.[25] The Environment Bank, which is currently involved in the Defra pilot, indicated its preference for compulsorily-renewed and registered personal covenants.[26]

[23] Consultation Paper, para 2.54.

[24] A range of consultees confirmed this, including several local authorities (Merthyr Tydfil Partnership, officials from Warwickshire County Council, and Derbyshire County Council), the Environment Bank, UKELA, Natural England, the Woodland Trust, the RSPB, Link, Natural Resources Wales, the British Mountaineering Council, and the Ramblers.

[25] Including the Environment Bank, John Box, officials from Warwickshire County Council, Derbyshire County Council, the RSPB, and Natural Resources Wales.

[26] We say more about the use of personal covenants below; para 2.71 and following.

2.38 Our discussions with officials from Warwickshire County Council also revealed that CIL contributions may be used to fund offset sites;[27] although consultees[28] were concerned that new restrictions as to the use of section 106 planning obligations, which came about as a result of the Community Infrastructure Levy Regulations 2010, could impact on the delivery of biodiversity offsetting.[29] As we understand the CIL legislation, it does not in itself enable the creation of binding obligations designed to protect an offset site, but can provide a means of securing contributions to fund such obligations.

2.39 A few consultees indicated that they thought existing methods were satisfactory to secure offsetting.[30] Consultees such as the Berkeley Group also thought that where offsetting obligations were required on the site of development (which may be likely where offsetting is required to be as close as possible to the original development), this was less difficult and the legal mechanisms for obtaining planning permission would suffice. The Wildlife Trusts felt that it was too early in the process of Defra's offsetting pilots to say with certainty whether existing methods for offsetting were satisfactory.

2.40 Officials from Warwickshire County Council took the view that there should be a way of linking control of the offset site back to the relevant local planning authority and, in particular, the local authority's grant of planning permission for the development. This is because a local planning authority would have granted planning permission that destroyed the biodiversity of the development site on the basis that the offset site would be protected, and so should be able to monitor the success of that protection. The use of planning mechanisms such as section 106 obligations means that the same local authority can control both the planning permission and the offset site.

2.41 However, many consultees felt that the existing mechanisms were unsatisfactory and they identified a number of problems with them.[31] We explore these problems in more detail below, and where possible indicate how conservation covenants might provide a solution.

[27] The Community Infrastructure Levy is discussed further at para 2.33(3), above.

[28] The Land Trust, Natural England, the Wildlife Trusts and Link. These issues were also noted by the attendees of the Law Commission's biodiversity offsetting round-table meeting in June 2013 and during our meeting with officials from Warwickshire County Council in July 2013.

[29] A section 106 planning obligation can be used to require a developer to make a monetary contribution to the cost of offsetting. The local authority can then use that contribution to create or maintain an offset site and may pool a number of contributions into one site. The Community Infrastructure Levy Regulations 2010 allow no more than five section 106 contributions to be pooled in this way; any additional payments must be made through CIL. This concerns consultees, some of whom feel that green infrastructure will not receive a fair share of the fund collected through CIL.

[30] The Forestry Commission, Trowers and Hamlins LLP, and Derbyshire County Council.

[31] Merthyr Tydfil Partnership, John Box, the British Mountaineering Council, the Environment Bank, the Land Trust, the Ramblers, the Central Association of Agricultural Valuers, UKELA, officials from Warwickshire County Council, the RSPB, Natural England, the Game and Wildlife Conservation Trust, the Woodland Trust, the Wildlife Trusts, Link, and the Country Land and Business Association.

ENSURING OFFSETTING OBLIGATIONS ARE PERMANENT

2.42 Where the loss of biodiversity is permanent, compensatory measures must also be permanent. Hence, the obligation to create and maintain an offset site should be able to run in perpetuity (as well as binding any future owner of the site),[32] or at least for a lengthy period.[33] Consultees indicated that although section 106 planning obligations can be for an unlimited period, they are normally created for a period of between 10 and 30 years.[34] The Woodland Trust said "the time period is too short for many habitats or species to develop sustainable communities and there is little or no protection if, at some later date, someone wants to propose the compensation land as a development site".

2.43 The ability to make a conservation covenant perpetual, and binding on future landowners, provides the long-term security needed for offsetting. This could be combined with a short-term, renewable management agreement to deal with matters of detail and funding.

MODIFICATION AND DISCHARGE

2.44 Consultees were concerned that section 106 planning obligations can be modified or discharged.[35] This is done in one of two ways. First, if five years have passed since the section 106 agreement was entered into, the landowner may apply to the local authority for modification or discharge (with an appeal to the Secretary of State).[36] Secondly, if five years have not elapsed since the agreement was entered into, then it may be modified or discharged by agreement between the landowner and local authority.[37] Consultees thought that local authorities are under pressure to discharge or modify section 106 planning obligations that are halting development.[38] This is regarded as unsatisfactory for a biodiversity offsetting site, where obligations should have a level of permanent protection from modification or discharge.

[32] This was raised by, for example, Natural England, the Woodland Trust, the RSPB, and the Central Association of Agricultural Valuers.

[33] Natural England noted that windfarm structures may only have a 20 to 30 year operational life, and would need a correspondingly shorter offset period.

[34] The RSPB, the Woodland Trust, and Natural England.

[35] For example, Natural England and officials from Warwickshire County Council raised this point.

[36] Town and Country Planning Act 1990, s 106A(3) and (4), and s 106B in respect of an appeal.

[37] Town and Country Planning Act 1990, s 106A(1)(a). In addition to both of these options, special provision has been made to enable the modification or discharge of obligations where they relate to affordable housing requirements: Town and Country Planning Act 1990, s106BA as amended by s 7 of the Growth and Infrastructure Act 2013. See also Town and Country Planning (Modification and Discharge of Planning Obligations) (Amendment) (England) Regulations 2013, SI 2013 No 147.

[38] This was a point noted during our discussions with officials from Warwickshire County Council, and was also raised in the Land Trust's response.

2.45 Our recommendations provide ways in which a conservation covenant can be discharged or modified by agreement between the parties. In either case, where agreement cannot be reached, the parties could also seek approval for modification or discharge from the Lands Chamber of the Upper Tribunal. So conservation covenants may not limit the possibility for modification and discharge to the extent that some consultees desire. However, this is something which could be addressed by making special provision for offsetting schemes.[39]

MANAGEMENT AND ENFORCEMENT

2.46 The lack of protection for the long-term management and enforcement of an offset site under the existing mechanisms is a key concern: 12 consultation responses referred to it,[40] and it was also raised during stakeholder meetings that we attended.[41] So, for example, UKELA and the Land Trust were concerned about a lack of robustness in planning mechanisms and Link referred to "an absence of adequate long-term monitoring and enforcement measures" in relation to section 106 planning obligations.

2.47 It was thought that the bespoke regime for enforcement in a scheme of conservation covenants would provide a better mechanism for handling breaches of obligations than the existing tools.[42] This is particularly the case after an extended period of time.

[39] As we indicate in Appendix C, para 7.

[40] Including Merthyr Tydfil Partnership, John Box, the British Mountaineering Council, the Ramblers, UKELA, the Land Trust, the Central Association of Agricultural Valuers, officials from Warwickshire County Council, the Game and Wildlife Conservation Trust, the Woodland Trust, the Wildlife Trusts, and Link. This issue was also a concern of the attendees of the Law Commission's biodiversity offsetting round-table meeting in June 2013 and our meeting with officials from Warwickshire County Council in July 2013.

[41] At the Law Commission's biodiversity offsetting round-table meeting in June 2013, the meeting with officials from Warwickshire County Council in July 2013, and a meeting with the Environment Bank in January 2013.

[42] Natural England expressed this view, as did officials from Warwickshire County Council.

CROSS-BOUNDARY ISSUES

2.48 In some cases a developer might own both the development site and an offset site, but the latter may be in a different local authority's area. A section 106 agreement can only be entered into with the local authority for the area where the relevant land is situated,[43] and accordingly there may be difficulties in this situation.[44] The difficulties are not insurmountable – for example two different local authorities could enter into separate 106 obligations (one relating to the funding from the developer and the granting of planning permission, the other to secure performance of obligations on the offset site).[45] However, the solutions are by no means simple or problem-free.

2.49 It is not clear how frequently this situation would arise; a local authority might not wish to endorse creation of an offset site within another authority's administrative boundaries, as it might prefer the benefit of offsetting to be available to residents of its own area.[46] This is probably more consistent with general theory on offsetting anyway (which favours compensation close to the affected site). However, where a more distant offset site was contemplated, the use of a conservation covenant to secure it would avoid the difficulties associated with cross-boundary section 106 agreements.

THE COST OF PUTTING LEGAL MECHANISMS IN PLACE

2.50 Natural England noted that section 106 planning obligations are bespoke, and are formulated and agreed at the very end of the planning decision process. By comparison, conservation covenants might offer reduced costs resulting from simpler legal processes and lower legal fees to set up and secure land for offsetting purposes. In particular, Natural England saw the potential advantage of using a conservation covenants template for the most straightforward offsetting situations, leading to reduced transaction costs. A draft conservation covenant could also be drawn up as part of a developer's "offer", thereby speeding up the process of gaining endorsement from a local authority.[47]

2.51 At this stage it is difficult to say with certainty whether conservation covenants would be a cheaper way to protect an offset site than the negotiation and drafting of a section 106 planning obligation. It may be that offsetting schemes can be developed on the basis that a developer, instead of setting up an offset site, could fund the development of an existing offset site. This is the vision of organisations such as the Environment Bank. Such a site would itself be protected by a conservation covenant.

[43] Town and Country Planning Act 1990, s 160(1). This local planning authority will be responsible for enforcing the section 106 obligation and must be identified in it: Town and Country Planning Act 1990, s 106(9).

[44] This was noted by Natural England. We also discussed the issue when we met with officials from Warwickshire County Council.

[45] Alternatively, the local authority granting the planning permission could stipulate in a planning obligation that the developer enter into another planning obligation with the local authority that has responsibility for the offset site.

[46] This was suggested during our discussion with officials from Warwickshire County Council.

[47] Natural England raised this point; it was also mentioned by the Environment Bank at the Law Commission's biodiversity offsetting round-table meeting in June 2013.

Discussion

2.52 Examining the use of conservation covenants in biodiversity offsetting has been a challenging process. There are several reasons for this.

(1) The Defra pilots have been somewhat slow to gather pace, and what can be learnt from them is still being developed.

(2) Although all local planning authorities work within the National Planning Policy Framework, and are under a duty to conserve biodiversity,[48] there is variation in how planning and offsetting are delivered at local level, and consequently a range of views on how best to achieve offsetting.

(3) Whilst some of the concerns identified to us have a basis in legislation or case law, a number relate simply to the experiences or perceptions of individuals in their use of the planning system, and vary according to their particular experience.

2.53 We agree with the view, expressed by many consultees, that conservation covenants would be an extremely useful additional tool for the creation of binding obligations on an offset site.

2.54 Conservation covenants could offer particular advantages over and above existing mechanisms, as outlined above. Stakeholders' views of existing mechanisms, particularly section 106 planning obligations, are affected by their experience of these mechanisms in practice; the advent of a new scheme offers the opportunity to implement conservation covenants in a way which is more suited to biodiversity offsetting (as well as the many other uses suggested for conservation covenants).

2.55 The general scheme of conservation covenants described in this Report may not address all of the specific needs of a biodiversity offsetting system. Some of the problems with current mechanisms (such as the issues relating to CIL) simply cannot be cured by conservation covenants. Other issues, however, such as the lack of permanence in existing mechanisms, could be addressed by conservation covenants.

OVERSEAS MODELS

2.56 Chapter 3 of the Consultation Paper examined, in some detail, a number of existing conservation covenants systems in other jurisdictions: Scotland, the USA, Canada, Australia and New Zealand.

[48] Natural Environment and Rural Communities Act 2006, s 40.

2.57 Our review of these jurisdictions shows that conservation covenants are widely used by landowners as a private and voluntary mechanism for the conservation of land. Whilst the policy underlying conservation covenants is similar wherever they are found, the spread of their use worldwide has not led to uniformity in how the policy is delivered. The ways in which acceptable conservation objectives are defined vary from a detailed list of specific aims (for example in the USA's Uniform Conservation Easement Act) to a very general statement of purpose (such as for "open space covenants" made with the Queen Elizabeth the Second National Trust in New Zealand). The policy choices made in relation to eligible holders of conservation covenants also vary widely.[49]

2.58 When we consider the routes to modification and discharge, distinct categories can again be identified:[50]

(1) Many American States limit the parties' freedom to agree on modification and discharge between themselves, either through an express statutory requirement to seek authorisation from a court or public authority, or (possibly) through the application of charitable trust principles.[51]

(2) Most Canadian provinces do not impose such restrictions. A few also establish adjudication procedures enabling one party to seek modification or discharge against the other's wishes, but generally on narrow grounds.

(3) Scotland provides flexibility by enabling one party to apply for modification or discharge if, having regard to a wide range of considerations, that would be reasonable.

[49] We refer again to the approach of other jurisdictions in Chapter 3, para 3.3 and following.

[50] It is difficult to categorise New Zealand and the Australian states because it is unclear how, if at all, conservation covenants are subject to general powers to modify covenants (akin to section 84(1) of the Law of Property Act 1925).

[51] Legislation has recently been proposed in Vermont, USA that would change the process for amending and terminating existing and future perpetual conservation easements. The Bill (S. 119, on amending perpetual conservation easements) made provision for the amendment of the existing legislative framework by enabling the conservation organisation to amend a conservation covenant with the approval of the landowner, but without judicial or governmental oversight. However, the proposed reform would limit the form of amendments that can be approved by the holder and would create the Easement Amendment Panel that would review certain proposed amendments. The proposed reform has been greeted by much public and academic criticism (J Echeverria, J Milne and N A Mclaughlin, "Keep the perpetual in perpetual conservation easements" (10 February 2014), available at http://vtdigger.org/2014/02/10/echeverria-milne-mclaughlin-keep-perpetual-perpetual-conservation-easements). This is an example of the importance to the public of conservation arrangements and the concerns that can be raised when modification is sought.

2.59 Our research show that some parallels can be drawn between policy choices as to eligible holders and the ease with which conservation covenants can be created, modified or discharged without the need for government oversight. For instance, in the USA a covenant can be held by a very wide range of bodies, but it is also difficult to modify or discharge them and governmental oversight has been introduced to various stages of the process. Scotland, on the other hand, requires holders to be authorised but makes it possible to create a covenant without oversight by the government.

2.60 We have found it extremely rewarding to study the overseas examples, and it was particularly useful to study the Scottish model. Under the Title Conditions (Scotland) Act 2003 ("the 2003 Act"),[52] "conservation burdens" can be agreed. These burdens must be for the purpose of preserving or protecting, for the benefit of the public:

(1) the architectural or historical characteristics of any land; or

(2) any other special characteristics of any land, including a special characteristic derived from the flora, fauna or general appearance of the land.[53]

2.61 The Scottish system balances these fairly wide conservation purposes by restricting who may hold the benefit of a conservation burden; the holder must be the Scottish Ministers or a conservation body prescribed by them.[54] Every Scottish local authority and 26 nature and heritage conservation groups have so far been prescribed under this power.[55] A conservation burden must be registered.[56] The 2003 Act also provides that the Lands Tribunal for Scotland may modify or discharge any real burden, including a conservation burden (though the parties may agree to exclude this jurisdiction for the first five years of the covenant).[57] When considering an application to modify or discharge, the Lands Tribunal must consider whether modification or discharge is reasonable, having regard to a number of specified factors; these are not specific to conservation burdens, but apply to all real burdens.[58]

[52] Which arose from recommendations of the Scottish Law Commission.

[53] Title Conditions (Scotland) Act 2003, s 38(1).

[54] Title Conditions (Scotland) Act 2003, s 38(1) and (4). A conservation body is an entity whose objects or functions are to preserve or protect for the benefit of the public the characteristics set out above.

[55] Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, SSI 2003 No 453 (as amended).

[56] Title Conditions (Scotland) Act 2003, s 4.

[57] Title Conditions (Scotland) Act 2003, ss 90 to 92.

[58] Title Conditions (Scotland) Act 2003, ss 98 and 100.

2.62 The Scottish system thus proved to be a helpful comparator when we were considering the form that conservation covenants should take in England and Wales. We therefore thought it would be pertinent to gain additional information on the Scottish scheme, which could continue to inform our policy decisions. In the Consultation Paper we invited feedback from consultees who had used the Scottish system.[59]

2.63 Consultees with understanding of the Scottish system have provided us with a great deal of useful information. This has enabled us to enhance our understanding on a number of the key aspects of the scheme, namely how conservation burdens are recorded on the Scottish register; how conservation bodies are prescribed and the role of the Scottish Government in monitoring the scheme; the part that local authorities play as conservation bodies; how a conservation burden can be modified or discharged; and the type of obligations set out in conservation burdens.[60]

2.64 In the Consultation Paper we cautioned against relying too heavily on the use of conservation covenants in other jurisdictions, because of the inherent differences in so many aspects of the law and the environment generally. This remains the case. Nevertheless, we have found it extremely useful to continue learning about these systems, particularly the scheme operating in Scotland. Not only have the overseas models helped us to understand the key policy elements of any system of conservation covenants, they have highlighted potential pitfalls to be avoided. We often refer back to the overseas examples throughout this Report.

THE CURRENT LAW AND THE AVAILABLE "WORKAROUNDS"

2.65 Consultation and research have demonstrated the potential uses for conservation covenants. However, they cannot be created under the current law.

2.66 Currently conservation obligations can be entered into as personal agreements between the parties to a contract but such contracts fail to bind future owners. That is the result of two features of the law of freehold covenants. First, landowners cannot impose positive obligations to do something (as opposed to a restrictive covenant not to do a specified thing) in a way which ensures they run with the land. Secondly, the current law will not permit a freehold restrictive covenant to bind the burdened land unless there is neighbouring land which benefits from it. This is a particular problem in a conservation context where work generally benefits society, rather than a neighbour.

[59] Consultation Paper, para 3.17.

[60] Reference to the Scottish scheme and the information provided by consultees is made throughout this Report; see also Chapter 3 of the Consultation Paper.

2.67 That is the general law. A limited number of statutory covenants do, however, already exist in the law of England and Wales.[61] One example is found in section 8 of the National Trust Act 1937; this provision allows the Trust to agree (on a mutually voluntary basis) restrictive obligations that are consistent with its general purposes. Whilst the section 8 statutory covenants have been used fairly widely by the Trust they are limited: they cannot include positive obligations, or even a right of access for the Trust.

2.68 In the planning context, section 106 of the Town and Country Planning Act 1990 enables positive and negative obligations to bind successors in title without the need for neighbouring land to be benefited. The usefulness of section 106 obligations has been discussed earlier in this Chapter.[62]

2.69 Finally, conservation covenants should be distinguished from the public law notification and designation regime – for example, the notification of sites of special scientific interest. Conservation covenants are of an altogether different nature; they are private law, voluntary agreements whose creation and scope depend entirely on the agreement of both parties. We envisage that conservation covenants will complement the existing system of land designation and notification, by providing a means of privately protecting land which has a conservation value, but which does not fall within the system of land designation or notification.

2.70 In our report Making Land Work: Easements, Covenants and Profits à Prendre, the Law Commission recommended the introduction of a new interest in land: land obligations.[63] Land obligations would be capable of being positive obligations – thus removing one of the limitations described above. However, they would not obviate the need for conservation covenants as the party seeking to benefit from the land obligation would still need to own neighbouring land.

2.71 In light of the restrictions under the current law, landowners and conservation bodies have taken to using workarounds to try to mirror the outcome that a conservation covenant would produce. We examined many of them in the Consultation Paper.[64] These methods, in our view, are undesirable: many are complex or cumbersome, and involve unnecessary transactions on the part of a landowner or conservation organisation. The mechanisms are noted below.

(1) Freehold covenants embodying restrictive obligations only.

[61] We discuss these in Chapter 8. Also see Chapter 8 and Appendix A of the Consultation Paper for specific information on these statutory covenants.

[62] Para 2.33 and following.

[63] (2011) Law Com 327 (referred to hereafter as "the Easements Report"), Parts 5 and 6.

[64] Consultation Paper, para 2.31 and following.

(2) Leasehold covenants. These can include positive or restrictive obligations. Some conservation charities use this arrangement by accepting a transfer of the freehold of the land, and then granting a lease (including covenants) back to the freeholder. This is cumbersome and often unwelcome; landowners who would like to enter into a conservation obligation will often not wish to part with their freehold.

(3) Chains of personal covenants. A freeholder, X, may make a covenant with a conservation organisation, imposing positive duties relating to X's land. As a personal obligation it can be enforced against X; but it will not bind X's successors in title. X also covenants to make a covenant, to the same effect, with his successor in title, and to oblige the successor to do the same when he or she sells the land on. This is complex and insecure.

(4) Rentcharges. An estate rentcharge is a requirement that a landowner pay a periodical sum of money to another person; it can be created for the purpose of enforcing positive obligations.[65] These are complicated and cumbersome arrangements which do not provide a direct method of enforcement. In the event of a breach by the landowner, the conservation organisation's only enforcement mechanism is to exercise the right of re-entry (that is, to reclaim the land).[66]

2.72 We invited consultees to tell us:

(1) whether they had used any of the "workarounds" we describe, and the benefits and disadvantages of those approaches; and

(2) whether there are other ways in which they have attempted to create binding obligations in respect of land for a conservation purpose (and how successful those measures have been).[67]

Response to the consultation

2.73 Some consultees relied on personal contracts, or covenants with landowners. South West Water, for example, uses covenants to encourage farmers' use of good land management practices which also improve water quality (though it is unclear whether the reference was to positive or restrictive covenants). The company thought that this approach worked well with individual farmers, but it was keen to have conservation covenants available for larger-scale conservation efforts.

[65] Rentcharges Act 1977, s 2.

[66] Easements Report, para 5.25.

[67] Consultation Paper, para 2.47.

2.74 Others had experience of putting in place restrictive covenants by retaining neighbouring land. The Forestry Commission had used this device, as well as Natural Resources Wales, though the latter noted the difficulty of only being able to restrict activity rather than require it. Both Professor McLaughlin and Professor Cheever, commenting on the American position, noted that restrictive covenants had been the preferred option before statutory conservation covenant schemes existed.

2.75 Consultation responses also revealed the complexity of the arrangements which are currently used, such as chains of covenants.[68] Other consultees told us that the disadvantages of these arrangements were so significant as to prohibit their use.[69]

2.76 Consultees confirmed that in some cases it had been necessary for them to take freehold ownership in order to protect land (and that this was undesirable). The Land Trust indicated that it takes ownership of land where funding is available; English Heritage had retained the freehold of land in some cases where it neither wanted nor needed this level of ownership.

2.77 Similarly, a number of consultees had experience of using lease arrangements, including English Heritage, the RSPB, the Woodland Trust, the Central Association of Agricultural Valuers, and the Country Land and Business Association.[70] We had previously examined a scheme set up by the Woodland Trust. This provides two options for potential land donors. Under the first option, a landowner passes the freehold to the Trust, which then grants a long lease (including covenants) back to the original landowner. Alternatively, the landowner grants a lease to the Woodland Trust, which then grants a sublease back to the owner, or to a third individual who has purchased the freehold; in both cases the sublease contains covenants about the use of the land. In its consultation response the Woodland Trust confirmed its use of these arrangements:

[68] Berkeley Group.

[69] English Heritage.

[70] For example, Christopher Jessel had experience of a slightly more complex arrangement: "…a structure under the Law of Property Act 1925, s 153 used for a historic mansion house. Part of the house was occupied as the family residence. Other parts comprised a visitor attraction as heritage areas of decorated and furnished rooms on several floors opened to the public. These parts were included in a long lease to a heritage charity subject to maintenance and use covenants. A few months later the lease was enlarged to a freehold. The result was that the family trustees continued to own the freehold of the residential part of the house and the charity owned the freehold of the heritage part subject to the covenants. I believe the conservation arrangements have worked well."

> We attempted to do this through the use of long leases and/or sub-leases which are cumbersome, expensive to set up and off-putting to landowners wishing to protect their land. This is because the leases need to include terms which are necessary for the proper operation of the lease, but which appear to be intrusive and overly restricting to lay persons. Conservation covenants can be far more focussed in their drafting and application. We have a steady stream of private individuals wishing to protect their woods in the long term and there is currently no satisfactory way of helping them, short of taking the wood into Trust ownership or using leases.

2.78 Consultees generally agreed with us that the leaseback scheme was undesirable. However, the RSPB commented that "in the main these have not been overly complex to arrange and the value of the leaseback arrangements has been reflected in the land purchase deal".

2.79 A final suggestion advanced by both Christopher Jessel and Trowers and Hamlins LLP was the use of a right of re-entry annexed to an estate rentcharge. Using this device, a landowner would be liable for the payment of a (perhaps nominal) sum to the beneficiary of the rentcharge. This rentcharge may also be accompanied by positive or restrictive covenants, and is binding on successors. The primary remedy available to the beneficiary is a right of re-entry, though Trowers and Hamlins LLP also mentioned a power to appoint a receiver and manager.[71]

Discussion

2.80 Clearly a range of mechanisms is being used. In explaining their current practices a number of consultees expressed the view that these workarounds were unsatisfactory. This is supported by the views expressed to us in meetings with consultees, and must be read alongside support for the introduction of conservation covenants as a viable alternative.

A NEW STATUTORY SCHEME

2.81 Based on the overwhelmingly positive response of our consultees, we have concluded that we should recommend the introduction of a new scheme of conservation covenants. We therefore set out below the core elements of a statutory scheme; our recommendation as to non-statutory guidance, which should accompany the scheme; and our conclusions as to the highly technical, but important, matter of the nature of a conservation covenant.

Core elements of the statutory scheme

2.82 In the Consultation Paper we detailed what we considered to be the core elements of the new statutory scheme. Consultees' views indicated that our judgement was correct. Accordingly, the core elements listed below remain almost identical to those set out in the Consultation Paper.

[71] See para 2.71(4), above.

(1) A conservation covenant can only be formed by the agreement of two parties: a landowner (a person with a freehold estate or with a leasehold estate of more than seven years),[72] and an (unconnected) "beneficiary" or "holder". In the case of conservation covenants, the holder must be one of a limited class of organisations known as responsible bodies. The holder is responsible for monitoring and, if necessary, enforcing obligations.

(2) The agreement must be made for a conservation purpose as defined in the draft Bill. We say more about the purposes for which a covenant can be made in Chapter 3.

(3) There is no need for benefitted land; in traditional terminology, a conservation covenant can take effect "in gross". This is justified on the basis that conservation of our environment and heritage represents a sufficiently important objective to justify an exception to the general law.

(4) A conservation covenant can contain both restrictive and positive obligations.

(5) A conservation covenant – whether restrictive or positive in nature ─ will bind the landowner's successors in title (that is, all subsequent owners) after he or she has disposed of the land. We consider this to be particularly important given the long-term nature of much conservation work.

Non-statutory guidance

2.83 In reviewing the use of conservation covenants in other jurisdictions, we discovered the frequent use of non-statutory guidance,[73] as well as academic critique in favour of such guidance. We thought that non-statutory guidance for a conservation covenants scheme could usefully include a conservation covenant template (covering issues such as the parties to the agreement, specific obligations, duration, and procedures for registration, management and enforcement).[74] We anticipated that guidance could also set out an explanation of the statutory scheme, refer to further resources (including overseas models), and encourage the publication of information about existing conservation covenants. Guidance, of course, is not law; it would be produced to assist landowners and responsible bodies but would not address issues which are for the courts to decide under the statutory scheme.

[72] We discuss what we mean by landowner in more detail in Chapter 5.

[73] See for example S Millar and J West (eds) *Rhode Island Conservation Easement Manual* (2009), available at http://www.nbwctp.org/CEG_Manual/RI%20Conservation%20Easement%20Guidance%20Manual.pdf .

[74] See, for example, the New Zealand open space covenant template in Appendix G.

Response to the consultation

2.84 There was strong support amongst consultees for the production of non-statutory guidance. It was generally agreed that that guidance would be a useful means of explaining how the statutory scheme will work in practice, its limitations, and any procedural arrangements that must be followed.

2.85 More specifically, the creation of model terms was supported by a number of consultees, including the Environment Bank, Professor Reid, Professor McLaughlin, the National Farmers' Union, the Institute for Historic Building Conservation, the RSPB, the War Memorials Trust, Natural England, and the National Trust. Both the Berkeley Group and the RSPB noted that the use of model terms might help keep costs low.

2.86 Some responses highlighted the fact that different guidance might be needed for specific situations: the Salmon and Trout Association, for example, volunteered its assistance in the drafting of model terms relating to conservation covenants over aquatic environments or fishing rights. The Central Association of Agricultural Valuers picked up on this point, but noted that non-statutory guidance would be easier to update and amend as more experience of conservation covenants was gained. Both Robert McCracken QC and UKELA thought that public participation in the creation of guidance was essential.

2.87 Consultees then turned to consider who might be best-placed to develop non-statutory guidance. There was very strong support for Government-led guidance drafted in consultation with a range of interested groups.[75] Professor Reid drew a parallel with Scottish legislation:

> To avoid confusion if different codes are produced by different bodies and in line with the central role of the Ministers … it is the relevant Minister who should make the code. The statute should, however, provide for clear consultation with all responsible bodies and the public, and perhaps for an enhanced role for the statutory conservation bodies within their own areas of expertise (cf. the provisions of the National Parks (Scotland) Act 2000, where SNH is responsible for the reports leading to ministerial designation).

[75] This approach was supported by Professor Reid, the Central Association of Agricultural Valuers, the Institute for Archaeologists, Dr Nsoh, Charles Cowap, UKELA, the Bar Council, South West Water, officials from Warwickshire County Council, the Salmon and Trout Association, the RSPB, RICS, the Agricultural Law Association, Derbyshire County Council, Link, English Heritage, and the Country Land and Business Association.

Discussion

2.88 We remain of the view that non-statutory guidance will be a sensible feature for a new statutory scheme for conservation covenants, and this is clearly supported by those likely to use such a scheme in the future. We think there is a need for a degree of centralisation which could be provided by the Secretary of State, or the Welsh Ministers in Wales; but equally, the involvement of a range of organisations is necessary to ensure different interests are represented. The form and content of the non-statutory guidance should be the product of a collaborative approach between central Government and those likely to use the scheme.

2.89 We have noted in Appendix D some of the matters that guidance might need to cover.

The nature of a conservation covenant

2.90 Here we turn to a final, technical issue in the basic picture of a conservation covenant: should it be an interest in land among those listed in section 1 of the Law of Property Act 1925 ("the 1925 Act"), can it be regarded simply as a contract, or should it be a purpose-built statutory burden?

2.91 On the one hand, a conservation covenant must be much more than a contract, because its purpose is to go beyond the law of contract in binding successors in title to the land and those with derived estates. Clearly conservation covenants, therefore, behave like property rights. Arguably they are property rights, in the sense that they bind the land, and can to some extent be transferred between responsible bodies (although we would not see them as marketable, nor as property that can be inherited[76]).

2.92 A conservation covenant does not fit into the existing categories of interests in land. It is not an easement (traditionally regarded as the right to do something on another's land, or to prevent the owner doing something on the land – such as a right to light). Nor is it a restrictive covenant, because it may include positive obligations. It is not a land obligation among those recommended in our Easements Report, because there is no requirement for there to be benefitting land.

2.93 Moreover, a conservation covenant is rather different in character from those existing interests; in particular, although it is a private agreement, it is created for the public good. So it has a rather different flavour from the interests listed in section 1 of the 1925 Act, which are of interest principally to the parties and to prospective purchasers of the land. Conservation covenants will have special rules about transmissibility, particularly where land is subdivided;[77] so they cannot simply slot into the existing common law rules, nor into those we have recommended for land obligations.

[76] Since they cannot be held by an individual in a private capacity.

[77] See our recommendation on this issue at para 5.116.

2.94 In the Consultation Paper we explained that we were reluctant to add a new form of interest in land to those found in section 1 of the 1925 Act. We did not want to create the possibility of legal and equitable conservation covenants, nor to replicate the requirements for different forms of registration depending upon whether they burden registered or unregistered land.

Response to the consultation

2.95 Most consultees agreed with us, on the grounds of simplicity and the avoidance of complication and confusion. Some consultees commented that a statutory burden might be more attractive to the public and command more confidence, and there may be merit in that point. The National Trust helpfully explained:

> The National Trust agrees that conservation covenants should be statutory burdens on land, rather than proprietary interests or contractual agreements as this avoids the complexities and drawbacks associated with these arrangements. The proposed statutory scheme does adopt some key features of proprietary interests and remedies available at common law but this is an opportunity to tailor those features and remedies to resolve any shortcomings and make them more appropriate and focused on conservation.

2.96 A few were unhappy with the proposal. Christopher Jessel felt that a conservation covenant is clearly a property right and must be fitted into the existing scheme of property rights. As discussed above, we disagree; the formal expression of the right as an interest within the 1925 Act or as a statutory burden does not affect whether or not it is, philosophically, an item of property. Other objectors included:

(1) Professor McLaughlin, who felt that the idea that the right has a value to the public would be lost if the covenant were to be a statutory burden. We think that this is not right, and that the value of the covenant is protected by the rules relating to discharge and modification, and to enforcement.

(2) The Bar Council, which thought that conservation covenants would simply be restrictive covenants. But that is not what is recommended.

(3) The Agricultural Law Association, which felt that conservation covenants should be able to be traded and should, therefore, be conventional property rights. Again, we are not convinced by this.

Discussion

2.97 A statutory burden would not take on the complications of a formal interest in land under the 1925 Act. It could have all its characteristics designed by statute, without the need to take on the common law of property or the rest of the apparatus of land law. Rules for binding successors in title, and for what happens when the land is subdivided, can be designed specifically for conservation covenants. We remain convinced that this is the best option. Conservation covenants should be statutory burdens, with their own rules for binding successors, for transferability, for registration and for discharge or modification and so on. The extension of the canon of property rights to enable the creation of legal and equitable conservation covenants as a new interest in land would be unnecessary and unduly complicated.

2.98 We recommend the introduction of conservation covenants into the law of England and Wales by statute. There should be:

(1) provision for a voluntary agreement to be made between a landowner and a responsible body for a conservation purpose and for the public good;

(2) no requirement for there to be benefitted land;

(3) the ability to agree positive as well as negative obligations; and

(4) provision for those obligations to bind successors in title.

2.99 We recommend that non-statutory guidance should be developed by the Secretary of State, or the Welsh Ministers as appropriate. This guidance should be developed through a consultation process.

2.100 We recommend that conservation covenants be a statutory burden on land, rather than either contractual rights or conventional property rights within section 1 of the Law of Property Act 1925.

CHAPTER 3
CONSERVATION PURPOSES

INTRODUCTION

3.1 Conservation covenants arise out of a desire to achieve long-term conservation objectives on land by enabling landowners to create binding obligations in respect of their land. In this way individuals can use private rights to benefit the public interest.

3.2 An obligation entered into between a landowner and a responsible body will only qualify as a conservation covenant if it is entered into for specific purposes and is for the public good. It is these features that justify creating an exception to the usual property rules and will safeguard against inappropriate proliferation.

THE PURPOSES FOR WHICH A CONSERVATION COVENANT CAN BE CREATED

3.3 When considering the purposes for which a conservation covenant can be created, we reviewed the purposes for which conservation covenants can be created in other jurisdictions. These are diverse. Some jurisdictions place few limitations on allowable purposes: the Canadian province of Newfoundland and Labrador does not specify purposes at all. Other jurisdictions are prescriptive in setting out the purposes for which a conservation covenant can be agreed; this is seen in federal-level conservation covenants in Australia, which are subject to a detailed and relatively extensive list of purposes. In the US, the Uniform Conservation Easement Act includes 14 permissible aims, split into five groups.

3.4 Having reviewed these different approaches, we concluded that a middle-ground approach was most appropriate. We thought there were four areas which would need to be covered:

(1) The actions sought to be captured. A conservation covenant should create an obligation to do or not do something in relation to land.

(2) The overall purposes of a conservation covenant should be for the public benefit. This is a requirement of the Scottish legislation which creates conservation burdens,[1] and balances the interests of the public against the private and voluntary nature of these agreements.

[1] Title Conditions (Scotland) 2003 Act, s 38.

(3) What the obligations are directed to; for example, the preservation and protection of certain characteristics and the renovation or restoration of buildings or habitats. A number of jurisdictions allow conservation covenants for the purposes of "propagation" or "enhancement"; this would allow conservation covenants to be created in order to improve the land. Such obligations could be particularly appropriate where derelict land is bought, perhaps as part of a biodiversity offsetting scheme, with the intention of improving its environmental value.

(4) The special characteristics that the conservation covenant is intended to conserve or create; for example, the natural environment, natural resources and the cultural or built heritage of land.

3.5 On this basis we provisionally proposed that a conservation covenant should consist of one or more obligations to do or not to do something on land for the public benefit, and in order to preserve, protect, restore or enhance:

(1) the land's natural environment, including its flora and fauna;

(2) its natural resources; or

(3) any cultural, historic or built heritage features of that land.[2]

Response to the consultation

3.6 This proposal provoked some of the most interesting consultation responses, and demonstrated to us the extraordinary range of expertise and enthusiasm for conservation held by consultees.

3.7 Consultees were generally supportive of our approach (22 either wholly or partly supporting it, with only three disagreeing). Some were concerned that our definition was not tight enough, and that an approach similar to the US model would be favourable.[3] Others thought that the proposed objectives were too restrictive;[4] for instance, the National Trust said that we had bound the conservation covenant's activities too closely to the land by using the phrase "to do or not do something on land", as opposed to the broader "in relation to land". It argued that activities might be the subject of a conservation covenant which related to land (such as a prohibition on making a planning application for a certain class of use) but were not "on" it.

3.8 Christopher Jessel urged us to include a catch-all such as "any purpose promoting the conservation of the use of land conducive to the benefit of the public or a substantial section of the public". He expressed the view that this would ensure that conservation covenant objectives could be flexible and adapt to changing values.

2 Consultation Paper, para 4.40.

3 AONB Team at Denbighshire County Council.

4 Expressed by Christopher Jessel and the National Trust.

3.9 Consultees offered a range of suggestions as to terms or scenarios which ought to be considered for inclusion. We list the most common here:

(1) Geographical or physiographical features of special interest.[5]

(2) Ensuring that "archaeological interest" includes prehistoric features[6] and activities which advance understanding of the past, such as archaeological excavation which may destroy the archaeological value of a site but advance understanding.[7]

(3) "Landscape character", which includes activities such as hedgerow management or certain farming or land management practices.[8]

(4) Ensuring that water rights can be protected along with land;[9] that would also ensure that sufficient water is available for the land to function as a viable habitat for plant and animal species (particularly in dry areas).[10]

(5) Protection of the land around a conservation site on the basis that the significance of heritage assets derives not only from their physical presence and fabric but also from their setting and may be affected by what is done not just on that land, but on other land nearby.[11]

3.10 The Consultation Paper's proposed collection of verbs ("preserve, protect" etc) drew comments from some consultees. English Heritage thought that "conserve" was preferable to "preserve": this "reflects better the objective, which is to sustain the heritage value of the place, rather than simply preserving its fabric, regardless of value". RICS, Charles Cowap and the Agricultural Law Association argued for the inclusion of "to manage" and "to develop", particularly bearing in mind the likely use of conservation covenants for eco-system services. The verb "enhance" was an issue for a number of consultees; some wanted to confirm that "enhance" would include the creation of new environmental features. But the National Farmers' Union was concerned by the inclusion of "enhance" because "the creation of an obligation to do something on the land for the public benefit to 'enhance' a feature is arguably a step too far".

3.11 Some consultees queried our use of the term "natural resources". The Central Association of Agricultural Valuers wondered what it meant, and whether it might allow the sterilisation of mineral rights. Natural England agreed this could be very broad, and suggested a reference to "eco-system services"; this was also the suggestion of the RSPB, whilst Link thought a catch all explanation of "natural resources and/or ecosystem services" was the answer.

5 The Central Association of Agricultural Valuers.

6 The Central Association of Agricultural Valuers.

7 The Institute for Archaeologists.

8 Campaign to Protect Rural England.

9 Salmon and Trout Association.

10 Professor McLaughlin.

11 Professor McLaughlin and the National Trust.

3.12 Commenting on our reference to "cultural, historic or heritage features", both English Heritage and the National Trust argued for closer alignment to the wording of the National Planning Policy Framework, which refers to "heritage assets"[12] so as to facilitate the protection of things such as machinery, which are attached to the land and have high heritage value.

3.13 With reference to the issue of "the public benefit", some consultees (Professor Reid and Dr Nsoh) thought that including this concept might preclude some, though not all, payments for eco-system arrangements. South West Water (a possible candidate for such arrangements) was clear that the purposes should include "the management for water and carbon where these functions can be improved for the benefit of society as a whole".

3.14 The main area of discussion was around the issue of public access. This was clearly an issue that matters a great deal to consultees, with a number of valid observations being made. In the Consultation Paper we referred to the provision of public access to certain sites as an important positive obligation which could be achieved by conservation covenants, and consultees agreed that this was a priority.

3.15 However, there were concerns that our explanation of purposes for which a covenant can be created did not specifically refer to public access. This point was made by the British Mountaineering Council, the Ramblers, the Open Spaces Society, the Bar Council, Natural Resources Wales, and the National Trust. The Trust explained, both in its response and when we met its officials, that it regards public access to conservation sites as fundamentally important, and in the case of most National Trust sites public access will be assumed It noted:

> In order to demonstrate the "public" element of the "public benefit" requirement, the National Trust believes that a responsible body should not only be capable of requiring public access to a conservation asset in addition to obligations to preserve, protect, restore and enhance, but they should only restrict public access where it is reasonable to do so … .
>
> Although it is not always appropriate to require public access where, for example, this could do irreparable damage to a conservation asset, we believe that to truly demonstrate a benefit to the public each responsible body should be required to try to strike a sustainable balance between public access and conservation. … Following on from that, we think that it would be helpful to include "make accessible" along with "preserve, protect, restore [or] enhance".

[12] Department for Communities and Local Government, *National Planning Policy Framework* (March 2012) p 52 contains the following definition of heritage asset: "A building, monument, site, place, area or landscape identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest. Heritage asset includes designated heritage assets and assets identified by the local planning authority (including local listing)".

3.16 Interestingly, though, the RSPB took a different view. It was concerned to ensure that our reference to "public benefit" could not be taken to mean public access; the RSPB thought that public access could make conservation covenants unattractive to landowners, and might create risks for certain species which are intended to be protected by the covenant. A site which contains delicate fossils, for example, might be susceptible to inadvertent or even deliberate damage if accessible by the public.[13]

Discussion

3.17 There were four elements to our proposal: a reference to activity on the land; a requirement that the covenant be for the public benefit; a group of verbs describing the conservation purpose ("preserve, protect, restore or enhance"); and the features of the land to which those purposes are to be applied. We discuss them in turn below, in the light of consultees' comments. We also explain our thinking and our answers to consultees' comments on public access.

To do or not to do something on land

3.18 We note the National Trust's comment that "to do or not to do something on land" binds the conservation activity too closely to the land. This element is, however, central to the nature of a conservation covenant: the whole point of the covenant is to ensure that obligations relating to land are tied to that land and go along with its ownership.

3.19 However, a conservation covenant may include one or more obligations on the part of the responsible body, and our recommendations and the draft Bill reflect that. Moreover, an obligation for either party to make a payment to the other would not be an obligation to do something *on* land, but has to be accommodated, while retaining the nexus to the land. We say more about this below.[14]

Public benefit

3.20 Professor Reid's comments on this issue were extremely helpful:

(1) In some cases the performance of obligations would only create a private benefit. For example, a farmer may refrain from using certain pesticides near a watercourse on his or her property. This improves the water quality, and that water is then used by a private company for bottling and sale. Alternatively, a landowner may agree not to build on a certain part of his or her land, to ensure that a neighbour's view is preserved. In these cases, *only* a private interest is served by the performance of the obligations; we do not want a conservation covenant to be used for this purpose.

[13] This point was made by the Geology Trusts in a pre-consultation questionnaire on conservation covenants, kindly distributed by Link and the Heritage Alliance.

[14] See para 3.42, below.

(2) On the other hand, the performance of obligations may benefit both a private individual/company and the public. If a farmer refrains from using certain pesticides near a watercourse on his or her property, and the water quality improves, it may then be beneficial for neighbouring farms, species which live in and around the watercourse, and also a water company which then distributes the water. In this case, the obligations achieve a mix of private and public benefits; here, a conservation covenant could be used.

3.21 These are obviously difficult issues; in the first scenario there are public benefits to water improvement, even if all of that water ends up being bottled and sold. But Professor Reid's description identifies what we want to exclude, which is a commercial benefit. This is going to be an important matter of judgement for responsible bodies in assessing the potential validity of proposed agreements.

3.22 Whilst a conservation covenant should produce a benefit for the public, and not just for an individual or a commercial organisation, this does not mean that the public should, for example, automatically have a right of access to the land. Benefit does not mean here the conferring of certain rights on certain people over certain parcels of land. Rather it is meant in a more holistic sense; the conservation of sites, and the protection of vulnerable species and of delicate physical features, add to the general public wellbeing whether or not the public is able to visit, to observe, or to touch what is being conserved. Again, this is a matter for careful judgement by landowners and responsible bodies.

3.23 In framing our recommendation and drafting the Bill we have moved away from the term "public benefit", which we had initially proposed following the approach taken in Scotland. It has been pointed out to us that a reference to "the public benefit" in legislation may import difficult concepts of charity law. This was not our intention, and accordingly we have used the words "public good", intended to capture public benefit – or what is in the public interest - in the widest sense and without any link to the case law or legislation associated with charity law. In the discussion in this Report, as a matter of ordinary language, we use the terms "public benefit", "public good" and "public interest" interchangeably.

Conservation purposes: to preserve, protect, restore or enhance

3.24 Equally essential is the description of the conservation purposes of the covenant. We captured these in the Consultation Paper's proposal by the verbs "preserve, protect, enhance or restore".

TO "PRESERVE" OR TO "CONSERVE"

3.25 We are persuaded that "to conserve" is preferable to "preserve". We think that "conserve" is broader in its application than "preserve"; preservation is essentially about maintaining the status quo whereas conservation is a more dynamic concept. For example, the preservation of an ancient woodland might be taken to involve maintaining and protecting vegetation, whereas conservation suggests a more proactive approach, for example undertaking work or introducing new species intended to conserve the woodland by ensuring it was more resilient to extreme weather conditions. Likewise, the conservation of an historic house might well include the use of materials which maintain the feel of the place, but which were not necessarily an exact match. For example, in the Supreme Court building there are original eau de nil tiles in certain sections of the building, but some of the tiles have fallen away and disappeared; to fill in the gaps, the renovators used tiles which were similarly dark green, but not an exact match. This approach maintains the feel of the building and, therefore, conserves it, but does not continue its exact form or the precise materials (which may well be unavailable).[15]

RESTORE AND ENHANCE

3.26 Conservation covenants should be able to be used for the restoration or creation of new environmental features and new habitats. This is important to enable "the enthusiasm, initiative and resources of a wider range of individuals and organisations to be harnessed to achieve long-term conservation objectives".[16] We are not, however, persuaded by the view of the National Farmers' Union that allowing such activities might be unduly burdensome for a landowner, or might become too restrictive over time; our proposals about modification and discharge in Chapter 7 ensure that, so far as is possible, these difficulties can be resolved. So "restore" and "enhance" are useful elements of conservation, which we think should remain.

ADDITIONAL WORDING

3.27 We do not agree with the suggestion made by the Institute for Archaeologists that excavation should be expressly set out as one of the purposes of a conservation covenant. Rather, a conservation covenant may be created in order to conserve land for future excavation; it might even include an obligation to permit excavation, provided that that excavation was itself a form of conservation in a broad sense.[17]

[15] There are further examples of this on the English Heritage website: see for example http://www.english-heritage.org.uk/professional/advice/conservation-principles/constructive-conservation/constructive-conservation-in-practice/regent-palace-hotel/ or http://www.english-heritage.org.uk/professional/advice/conservation-principles/constructive-conservation/constructive-conservation-in-practice/blencowe-hall/ .

[16] C Reid, "The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK" (2011) 23(2) *Journal of Environmental Law* 203, 211.

[17] As most modern archaeological work is.

3.28 Nor do we think that a wider description of purpose such as "any purpose promoting the conservation of the use of land conducive to the benefit of the public or a substantial section of the public" would be appropriate.[18] We think that this is too broad, and moves too far away from the careful description we have suggested above.

The features of the land

3.29 The fourth element of our provisional proposal was a list of three groups of features that might be conserved, namely the natural environment of the land, including its flora and fauna; its natural resources; or any cultural, historic or built heritage features of that land.

NATURAL ENVIRONMENT, INCLUDING FLORA AND FAUNA

3.30 We consider that it is useful to add reference to geological features of the land.[19] Turning to the proposal to include a reference to "landscape character"; the Campaign to Protect Rural England told us this would include activities such as hedgerow management and farming or land management practices. It was suggested this should be added after flora and fauna (though the consultee noted some might argue landscape is a combination of natural environment and heritage). This appears to us to be an issue that is related to the question of "setting", which might involve protecting a broad swathe of land (via, for example, an obligation to maintain a hedgerow) to ensure that its landscape or overall "feel" is maintained.

3.31 We agree with consultees that this is worth protection and special mention. The setting which surrounds a site may affect its conservation status in many ways. It may enable a better understanding or appreciation of the conservation site itself; it may provide linkage between sites of significance; and in extreme cases, it may protect against damage or disruption to a site's conservation value. As the National Trust noted, "the importance of the setting of a heritage asset is widely recognised and protected in public policy, including the National Planning Policy Framework".

NATURAL RESOURCES

3.32 A small number of consultees were keen to include reference to "eco-system services", a term now commonly used in conservation in England and Wales. We decided against express inclusion on the basis that it is too specialist; we think that the simpler reference to "natural resources" captures what we mean here.

[18] See para 3.8, above.

[19] Compare section 28(4) of the Wildlife and Countryside Act 1981.

3.33 Likewise, we think that geographical or physiographical features of special interest would be captured within the idea of "natural resources". We were also asked to ensure that water rights can be protected along with land, by the Salmon and Trout Association as well as Professor McLaughlin. To a certain extent this will depend on whether the freeholder's or leaseholder's rights include riparian rights (since the holder of a profit would not have a sufficient interest to create a conservation covenant). If that is the case, then protection of water should fall within the descriptor of "natural environment", or alternatively "natural resources".

CULTURAL, HISTORIC OR BUILT HERITAGE FEATURES

3.34 We were interested to read the suggestions of English Heritage and the National Trust that our description should refer to sites having "archaeological, architectural, artistic or historic" features of significance. This is a sensible suggestion (particularly given the expertise of English Heritage and the Trust in this area). We are content to expand our description of this category in the way suggested. We intend to keep the reference to "cultural" to ensure that matters of, for example, religious or spiritual significance can be included. This could also be used to protect a war memorial commemorating a recent conflict (which might not be regarded as "historic" or "architectural"). It is worth noting that we do not think that a reference to "historic" would preclude the preservation of a prehistoric site as the Central Association of Agricultural Valuers suggests. And we do not think it is appropriate to refer to "heritage assets" (as suggested by English Heritage) as a reference to the features mentioned should be sufficient.

Access to land that is subject to a conservation covenant

3.35 Consultees made a number of observations relating to public access, and it is an issue that we have considered carefully. Our initial view was that the provision of public access was simply a positive obligation, and hence captured by the expression "to do or not to do something". But we were interested in the force with which consultees argued for special recognition of public access, particularly the National Trust.

3.36 We also acknowledge the point made by the RSPB, that public access will not always be appropriate. The public may inadvertently damage special conservation features of the land, disturb a protected species, or erode a hillside. Clearly, the statute cannot *require* public access to be a feature of all conservation covenants. Nor can the provision of public access to a site be, by itself, enough to make an agreement a conservation covenant; public access is in many cases not something that conserves a site at all. Nevertheless, in many cases public access will be part of the terms of a conservation covenant and will be important in securing the public benefit that is central to the scheme; and accordingly, as will be seen, special provision is made for public access in the terms of our recommendations and of the draft Bill.

CONCLUSION

3.37 In light of the considerations discussed above, the wording of our recommendation is not precisely the same as our provisional proposal.

3.38 We recommend that a conservation covenant should be an agreement made between a landowner and a responsible body requiring either party to do or not do something on land. It should be made for the public good, and for the purpose of conserving, protecting, restoring or enhancing:

(1) the natural environment, including flora, fauna or geological features of the land;

(2) the natural resources of the land;

(3) cultural, historic, archaeological, architectural or artistic features of the land; or

(4) the surroundings, setting or landscape of any land which has any of these features.

3.39 We recommend that a conservation covenant may contain provision for public access to the land concerned.

THE DRAFT BILL

3.40 Clause 1 of the draft Bill translates this recommendation into statutory form and repays careful study. It defines as a conservation covenant an agreement made between a landowner and a responsible body and which contains provisions requiring either party to do or not to do something on the land,[20] made for the public good and for a conservation purpose. A conservation purpose is defined in clause 1(4) and 1(5); the purpose must be the conservation of certain features of the land, described so as to reflect the recommendation made above. Conservation is defined to include "protect, restore or enhance".

3.41 The agreement may, but need not, be a contract. It takes effect as a conservation covenant by virtue of clause 4 of the draft Bill, which provides that terms within a conservation covenant that meet those conditions – and provisions ancillary to them – have effect by virtue of the statute.[21]

[20] Spelt out more precisely in clause 1(3) of the draft Bill because a negative obligation – not to do something – can be relevant only to the landowner. The responsible body can in any event only do what the landowner permits.

[21] This is why the terms of the agreement are not referred to as obligations in clause 1. Provisions that satisfy clause 1 of the draft Bill take effect (and therefore become obligations) by virtue not of what they say, nor by virtue of the law of contract, but as a result of clause 4 of the draft Bill.

3.42 The inclusion of ancillary terms is important, because not every obligation under an agreement will fall neatly under the above rubric; importantly, an obligation to make a payment may not appear – taken in isolation – to have a conservation purpose. An agreement that contains nothing but an obligation to pay money is therefore almost certainly not a conservation covenant; but an agreement obliging the landowner to maintain his ancient woodlands, and to pay the responsible body's expenses of providing expert assistance in coppicing the trees on the land, is a conservation covenant. Clause 4(2) ensures that provision about public access is regarded as ancillary to the other qualifying terms of the agreement; accordingly, such provision is allowable even if, in itself, it does not achieve any conservation purpose (and may even be, to some extent, damaging, as we discussed above). Other ancillary terms, for example not to apply for planning permission,[22] would also be made enforceable by this provision.

3.43 The Bill does not prevent the agreement including terms that do not qualify under clause 1 and are not ancillary to such terms. The presence of non-qualifying terms will not prevent the agreement from being a conservation covenant.

3.44 Clause 20 adds that if any provision of a conservation covenant ceases to be for the public good it ceases to have effect.[23] In other words, clause 4 only operates to make the terms of a conservation covenant effective if they continue to be in the public interest. This will be important where there is a dispute about a continuing obligation; a later landowner (who will have no contractual relationship to the responsible body even if the conservation covenant happened to be a contract) will have a defence to enforcement proceedings if he or she can show that the obligation concerned no longer benefits the public.[24] There may be cases where a landowner seeks a declaration, from the Lands Chamber of the Upper Tribunal, that the obligation no longer serves the public interest, so as to pre-empt argument about its enforceability.[25]

[22] See para 3.7, above.

[23] By contrast, a provision that was made for conservation purposes cannot later cease to have been made for such purposes; the draft Bill treats that requirement as a single test to be satisfied at creation.

[24] As to enforcement, see Chapter 6.

[25] See Chapter 7. This is relevant also to our discussion of the discharge of conservation covenants in Chapter 7. It is possible to envisage a scenario where a landowner seeks a declaration that an obligation no longer serves the public good and, in the alternative, failing that, the discharge of the conservation covenant.

CHAPTER 4
RESPONSIBLE BODIES

INTRODUCTION

4.1 In this Chapter we turn to consider an essential feature of the conservation covenants scheme: the responsible bodies. We start by explaining the concept of the responsible bodies; in doing so we highlight their function within the scheme. We then consider what sort of bodies should be capable of being responsible bodies, and the process by which they are to be listed as such. Then we set out our recommendation relating to the holder of last resort.

4.2 Finally, we consider the issue of public oversight in the new statutory scheme. In preparing the Consultation Paper we gave considerable thought to this issue. We contemplated whether public oversight should be required at different points in the life cycle of a conservation covenant, namely creation, enforcement and at any point when a responsible body ceases to exist or is removed from the list of responsible bodies. This meant that our discussion on public oversight appeared in various Chapters of the Consultation Paper. This Chapter gathers together our conclusions about it.

THE RESPONSIBLE BODIES

4.3 Conservation covenants straddle the public and the private sphere. They are voluntary agreements whereby an individual takes on an obligation and imposes it on future owners of the land; but the agreement is made for the public good, and it is made not with a private individual but with one of a defined class of responsible bodies. The responsible body will be charged with making informed and important decisions as to the creation, management, enforcement and (in some cases) discharge of conservation covenants.

4.4 It is important that the new scheme is not administration-heavy, or regulation-heavy, either for those involved or for Government. The careful restriction of the range of potential responsible bodies, and the choice of organisations with the appropriate expertise, resources and governance is intended to ensure that they can be relied upon. And this in turn permits the scheme to be low on state regulation, intervention or oversight (which we discuss in more detail below).[1]

4.5 Many consultees were concerned that conservation covenants should be properly managed and enforced, and it is tempting to try to produce a mechanism that appears to guarantee this by the imposition of multiple layers of control. In reality, we are recommending that the responsible bodies themselves be chosen from among those best qualified to exert quality control, and in doing so we avoid the need to create further oversight mechanisms.[2]

[1] See para 4.85 and following.

[2] But note the role of the Secretary of State, and Welsh Ministers, as holders of last resort: see paras 4.65 and following.

4.6 The Consultation Paper proposed that a conservation covenant should be made between a landowner and a "responsible body": one of a defined class of organisations. This reflected the approach taken in the other jurisdictions we studied. We are mindful that restrictions on eligibility for being a responsible body vary widely across jurisdictions, but it is possible to group the jurisdictions as follows.[3]

(1) At the liberal end of the scale, most North American states and provinces give responsible body status to all non-profit conservation bodies.[4] Some go even further by allowing for-profit organisations;[5] but it is notable that there is no instance of individuals being permitted to hold the benefit.

(2) In the middle of the scale are Scotland and a small number of Canadian provinces, where non-profit conservation bodies must first be designated as responsible bodies before they can enter into conservation covenants.

(3) The most restrictive jurisdictions are New Zealand and the Australian states, which allow only public bodies to hold conservation covenants.

4.7 Overall, we preferred a middle-ground approach, allowing individual bodies within defined classes of organisations to be approved as responsible bodies. The approach that we asked consultees to consider was very close to that taken in Scotland, where responsible bodies are listed by the Secretary of State from amongst local authorities, public bodies and charities.[6] We indicated that the public bodies and charities likely to be listed will be well-established, secure and expert bodies with a significant standing and reputation. Natural England, English Heritage and the National Trust were obvious examples.

4.8 Based on these conclusions, we provisionally proposed that conservation covenants should be capable of being held by the Secretary of State (for England) or the Welsh Ministers (in Wales), who should have the power to nominate responsible bodies from a defined group of qualifying bodies. The qualifying bodies should be:

(1) a public body whose objects include conservation purposes;

(2) a registered charity whose objects include conservation purposes;[7] or

(3) a local authority.[8]

[3] Some parallels can be drawn between policy choices as to eligible holders and the ease with which conservation covenants can be modified or discharged.

[4] Twenty-eight states base their statutes on the Uniform Conservation Easement Act 1981; section 1(2) of the Act lists the class of responsible bodies. See Land Trust Alliance, *A Guided Tour of the Conservation Easement Enabling Statutes* (2010).

[5] North Carolina, New Hampshire and Rhode Island: see NC Gen Stat § 121-35; NH Rev Stat Ann § 477-46; RI Gen Laws § 34-39-3.

[6] For more information on the Scottish scheme of conservation burden, see the Consultation Paper, para 3.7 and following.

[7] For example, the National Trust, the RSPB, and the Woodland Trust.

Response to the consultation

Secretary of State/Welsh Ministers – the power to hold and to list

4.9 Our proposal that every Secretary of State, and the Welsh Ministers (acting collectively), should be able to hold a conservation covenant was supported by the majority of those who addressed the issues.[9] However, a small number were concerned about the political pressures placed on the Secretary of State or the Welsh Ministers, and the effect that this might have on their approach to holding a conservation covenant. It was thought that there were risks in allowing Ministers, whose responsibilities might conflict with conservation, to hold conservation covenants (particularly in light of our proposals about discharge and modification).[10]

4.10 Several of the responses went on to address our subsequent proposal relating to the listing and de-listing of responsible bodies. Professor McLaughlin's proposal, based on the American approach, was as follows:

> (i) Requi[re] entities qualifying as responsible bodies to have sufficient financial and staff resources to monitor and enforce the covenants it holds on behalf of the public (which should include making at least annual monitoring visits to the property, maintenance of accurate records, and bringing lawsuits or other enforcement actions against violators if need be). …
>
> (iii) If a holder fails to monitor or enforce the covenants its holds, or agrees to modify or discharge a covenant in a manner contrary to the rules you develop to govern such activities, the holder should potentially lose its status as a responsible body and its board of directors should potentially be subject to penalties (penalties serve as a deterrent).

4.11 These comments are interesting in light of information provided by the Scottish Government about the process of designating a "conservation body". When prescribing a body, Scottish Ministers would need to be satisfied that:

(1) it would be in the public policy interest to designate the body;

(2) the conservation burdens likely to be created in favour of the body would benefit the public;

(3) the conservation burdens likely to be created in favour of the body would preserve or protect the architectural or historical or other special characteristics of land; and

[8] Consultation Paper, para 4.22.

[9] Including the National Farmers' Union, UKELA, Natural England, the Wildlife Trusts, Link, and the Woodland Trust.

[10] Raised by Professor Reid and Dr Nsoh, but also mentioned by Robert McCracken QC, the RSPB, and Link.

(4) the objectives of the body seeking designation as a conservation body could not be met through existing means (such as, for example, the land use planning system).[11]

4.12 Very few consultees specifically addressed the issue of de-listing. The Country Land and Business Association touched on this issue by pointing out that charities and public bodies should only remain on the list so long as they retained the necessary objects. The National Trust appeared to be in favour of criteria for this process, asking:

> Is the power to "exclude" responsible bodies in effect a power to denominate them? If so, would there need to be safeguards as to how such a power could be exercised, given the investment which the responsible body might have made in setting up or managing the covenant?

4.13 A more general concern about the pressure placed on a responsible body in respect of management and enforcement was noted by consultees. This reflects comments expressed to us by charities and public bodies in a number of meetings during the consultation. Natural Resources Wales and Derbyshire County Council thought that being a responsible body could have a significant financial impact on the organisation concerned.[12]

A class of qualifying bodies

4.14 As to the responsible bodies themselves, it was in the main agreed that it was appropriate to limit in some way the range of bodies which were able to hold a conservation covenant.[13] Professor Cheever, reflecting on the American experience, said:

> I applaud your tentative decision to move away from the more restrictive Commonwealth system of limiting holders of conservation covenant to government agencies. The experience in the United States suggested that there are many non-profit community groups committed to the preservation of particular landscapes and particular types of resource that can effectively act as holders of conservation covenants. However, the primary consideration of durability requires that there be some limitation on which groups should be allowed to hold conservation covenants.

[11] Provided by Scottish Government officials, correct as at June 2013.

[12] The Forestry Commission gave a similar warning.

[13] The Forestry Commission noted that the designation of bodies was an established practice. Similarly, the British Mountaineering Council referred us to section 35 of the Wildlife and Countryside Act 1981, which provides for an "appropriate conservation body" to declare land as a national nature reserve; section 34A designates Natural England, the Countryside Council for Wales, and Scottish Natural Heritage as "appropriate conservation bodies".

LOCAL AUTHORITIES

4.15 Slightly more consultees were in favour of the inclusion of local authorities than against.[14] Lawyers in Local Government made a number of helpful suggestions, noting:

(1) It would be logical for local authorities to be eligible as responsible bodies; many authorities own areas of land for the public benefit, some of which are subject to conservation programmes. Local authorities also hold land as trustees for public benefit (for example, parks, open spaces, common land and village greens, moorland). And in their planning role, local authorities are familiar with conservation issues and planning instruments such as section 106 obligations.

(2) It would be sensible to allow local authorities to hold a conservation covenant jointly (for example a county and district council working together, or alternatively adjoining district councils).

(3) The power of a local authority to exercise a "responsible body" role as described in the consultation should be discretionary. As local authorities are politically-led bodies, it should not be presumed that every local authority would wish to be a responsible body.

4.16 The main reason given by those who disagreed was that a local authority, faced with conflicting priorities, would find it difficult to safeguard the conservation interest provided by conservation covenants.[15] The Environment Bank was very clear on the disadvantages of local authorities as responsible bodies, but advanced a slightly different argument. It asserted that "one of the reasons for the failure of conventional planning obligations is the widespread lack of enforcement of section 106 agreements by resource-poor [local planning authorities]".

CHARITIES

4.17 Fewer consultees addressed the specific possibility of a charity as a responsible body, which we take to indicate that this was generally uncontroversial. The seven who specifically answered the question in the affirmative were mostly charities themselves, including the British Mountaineering Council, the Wildlife Trusts, Link, and the National Trust.

[14] The British Mountaineering Council, the Ramblers, the National Farmers' Union, officials from Warwickshire County Council, and the Country Land and Business Association supported the proposal.

[15] This point was made strongly by Alison Finn, and was echoed by the Wildlife Trust, the Wildlife and Countryside Link, and Dr Nsoh.

4.18 However, our description of likely responsible bodies as "large and well-established charities"[16] was queried: some thought that smaller charities could play a valuable role, and were keen to ensure that they were not excluded.[17] Consultees made a number of observations as to why it might be advantageous to permit smaller charities to engage in the scheme.

(1) Some landowners are suspicious of the larger, more corporate non-governmental organisations, and prefer to support and aid the work of nationally small but locally significant groups.[18]

(2) Local charities and groups are more likely to support smaller localised conservation covenants.[19]

(3) Small, localised charities could play a fundamental role in management and enforcement efforts and also give guidance on sites of interest.[20]

4.19 A small number of consultees felt that there were risks associated with including charities as responsible bodies, namely that "the fortunes of charities can ebb and flow and their approach to issues like enforcement can change radically with a change of governance",[21] and that "sham charities" could be created in order to hold conservation covenants.[22] The Environment Bank argued that charities may have neither longevity nor accountability. The National Farmers' Union was particularly clear on this issue:

> Our principal concerns are with successors (what happens when the charity ceases to exist?) and with objectivity and impartiality. Charitable objects are inherently broad, and might not identify the true nature of the charity's activities. We would suggest that the charity might have to display to the Secretary of State in an application, evidence of existing charitable work in this area, and satisfy the Secretary of State as to the extent to which the creation of conservation covenants is within the objects of the charity, and is an element of its existing, and continuing activities.

4.20 Natural England also expressed concern because charities' decisions are not necessarily subject to judicial review and access to information regimes but wondered if a measure of oversight by the Secretary of State might mitigate these risks.

[16] Consultation Paper, para 4.19.

[17] The British Mountaineering Council, Christopher Jessel, the Berkeley Group, and the Salmon and Trout Association.

[18] The Salmon and Trout Association.

[19] The Berkeley Group.

[20] Professor Hodge.

[21] The Forestry Commission.

[22] The British Mountaineering Council and the Ramblers.

4.21 Consultees were broadly in favour of this aspect of the proposal.[23] Those in support included the National Trust, the National Farmers' Union, Natural England, the RSPB, RICS, and the Woodland Trust. Christopher Jessel pointed out the need to be more precise with our definition of a "public body", noting that the Human Rights Act 1998 and Freedom of Information Act 2000 could provide a useful starting point.

4.22 The National Farmers' Union wanted conservation covenants only to be held by a Secretary of State or a public body or agency authorised by the Secretary of State. They saw the advantages of this combination as twofold: providing continuity for a landowner, and ensuring that any subsequent enforcement action taken would be objective and impartial.

4.23 A small number of consultees made the point that allowing a public body (or a charity) whose purposes "included some or all" of the purposes for which a conservation covenant could be created was insufficiently precise. The alternatives suggested were: "primary purpose", "wholly or mainly" and "primary or sole object".[24] It was thought that a tighter restriction would be a more effective means of ensuring that only the most appropriate public bodies, with the relevant expertise, could enter into a covenant.

Discussion

4.24 We remain of the view that it is appropriate to place limits on the organisations which may be responsible bodies. This ensures that responsible bodies are organisations for whom conservation is an important priority and who have the skills and resources needed to support conservation covenants. As noted above, the restriction of the range of responsible bodies, and the element of quality control that entails, enables us to propose a regime that leaves choice and control with the responsible bodies.

4.25 A few consultees advocated no limits at all; we think this would be unwise. There is also no precedent for such an approach; all of the other jurisdictions we examined control eligible holders of conservation covenants. We think that the double-lock system we propose – a requirement that an organisation should fall within certain categories, and a further requirement that any such organisation must be listed by the Secretary of State or Welsh Ministers – provides important safeguards to protect the public interest.

[23] Ten fully or partly supported it, while only one disagreed.

[24] The AONB Team at Denbighshire County Council, the Agricultural Law Association, and the National Trust respectively.

4.26 There was no serious disagreement with the process we proposed, nor with the proposal that any Secretary of State and the Welsh Ministers could hold conservation covenants. Indeed, this approach appears to have worked well in Scotland. We agree, though, that there should be criteria which set out the factors that the Secretary of State and Welsh Ministers will consider when listing or de-listing responsible bodies. We would expect the Secretary of State and Welsh Ministers to develop and publish their own criteria, but the Scottish experience – and the criteria used there (listed in Appendix F) – will be a useful reference point.

4.27 We acknowledge the concerns raised by some consultees about the potential for pressure upon the Secretary of States and Welsh Ministers, and for conflict with their role in holding a conservation covenant. However, it is highly unlikely that the Secretary of State and Welsh Ministers will in fact hold conservation covenants except as the holder of last resort,[25] and only then for a short time before passing responsibility for the covenant on to another responsible body.

4.28 As a final point, we acknowledge the concerns of some consultees that acting as a responsible body will carry financial burdens. This is why it is important that it should be voluntary for an organisation to be a responsible body, and why the creation of a conservation covenant should be voluntary as well. We turn now to discuss each specific type of body.

LOCAL AUTHORITIES

4.29 Local authorities were the third category we proposed for inclusion as responsible bodies. But what is a local authority? What we had in mind were local authorities in the colloquial sense, meaning local government bodies such as county planning authorities; district planning authorities; and metropolitan district councils. We do not intend to include smaller local government bodies (for example, parish councils) whose powers and resources are more limited.

4.30 Clause 2 of the draft Bill therefore makes provision for a narrow definition of local authority, namely "a county, district or London borough council", "the Council of the Isles of Scilly" and "the Common Council of the City of London". The first category is wide enough to include metropolitan councils and unitary authorities. We have included the second provision because the Isles of Scilly do not fall within the general structure of local government in England and Wales; to omit this reference would mean that there would be no local authority equivalent capable of being listed as a responsible body in the Isles. Similar provision is made for Wales in clause 3.

[25] See para 4.65 and following.

4.31 Professor Reid asked whether National Park Authorities and conservation boards in Areas of Outstanding Natural Beauty should be included within the definition of local authority. It is our intention that the Broads Authority or a National Park authority should be able to be listed as a responsible body, should they wish that. These bodies will fall under the definition of a public body, discussed below.[26]

4.32 A few consultees were concerned that local authorities, already under significant financial pressure, would struggle to reconcile responsibilities in respect of conservation covenants alongside other priorities. But it is already the case that local authorities must balance these (potentially competing) priorities. In fact, it seems clear to us from consultation feedback that local authorities undertake conservation work (the management of biodiversity offsetting schemes is of course a topical example); many employ staff with considerable conservation expertise to fulfil conservation objectives. In addition, local authorities are subject to a number of checks on their work, such as involvement in access to information schemes, judicial review and the control exercised by central Government. They, like central Government, are also subject to the control of the democratic process. For these reasons we think it is sensible and appropriate for local authorities to be able to be responsible bodies. However, they will be subject to the listing process. Some may not want to be a responsible body;[27] and the Secretary of State and Welsh Ministers must be able to de-list where appropriate.

CHARITIES

4.33 Again, the inclusion of this category (confined to charities whose objects include the defined conservation purposes)[28] was generally uncontroversial with consultees. The meetings we held with conservation charities in the course of our consultation also reinforced our conclusion that this group should be included as potential responsible bodies. We note the comments made that the fortunes of charities may be variable, and that this presents a risk to the management and enforcement of conservation covenants. This is undoubtedly true: we know that this is a challenging time for the third sector. However, we think that the listing/de-listing process will ensure that charities which become responsible bodies will be experienced and sufficiently well-resourced to minimise this risk.

4.34 Moreover, as some consultees pointed out, distance from the state may have advantages in this context: many landowners may prefer to agree a conservation covenant with a charity than with an arm of the state. This is certainly reflected in the experience of the Queen Elizabeth the Second National Trust in New Zealand. The success of the National Trust's section 8 covenants[29] is another example of the particular strength which well-resourced and experienced charities can bring to conservation covenants.

[26] See para 4.38 and following.

[27] Lawyers in Local Government made this point.

[28] See para 3.38, above.

[29] Which we note in Chapter 1 and expand on in Chapter 8.

4.35 This leads us to the issue of what size of charity should be a responsible body. We acknowledge the views of consultees who argued the case for including smaller charities on the basis of their local knowledge and hands-on expertise. This is not, however, an issue on which we can express a view; it will be a matter for the Secretary of State and Welsh Ministers, applying clear criteria, to consider whether a charity is an appropriate responsible body. We would expect the criteria to be formulated to ensure that charities which are listed are well-established, secure and expert bodies.[30] That said, it is clear to us that smaller, localised charities play a fundamental role in conservation efforts, and it is not our intention to exclude that contribution by preventing participation in the scheme altogether; it is simply a question of whether such groups are best placed to be listed as responsible bodies. Those that are not may nevertheless be involved in conservation covenants by being party to management agreements made as personal covenants between landowners and responsible bodies.[31]

4.36 We have also considered the position of exempt charities. These include most universities in England; many national museums and galleries; and the governing bodies of voluntary and foundational schools. Such charities are not required to be registered with the Charity Commission because they are regulated by another body. There is no reason why these bodies should not be able to become responsible bodies in the same way as registered charities.[32]

4.37 Finally, we note the concern expressed about the possibility of a "sham" charity being created. Again, the measures we propose are sufficient to guard against the risk of this happening; charities will have to be registered and regulated by the Charity Commission (or some other body in the case of exempt charities), as well as being specifically considered for inclusion by the Secretary of State or Welsh Ministers. The role of the landowner must also be acknowledged. When creating the agreement the landowner will have an interest in ensuring that a responsible body is appropriate; and if that body does not carry out its obligations, the landowner will have remedies available.

PUBLIC BODIES

4.38 We turn then to the first category we had proposed as potential responsible bodies: public bodies whose objects include some or all of the purposes for which a conservation covenant might be made. This category was uncontroversial. We had in mind organisations such as Natural England, English Heritage, the Environment Agency and Natural Resources Wales; and consultees clearly envisaged such bodies, which have vast experience in this sort of work, holding conservation covenants. But how should we define public body within the statute?

[30] The Secretary of State and Welsh Ministers would develop their own criteria. We would expect that the criteria used in Scotland would be a useful reference point; see Appendix F.

[31] See para 6.4 and following.

[32] The draft Bill defines registered and exempt charities, in clauses 2 and 3, by reference to the Charities Act 2011.

4.39 The meaning of "public body" in existing legislation varies according to the context, and our research has concluded that the existing statutory definitions are inadequate for the purposes of conservation covenants. Clauses 2 and 3 of the draft Bill, therefore, make provision for a tailor-made definition, namely:

(1) a body established by a public general Act; and

(2) a body established under a public general Act and funded by money provided by Parliament.[33]

4.40 The definition is wide enough to capture the types of public bodies which will make suitable responsible bodies such as English Heritage and Natural England (in England), Cadw and Natural Resources Wales (in Wales);[34] it will at the same time exclude certain bodies, such as statutory undertakers, that can be classified as public authorities but operate on a private, for-profit basis.

4.41 Some consultees (such as the National Trust) queried our suggestion that a public body's objects should "include" the various purposes, and suggested instead that those purposes should be the "primary or sole object" of the organisation. It was argued that without this further safeguard public bodies and charities could be included which do not have the expertise to negotiate and create appropriate conservation covenants, or perform the duties required under them. We disagree. The two key safeguards around responsible bodies are sufficient to ensure that only organisations with appropriate experience can become responsible bodies. We do not want to make that pool even smaller by requiring that an organisation's primary purpose is one of those listed in our scheme.[35] Accordingly, the draft Bill requires that "at least one of the purposes or functions of the body is, or is related to or connected with …" the purpose for which a conservation covenant can be made.[36]

Private sector companies

4.42 We discussed in the Consultation Paper the possibility of including private sector, for-profit organisations as potential responsible bodies as well. This had been raised with us by the Environment Bank during the pre-consultation period. Although it conflicted with our general principles for qualification as a responsible body, we were interested to gauge consultees' views.

[33] Compare the Conservation of Habitats and Species Regulations 2010, reg 7(3)(b) and the Natural Environment and Rural Communities Act 2006, s 40(4).

[34] Clause 3(4) of the draft Bill ensures bodies created by Act or Measure of the National Assembly of Wales fall within the definition.

[35] This reasoning applies equally in respect of charities (which we consider above) as well.

[36] Clauses 2(3) and 3(3).

4.43 We invited views from consultees on whether there is a case for giving the Secretary of State and the Welsh Ministers the power to list for-profit companies whose objects include some or all of the purposes set out at paragraph 3.38 as responsible bodies.[37]

Response to the consultation

4.44 This was certainly an issue on which many consultees had strong views, and they were almost evenly divided; overall, slightly more opposed the idea[38] than supported it,[39] while a small number were uncertain.

4.45 Those in favour of including profit-making private sector companies thought we were in danger of unnecessarily limiting the utility of a scheme of conservation covenants. The Environment Bank provided a comprehensive response on this matter. It felt that the Consultation Paper's proposed approach would needlessly restrict the range of responsible bodies, and argued that private companies have an important part to play in the offsetting movement because they are independent of Government and the planning system. It took the view that for-profit organisations may be more suitable than charities and local authorities in terms of expertise, resource, and potential longevity.

4.46 The Central Association for Agricultural Valuers felt strongly about this issue; the Association was aware of for-profit organisations involved in schemes which would be suited to conservation covenants (especially in relation to biodiversity offsetting and compensatory habitats), arguing that conservation covenants had "substantial potential commercial application". It argued that our focus was too narrow, and would condemn conservation covenants to "specialised and limited use".

4.47 A number of consultees felt that the case for allowing for-profit entities to be listed might at least be made in respect of utility companies, which have a special (arguably quasi-state) role.[40] Professor Hodge's explanation provides a helpful exposition of the argument:

[37] Consultation Paper, para 4.24.

[38] Those against included the Merthyr Tydfil Partnership, Professor McLaughlin, Christopher Jessel, Professor Reid, the Open Spaces Society, Robert McCracken QC, UKELA, the National Farmers' Union, the RSPB, the Forestry Commission, the Bar Council, Derbyshire County Council, the Game and Wildlife Conservation Trust, the Woodland Trust, the Wildlife Trusts, Link, English Heritage, and the National Trust.

[39] Consultees who supported the inclusion of for-profit companies included the AONB Team at Denbighshire County Council, the Environment Bank, the Land Trust, the Berkeley Group, the Central Association of Agricultural Valuers, the Institute for Archaeologists, Charles Cowap, officials from Warwickshire County Council, the Institute for Historic Building Conservation, South West Water, Trowers and Hamlins LLP, RICS, the Agricultural Law Association, the Country Land and Business Association, and Natural Resources Wales.

[40] Dr Nsoh, Charles Cowap, RICS, South West Water, the Agricultural Law Association, Natural Resources Wales, and Professor Hodge.

> In [the case of water companies] the environmental benefit is primarily enjoyed by the company in terms of the lower costs of water treatment, but it would be likely that reduced levels of water pollution would have wider benefits for the environment that would be appreciated by the public. There is thus a positive relationship between the objective of the water company, the provision of good quality drinking water at minimum cost, and the provision of the public benefit. Thus there may be a case for private water companies to be able to enter into conservation covenants.

4.48 Consultees who opposed the inclusion of for-profit companies were equally firm in their views. The Bar Council concluded that other aspects of a statutory scheme did not sit comfortably with an extended group of responsible bodies:

> We do not see that there is any case for this. A for-profit company does not appear to us to be an appropriate body to hold the benefit of such covenants. The right to recover exemplary damages, for instance, does not sit happily with the shareholders of a for-profit company then benefiting from them. We are also a little concerned that this could pave the way for abuse of the system. The grant of a restrictive covenant to a for-profit company could be used as a method of artificially and temporarily devaluing the land for tax assessment purposes, for instance.

4.49 The focus of a private company on making a profit was a key concern. The Wildlife Trusts did not believe that "the governance, motivation or transparency of for-profit companies lends itself to the management of conservation covenants". It thought that for-profit companies would be answerable to shareholders rather than a board of trustees; and that shareholders would seek to maximise profitability, potentially at the expense of sustainable land management.[41]

4.50 National Trust, which had "substantial reservation about including for-profit companies as responsible bodies", put forward four arguments.

(1) That conservation covenants exist (by definition) for the benefit of the public as a whole. They will have much greater credibility, and be more readily understood, if the benefit of them is vested in bodies whose only concern is to provide benefit to the public or a substantial section of it, and which do not have to balance that against pursuing private interest or delivering private gain.

[41] Officials from Warwickshire County Council also queried how a profit-making aim would sit within the general framework of the scheme.

(2) That a reference to for-profit companies whose objects include some or all of the purposes for which a covenant can be made would invite risks as to ability and expertise. There are many for-profit companies whose primary purpose is unrelated to conservation; they will not have the expertise to negotiate and create appropriate conservation covenants or to perform the duties under a conservation covenant to protect a conservation interest. This could result in land which is of doubtful conservation value being tied up indefinitely or land which has significant conservation value being mismanaged and conservation assets damaged or lost.

(3) That a private company can change its objectives with relative ease. (Although the Secretary of State or the Welsh Ministers could exclude a company which altered its objects to render it ineligible to be a responsible body, such an approach would potentially overwhelm the holder of last resort.)

(4) That as a general rule private organisations are not open to the same level of public scrutiny that applies to local authorities, public bodies and charities.

4.51 The comments of Natural England reflect the finely-balanced nature of these issues:

> Whether or not a for-profit company could fulfil the roles of benefit holder depends in part on the defined scope and responsibilities of that role, and whether these responsibilities were consistent with the purposes of a for-profit company.
>
> Vesting the benefit-holding responsibility in a for-profit company would carry greater risks than the public body proposals … and there would need to be significant safeguards to ensure proper accountability and long-term security.
>
> If a for-profit company fulfilled the role of benefit holder in a biodiversity offsetting situation, an advantage might be that the costs resulting from the various roles would be passed on directly to developers and offset providers to whom they provide the service, rather than being borne by public bodies (unless public bodies were also able to recover costs by charging for the equivalent services).

Discussion

4.52 This is one of the most difficult issues that we have had to consider. We are keen to ensure that any statutory scheme is widely-used and it seems clear that the use of conservation covenants (for example, in payment for eco-system services arrangements and the delivery of offsetting) might usefully involve for-profit private companies. We are also mindful of the pressures on the state and the charity sector at present, and can see that there is force in the argument (advanced by the Environment Bank) that it is sensible to enable the private sector to meet a growing need for conservation activity.

4.53 Equally, we agree with consultees that the safeguards which led us to limit the categories of responsible bodies in the first place are less effective in the private sector, where organisations will not be subject to judicial review, access to information schemes, or regulation by the Charity Commission. Even more problematic, to our minds, is that a for-profit company must be just that – in search of profit. We are concerned that there will be cases in which a responsible body must make a choice between acting in its own interests and acting for the public interest. A private company will, entirely appropriately, have in mind the interests of its shareholders.[42]

4.54 We are also mindful of the fact that the scheme has been crafted with a limited group of potential responsible bodies in mind. If the range of potential responsible bodies were to be extended to the private sector, the scheme could look very different. Considerable thought would need to be given to whether certain aspects of the scheme should be adjusted, particularly in relation to safeguards, oversight and enforcement.

4.55 The arguments are finely balanced, but we have concluded that the better answer is to limit the type of organisation able to be responsible bodies in the way originally proposed. Nor do we propose to include utility companies; despite the different role they play, they are nonetheless for-profit entities, and subject to the same risks we have identified above.

4.56 However, we emphasise that we regard it as extremely important that the private sector should be involved in the delivery of conservation activity via conservation covenants; for example, in the same way that water companies currently work with landowners and conservation charities to improve water quality under payment for eco-system services schemes. It is also possible that a private organisation might wish to set up a charity for conservation purposes, which could then apply to become a responsible body.

4.57 We recommend that the following should be able to be responsible bodies:

(1) any Secretary of State (for England);

(2) the Welsh Ministers (in Wales);

(3) any of the following specified as responsible bodies by the Secretary of State or Welsh Ministers by order:

(a) a local authority;

(b) a public body whose purposes or functions are, or are related to or connected with, at least one of the purposes set out at paragraph 3.38; or

[42] We note the example given by Christopher Jessel in response to a different topic, that a for-profit company may have a particular incentive to release a conservation covenant in exchange for the payment of money by a landowner.

(c) a registered or exempt charity whose purposes or functions are, or are related to or connected with, at least one of the purposes set out at paragraph 3.38.

4.58 We recommend that the Secretary of State and Welsh Ministers should develop and publish criteria by reference to which they will specify responsible bodies.

4.59 Clauses 2 and 3 of the draft Bill give effect to this recommendation, for England and Wales respectively. The Secretary of State (for England), and the Welsh Ministers (for Wales), are enabled to specify organisations to be responsible bodies in relation to land in England and Wales respectively. They are given concurrent powers. There will be one or more orders made by the Secretary of State and one or more orders by the Welsh Ministers. Some organisations may only be listed by the Welsh or English Ministers – for example a substantial wildlife charity operating only in Wales – and some organisations may be listed both by Welsh and English Ministers.

4.60 The practical consequence of this is that where the land that is subject to a conservation covenant is in England, the responsible body must be one of those specified by the Secretary of State; where the land is in Wales it must be one of those specified by the Welsh Ministers. In the event that any conservation covenant straddles the border, then the responsible body must be chosen from those organisations that are specified in both England and Wales.

4.61 We have considered various procedures for specifying responsible bodies. We have concluded that the most appropriate procedure for this is by means of an order in the form of a statutory instrument made by the Secretary of State or the Welsh Minsters, and the draft Bill so provides. The advantage of these requirements is that it means that any such order will be in a standard format and readily identifiable. The wording for designation orders is likely to become standardised which will make the drafting easier.

4.62 We anticipate that usually it will be a qualifying body (that is, one of the categories of bodies able to be specified), which wishes to be a responsible body that will approach the Secretary of State or the Welsh Minsters and ask to be listed. However, sometimes the Secretary of State or the Welsh Ministers may list a qualifying body on their own initiative. In the former circumstances, it is sensible for the Secretary of State or the Welsh Minsters to consult bodies such as Natural England, English Heritage, Natural Resources Wales, Cadw and the Charity Commission which may have greater knowledge of prospective responsible bodies and their suitability. In the latter circumstances, the Secretary of State or the Welsh Minsters should consult the prospective responsible body before it is specified to ensure that it is ready and willing to be listed and, potentially, to take on responsibility for conservation covenants.

4.63 The fact that a qualifying body is specified as a responsible body does not compel it to do anything; it will still be a matter for its discretion whether or not it enters into a conservation covenant.

4.64 If a responsible body no longer wishes to be a responsible body, or the Secretary of State or the Welsh Minsters consider that a specified body should no longer be a responsible body, the Secretary of State or the Welsh Ministers can de-list it.[43]

THE HOLDER OF LAST RESORT

4.65 A responsible body might cease to exist, or be removed from the list of responsible bodies. What should happen to its conservation covenants? The desirable outcome would be for the responsible body to transfer its stock of conservation covenants to another responsible body. However, in some circumstances this might fail to occur.

4.66 In the Consultation Paper we discussed three possible solutions. The first, which we took from the Scottish scheme, was to provide that the conservation covenant would cease to exist. This seemed an unsatisfactory outcome, which failed to deliver the public benefit provided by the conservation covenant. Another option was to compel responsible bodies to transfer the covenant to another responsible body. This did not seem feasible; it would be impossible to enforce if the responsible body had ceased to exist. Moreover, it might involve requiring another responsible body to take on a conservation covenant it was unwilling or unable to manage.

4.67 The final possibility was for the statutory scheme to include a "holder of last resort". If a responsible body ceased to exist, or was removed from the list (and its covenants had not been transferred), existing conservation covenants would automatically pass to a holder of last resort. This organisation would then take steps to find a suitable responsible body willing to take over the conservation covenants.

4.68 We invited consultees' views on what should happen to a conservation covenant where the responsible body which holds it ceases to exist, or ceases to be a responsible body.[44]

Response to the consultation

4.69 Consultees considered whether a holder of last resort was necessary, and then who should take on that responsibility. A number of consultees also considered how this would operate in practice.

Should there be a holder of last resort?

4.70 The majority of consultees thought that a holder of last resort should be included in the new statutory scheme, and shared our reasoning. Only Trowers and Hamlin LLP dismissed the need for a holder of last resort altogether: "[t]he rules that apply to the disposition of other interests in land should apply to the benefit of covenants about conservation".

[43] By virtue of section 14 of the Interpretation Act 1978, power to make an order by statutory instrument implies (unless a contrary intention appears) power to revoke an order previously made under the power by making a further order to that effect.

[44] Consultation Paper, para 4.26.

4.71 Link and the Wildlife Trusts suggested that in addition to a holder of last resort, there should be a holder of first resort. This would involve the parties to the conservation covenant agreeing, and stipulating in the conservation covenant, to whom the conservation covenant would pass. Link's reasoning was that "the measure would enable clarity and security for the landholder … and would reduce the burden on Government". Others thought that conservation covenants should only pass to a holder of last resort when the original responsible body was a public body; or that responsible bodies with an interest in the local area should take it upon themselves to uphold or take over orphaned conservation covenants.[45]

Who should take on this responsibility and how would it operate in practice?

4.72 There was a consensus that the holder of last resort should be a part of Government (whether at a local level, or centrally in Westminster or Cardiff) or a public body.[46] The majority of consultees who answered the question considered that a Secretary of State and Welsh Ministers should take this role.[47] Natural England thought this would ensure democratic legitimacy and accountability. Some consultees recommended the Secretary of State for a particular Government Department. Professor Reid, Dr Nsoh and the RSPB argued that the holder of last resort should be the Minister responsible for designating and maintaining the list of responsible bodies. The National Trust suggested that the role should be taken by the Secretary of State for Environment, Food and Rural Affairs or the Secretary of State for Culture, Media and Sport depending on the purpose of the covenant.

4.73 Other consultees thought that conservation covenants should pass to a designated public body.[48] Suggestions included Natural England, English Heritage and Natural Resources Wales. Only a small minority of consultees suggested the creation of a new body.[49]

[45] The National Farmers' Union and Denbighshire County Council respectively.

[46] Government as a holder of last resort was suggested 38 times.

[47] 22 consultees suggested that a Secretary of State and the Welsh Ministers should be listed as a holder of last resort.

[48] The British Mountaineering Council, the Ramblers, Robert McCracken QC, UKELA, the Salmon and Trout Association, the Woodland Trust, Natural England, the RSPB, the Open Spaces Society, the Forestry Commission, and the AONB Team at Denbighshire County Council.

[49] The British Mountaineering Council, the Ramblers, and Christopher Jessel. The Land Trust thought it would be plausible to create a voluntary panel of responsible bodies that would hold orphaned conservation covenants.

4.74 A number of consultees considered how provision for a holder of last resort might work in practice. The Institute of Historic Building Conservation thought that the holder should produce a national register of orphaned conservation covenants, allowing responsible bodies to inspect the register for covenants that it might take on. Some consultees were also concerned that the holder of last resort would build up its own portfolio of conservation covenants. The Salmon and Trout Association thought that this could be avoided by placing the holder of last resort under a duty to pass conservation covenants to other bodies.[50]

Discussion

4.75 Consultees supported the introduction of a holder of last resort, to ensure the continued protection and realisation of the public interest invested in a conservation covenant.

4.76 Consultees have made a number of useful suggestions as to who should be the holder of last resort. It is not necessary to create a new body; this would be disproportionate given the existence of a number of candidates to fulfil the role. We agree that Government in some form should fulfil the role, and take the view that the functions of the holder of last resort should be reserved to the Secretary of State in England and the Welsh Ministers in Wales (in practice, in England this will be the Secretary of State for Environment Food and Rural Affairs and the Secretary of State for Culture, Media and Sport).[51]

4.77 We recommend that when the responsible body which holds a conservation covenant ceases to exist, or ceases to be a responsible body, and fails to transfer its conservation covenants, those conservation covenants should pass to a holder of last resort.

4.78 We recommend that the holder of last resort should be the Secretary of State for the Department with responsibility for nominating responsible bodies (in England) or the Welsh Ministers (in Wales).

4.79 The draft Bill provides, in clauses 18 and 19, for the Secretary of State and Welsh Ministers to take over from a responsible body that ceases to exist or ceases to be listed as a responsible body. This is to happen automatically.[52]

[50] This was echoed by the Country Land and Business Association and the Central Association of Agricultural Valuers. Christopher Jessel took an alternative view, suggesting that a limitation period be placed on how long the holder of last resort could hold an orphaned conservation covenant. Mr Jessel thought that this was necessary to prevent a landowner being left in limbo, not knowing to whom he or she owed his or her duties.

[51] In this way, the holder of last resort will have all the powers and responsibilities of a responsible body.

[52] In those few cases where land that is the subject of a conservation covenant straddles the Welsh border, we anticipate that the Secretary of State and the Welsh Ministers will make appropriate administrative arrangements for the oversight of the covenant and it may be that they will act as agents for each other. So while there may be two entities holding in the last resort, in practice one will act (by himself or herself and as agent for the other).

4.80 How the holder of last resort deals with conservation covenants will ultimately be for it to decide, although the suggestion of a national register of orphaned conservation covenants is attractive. The Secretary of State and Welsh Ministers will want to avoid building up their own stock of conservation covenants; they will be able to make an informed decision to transfer the covenant to a listed responsible body that is willing to take it on as soon as that is practicable.

4.81 Meanwhile, however, the holder of last resort is the responsible body in a limited sense. It will not automatically become obliged to fulfil any obligations imposed by the conservation covenant upon the responsible body.[53] It will have a choice. We consider this to be appropriate given that the holder of last resort will receive the covenant not by agreement, but by way of an automatic process. Moreover it is inappropriate to expose the Secretary of State or Welsh Ministers (and therefore the tax-payer) to liability that they have not expressly agreed to at the point of creation or transfer. We take the view that the holder of last resort should become liable to comply with the responsible body's obligations under the conservation covenant only if it makes an express choice to do so.

4.82 When the holder of last resort decides to take on responsibility in this way, a number of steps must be followed. First the holder of last resort must notify the landowner of its intention take on liability for the covenant. In addition, the holder must notify the local land charges office so that the register is updated to reflect the fact that it is the responsible body for the covenant in question. Unless both these steps are taken the holder of last resort does not become, in the full sense, the responsible body under the conservation covenant. It can enforce the landowner's obligations but it cannot be sued for breach of the responsible body's obligations.

4.83 We recommend that when a conservation covenant passes to the holder of last resort, the latter should not be liable for fulfilling any obligations imposed upon the responsible body by the covenant unless it notifies the landowner of its intention to take on liability and notifies the local land charges office.

4.84 The draft Bill makes provision for this arrangement at clauses 18 and 19, for England and Wales respectively. It is noted that rules 8(1) and (2) of the Local Land Charges Rules 1977[54] require details to be given to the Local Land Charges Register following the modification registered charge.

[53] Nor will it in any event become responsible for compliance with any management agreement in force between the current landowner and the responsible body.

[54] SI 1977 No 985.

PUBLIC OVERSIGHT

4.85 A conservation covenant is a private, voluntary agreement. However, its purpose is ultimately to serve the public good, and so we have to consider how the public interest is protected and represented. If the responsible bodies are selected as we recommend, it becomes possible to trust them to fulfil their duties. They should be permitted to agree to take on covenants that are worthwhile, in the public interest, and practicable without requiring them to seek external approval or authority to do so; the intention is that they should be relied upon to enforce the covenants, rather than inventing a new layer of oversight or even a new regulatory body to force them to do so, and that they should be allowed to discharge covenants in appropriate circumstances by agreement without being forced to litigate in every instance.

4.86 It would of course be possible to add additional protection, namely by providing for public oversight at various stages of the scheme. At its simplest, oversight would require the creation and operation of covenants to be overseen by a person or entity other than the contracting parties. Oversight could take many different forms, ranging from Governmental oversight to public consultation. It might also include the provision of a third-party enforcer.

4.87 In considering the arguments for and against oversight, we have looked at the use of oversight in other jurisdictions. Public oversight is not particularly common overseas, even in the USA where a regulatory approach has been taken. A study of the American examples suggested that public oversight was best suited to systems which provide significant public investment in conservation covenants; in such systems there is a need to ensure that conservation covenants are not created in an attempt to exploit the incentives available. It is also important to view public oversight requirements in context: in the USA a wider range of bodies may hold the benefit of a conservation covenant.

4.88 The Consultation Paper, therefore, provisionally concluded that public oversight was not necessary.[55] To require oversight would not only be disproportionate – given the trust that can be placed in the responsible bodies – but would also be extremely burdensome both in administrative and financial terms. We did, however, invite views from consultees on whether there should be oversight at the point of creation and enforcement.[56]

[55] Except for the creation of a holder of last resort, discussed above at para 4.65 and following.

[56] Consultation Paper, para 4.49.

Public oversight of creation

4.89 As to creation, oversight might include requiring Government approval of all new conservation covenants in order for them to be valid. Another option could be to require public consultation on the creation of a new conservation covenant. We concluded in the Consultation Paper that these were unnecessary. We expressed the view that our proposal for a limited range of responsible bodies, and the objectives for which a conservation covenant might be created, would protect the public interest in a more appropriate way. We thought that an oversight requirement would add an additional level of regulation, with added costs for all involved, to what is ultimately a private, voluntary agreement.

Response to the consultation

4.90 The consensus was against public oversight at the point of creation.[57] But seven consultees thought that oversight might be necessary in certain circumstances or suggested an alternative approach.[58] An additional eight considered oversight to be necessary.[59] Some also made suggestions as to who should carry out oversight in this context.[60]

4.91 Those that dismissed the need for oversight tended to share our views on why it is unnecessary. In particular, consultees thought such a requirement would detract from the private, voluntary nature of conservation covenants.[61] Others took the view that the combination of a restrictive list of responsible bodies, defined purposes, and public registration would provide sufficient protection.[62] And some consultees noted that a responsible body's decision to enter into a conservation covenant would already be subject to scrutiny through the access to information regimes, and in some cases judicial review.[63]

[57] Merthyr Tydfil Partnership, Christopher Jessel, Professor Cheever, the Berkeley Group, the Central Association of Agricultural Valuers, the Institute for Archaeologists, Charles Cowap, the National Farmers' Union, Natural Resources Wales, the Salmon and Trout Association, the RSPB, the Bar Council, South West Water, RICS, the Agricultural Law Association, the Game and Wildlife Conservation Trust, the Woodland Trust, the Wildlife Trusts, Link, English Heritage, the National Trust, and the Country Land and Business Association.

[58] The British Mountaineering Council, Professor McLaughlin, the Ramblers, Professor Reid, Dr Nsoh, officials from Warwickshire County Council, and the Forestry Commission.

[59] The AONB Team at Denbighshire County Council, the Land Trust, the Open Spaces Society, Robert McCracken QC, UKELA, the Institute of Historic Building Conservation, the War Memorials Trust, and Natural England.

[60] Suggestions included local authorities, local nature partnerships, and public bodies.

[61] Christopher Jessel, the Central Association of Agricultural Valuers, the National Farmers' Union, the Salmon and Trout Association, the Agricultural Law Association, Link, and the Country Land and Business Association.

[62] The Berkeley Group, the National Trust, and South West Water.

[63] The Wildlife Trusts, the RSPB, and Natural Resources Wales.

4.92 A number of consultees were concerned that oversight of creation would make the process unduly bureaucratic, complex and costly.[64] Others considered that such a provision would dampen enthusiasm for creating conservation covenants.[65] For instance, Link stated:

> We would not want to see a system of pre-oversight of the detailed objectives and terms of conservation covenants. Or any heavy handed statutory led approval process. This may well cause a dampening of interest or enthusiasm in landowners offering to enter into such covenants.

4.93 Professor Cheever, calling on his experience of the American system, could not see a need for oversight under the proposed scheme. He observed that oversight is intricately linked to public investment or expenditure.

4.94 Some consultees thought that oversight might be needed in certain circumstances. Professor Reid and officials from Warwickshire County Council thought that if a conservation covenant were used as a vehicle for payment for eco-system services, oversight might be required. The British Mountaineering Council and the Ramblers considered that the need for oversight would depend on the level of public investment involved; agreements that resulted in payments or grants to a landowner to realise an environmental outcome would require oversight.

4.95 Others suggested an alternative. Professor McLaughlin, for example, asserted a need for some form of oversight which could be realised through the provision of a set of model terms and guidance. Her reasoning was based on the need for consistent interpretation of conservation covenants, which had been an issue in the USA. Another option, suggested by Link, was to require public participation at the point of creation.[66] It suggested that this would create a greater sense of public ownership of the objectives enshrined in the conservation covenant, thus ensuring awareness and compliance.

4.96 Natural England advanced two arguments in favour of oversight, noting that the level of oversight required would depend on the purpose of the conservation covenant being created and who was holding the benefit. First, they said that oversight at creation would provide a means of tracking the use of conservation for particular purposes. Secondly, oversight would be desirable as a quality assurance exercise,[67] which Natural England thought would be essential in a biodiversity offsetting context, where the authorities would want to be certain that the conservation covenant could stand the test of time.

[64] Christopher Jessel, the Central Association of Agricultural Valuers, and English Heritage.

[65] The Salmon and Trout Association, the Woodland Trust, the Game and Wildlife Conservation Trust, and Link.

[66] Robert McCracken QC shared this view. He thought that public oversight and participation was in the spirit of Principle 10 of the Rio Declaration on Environment and Development 1992.

[67] This argument was also advanced by the Land Trust.

Discussion

4.97 Consultation has confirmed our initial view that public oversight at the point of creation is unnecessary. We are confident that the safeguards built into the new statutory scheme will provide sufficient protection. Furthermore, consultees are right to emphasise that a responsible body's decision to create a conservation covenant will be subject to scrutiny via existing means. There is no need to add an extra layer of regulation, which would be unduly bureaucratic, complex and costly.

4.98 Link makes a valid point that public participation would foster and enhance a sense of public ownership in conservation covenants. However, to require compulsory public participation would be extremely burdensome; it would be disproportionate to require a landowner – or a responsible body – to undertake and pay for a public inquiry.

4.99 As for the arguments raised by Natural England, our recommendation about the annual returning of information, at paragraph 5.87, will provide a means of tracking the number of conservation covenants and purpose for which they are made. The concerns as to the quality of a conservation covenant are duly noted. However, our recommendation on the production of model terms and non-statutory guidance will go some way in achieving quality and consistency.[68] As responsible bodies, the holders of conservation covenants should also be trusted to draft conservation covenants to the necessary standard.

4.100 The situation may differ in the context of biodiversity offsetting. We have already explained that it will be a matter for Government to consider and decide whether specific provision is required to determine how a conservation covenant looks and operates in a particular context.[69] We list in Appendix C a number of matters that Government might consider when deciding whether there should be specific requirements for conservation covenants used in an offsetting context.

Public oversight of enforcement

4.101 In the Consultation Paper we spent some time exploring the provision of third party enforcement in other jurisdictions; particularly the USA where third party enforcement is a frequent feature of conservation covenant schemes, and is a function often performed by a state's Attorney General. In the light of this, we noted that there was an argument to be made for a statutory scheme to extend enforcement action to Government or a statutory conservation body. However, at the time we were not convinced that there was a case for this, as it would detract from the private nature of a conservation covenant.

[68] See para 2.99, above.

[69] Para 1.15, above.

Response to the consultation

4.102 There was support for a mechanism of third party enforcement,[70] and some consultees made suggestions as to who should have this responsibility.[71] Three consultees saw third party enforcement as desirable, but qualified their support or suggested an alternative way forward.[72] Eight consultees were against provision for third party enforcement.[73]

4.103 Support for third party enforcement ranged across sectors. There was a general consensus that it was needed to safeguard the public interest invested in a conservation covenant.[74] Professor McLaughlin put her view in this way:

> Given the public benefit flowing from and the public investment in these instruments, it stands to reason that a representative of the public should have the right to enforce … . If the wrecking ball is swinging (with regard to an historic structure) or the chainsaws are buzzing (with regard to an old forest) and the holder is failing to enforce the conservation covenant or is unable to do so for whatever reasons, some representative of the public ought to be able to step in to protect the public interest and investment in the covenant.

4.104 Christopher Jessel supported third party enforcement for a different reason. He was concerned that responsible bodies might be deterred from enforcing because of other policy agendas.[75] The Bar Council, which generally advocated the private nature of conservation covenants, also saw a need for third party enforcement:

> It seems to us that a case can potentially be made out for this, and we would on balance support such a provision. While the covenants are consensually imposed, contractual obligations, while they exist, they exist for the public benefit.

[70] Including Merthyr Tydfil Partnership, the British Mountaineering Council, the AONB Team at Denbighshire County Council, Professor McLaughlin, Christopher Jessel, Professor Cheever, Professor Reid, the Berkeley Group, the Ramblers, the Open Spaces Society, Dr Nsoh, Charles Cowap, UKELA, officials from Warwickshire County Council, the Institute of Historic Building Conservation, the Salmon and Trout Association, the Forestry Commission, the Bar Council, the War Memorials Trust, South West Water, RICS, Derbyshire County Council, the Woodland Trust, English Heritage, and the National Trust.

[71] Suggestions included the Attorney General, local authorities, a Secretary of State and the Welsh Ministers, and the Secretary of State/Welsh Ministers responsible for listing responsible bodies and statutory bodies (including Natural England, English Heritage, and Natural Resources Wales).

[72] The Land Trust, the RSPB, and the Wildlife Trusts.

[73] The Central Association of Agricultural Valuers, the Institute for Archaeologists, the National Farmers' Union, Natural England, Trowers and Hamlins LLP, the Game and Wildlife Conservation Trust, Link, and the Country Land and Business Association.

[74] This view was advanced by 15 consultees.

[75] This was a view share by the Institute of Historic Building Conservation and a similar view was held by Merthyr Tydfil Partnership which saw that an absence of third party enforcement would provide responsible bodies with a "significant get out clause".

4.105 The Open Spaces Society was in favour of third party enforcement, but thought a power was insufficient; the Society considered that an enforcer of last resort should be under a duty to enforce. A similar view was held by Derbyshire County Council, which wanted a concurrent power and duty to enforce.

4.106 Most consultees were content with the idea of Government (whether local or central) or a statutory conservation body having a power to enforce in the circumstances we described. The British Mountaineering Council and the Ramblers thought there should be scope for anyone to bring enforcement action. The Land Trust and the Wildlife Trusts supported third party enforcement in theory, but were concerned about its realisation; their mutual concern was resourcing. The Wildlife Trusts stated:

> From previous experience, there is little capacity within local authorities to check and/or enforce. … In addition, Natural England has had [its] resources and budgets slashed and have resultant lack of capacity. As a result, granting a statutory conservation body the power to enforce conservation covenants should be considered carefully and the resource implications fully understood and accounted for.

4.107 Those that were against third party enforcement generally thought that it would run contrary to the voluntary, private nature of conservation covenants.[76] There was a strong sense that enforcement by any other party would amount to an intrusion and bring uncertainty.

4.108 The Country Land and Business Association considered that third party enforcement should be retained within its proper sphere: public designations and not private rights.[77] Others thought that the burden and costs of third party enforcement would be too great. For instance, Natural England noted that "the proposal would represent a new duty and create a new burden on the nominated responsible body, potentially requiring new legal expertise or costs of buying expertise".

Discussion

4.109 We consider that the circumstances in which third party enforcement would be required would be minimal. Those selected to be responsible bodies will be well-established and appropriately resourced organisations. They will have a vested interest in enforcing a conservation covenant; not only because conservation is at the heart of what they do, but because such organisations could also face public pressure and reputational loss (or even de-listing) for failing to enforce. We disagree with the reasoning of consultees in this regard.

[76] This view was held by the Central Association of Agricultural Valuers, the Institute for Archaeologists, the National Farmers' Union, Trowers and Hamlins LLP, the Game and Wildlife Conservation Trust, Link, and the Country Land and Business Association.

[77] Trowers and Hamlins LLP also held this view.

4.110 We can see the desirability of third party enforcement in certain circumstances, such as when immediate damage is threatened. However, like the Land Trust and the Wildlife Trusts we are concerned about the resource and financial implications of recommending some form of third party enforcement.

4.111 It also remains the case that third party enforcement would take a conservation covenant away from the private, voluntary arrangement that it is and into the realms of public designation. It is a level of intervention that is uncharacteristic of a private right and unnecessary given the trust that is to be placed in the scheme's existing safeguards. We remain unconvinced of the need for third party enforcement in the new statutory scheme of conservation covenants.

CHAPTER 5
THE FORMATION AND TRANSFER OF CONSERVATION COVENANTS

INTRODUCTION

5.1 In this Chapter we describe some technical aspects of the statutory scheme. We set out by whom and how a conservation covenant can be created, and how it can be registered as a local land charge so as to remain effective when the land changes hands. The following matters are covered:

(1) the parties to a conservation covenant;

(2) the terms of a conservation covenant;

(3) the duration of a conservation covenant;

(4) the formalities for the creation of a conservation covenant;

(5) registration as a local land charge and the effect of registration;

(6) central recording;

(7) transfer between responsible bodies;

(8) events affecting the land and the landowner (for example, the ending of a lease); and

(9) the operation of the scheme in respect of Crown land.

PARTIES TO A CONSERVATION COVENANT

5.2 A conservation covenant will usually be agreed between two parties. On the one hand there will the owner of the land, and on the other there will be the responsible body,[1] which will be responsible for managing and enforcing it. The law of England and Wales allows for multiple estates and interests in land (freehold, leasehold, easements, covenants and so on) so, having discussed the responsible bodies in Chapter 4 we here turn to the narrower question of which landowners should be competent to create a conservation covenant.

[1] Lawyers in Local Government commented that it might be appropriate for a conservation covenant to be held jointly by two responsible bodies. We can see that this might be useful on occasions.

5.3 In the Consultation Paper, we proposed that the holder of a freehold estate in land should be able to create a conservation covenant. We further proposed that only certain leaseholders should be able to do so: leaseholders whose lease had at least seven years remaining. The conservation covenant could be effective against successors in title to the lessee (an assignee or sub-lessee), but would end at the conclusion of the lease. We envisaged that in practice it would be more likely that a conservation covenant would be created for a longer period, such as 15 or 20 years at least.

5.4 The rationale for this approach was to prevent the inappropriate proliferation of obligations on land. In practice, the holders of interests such as easements and profits à prendre are unlikely to have sufficient control over the land to be able to create meaningful obligations.

Response to the consultation

5.5 Consultees' responses fell into two categories: those who responded to the whole proposal, and those who specifically addressed the freehold proposal, or the leasehold proposal. Of those responding generally, there was good support, with 16 of 18 either agreeing with the proposal, or agreeing with qualifications.[2] English Heritage, for example, thought that the proposals represented the minimum period of legal interest in land which could be considered sufficient for the purposes of a binding conservation covenant.

5.6 A key issue in relation to leaseholders was the period of seven years, which eight consultees felt was too short, and one consultee described as "arbitrary".[3] The British Mountaineering Council, the Ramblers, and Link contrasted this with the ability of a leaseholder to dedicate land for public access under section 16 of the Countryside and Rights of Way Act 2000, which requires that the lease must have at least 90 years left to run. On the other hand the RSPB, Natural England, and the Wildlife Trusts supported the seven-year approach. We also discovered during the consultation that this period reflects existing arrangements such as environmental stewardship schemes, which are generally for five to ten years.[4] Natural England thought this was a "sensible starting point", but also agreed with our assumption that it would more usually involve leaseholders with at least 15 or 20 years to run.

[2] This included Merthyr Tydfil Partnership, the Land Trust, the Institute for Archaeologists, officials from Warwickshire County Council, the Institute of Historic Building Conservation, the Salmon and Trout Association, the RSPB, the Bar Council, Natural England, Derbyshire County Council, the Woodland Trust, the Wildlife Trusts, Link, English Heritage, and the National Trust.

[3] Trowers and Hamlins LLP.

[4] Natural England, *Entry Level Stewardship: Environmental Stewardship Handbook* (4th ed, January 2013) para 1.2.6; and Natural England, *Higher Level Stewardship: Environmental Stewardship Handbook* (4th ed, January 2013) para 5.2.1.

5.7 There was general concern about the position of a freeholder whose tenant had entered into a conservation covenant. The Forestry Commission noted the parallel example of a leaseholder's ability to dedicate land for access under the Countryside and Rights of Way Act 2000; the Forestry Commission has never attempted to enforce such an access right against the leaseholder because of the difficulties expected. The Country Land and Business Association made the point that a lease may not have been drafted with a conservation covenant in mind. Alison Finn, who had recently taken steps to protect the conservation status of her land via the creation of a trust, felt that only a freeholder should be able to create a conservation covenant.

5.8 Concerns were raised about a leaseholder's conservation obligations affecting the value of the freeholder's interest. Professor Reid wondered whether some conservation covenants might impinge on rights retained by the freeholder, such as mineral rights. Charles Cowap, RICS, and the Country Land and Business Association thought that improvement in the condition of land as a result of a conservation covenant might lead to listing as a Site of Special Scientific Interest, and in doing so impose a "considerable liability" on the reversion. They, the Agricultural Law Association, and the National Farmers' Union thought there might be long-term effects on land as a result of conservation obligations, needing to be remedied at the conclusion of the lease. RICS described one scenario (relating to the creation of wetland) thus:

> A covenant is entered into under which significant areas of the farm are re-wet for habitation creation. Depending on the detailed circumstances, it may take some time for the effects of this work to be remedied beyond the end of the term. One remedy for this might be a dilapidations claim at the end of the tenancy, but this would be to bolt the door too late.

5.9 The National Farmers' Union echoed this concern more generally:

> A covenant in this situation might permanently remove agricultural land from production, and the continuing restrictions/obligations may be considered to be overly burdensome for the landlord and successive tenants. In addition, given that conservation covenants are proposed to be binding upon successors in title, we are concerned that the covenant would result in an inability for the successive tenant/ landlord to adapt to changing farming practices.

5.10 For some consultees, the obvious conclusion was that the consent of the freeholder should be required prior to entering into a conservation covenant.[5] On the other hand, the RSPB thought that this was a matter for freeholders, who could require in a lease that their consent be sought. An alternative raised by both the Berkeley Group and Professor Reid was a jointly-created conservation covenant, entered into by both the freeholder and leaseholder. Similarly, the National Trust thought that the freeholder could be party to the conservation covenant, and if the lease was forfeited or surrendered the obligations should fall to be observed by the freeholder.

5.11 The question of how a conservation covenant might interact with other rights on land was a frequent topic. So, for example, eight consultees mentioned rights of common in one form or another. The British Mountaineering Council, the Ramblers, and the Open Spaces Society, who have a natural interest in this issue, were concerned about the position in respect of common land. This is land owned by one person, but where a number of other individuals hold rights in respect of the land (such as fishing or grazing rights); in addition, following the enactment of section 2 of the Countryside and Rights of Way Act 2000, there is a right of public access on common land. These groups argued that a landowner (whether freeholder or leaseholder) should be required to obtain the permission of all rights holders before entering into obligations.

5.12 The Country Land and Business Association took a more relaxed approach, noting that in all cases (whether the giver of the covenant was a freeholder or a lessee) account would need to be taken of other interests over the land. Charles Cowap and RICS had a slightly different take on this issue: they wondered if it might be possible for formally-constituted commoners' associations to be added as a further category of interests which would be sufficient to create a conservation covenant (though the response tended to suggest this would be jointly with a freeholder or leaseholder).

5.13 A few consultees suggested extending the types of ownership which might enable a landowner to create a conservation covenant. The Salmon and Trout Association wanted conservation covenants to be able to be created by those with fishing rights, which can be incorporeal rights or profits à prendre held separately from the land itself. The War Memorials Trust also gave an example of a further case in which they argued a conservation covenant should be able to be created:

[5] This was suggested by Professor Reid, the Central Association of Agricultural Valuers, Charles Cowap, RICS, the Agricultural Law Association, the Country Land and Business Association, and Natural Resources Wales.

Some types of heritage assets do not have a legal 'owner'. In the case of war memorials, many were originally funded by public subscription with no formal transfer of ownership. Therefore, the legal ownership of many war memorials is not clear and there are often 'custodians' who have taken on responsibility of the memorial and its maintenance. This is often parish and town councils and parochial church councils but sometimes may be smaller local groups set up for the protection of a memorial and this group may or may not be a registered charity.

Many local authorities invoke the War Memorials (Local Authorities' Powers) Act 1923 and subsequent amendments to be able to undertake works to a memorial even if they are not legally the owner. Could there be provisions made that allow local authorities to enter into conservation covenants if they are not the legal owner under this Act?

5.14 Christopher Jessel observed that there are cases of common land whose owner is unknown, and argued that in these circumstances a local authority should have power to enter into a conservation covenant.

Discussion

5.15 It is uncontroversial that a freeholder should be able to create a conservation covenant in respect of his or her land. Consultees' responses on the issue of leaseholders were more varied. We consider that it would be useful for a wide range of leaseholders to be able to take part in this scheme, and so we think that the holder of a leasehold estate of more than seven years should be able to enter into a conservation covenant. The feedback from our stakeholders in the agricultural sector indicates that farmers are accustomed to entering into agri-environment agreements with Natural England for five to ten years, so there is a precedent for this approach.

5.16 We do not want to create any further restrictions to the effect that the lease must have any particular number of years left to run at the time the conservation covenant is created (although the shorter the term left, the less likely it is that the leaseholder will create one). However, a conservation covenant created by a leaseholder can last no longer than the lease.

5.17 Consultees have proposed that a freeholder's consent should be required where a leaseholder wishes to enter into a conservation covenant. We do not think this is necessary. It is the responsibility of landowners – whether freeholder or leaseholder – to act within the limits of their powers and their existing legal obligations. This is no different from any other situation where multiple rights exist in respect of land; the parties must take responsibility for adhering to existing obligations (such as under a mortgage, where the land is subject to a right of way, or where rights of common exist); a lessee is responsible for ensuring that any new rights that he or she creates do not amount to a breach of a leasehold covenant, just as a freeholder will need to check that the creation of a conservation covenant does not conflict with the terms of a mortgage or of any other third party right over the land. Requiring a leaseholder to obtain the consent of a freeholder – or, as some consultees suggested, of owners of rights of common – would also be an unnecessary extra burden, and might create real difficulties for those leaseholders whose freeholder cannot be identified.

5.18 The ability to create a conservation covenant should not extend beyond freeholders and holders of leasehold estates of more than seven years. We understand the reasoning advanced by the War Memorials Trust, the Salmon and Trout Association, Christopher Jessel, and RICS on this point but we think it is unlikely that the holder of a non-possessory interest (for example, an easement) would have sufficient control of the land to create a meaningful conservation covenant, bearing in mind that such a person could not bind superior interests. For the same reason, where the ownership of land is uncertain, for example as in the case of some war memorials, it should not be possible for the local authority to create a conservation covenant.

5.19 We think it should be possible for a freeholder and a leaseholder jointly to create a conservation covenant in respect of their land as suggested by Professor Reid. In that event it would, unless otherwise stated, bind the freehold without limit and the leasehold until its expiry.

5.20 We recommend that freeholders, and the holder of a leasehold estate of more than seven years, should be able to create conservation covenants.

5.21 Clause 1 of the draft Bill puts this recommendation into effect. It defines a conservation covenant as an agreement made between a landowner and a responsible body.[6] It also requires the agreement to specify the land to which it relates, and the interest held by the landowner.[7] The latter point is important because the extent of the landowner's interest defines (in the absence of provision to the contrary) the duration of the conservation covenant (clause 6). So a freeholder can create a conservation covenant of indefinite duration, or can specify that it shall endure for a defined period. A conservation covenant created by a leaseholder cannot last beyond the term of the lease.[8]

TERMS INCLUDED IN A CONSERVATION COVENANT

Whose obligations?

5.22 The point of a conservation covenant is to ensure that a landowner's responsibilities endure when the land changes hands, and so its most important terms will generally be requirements for the landowner to do or not do something on the land.[9] It may also include obligations for the responsible body. For example, a landowner might agree to allow a responsible body access to an ancient woodland twice a year, and the responsible body might agree to coppice the woodland twice a year. Either party's obligations might be expressed as being conditional upon the other's performance; a conservation covenant could provide that *if* a responsible body pays a landowner an annual sum, he or she must maintain a hedgerow.[10]

5.23 A different approach is taken in Scotland, where a conservation burden contains only the obligations of the landowner. Any responsibilities on the part of the conservation body are dealt with separately (for example, in a management agreement).

What sort of obligations?

5.24 We emphasised in the Consultation Paper the need for the parties to have flexibility in the terms they could include in a conservation covenant (subject to the more general limitation of the purposes for which a conservation covenant can be created). We also noted that although some jurisdictions explicitly set out the terms that a conservation covenant may include, we did not consider there to be any advantage in doing so.

[6] There may be cases where two responsible bodies are involved and, in that event, the one document would function, for the purposes of the Bill, as two agreements between the landowner and each responsible body. Similarly, the one document could create a conservation covenant by both a freeholder and a leaseholder.

[7] This is particularly important if the landowner happens to hold more than one interest in the land.

[8] A conservation covenant must be created during the fixed term of the lease. Clause 1(5)(b) of the draft Bill ensures that a conservation covenant cannot be created after the expiry of the fixed term originally granted, for example during any period of statutory continuation of the lease under the Landlord and Tenant Act 1945, s 24(1).

[9] See our recommendation at para 3.38, above.

[10] Some obligations may also be set out in a short-term management agreement, alongside the conservation covenant; we discuss management agreements in Chapter 6.

5.25 We provisionally proposed that a statutory scheme for conservation covenants should not limit the obligations which parties may include in a conservation covenant, provided they do not go beyond the purposes for which such a covenant can be created.[11]

5.26 That proposal was subject to an exception. We provisionally proposed that any provisions of a conservation covenant made by a leaseholder which conflicted with the provisions of his or her lease should be void.[12]

Response to the consultation

5.27 The proposal not to limit the terms so long as the agreement fell within the purposes for which a conservation covenant could be created was generally uncontroversial: 33 consultees either wholly or partly supported it, while only two disagreed. The Game and Wildlife Conservation Trust thought that "such flexibility is what will be attractive to land owners and their partners". And the Central Association of Agricultural Valuers thought that this approach reflected the fundamental nature of a conservation covenant as an "agreement between willing parties". The British Mountaineering Council, the Ramblers, and Link, who all agreed with the proposal, anticipated it was likely that a conservation covenant would record commitment to a specific objective, with more detailed measures set out in a management plan.

5.28 Professor Cheever observed:

> One of the great virtues of conservation restrictions is that they provide latitude for the creativity of transaction parties who know the land well. You must take the bad with the good.

5.29 The Berkeley Group supported the proposal but argued for conservation covenants to be severable, to ensure that if some clauses failed the remainder could be saved. Christopher Jessel thought there should be a further test of "reasonableness", and drew on the restrictions surrounding section 106 obligations ("proportionate, related to the purposes for which they are imposed and reasonably necessary"). He was also concerned at the possibility that a conservation covenant might include a term requiring a landowner to pay a sum or sums of money to a responsible body. The Forestry Commission referred to a similar concern:

> We consider that there should be limits, especially on positive covenants which could create an unsustainable burden and result in quite reasonable requests for modification. It should also be limited to the purpose for which the specific covenant was created and not the wider 'catch all' for which they can be created.

[11] Consultation Paper, para 5.16.

[12] Consultation Paper, para 5.18.

5.30 Consultees then considered our proposal that obligations in a conservation covenant made by a leaseholder which conflict with his or her lease should be void. Again, this was generally supported. 28 consultees were in favour of the proposal (or in favour but offering some qualification), whilst five expressed disagreement. Both Professor Reid and the Central Association of Agricultural Valuers noted this as a logical extension of the proposition that one cannot grant more than one has. But Trowers and Hamlins LLP thought that specific provision was unnecessary:

> The owner of leasehold land should be able to make any covenants that bind him and it, and his successors in title and persons deriving title under him or them as he can now. If so doing, or making any disposals of the land associated with them (such as the grant of rentcharges, rights of re-entry, easements, or profits à prendre) is a breach of his lease that exposes his estate to forfeiture then so be it. Caveat emptor should apply to the purchaser, the covenantee.

5.31 The Institute of Historic Building Conservation was concerned at the potential loss of a conservation covenant:

> We think this issue should be re-examined. We would not wish to see [conservation covenants] entered into in good faith be subject to being voided in this way as there may be public benefits involved. We think the mechanism for leaseholder [conservation covenants] should involve scrutiny of the terms of the lease at the time of the Agreement.

5.32 In a similar vein, South West Water felt that the issue would be better addressed by requiring freeholder involvement where a leaseholder wished to agree a conservation covenant. Both UKELA and Robert McCracken QC argued that a failure by a freeholder to object to the breach of a lease should mean that the conservation covenant would continue. Christopher Jessel thought that the issue could be handled in a different way. He said that the relevant provisions of the covenant should not be void, but unenforceable so long as performance of them could give rise to forfeiture.

Discussion

5.33 Consultees were supportive of our view that conservation covenants should be flexible so as to allow the parties to agree terms that they regarded as appropriate. We do not see a need to specify further requirements or prohibitions beyond what we have already said about the purposes of the covenant; the requirements as to purposes and public benefit, and the expertise of landowners and of responsible bodies, will be the most reliable means of ensuring that conservation covenants are not created inappropriately.

5.34 Turning specifically to leaseholds, despite general support for our provisional proposal, we now think such a provision is unnecessary. We considered above whether a leaseholder should require his or her freeholder's permission to create a conservation covenant.[13] We concluded that it is a landowner's responsibility to act within the limits of his or her powers and legal obligations. That principle is equally relevant here. It should not be necessary to make specific provision for a case where the terms of a conservation covenant conflict with a lease; it is a leaseholder's responsibility to act within the terms of the lease in this and other situations where obligations may be created.

5.35 The draft Bill, therefore, makes no provision for the content of the conservation covenant beyond the terms of clause 1, discussed in Chapter 3. Terms that do not comply with the requirements of clause 1 – for example, those that do not serve the public good or a conservation purpose will not disqualify the rest of the agreement from being a conservation covenant provided that they do not detract from the conservation purpose of the qualifying terms. In some cases such terms will be enforceable as terms of a contract, but we anticipate that conservation covenants will be drafted with a focus on conservation and that the parties will endeavour to avoid terms that do not fall within the ambit of clauses 1 and 4 of the draft Bill.

DURATION

5.36 The Consultation Paper considered whether a statutory scheme should make provision for the duration of a conservation covenant; and if so, what length of time might be appropriate. We assumed that ordinarily obligations in a conservation covenant should be long-lasting, if not perpetual, because conservation may require a long-term approach to achieve particular outcomes.

5.37 However, we were also keen to ensure that would-be parties to a conservation covenant had maximum flexibility. Whilst a perpetual conservation covenant might be desirable to some landowners or conservation organisations, equally, a fixed-term conservation covenant would be appropriate in some cases.

5.38 As a separate matter, of course, a conservation covenant created by a leaseholder cannot last beyond the term of the lease.

5.39 We provisionally proposed that a conservation covenant should bind land in perpetuity, unless a shorter period is expressed in the conservation covenant.[14]

[13] See para 5.17, above.

[14] Consultation Paper, para 5.14.

Response to the consultation

5.40 Of the 39 responses to this question, 32 indicated support for our proposal, while seven disagreed with it. RICS, which supported the proposal, noted that although agreements in perpetuity were generally desirable, it was important to allow for shorter periods, especially during the early stages of a statutory scheme when conservation covenants would be a novel concept. For some, their agreement was based on the existence of proposals for modification and discharge of conservation covenants in appropriate circumstances.[15]

5.41 Other consultees explained why it should be possible for a conservation covenant to be perpetual. Professor Cheever, commenting on the American position, thought that perpetuity was inevitably the correct choice for most sites, and that the "dead hand" problem had been overstated in the USA. The Wildlife Trusts noted that it would like to have the opportunity of agreeing longer conditions on land to develop and sustain wildlife interests; it welcomed the possibility of longer agreements, including those which could run in perpetuity.

5.42 On the other hand, a number of consultees pointed out the advantages of shorter-term conservation covenants. English Heritage supported the default approach, but felt that in most cases it would create time-limited conservation covenants. The Environment Bank made the important point that the impact of climate change meant that "there is no guarantee that land that is good for orchids will be so in 30 years". It also emphasised that conservation strategies may proceed best via the creation of temporary habitat corridors (which facilitate the easy migration of wildlife). The National Farmers' Union, considering the issue from an agricultural perspective, was concerned to ensure maximum flexibility for landowners. It worried that "a system that binds land in perpetuity could be very unappealing to farmers … long term obligations or restrictions on land use are often viewed as severely limiting opportunities for options in terms of future farming methods and practices on the land in question".

Discussion

5.43 The proposal for flexibility as to duration had the clear support of consultees and indeed we see no sensible alternative to it.

5.44 We recommend that a conservation covenant created by a freeholder should bind land in perpetuity, or for any shorter term specified in the covenant. If created by a leaseholder, a conservation covenant should endure for the term of the lease or for any shorter period expressed in the covenant.

5.45 This recommendation is given effect by clause 6 of the draft Bill.

[15] This was a key factor for the Institute for Archaeologists, for example.

FORMALITIES FOR THE CREATION OF A CONSERVATION COVENANT

Introduction

5.46 In considering the creation of a conservation covenant, we aimed to balance the necessary formality (bearing in mind the potentially long-lasting nature of the obligations) against the need to limit obstacles and avoid unnecessary costs.

5.47 We provisionally proposed that a conservation covenant must be created in writing and signed by the parties.[16]

Response to the consultation

5.48 This proposal was generally well-accepted: 32 consultees agreed (or agreed subject to qualifications), while only six disagreed. Natural Resources Wales, supporting the proposal, noted that "clarity of intention and responsibility is essential".

5.49 The key area of disagreement was whether greater formality was required. Christopher Jessel argued that the seriousness of the transaction necessitated greater formality, and favoured execution as a deed. He was also concerned that otherwise a landowner might "find his land is bound by an apparently casual statement of intent" in correspondence or meeting minutes.

5.50 The Berkeley Group drew a parallel with section 106 obligations:

> We assume that as with section 106 obligations the Act will require that the agreement is executed as a deed and states that the covenants entered into are conservation covenants for the purposes of the Act, must identify the land to which the covenantor is interested and to which those covenants relate.

5.51 The Bar Council and the Institute of Historic Building Conservation thought that the seriousness of the transaction and/or parity with other land transactions warranted a more formal approach. The National Farmers' Union went a step further, suggesting that the covenant should be accompanied by a solicitor's certificate indicating that the landowner had been advised in respect of the transaction. The National Trust, which was also in favour of execution as a deed, made the point that execution in this way would afford a longer period of limitation (12 years under the Limitation Act 1980, rather than six).

Discussion

5.52 Given the support for the proposal expressed by most consultees, we cannot see a reason to recommend the further level of formality and expense that execution as a deed would involve. Those who would prefer to execute their conservation covenant as a deed may do so.

5.53 We note the National Trust's comment about limitation periods; that is discussed in Chapter 6.

[16] Consultation Paper, para 5.10.

5.54 We recommend that a conservation covenant must be created in writing and signed by the parties.

5.55 Clause 1(2)(a) of the draft Bill puts this into effect. Clause 1(2)(c) adds a further requirement: that it must appear from the agreement that the Act is intended to apply to it. This is to avoid accidentally catching agreements that are intended to be personal and not to be effective against later owners of the land, or agreements that look rather like conservation covenants because they happen to be made with a responsible body but which are intended to take effect as restrictive covenants under general land law (where the responsible body owns neighbouring land). Non-statutory guidance should highlight this important requirement.[17]

REGISTRATION AND THE EFFECT OF REGISTRATION

5.56 In the Consultation Paper we proposed that a conservation covenant should be registrable as a local land charge, and that from the date when it was so registered it would be enforceable against successors in title to the original covenantor.[18]

Response to the consultation

5.57 Consultees were generally supportive of the proposal to register a conservation covenant as a local land charge, with registration making the covenant enforceable against successors. Twenty-five out of thirty-seven were wholly in favour,[19] with a further four in favour but with a qualification; seven consultees disagreed with the proposal, and one was uncertain. The National Trust said:

> The National Trust agrees that a conservation covenant should be registrable as a local land charge and it should be enforceable from that date against the covenantor and the covenantor's successors in title. Registration will help to overcome, at least in part, the practical difficulty of the owners of land subject to covenants not knowing about (or claiming that they do not know about) covenants affecting their land. This will be helpful to, amongst other bodies, the National Trust – the National Trust struggles with the current lack of a publicly available record of such agreements.

5.58 The Berkeley Group suggested that further guidance on registration requirements (such as whether a copy of the conservation covenant should be lodged) would be helpful. This was an issue we had discussed with Jan Boothroyd, the author of *Garner's Local Land Charges* and Chief Executive of Land Data.

[17] See Appendix D.

[18] Consultation Paper, para 5.31.

[19] Those in favour included the Central Association of Agricultural Valuers, Charles Cowap, the Berkeley Group, the National Farmers' Union, the Salmon and Trout Association, the Forestry Commission, RICS, the Wildlife Trusts, English Heritage, and the National Trust.

5.59 A small group of consultees, mostly legal groups, were in favour of registration at the Land Registry (rather than as a local land charge). In general, these were consultees who had also argued for a conservation covenant to be an interest in land rather than a statutory burden. The Law Society and the Bar Council thought that registration at the Land Registry was preferable, with the latter noting that registration of National Trust restrictive covenants followed this approach.

5.60 Christopher Jessel argued that neither lawyers nor lay people look at the local land charges register, except during conveyancing processes for the purposes of a sale. He was also concerned that lawyers acting for a responsible body might not know how to register a conservation covenant, or its transfer. Natural Resources Wales was concerned on the basis of its experience with SSSI registration:

> Natural Resources Wales regularly learns of people who have purchased land without doing a local search, and have therefore not known that the land purchased included a Site of Special Scientific Interest (SSSI are registered as a local land charge). To avoid this happening with conservation covenants we, therefore, suggest that covenants are recorded with the Land Registry, in the same way as other covenants.

5.61 Only a small number of consultees specifically addressed the issue of enforceability – understandably, since the purpose of creating a conservation covenant rather than entering into a personal agreement is precisely to ensure that it will remain in force when the land changes hands. UKELA agreed with the proposal for registration as a local land charge but felt that enforcement should not be dependent on registration. On the other hand, the Country Land and Business Association agreed that enforcement should depend upon registration.

Discussion

5.62 As explained in the Consultation Paper, registration provides openness and transparency about the existence of conservation covenants. This is important for a wide range of interested parties. Prospective purchasers or tenants need to know what they are acquiring; local authorities must be able to see how land in their area is being used; researchers and Government need to be able to assess the implementation of land-related initiatives. The disadvantage of imposing an obligation to register is outweighed by the importance of ensuring that anyone may discover whether land is subject to a conservation covenant.

5.63 The obligation to register is a conditional one: if the parties to a conservation covenant want it to last when the land changes hands, they will have to register it. If it is not registered as a local land charge it will only bind the parties to the agreement.

5.64 A conservation covenant is not designed as an interest in land, capable of existing at law and in equity with all the complexity that that entails,[20] and therefore it cannot be registered with the Land Registry. The alternative is the local land charges register kept by each local authority.[21] Local land charges are, in general, obligations with a public flavour: Sites of Special Scientific Interest and section 106 obligations are examples of matters that are listed as local land charges. More importantly, a search of the local land charges register is one of the standard, pre-contract enquiries that should be conducted by a purchaser's conveyancer and registration in this way will bring conservation covenants (and other obligations) to their attention.

5.65 The lasting effect of a conservation covenant, once registered, will differ slightly as between positive and restrictive obligations, because our recommendation ensures that a lessee for a term of seven years or less will not be bound by a positive obligation.

5.66 We recommend that a conservation covenant should be a local land charge.

5.67 We recommend that once a conservation covenant is registered as a local land charge it should be effective against future owners of the land. Restrictive obligations will be effective against:

(1) the landowner who created the conservation covenant, and all subsequent owners of that landowner's estate; and

(2) the owner of any other leasehold interest created out of that estate after the registration of the conservation covenant.

Positive obligations will be effective against:

(3) the landowner who created the conservation covenant, and all subsequent owners of that landowner's estate; and

(4) the owner of any other leasehold interest created out of that estate after the registration of the conservation covenant; but *not*

(5) the owner of a leasehold estate granted for a period of seven years or less.

5.68 The draft Bill puts this into effect by clauses 5, 7 and 8. Clause 5 deals with registration as a local land charge. In practice conservation covenants will be registered under Part 4 of the Local Land Charges Rules 1977, which relates to miscellaneous charges not registrable in another part of the register.

[20] See paras 2.90 to 2.97, above.

[21] Although it is intended that Land Registry should take over the registration of local land charges: Infrastructure Bill 2014, cl 23 to 35 and Sch 4. Also Land Registry, Consultation Paper: *Land Registry, Wider Powers and Local Land Charges* (January 2014), Ch 8. This intended change will not impact on our recommendations.

5.69 The form which should be submitted to the registering authority containing the information required to complete Part 4 of the register should be set out in non-statutory guidance. Our approach is similar to that used for the dedication of land as access land under section 16 of the Countryside and Rights of Way Act 2000.[22] In that context, non-statutory guidance was produced by Defra which explained the procedure for registering a section 16 dedication as a local land charge, including a template form specifying the information to be provided to the registering authority.[23] We have set out in Appendix D some of the matters that need to be considered when drafting the non-statutory guidance on these issues.

5.70 Clause 5 amends, in the context of conservation covenants only, section 10 of the Local Land Charges Act 1975 which deals with the issue of compensation for non-registration or defective official search certificates where a person has purchased any land affected by a local land charge. There is no need to provide for compensation for purchasers when a conservation covenant is not registered, since in that event it will have no effect against the purchaser. It will, therefore, be important for the parties to the covenant to make sure that registration is properly carried out. However, provision remains for compensation for purchasers in the event that the result of a search of the register does not reveal the covenant.

CENTRAL RECORDING

5.71 In the Consultation Paper we considered whether it would be feasible to have conservation covenants centrally recorded in some way, to enable those interested to see the spread of conservation covenants across England and Wales. Although we acknowledged the advantages of central registration of conservation covenants, we could not see a way for this to be achieved without the creation of significant extra burdens for any Government department or conservation organisation whose responsibility it would be. Our initial view was that non-statutory guidance could encourage responsible bodies to keep public lists of conservation covenants they hold. Accordingly, we provisionally proposed that there should not be a statutory requirement for central recording of conservation covenants; but that responsible bodies should be encouraged to publish this information voluntarily, with the agreement of the relevant landowner.[24]

[22] Section 16(8) of the Countryside and Rights of Way Act 2000 states that a dedication is a local land charge.

[23] Guidance note on the dedication of land under section 16 of the Countryside and Rights of Way Act 2000 (June 2012), para 9.1 to 9.4.

[24] Consultation Paper, para 5.32.

Response to the consultation

5.72 Many consultees felt strongly that the ability to obtain information about conservation covenants generally, from a central source, was an important feature of a statutory scheme. Professor McLaughlin and Professor Cheever's experience of the American systems indicated to them that central recording was necessary. Professor McLaughlin noted that the lack of central data in the US "has caused problems … with regard to strategic planning, the development of good laws and policy, and enforcement".[25]

5.73 Professor Reid argued that "knowledge of the existence of covenants is vital for scrutiny and enforcement and in terms of post-legislative scrutiny, it is important to be able to find out how much this innovation has been used". He noted that amongst responsible bodies, there would be different reporting duties and access to information regimes; and some statutory bodies would have existing annual reporting requirements.

5.74 Natural England also disagreed with our proposal; it thought that central registration would play a key role in ensuring transparency and accountability in the scheme. In particular it thought that:

> Some kind of recording scheme would enable the success of the scheme to be monitored, and the benefits evaluated, and to understand the level of use of conservation covenants e.g. in biodiversity offsetting. This would allow lessons to be drawn from the different ways in which they are being used, which could benefit future users.

5.75 Natural England commented on cost, saying that it would be "advantageous and much cheaper" to collect information centrally from the imposition of the scheme, than to try to collate it some time in the future. It made one last point:

> This proposal would merely transfer this burden from central government to the public body. In the current economic climate unless a public body is formally required by Government to record and report on a subject, it is unlikely to take place, as it would divert resources from the discharge of statutory obligations.

5.76 Other consultees agreed with us that although central recording would be desirable, it was not feasible to recommend a mandatory system. The Wildlife Trusts agreed that there should not be a statutory requirement for central recording. It noted that land owned by individual Wildlife Trusts (and any charity with a turnover of greater than £250,000) would be included as fixed assets on published and audited charity accounts. This would not be the case with conservation covenant land, so the Wildlife Trusts supported the idea of voluntary publication of information about conservation covenants, with the agreement of the landowner.

[25] A point echoed by the Bar Council.

5.77 Finally, two consultees mentioned the potential role of the Environmental Information Regulations 2004 in relation to central recording. The National Farmers' Union, which agreed with our proposal, thought that many responsible bodies would be subject to access requests under the 2004 Regulations, and this would provide sufficient public oversight. However, the Salmon and Trout Association approached this from a different perspective:

> As a fall-back there needs to be a statutory right of access to information about conservation covenants, which is best delivered by a central register. As conservation covenants are made in the public interest, details about the terms, restrictions etc should be readily accessible to the public. A public register would certainly be in keeping with UK obligations under the Aarhus Convention and the EC Directive on Public Access to Information on the Environment (2003/04/EC).

Discussion

5.78 We agree with consultees that ideally conservation covenants would be centrally recorded. It was useful to hear about the American experience, but this is one area where the differences in governance may lead to a different policy result; although planning is centrally directed in the UK, it is implemented by local authorities (evident in the range of obligations registered as local land charges). In any event, there is no easily-available mechanism for central registration. A move to central registration by the Land Registry would mean that there would be a central place to register and search for the existence of a conservation covenant over a plot of land, but only on a property-by-property basis.

5.79 We were interested that consultees mentioned the Environmental Information Regulations 2004 ("the 2004 Regulations"), which we have been considering more generally in the context of this project. These regulations give effect to the Directive on Public Access to Information,[26] which was agreed as a result of the European Community becoming a signatory to the UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (known as "the Aarhus Convention"). The Aarhus Convention provides for both active and passive provision of environmental information by public authorities.[27]

5.80 The 2004 Regulations, which implemented the Directive in England and Wales, incorporate much of the Aarhus Convention. Access to environmental information is provided, under the 2004 Regulations, in two ways. First a request regime – similar to the freedom of information regime – is provided to allow individuals to make applications to public authorities for environmental information. Secondly, a duty is placed on public authorities to disseminate environmental information to the public proactively.

[26] 2003/4/EC; 90/313/EEC Official Journal L41 of 14 14.02.2003 p 26.

[27] Aarhus Convention 1998, art 4 and 5.

5.81 Our preliminary view is that it is likely that information about conservation covenants could well come within the definition of "environmental information". If that is right, and the information is held by a public authority for the purposes of the Regulations, members of the public may be able to access it. Although we do not make a recommendation for central recording, we think that voluntary publication of information about conservation covenants should be encouraged amongst responsible bodies, in keeping with the spirit of the Aarhus Convention. Several organisations, including the National Trust and the Wildlife Trusts agreed that voluntary publication of information was feasible.

5.82 We have taken on board the comments made by Natural England, and in light of them have considered whether it would be suitable to require some form of central collection of information on conservation covenants, falling short of formal registration. Our conclusion is that such a requirement would be appropriate. On this basis the draft Bill makes provision for a responsible body to be under a statutory duty to make a return to the Secretary of State (in England) and the Welsh Ministers (in Wales) containing information on the conservation covenants it is party to. In practice this will be the Secretary of State and Welsh Ministers responsible for listing responsible bodies under the scheme.

5.83 The return should take place on an annual basis, and should set out the number of covenants to which the responsible body is a party and the land involved.

5.84 We do not want to specify the form in which this information should be reported to the Secretary of State and Welsh Ministers; this is a matter for non-statutory guidance. Equally, it will be for the Secretary of State or Welsh Minister to decide what to do with the information they receive; although we imagine that the information would be processed and presented in an appropriate manner. There is an added benefit that follows: by ensuring that such information is held by the Secretary of State and Welsh Minister we can be confident that such information can be accessed by the public through existing access to information regimes. This would not otherwise have been the case as charities and some public bodies are not captured under these regimes.

5.85 A failure to comply with the duty should not carry any sanction, although this may be a factor that is taken into account when considering whether a responsible body should be removed from the list of responsible bodies.

5.86 We recommend that responsible bodies should be encouraged to publish information about conservation covenants voluntarily, with the agreement of the relevant landowner.

5.87 We recommend that responsible bodies should report, on an annual basis, information on the conservation covenants that they hold, to the Secretary of State or the Welsh Ministers. The information contained in the report should be:

(1) the number of covenants to which the responsible body is party; and

(2) the extent of land covered by those covenants.

5.88 This recommendation is given effect in clause 25 of the draft Bill.

TRANSFER OF A CONSERVATION COVENANT

5.89 In the Consultation Paper we said that a responsible body should have the power to transfer responsibility for a conservation covenant to another responsible body if it wished to do so. Drawing on the Scottish system, we envisaged that a responsible body would primarily use the ability to transfer in two circumstances: when it was about to cease to exist, and when it no longer had the capacity to manage its conservation covenants. We thought that this was important for ensuring the continuation of a conservation covenant and the public good that it provides.

Response to the consultation

5.90 There was overwhelming support amongst consultees for the provision of some form of voluntary transfer power. Consultees focused on whether a power to transfer was necessary, before turning to explore the circumstances in which it might be appropriate to use that power.

5.91 A wide range of consultees agreed that the ability to transfer was important, for the sake of flexibility. The National Trust's response demonstrates the general mood amongst consultees:

> The National Trust agrees that a conservation covenant should be capable of being transferred from one responsible body to another. This would not only ensure that there can be continuity of [a] conservation covenant if a responsible body ceases to exist but also offers the opportunity for … conservation covenants to be transferred to a responsible body with more appropriate expertise should the conservation interest evolve or the focus of the responsible body change.

5.92 Some consultees qualified their agreement to this proposal by reference to the circumstances in which the power to transfer should be used and the need for safeguards to prevent misuse of the ability to transfer.[28]

5.93 Consultees generally agreed that it would be appropriate for a responsible body to transfer a conservation covenant when the holder ceases to exist.[29] However, the Wildlife Trusts thought it would be more appropriate for the conservation covenant to transfer automatically to a holder of last resort, who would have responsibility for re-assigning it.

5.94 Natural Resources Wales also agreed that a transfer should be permitted when a responsible body ceases to exist, subject to limitations. Where the body is in the public sector and ceases to exist, the conservation covenant should be transferred to the sponsoring Government department. In the case of charities, the conservation covenant should pass to another charity with similar aims.

[28] On the other hand, Link suggested that the parties should be able expressly to exclude the ability to transfer.

[29] Consultees include the Berkeley Group, the National Farmers' Union, Natural England, English Heritage, and the Country Land and Business Association.

5.95 The National Farmers' Union felt that there should be power to transfer only when a responsible body ceases to exist. It thought that the benefit of the conservation covenant should not be able to be transferred voluntarily to a responsible body that might have a different management approach; this could have a detrimental impact on the landowner. However, the Salmon and Trout Association saw real merit in an ability to transfer voluntarily:

> There will be many cases of simple utility where this would be desirable. For example, in the event of purchase of a woodland for conservation by one environmental charity (for example the Woodland Trust), where the benefit of a covenant on neighbouring woodland lies with another [responsible body], but overall conservation management of both pieces of land as a whole woodland … would be best managed and enforced by the Woodland Trust.

5.96 A number of consultees thought that the power to transfer should be subject to some form of safeguard, irrespective of the reason for transferring.[30] The safeguards suggested ranged from oversight or approval by the Secretary of State,[31] to requiring the consent of the landowner.[32] The Country Land and Business Association had particularly strong views on the need to obtain the consent of the landowner. It noted that without consent a transfer could take place that was contrary to the landowner's wishes and intention.

5.97 Professor McLaughlin suggested that the power should be limited by requiring the transferee to have objectives consistent with the conservation covenant, and that the transferee should undertake to continue its enforcement. Others, including UKELA, the War Memorials Trust, and Link thought that public consultation or participation should be required. Natural England thought it would be appropriate to allow the landowner or the public to make representations against the proposed transfer.

Discussion

5.98 We share the views of consultees that a responsible body should have the power to transfer responsibility for a conservation covenant to another listed body – this is essential to ensure the continuity of conservation covenants.

[30] Although some consultees, for example the Berkeley Group and National Farmers' Union, only mentioned safeguards in the context of voluntary transfer.

[31] For example, the Berkeley Group, Natural England, and English Heritage.

[32] For example, UKELA, the Woodland Trust, and the Country Land and Business Association.

5.99 We have considered the suggestion that the parties should be able expressly to exclude the ability to transfer when creating the conservation covenant,[33] and we agree that this should be possible. This is in keeping with our general aim for the parties to have flexibility when they negotiate terms of a conservation covenant. If the parties exclude the ability to transfer, and the position later changes and they want to transfer the conservation covenant, they should agree between themselves to modify the terms of the conservation covenant.[34]

5.100 Transfer can only be voluntary; a responsible body cannot be forced to exercise its power to transfer. Similarly, no responsible body can be forced to take on the covenant. But provided that the transferor responsible body and the transferee responsible body are in agreement, and the power to transfer has not been expressly excluded by a term of the conservation covenant, a transfer can take place.

5.101 Should there be a restriction on who can receive the conservation covenant or when it can be transferred? We do not think it necessary to prescribe a specific set of rules in this instance. We are also against limiting the circumstances when the power to transfer may be exercised. It is important that a responsible body is able to make a decision to transfer as part of its informed management of its conservation covenants, and not only when it is faced with extinction or de-listing. In addition, we were persuaded by the Salmon and Trout Association's response and think that it shows the merit that can result from a wider ability to transfer. Moreover, there is a greater risk of the public interest being lost if responsible bodies are forced to release conservation covenants because they do not have the ability to transfer.

5.102 A number of consultees thought that the ability to transfer should be subject to safeguards. Whilst we see the merit in these arguments we have not been persuaded of the need to introduce them. Our reasoning is threefold. First, the organisations able to hold conservation covenants – and therefore able to accept a conservation covenant on transfer – will be limited. The proposed scheme must not, nor does it need to, micromanage the decisions made by those organisations. Secondly, responsible bodies will be accountable for their actions by various existing means. Thirdly, we are concerned that if a responsible body's ability to transfer is unnecessarily limited the alternative will be to release the conservation covenant, which will be to the detriment of the public.

[33] A suggestion made by Link.

[34] See Chapter 7.

5.103 The transfer should have an element of formality. First, the covenant can only pass as a whole to the new responsible body; the transferor or transferee cannot cherry pick which terms they wish to transfer.[35] The transfer must be in writing and signed by both the transferor and transferee.[36] In addition, the transferee must notify the local land charges office of the change in responsible body so that the register is amended.[37] If either of these two elements do not occur the transfer will fail, and the conservation covenant will not be enforceable by or against the new responsible body; instead the original responsible body will remain party to the covenant.[38]

5.104 Two questions arise: should the landowner's consent be required? And should there be a requirement to notify the landowner? The landowner's consent should not be required because once the covenant has been created the responsibility for its future enforcement lies with the responsible body. But it is important that the landowner is aware of any transfer. A landowner needs to know to whom he or she is accountable, where advice on management of the conservation covenant should be sought, and (in some cases) who will be inspecting the covenanted land. Clause 17(7) of the draft Bill, therefore, includes a statutory duty on the transferee responsible body to notify the landowner of the transfer.[39]

5.105 Link and the Wildlife Trusts suggested, when commenting on our proposal relating to the holder of last resort, that there should be a holder of first resort. They meant by this that the parties to the conservation covenant could stipulate in the conservation covenant to whom it should pass if there were ever a transfer. Link's reasoning was that "the measure would enable clarity and security for the landholder … and would reduce the burden on Government".

5.106 There is no reason why the parties to a conservation covenant should not include such a term, effectively restricting the responsible body's ability to transfer. It is in the sprit of the voluntary, non-regulatory nature of conservation covenants that this should be possible; and it might also help to reduce the number of conservation covenants that ultimately pass to the holder of last resort. There is the added benefit that the landowner's wishes may be reflected in this forward planning. However, the nominated responsible body could not be obliged to hold the conservation covenant, and if in the event it refused, the responsible body would have to find a different transferee.

5.107 We recommend that a conservation covenant should be capable of being transferred from one responsible body to another and that notice of any such transfer should be given to the landowner.

[35] We agree with the Central Association of Agricultural Valuers in this regard. If the parties want to split the obligations under a conservation covenant they must discharge it, and create a new covenant apportioning the obligations as desired.

[36] Draft Bill, cl 17(2).

[37] Draft Bill, cl 17(3).

[38] Realised by the combined effect of cl 17(1), (2) and (3) of the draft Bill.

[39] Although we are not of the view that any particular sanction should follow from failing to comply with this duty. This is because a landowner can ultimately inspect the local land charges register to determine which responsible body holds the benefit of the covenant.

5.108 We recommend that when a conservation covenant is transferred, the conservation covenant will not be enforceable by the transferee unless the change of responsible body has been notified to the local land charges office.

5.109 Clause 17 of the draft Bill gives effect to these recommendations. It provides that a responsible body may appoint another responsible body to act in its place under a conservation covenant. It requires that this be done by an agreement in writing signed by the appointer and the appointee and that, if the conservation covenant has been registered, the register must be amended. The effect of the appointment is that the burden of all the responsible body's obligations, and the benefit of all the landowner's obligations, pass to the appointee.[40]

5.110 It will be recalled that in Chapter 4 we discussed the automatic transfer of conservation covenants to the holder of last resort where a responsible body ceases to exist. Ideally, this will not happen because a responsible body will take steps to ensure a transfer before it ceases to exist; but this may not be practicable and in that event the holder of last resort will take over responsibility for the covenant in line with our recommendations in Chapter 4.

EVENTS AFFECTING THE LAND AND THE LANDOWNER

5.111 Over the lifetime of a conservation covenant a number of events could occur that affect the land or the landowner. For example, the land could be divided into two or more separate plots and one or both sold. Where the landowner is a lessee, the lease could come to an end. The responsible body could purchase the covenanted land. We deal with these possibilities below.

Subdivision of the burdened land

5.112 In the Consultation Paper we provisionally proposed that if land which is the subject of a conservation covenant is subdivided, the owners of the subdivided land should be jointly and severally liable for the conservation covenant obligations, unless the conservation covenant has provided otherwise (or it is modified or discharged).[41]

Response to the consultation

5.113 Nine consultees disagreed with our provisional proposal, while 27 agreed or substantially agreed. The latter regarded the proposal as a sensible starting point, subject to any further arrangements that the parties might choose to make. Professor Reid described this as the "safest basic position", while the RSPB thought that a conservation covenants scheme would be unworkable without such a provision.

[40] Draft Bill, cl 17(5).

[41] Consultation Paper, para 5.20.

5.114 The main reason for disagreement with our policy related to the difficulties of enforcing obligations between neighbours. The lack of control over the actions of nearby owners was also a concern.[42] English Heritage, which advocated a different default position, noted that "joint and several liability could become a problem if there is no means by which one owner can achieve the satisfaction of the covenant".

Discussion

5.115 No provision in respect of subdivision will provide a solution that meets all of the possible circumstances and risks. Ideally, prior to subdivision of the land, all the parties would agree their respective liabilities under the conservation covenant. But that will not always happen, due to inadvertence or disagreement. We have concluded that the default position should, therefore, be that where land is subdivided, it should (of course) remain subject to the obligations under a conservation covenant; but (in the light of consultees' comments) the new landowners will be severally liable for the obligations, rather than jointly and severally. In other words, each will be responsible for his or her own breaches, relating to his or her own land. We would hope that, despite the existence of this default position, the parties will engage with this issue in advance of land being divided, and come to agreement about the most appropriate solution.

5.116 We recommend that if land which is the subject of a conservation covenant is subdivided, the owners of the subdivided land should be severally liable for the conservation covenant obligations, unless the conservation covenant is modified to provide otherwise.

5.117 Clauses 7 and 8 of the draft Bill give effect to this recommendation. Clause 7 provides that a landowner ceases to be bound by a conservation covenant when he or she parts with the land, or with part of it (clause 7(2)(b)), and also ceases to be bound by an obligation in a covenant if he or she ceases to own land to which it applies (for example, if different obligations relate to different parts of the land, and the landowner sells part) (clause 7(2)(a)). Provided that the covenant is registered in the local land charges register, the new owner will of course take over liability. Clause 8 makes similar provision for the responsible body.

[42] As expressed by the Central Association of Agricultural Valuers, the Bar Council, and the County Land and Business Association.

The ending of a lease that is burdened by a conservation covenant

5.118 If a lease, whose holder is party to the conservation covenant or is a direct successor in title to that party, comes to an end the conservation covenant also comes to an end.[43] This is the case whether the lease comes to an end by reason of surrender, merger, forfeiture or by effluxion of time.[44] There are, however, two specific circumstances when the outcome will be different: namely when a head-lease comes to an end but the sub-lease is preserved and when there is a deemed surrender and re-grant.

5.119 A sub-lease will not survive a "unilateral termination" of the head-lease. This includes when the head-lease ends by forfeiture, by a break (pursuant to a break clause) instigated by the landlord, or by a notice to quit served by the tenant.[45] In these circumstances any sub-lease comes to an end, and the conservation covenant would also cease.

5.120 However, a sub-lease will survive a "consensual termination" (surrender or merger) of the head lease.[46] The sub-tenant in these cases "moves up the ladder" and becomes the head-tenant.[47] In this situation a conservation covenant would live on; the sub-tenant who was bound by the conservation covenant will remain so. The duration of the covenant is unaffected.[48]

5.121 Where a lease is extended by agreement there is a deemed surrender and re-grant.[49] In that event the conservation covenant will continue in existence although, again, its duration will be unaffected.[50]

[43] For completeness, it should be noted that where the lessee of a fixed-term lease holds over on a periodic tenancy, a conservation covenant created by that lessee (or his predecessor in title) will not continue. Similarly, a conservation covenant created by a lessee whose lease is continuing by statute (for example, under the Landlord and Tenant Act 1954, s 24(1)) will not continue during the statutory continuation (see clauses 1(5)(b) and 6(1) and (2)(b) of the draft Bill).

[44] When that happens the owner of a superior estate will only be bound if he or she is also a party to the conservation covenant.

[45] *Great Western Rly Co v Smith* (1876) 2 CH D 235; 40 JP 469, 45 LJ Ch 235, 24 WR 443, 34 LT 267; *Pennell v Payne* [1995] QB 192; and *Barrett v Morgan* [2000] 2 AC 264, [2000] 1 All ER 481.

[46] Law of Property Act 1925, s 150. Also see *Barrett v Morgan* [2000] 2 AC 264, [2000] 1 All ER 481; *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch); and *Ecclesiasitical Commissioners for England v Treemer* [1893] 1 Ch 166.

[47] Law of Property Act 1925, s 139.

[48] Its maximum duration will be that of the lease held by the lessee who created it: see para 5.44 above and clause 6 of the draft Bill; the sub-lease will be of shorter duration, of course, and so in practice in these circumstances the conservation covenant will come to an end early.

[49] C Harpum and others (eds) *Megarry and Wade: The Law of Real Property* (8th ed 2012), para 18-087. See also *Baker v Merckel* [1960] 1 QB 657, and Russell LJ in *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477, at 496.

[50] Draft Bill, cl 22.

Where a responsible body acquires land which is subject to a conservation covenant

5.122 In the Consultation Paper we provisionally proposed that where a responsible body in respect of a conservation covenant acquires land which is subject to that covenant, the conservation covenant should cease.[51] We made this proposal because we could not see a need for the conservation covenant to continue when the land is in the ownership of a responsible body. It would in any event ensure the continued conservation of the land (without any need to enforce a covenant against itself) and would also be best placed to make a decision as to whether to impose a conservation covenant at a later date, in the event that the land was sold.

5.123 In the light of consultation we have changed our view. A number of consultees simply agreed with the proposal, and provided no further comments.[52] Some thought that there should be safeguards to restrict the ability of responsible bodies to sell on previously covenanted land,[53] and some opposed the policy outright.

5.124 Because of the nature of the responsible bodies, their objectives, and their accountability, we think it highly unlikely that any would use the ending of a conservation covenant, on the occasion of their acquiring the land, as a means to avoid their conservation duties or to make a profit on the re-sale of the land. But we were swayed by a pragmatic point made by Christopher Jessel. He observed that a responsible body might have good cause to acquire land on a temporary basis, before selling it on. If the conservation covenant came to an end automatically, that would cause some inconvenience and could even be overlooked. We think that that is a good reason for recommending that where the responsible body acquires land subject to a conservation covenant for which it is itself the responsible body, the covenant should continue in existence.

5.125 We recommend that where a responsible body in respect of a conservation covenant acquires land which is subject to that covenant, the conservation covenant should remain in force unless discharged.

5.126 Clause 21 of the draft Bill gives effect to this recommendation.

[51] Consultation Paper, para 7.20.

[52] These consultees included the Land Trust, the Institute for Archaeologists, the Institute of Historic Building Conservation, the Salmon and Trout Association, Derbyshire County Council, the Agricultural Law Association, the Woodland Trust, and English Heritage.

[53] This was echoed by Natural Resources Wales and the Open Spaces Society. The Society also thought that responsible bodies should be reminded or required to re-impose the conservation covenant when the land leaves their ownership.

THE APPLICATION OF THE SCHEME TO CROWN LAND

5.127 Clause 26 of the draft Bill provides for the statute to bind the Crown. No further provision is needed to enable a Crown body – whether the sovereign, the Duke of Cornwall or a Government department – to enter into a conservation covenant, or to acquire land that is already subject to one. However, schedule 2 adds further provision so as to enable a different arrangement to be made where it is not desired to make the Crown body, as landowner, directly liable under the covenant. The schedule defines the "appropriate authority" for the different types of Crown land and enables the appropriate person to enter into the covenant on behalf of the landowner or to be liable under a conservation covenant to which land acquired by the Crown is already subject.

5.128 Clause 23 makes provision for the rather different circumstance when land that is subject to a conservation covenant passes to the Crown as bona vacantia. This takes place where a person dies intestate and no-one is entitled to his or her estate under the intestacy rules (contained in the Administration of Estates Act 1925), or where a company is dissolved. The clause replicates the general rule of land law in relation to bona vacantia, by providing that the Crown is not liable under an obligation in a conservation covenant until it takes possession or control of the land or enters into occupation of it. The responsible body's obligations are in effect suspended unless the Crown makes that choice, until the land passes into the hands of a new owner.

CHAPTER 6
MANAGEMENT AND ENFORCEMENT

INTRODUCTION

6.1 The creation of a conservation covenant is merely the beginning of the work, rather than the end. Landowners will have a range of ongoing responsibilities; responsible bodies may need to monitor these activities, and more generally to ensure that the conservation objectives for which the covenant was created are being upheld. Accordingly, thought has had to be given to how conservation covenants will be managed and how the statutory scheme for conservation covenants should make provision for the enforcement of the parties' responsibilities.

6.2 In this Chapter we review the type of management action that responsible bodies or a landowner might need to undertake to give effect to a conservation covenant. We then consider whether any management actions – such as a right of entry by a responsible body – should be in the statute.

6.3 Then we address the situation in which a landowner or a responsible body breaches its obligations to the other party. In turn, we consider the following issues:

(1) the definition of breach of a conservation covenant;

(2) defences to an action for breach of a conservation covenant;

(3) the limitation periods within which action must be brought;

(4) the remedies that should be available to a responsible body if a landowner breaches its obligations; and

(5) the remedies that should be available to the landowner if a responsible body breaches its obligations.

MANAGEMENT OF A CONSERVATION COVENANT

6.4 We note the frequent use in other jurisdictions of "management agreements"; which are (in this context) personal contracts agreed by the parties alongside conservation covenants. A management agreement is a purely contractual arrangement, which allows the parties to agree management activity in greater detail than would be appropriate for a conservation covenant, and which could be amended or concluded more easily than a conservation covenant. Unlike a conservation covenant, the management agreement would not be effective against later owners of the land.

6.5 We invited consultees' views on how obligations under a conservation covenant should be managed, and whether in some cases it would be useful for a management agreement to be used in addition to a conservation covenant.[1]

6.6 We also considered whether any management obligations should be enshrined in statute, or left to the parties to agree. Other jurisdictions generally do not include these matters in legislation; the exception tends to be a power of entry for the responsible body. We knew that this would be a controversial issue for consultees; in the pre-consultation stage stakeholders were divided as to whether obligations such as a requirement to allow access by a responsible body should be set out in statute.

6.7 We provisionally proposed that the parties should be free to agree management actions as part of a conservation covenant, but that no management powers should be provided for in the statute.[2]

Response to the consultation

Types of management action

6.8 Some consultees thought that the wide range of scenarios in which a conservation covenant could be used precluded a meaningful discussion about what sort of management action might be needed. Others, though, drew on their experience within a particular area to explain the sort of management activity that might take place under a conservation covenant. We have extracted some examples here.

(1) "In relation to, for example, land of ecological importance, usually as part of the planning approval process an ecological management plan will have been required to be prepared and under the Section 106 Agreement a maintenance inspection and monitoring scheme detailed to ensure that plan is followed. Usually, a dowry payment or monitoring fees are required to be paid to the local planning authority to undertake this role. We envisage that similar arrangements will form part of the Conservation Covenant Agreement with the responsible body."[3]

(2) "With regard to the historic environment there is likely to be a need for inspection, assessment, advice, recording and, if necessary, preventative/remedial action."[4]

1 Consultation Paper, para 6.10.

2 Consultation Paper, para 6.15.

3 Berkeley Group.

4 Institute for Archaeologists.

(3) "Specific forms of management are almost always necessary to sustain biodiversity interests. Each habitat type needs a particular type of ongoing management in order to sustain their characteristic suite of species and special features, often based on 'traditional' forms of management e.g. coppicing of certain types of woodland, or cutting of hay meadows with aftermath grazing."[5]

(4) "We can envisage a wide range of potential actions covering aspects such as land use, vegetation management measures, water level management, agricultural practices, access arrangements, soil conservation and monitoring. These will be determined by, and dependent upon, the habitat, its current condition and the aims and objectives for the land of both the landowner and the responsible body. We think that in most cases where specified habitat or species conservation outcomes are required, these outcomes and the pursuant measures would be best placed in a management agreement that is underpinned by the conservation covenants. A management agreement can also be a useful source of information about when certain management actions are required and/or inappropriate."[6]

6.9 The National Trust also provided a helpful summary of the actions it regarded as essential:

> The National Trust would suggest three primary management actions to administer a conservation covenant. These should be encouraged, but should not be compulsory.
>
> - Develop a covenant statement on creation of a conservation covenant. Every conservation covenant should include a very clear statement of why the covenant has been created and what the parties are trying to protect. This enables successors in title to the original covenantor to understand before acquiring a covenanted property both the responsibility and the benefit of the conservation covenant. Such a statement would also help the public to understand the scope of, and the context for, the covenant.
>
> - Periodic contact with the owners of land subject to a conservation covenant. ... Periodic contact with the owners of covenanted land provides an opportunity to engage with new owners to enable them to fully understand the implications of being subject to a conservation covenant. An appreciation and understanding of the conservation covenant assists in producing more appropriate development proposals and minimises future dispute and misunderstanding.

[5] Natural England.

[6] Link.

- Where the conservation covenant is of a restrictive nature, regular inspection of covenanted land together with monitoring of local planning proposals to ensure the obligations under conservation covenants are being observed. Where the conservation covenant includes positive obligations, regular inspections of the conservation asset and possible testing and investigations to ensure the condition of the asset is being maintained in accordance with the conservation covenant obligations.

6.10 Consultees such as the Institute for Archaeologists also emphasised that a responsible body's ability to manage a conservation covenant would depend on its financial ability to do so. This reflected the experience of the Queen Elizabeth the Second National Trust in New Zealand, which said:

> We have very good relationships with landowners and are by far the preferred legal protection vehicle for private property landowners in New Zealand. The key to our success is that we offer a voluntary conservation service to landowners that is not seen as being connected to the state. Covenant management is in the hands of the landowner, however to be effective we offer practical advice and assistance. This is an area which we struggle with due to resourcing.

Use of management agreements

6.11 Our suggestion that a conservation covenant could be accompanied by a management agreement enjoyed wide support, with consultees confirming that this would be a useful approach, and one which mirrored current practice.[7] As Christopher Jessel explained, "a management agreement can supplement a formal covenant and can be brought up to date as circumstances, technologies, practices or the habitat change without needing to alter the covenant itself". These benefits were also reflected in English Heritage's comments:

> English Heritage already operates a system of local management agreements by which a suitable local body agrees to undertake certain management activities on a heritage asset in English Heritage's care. The range of activities will depend upon the expertise of the local body and the requirements of the heritage asset. This system operates well and has been in use for many years and we would certainly see this as a potential model for participation between a responsible body and a landowner. Management agreements are helpful because they can take into account specific circumstances and identify named partners which tends to provide focus and timeliness.

[7] Consultees who supported this included the Merthyr Tydfil Partnership, the British Mountaineering Council, Christopher Jessel, Professor Cheever, the Land Trust, the Berkeley Group, the Ramblers, the Open Spaces Society, the Central Association of Agricultural Valuers, Dr Nsoh, Charles Cowap, the National Farmers' Union, officials from Warwickshire County Council, the Institute of Historic Building Conservation, the Salmon and Trout Association, the RSPB, Natural England, South West Water, RICS, the Game and Wildlife Conservation Trust, the Woodland Trust, the Wildlife Trusts, Link, English Heritage, and the National Trust.

6.12 Natural England thought we had not explained the distinction between a conservation covenant and a management agreement with sufficient clarity. This may be because "management agreements" made with Natural England under the Natural Environment and Rural Communities Act 2006 or the Conservation of Habitats and Species Regulations 2010 have special meaning (and unlike our proposal, are binding on successors in title). Natural England made the following comment:

> In a nature conservation situation, a clear distinction needs to be drawn between two different types of agreement. Firstly, the 'core permanent agreement' securing an area of land from key future threats such as development, or changes in agricultural use (e.g. ploughing, application of damaging herbicides etc), which have the potential to undo at a stroke positive nature conservation investments made in the land up to that point. Secondly, a complementary shorter-term agreement which secures the periodic management needed to sustain biodiversity interests and prevent reversion to scrub or other lower-value habitat (e.g. grazing).

6.13 Few consultees specifically addressed our comment that management activity might be undertaken by a "sub-contracted" smaller conservation organisation. However, the National Farmers' Union noted that there was a precedent for this:

> We can see that there could be a place, in some circumstances, for an intermediary organisation to be involved in the management or monitoring of a site. This would probably be case specific, and would likely depend on there being an existing well-established relationship between the intermediary organisation and the parties. We are aware of a current situation where the Rivers Trust acts as an intermediary between landowners and a water company in a 'payment for eco-system services' situation.

Management obligations in statute

6.14 For the most part consultees agreed that no management power should be provided for in the statute. Those who agreed with our proposal emphasised the need for the parties to agree terms themselves, and the need for flexibility to suit the particular circumstances of the property. The National Farmers' Union said:

> We believe that the parties should be offered the opportunity to contract and agree management actions as they wish, depending on the nature, scale and length of term of the covenant. Whilst we accept that the responsible party may wish to monitor the landowner's compliance with the covenant, we do not agree that responsible bodies should be given the statutory power to enter land.

> Management and monitoring will undoubtedly vary on a case by case basis, and will be bespoke to the site concerned. For example, the creation and maintenance of a wetland site, or large woodland, is unlikely to require a greater degree of monitoring than a specific conservation site developed to provide habitat for a rare or threatened species of bird. We, therefore, believe that management and monitoring by the responsible body should be left to the discretion and negotiation of the parties.

6.15 English Heritage also identified a concern about statutory powers:

> We agree that the parties should be free to agree management actions. To give statutory powers to the body entering into the covenant with the landowner would appear to set up an alternative means of action and redress to the penalties for breach provided for in the covenant. A model covenant or suite of covenants might usefully include some sensible mechanisms for access, inspection, emergency action in default, remedies etc.

6.16 Eleven consultees disagreed with our proposal on the basis that a power of entry for a responsible body should be included in a statute. Link reflected that "there is no easily envisioned circumstance where the responsible body would not on occasion need to check that the conservation covenant is functioning". Professor Hodge argued that it would be unreasonable to expect a responsible body to be able to monitor performance of the obligations without being guaranteed access. Professor McLaughlin drew on her experience of the American system to explain her concern:

> U.S. federal tax law (which has been the driving force behind many charitable gifts of conservation easements) specifically requires that the terms of the easement provide the donee with certain information, notice, access, and enforcement rights. This requirement has not in any way chilled conservation easement donations and I think these rights are essential to the protection of the public interest and investment in these instruments.

6.17 Professor Reid drew our attention to a previous example where this issue had arisen:

> All conservation covenants should include powers of entry for the covenant holder. Without this it may be impossible to monitor the situation and identify non-compliance. The absence of powers of entry was identified as a major weakness in the 1981 legislation on Sites of Special Scientific Interest that has subsequently had to be remedied.

6.18 Both Christopher Jessel and the National Trust also pushed for a responsible body to have the right to enter land and repair damage. Christopher Jessel suggested powers of entry, and for the responsible body to do work if the landowner did not, should be set out in statute and apply by default unless the parties specifically excluded them.

Discussion

6.19 Consultees provided us with valuable information about the sorts of management activity which might need to be undertaken. We acknowledge consultees' concern that, where management activity is required, this may have a cost – in some cases a significant cost. This, we think, is part of the more general cost which may be associated with some conservation covenants. Responsible bodies in particular should be conscious of considering fully the nature of their management obligations before entering into a conservation covenant.

6.20 Turning to the use of management agreements, it is worth re-stating our understanding of what we regard as a "management agreement", namely as a personal contract between a landowner and a responsible body. A management agreement would set out obligations in respect of the parties to a conservation covenant, but unlike the conservation covenant, would *not* be binding on successors in title to the landowner. A management agreement would be likely to be used to expand upon the detail of how core obligations in a conservation covenant are to be carried out, and could be updated at agreed intervals.

6.21 We think it is right that in some cases smaller organisations might undertake the day-to-day management work of a conservation covenant on behalf of a responsible body (though we note that would probably need to be agreed between the responsible body and the landowner).

6.22 As to the need for a power for the responsible body to enter and inspect the land, this is a difficult issue. We agree with consultees that in almost all cases a responsible body would, from time to time, need to inspect land which was subject to a conservation covenant. But providing for a mandatory power of entry in legislation is, on balance, an unnecessary step (even if, as Christopher Jessel suggests, it could be set aside by agreement). Moreover, it would be difficult to frame a power capable of universal application; what is appropriate for a small historic home will not necessarily work for a large area of open space. Instead, we suggest that a power to inspect land should be included in model terms for a conservation covenant, to prompt the parties to consider the issue when negotiating the conservation covenant. We think that generally a responsible body will not agree a conservation covenant unless it has a power of inspection; so the power will exist, but will be positively agreed by the parties, rather than being imposed upon them. There are other instances of this in land law; for example, a landlord's right to inspect a property depends on the inclusion of that term in the lease, which is agreed by the parties.

6.23 We have also reviewed Home Office guidance on creating new powers of entry.[8] Although this guidance is directed at Government departments intending to create new powers, Defra might need to follow the process set out in the guidance to seek approval from the Home Office if it wished to implement any power of entry the Law Commission had recommended. We remain of the view that it would not be appropriate to include any management powers in a statute, as we aim to create a flexible system which allows the parties freedom to negotiate for their particular circumstances. To make an exception for a power of inspection by a responsible body would detract from that approach.

6.24 We conclude that the parties should be free to agree management actions as part of a conservation covenant, but that no management powers should be provided for in the statute.

BREACH OF A CONSERVATION COVENANT

6.25 The need for enforcement proceedings against a party to a conservation covenant is likely to be rare; statistics from other jurisdictions seem to show high rates of compliance.[9] But statutory provision will be needed to determine whether a breach has occurred and, if so, what remedies are available.

What amounts to a breach of a conservation covenant?

6.26 When considering this question we turned to our earlier Report "Making Land Work: Easements, Covenants and Profits à Prendre", in which we considered when liability might arise for failure to adhere to a land obligation.[10] These recommendations had been supported by consultees during that project, and seemed appropriate for conservation covenants as well. For a restrictive obligation (that is, a promise not to do something), a breach would occur when the landowner carried out an activity in contravention of the restriction, or when another person did so at the landowner's behest or with his or her approval.[11] For a positive obligation (where there is a requirement to do something), a failure to act by the landowner or responsible body who was supposed to carry out the activity would be an obvious breach.

[8] Home Office, *Power of Entry Gateway Guidance* (August 2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98386/powers-entry-guidance.pdf.

[9] A USA-wide survey of 7,400 easement in 1999 found that breaches had occurred in 498 cases (less than 7%). Of these only 115 were major breaches, and the vast majority of these were resolved without litigation (E Byers and K Marchetti Ponte, *The Conservation Easement Handbook* (2nd ed 2005) p 158). In New Zealand, the Queen Elizabeth the Second National Trust found a 95.1% adherence rate among the 1,723 conservation covenants monitored in 2011 to 2012 (Queen Elizabeth the Second National trust, *Annual Report 2012* (2012) p 11).

[10] Easements Report, paras 6.150 to 6.153.

[11] Easements Report, para 6.154.

6.27 We provisionally proposed that, under the terms of a conservation covenant, a person who is bound by a restrictive obligation breaches it by doing something which it prohibits, or by permitting or suffering someone else to do so; and a person who is bound by a positive obligation breaches it if the obligation is not performed.[12]

Response to the consultation

6.28 This proposal was broadly supported, with 33 consultees either wholly or partly in favour, and only one disagreeing. A key theme among those who responded in detail was the need for further guidance on when liability would arise. Professor Reid referred us to difficulties which had arisen in the context of criminal liability for environmental activity, and in particular the debate around vicarious liability. Professor Farrier commented that enforcement of positive obligations presents a significant challenge; he thought that in nature conservation, the problem is more likely to be adequacy of performance rather than a total failure to act. He suggested that mediation or arbitration might be a better way to determine liability for a breach in those circumstances.

6.29 Christopher Jessel had a different concern about positive obligations:

> For a positive obligation, in principle the person bound should perform his duties unless prevented by illegality. This could arise from the exercise of public powers such as compulsory purchase, from controls such as ancient monument or SSSI, or from incapacity, for instance where the land passes into the ownership of an entity which has no legal power to perform the obligation. Other controls are more difficult to assess. Thus if there is an obligation that the land must be open to the public but the landowner can not obtain insurance cover against public liability at reasonable cost (perhaps because the land has become in a dangerous condition or is shown to be polluted) then he should be relieved of that obligation.

6.30 On the other hand, Robert McCracken QC and UKELA wanted to extend liability for breaches, arguing that our definition should include "whether by self, servant or agent" and adding personal responsibility for directors or officers of a company where their neglect or connivance had contributed to the breach.

[12] Consultation Paper, para 6.20.

6.31 Some consultees also queried the position of landowners or responsible bodies where an act occurred beyond their control. Professor McLaughlin referred to damage that results from causes such as fire, flood, and storm, and queried the extent to which the landowner would be responsible for preventing trespass, including the use of motorized vehicles, illegal dumping, or poaching (especially on a large property). These scenarios had caused problems in determining liability in the US. The National Farmers' Union was also concerned about inclusion of the "suffering" provision, arguing that this took the definition too far; it "might encompass actions on land far beyond the control of the landowner, for example fly tipping or vandalism". The National Farmers' Union also thought that only actions which were directly attributable to the landowner should be captured. Conversely, Christopher Jessel thought our proposal was correct in respect of restrictive obligations, even where the breach was outside a party's control.

6.32 The National Trust took a measured view of this issue:

> The National Trust agrees that a conservation covenant should be deemed to have been breached where a person who is bound by a restriction does something which it prohibits and a person who is bound by a positive obligation fails to perform that obligation. We also agree that a person who is bound by a restriction should be deemed to be in breach where they "knowingly" permit or suffer someone else to do something which the restriction prohibits. We question whether a person who is bound by a restriction should be deemed to be in breach where they "unknowingly" permit or suffer an act which the restriction prohibits.

Discussion

6.33 Although we cannot predict rates of compliance, we think it likely that compliance will generally be high to begin with, and then decrease over time as land changes hands. As consultees noted, it is important that the respective liabilities of the parties are clear from the outset, to enable the parties to perform their obligations and to reduce the need for litigation to resolve the question of whether a conservation covenant has in fact been breached.

6.34 Proving a breach is not just a matter of establishing what has happened once the conservation covenant is in place. When it is drafted, the parties must ensure that their respective obligations are clearly expressed, and capable of being performed. We understand the view expressed by the Forestry Commission that there is a preference for outcome-focussed agreements. These allow a landowner to undertake whatever activities are desired so long as a particular outcome is achieved. For example, a farmer undertakes to ensure that a certain area of land is covered by native shrub within five years; the particular means of achieving that goal are entirely a matter for the farmer. However, care is needed in drafting because obligations must be sufficiently clear that (a) they can be performed and (b) a court can determine whether they have been breached.

6.35 Consultees' support for our proposal about the nature of a breach suggests that our definition of what amounts to a breach is generally right. We do not want to extend it as UKELA and Robert McCracken QC suggest, to capture company officers; this is unnecessarily punitive, and contrary to the general public policy which limits opportunities to pierce the corporate veil.

6.36 We recommend that a person who is bound by a restrictive obligation in a conservation covenant breaches it by doing something which it prohibits, or by permitting or suffering someone else to do so; and that a person who is bound by a positive obligation breaches it if the obligation is not performed.

6.37 Clause 9 of the draft Bill gives effect to this recommendation.

DEFENCES TO A BREACH OF A CONSERVATION COVENANT

6.38 Of course, matters may not be as clear-cut as the recommendation set out above might imply. Consultees made a number of helpful observations about possible defences to an action for breach of a conservation covenant, which we bring together as follows.

Matters outside a party's control

6.39 Consultees raised the issue of liability where an event outside the landowner's control takes place, for example the effects of climate change or the actions of third parties. There is a range of possibilities. If flooding or a storm destroys woodland which is the subject of a conservation covenant, this would not be the landowner's responsibility; he or she has not permitted or allowed someone to breach the obligation to maintain the woodland. Similarly, a landowner, X, has entered into a conservation covenant which includes an obligation not to use insecticides on his or her land, but a neighbouring farmer spraying his own fields also (inadvertently) sprays part of X's field. If the landowner is aware of this, or could reasonably be expected to be aware of it because it has happened regularly, but takes no action to prevent it, he or she is allowing someone else to breach the restrictive obligation. On the other hand if the landowner is unaware of this, perhaps because it has only happened once accidentally, the landowner should not be considered to be in breach of the restrictive covenant.

6.40 Of course, the destruction or natural change of the conservation interest in the land may require a modification of the conservation covenant, which is why we recommend that the parties may agree to modify or to discharge the covenant between themselves. In the absence of agreement it will be possible to apply to the Lands Chamber of the Upper Tribunal.[13]

Emergencies

6.41 There may be circumstances when an action intended to prevent injury or loss of life may result in a breach of a conservation covenant. For example, it might be necessary to fell trees, on land subject to a conservation covenant prohibiting felling, to create a fire break to contain a fire. Accordingly, some provision should be made for defences to an action for breach of a conservation covenant in these circumstances and these should be available to either party.

[13] See Chapter 7.

Incompatibility with public designations

6.42 In the Consultation Paper we explored the system of designating land for conservation or heritage purposes in England and Wales, for example as a Site of Special Scientific Interest. A scheme of conservation covenants would provide landowners, public bodies and conservation organisations with a tool that is distinctly different from land designations. With that in mind we envisaged that the two systems would complement each other with conservation covenants providing a voluntary means of privately protecting land.

6.43 We considered whether conflicts would arise, and concluded that in practice the interaction of the two systems would not often be problematic, and that if it was the system for modification and discharge of a conservation covenant would provide a practical solution. We asked consultees for their views.[14]

Response to the consultation

6.44 A proportion of consultees could not foresee any likely difficulties arising between the two systems.[15] The responses of English Heritage, Natural Resources Wales, and Natural England are particularly interesting on this point. English Heritage saw conservation covenants as a supplementary tool for the protection of heritage. Natural Resources Wales noted that designating bodies are accustomed to taking account of competing interests and rights when designating land. Natural England thought that conservation covenants would not negate the need for statutory designation, and would mainly be used where sites do not meet the criteria for designation. These views carry particular weight because of the wealth of knowledge these organisations possess on the designation of land in England and Wales.

6.45 However, a number of consultees foresaw difficulties or conflicts arising between the two systems. These consultees were generally concerned that the terms of a conservation covenant would be inconsistent with the terms of a designation. The Institute of Archaeologists and the War Memorials Trust, for example, pointed out that a requirement for a positive act under a conservation covenant does not constitute consent under a designation.

6.46 A further concern raised by the Ramblers and the British Mountaineering Council was that when a conservation covenant permits public access, the duty of care owed to visitors would be higher than that owed if the land was subject to a right of way under the Countryside and Rights of Way Act 2000. These organisations suggested reducing the duty owed under conservation covenants in order to achieve consistency with the designation system.

[14] Consultation Paper, para 5.33.

[15] Consultees included Merthyr Tydfil Partnership, the AONB Team at Denbighshire County Council, the Land Trust, Professor Cheever, the Berkeley Group, the Bar Council, Natural England, Trowers and Hamlins LLP, the Woodland Trust, Link, English Heritage, and the Campaign to Protect Rural England.

6.47 But how did consultees propose that difficulties should be resolved? Most thought that a system of priority should operate. Merthyr Tydfil Partnership suggested that the more recently executed instrument should take priority. For example, if the land was subject to a conservation covenant and subsequently became designated, the designation would take priority. Christopher Jessel thought that in the event of inconsistency between a conservation covenant and a designation, the designation should always prevail, as did the Salmon and Trout Association, Derbyshire County Council, and Natural England.

6.48 The Land Trust and UKELA thought that conflicts could be avoided and resolved by clear statutory guidance on the inter-relationship between the two systems. However, the National Trust suggested that the conservation covenants scheme include a "deconfliction process" to allow the parties a grace period to resolve the conflicts between the two instruments.

6.49 A further point of concern, raised by consultees representing landowners and the agricultural sector,[16] was that participation in the conservation covenants scheme would result in land becoming subject to a designation. This could result in land becoming subject to further and potentially more burdensome restrictions, against the landowner's wishes. The Central Association of Agricultural Valuers told us that this has caused particular upset to the farming community in the past.[17] It thought that the Commission should resolve this issue by allowing conservation covenants to include an undertaking that participation in a scheme of conservation covenants will not result in designation; but it noted that this might not be achievable.

6.50 Finally, the Agricultural Law Association also noted that in the event that the conservation covenant and the designation required the same work to be undertaken, but the conservation covenant provided for payment and the designation did not, there might be a question of interference with the landowner's human rights under Article 1 of the First Protocol to the European Convention on Human Rights.

[16] These consultees included the Central Association of Agricultural Valuers, the National Farmers' Union, and the Country Land and Business Association. RICS and Charles Cowap made the same point.

[17] The Central Association of Agricultural Valuers stated: "There may be reservations in some quarters due to what has become known as "the stone curlew effect". Some years ago, landowners in East Anglia co-operated in a voluntary project to manage farmed land to benefit the stone curlew population. They were so successful that the area was designated as a SSSI on account of the stone curlews breeding there. The SSSI has imposed permanent restrictions which affect farming operation and the episode caused great upset in the farming community, with associated mis-trust of some conservation organisations".

Discussion

6.51 In light of these responses we agree, in general terms, that some form of mechanism is needed to resolve issues when the two systems interact. We are conscious that designations are public law instruments used to preserve the natural environment and heritage; they form part of a network of designation, which is administered and policed at a national level for the public. So the public designation must prevail when conflicts arise. If work required under a conservation covenant is later forbidden by the terms of a statutory designation, that designation will provide a defence to an action for breach of the conservation covenant. If work required under a conservation covenant requires consent under a designation, that consent will have to be sought.

6.52 Nevertheless, we are confident – particularly in light of comments made by Natural England, English Heritage and Natural Resources Wales – that the two systems will live together in relative harmony.

6.53 Concerns were raised that participation in a scheme of conservation covenants would result in land becoming subject to a designation. We can sympathise with the experience of the farming community, but nevertheless do not agree that a system of conservation covenants should allow the landowner to stipulate that covenanted land cannot be subject to a designation. Designations are a creature of public law, usually exercised as a matter of compulsion, and preserve the very best that our country has in terms of natural environment and heritage. Designations should not, therefore, be prevented by the existence of a conservation covenant.

6.54 Furthermore, a conservation covenant is not compulsory. If, on balance, the landowner's concerns as to future designation outweigh the benefits of the conservation covenant, the landowner can choose not to create the conservation covenant. We hope that the potential conflicts will be minimised through an open and frank relationship between the landowner, responsible body and designating body.

6.55 As to the concerns that the levels of duties arising under land designations vary,[18] we do not think it is appropriate to align conservation covenants with any one system of land designation. This should be determined by the existing law; section 12(2) of the Countryside and Rights of Way Act 2000, for example, ensures that conservation covenants would be subject to rights of access provided under that Act. We do not see substance in the concern expressed by the Agricultural Law Association about the European Convention on Human Rights; human rights concerns, if any, would arise by reason of the designation regime, not as a result of its interaction with a conservation covenant.

[18] Noted by the Ramblers and the British Mountaineering Council.

A defence arising from compulsory purchase

6.56 There may be occasions when land which is subject to a conservation covenant is acquired compulsorily. In general, when an acquiring authority compulsorily acquires land which is subject to an easement, for example, the land remains subject to the easement. The owner of the easement (or other right) will not be able to enforce the benefit of the easement against the acquiring authority so long as the latter is acting in pursuance of its statutory powers.[19] The easement is overridden but not extinguished. The position has been explained as follows:

> Easements and restrictive covenants do not prevail against an acquiring authority where land compulsorily acquired is used for the statutory purposes of that authority.[20] Unless specifically extinguished by the compulsory purchase, however, such interest may revive against a subsequent purchaser.[21]

6.57 If the acquiring authority later sells the land, therefore, the owner of the easement will be able to enforce it again unless there is an express statutory provision which provides otherwise.

6.58 In the same way, when an acquiring authority compulsorily purchases land which is bound by a conservation covenant, we consider that the responsible body should not be able to enforce the conservation covenant against the acquiring authority while it owns the land and is acting in pursuance of its statutory powers.

6.59 In these circumstances, we consider that it is appropriate that the acquiring authority should be required to give notice of the making of the compulsory purchase order to the responsible body for any conservation covenant that relates to land that is the subject of a compulsory purchase order. This will mean that the responsible body can make representations to the Secretary of State about where the balance of the public good lies, to be taken into account by the Secretary of State in his or her assessment of whether there was a compelling need in the public interest for the land to be compulsorily acquired. The responsible body should, therefore, be served with notice under section 12 of the Acquisition of Land Act 1981.

Our recommendations about defences

6.60 We recommend that the following be defences to an action for breach of a conservation covenant:

(1) that the breach of the obligation was due to a matter outside the party's control;

(2) that the breach of the obligation arose in an emergency where action, or inaction, was essential to prevent injury or loss of life;

[19] *Kirby v School Board for Harrogate* (1896) 1 Ch 437.

[20] *Kirby v School Board for Harrogate* (1896) 1 Ch 437.

[21] Roots QC and others, *The Law of Compulsory Purchase* (2nd ed 2011), Division A, para 657; *Marten v Flight Refuelling Ltd* [1962] Ch 115; *Bird v Eggleton* (1885) 29 Ch D 1012.

(3) that compliance with the conservation covenant would contravene any statutory control applying as a result of the public notification or designation of the land to which the conservation covenant relates, taking effect after the conservation covenant was agreed; and

(4) statutory authority, which will be relevant in cases where land subject to a conservation covenant is compulsorily purchased.

6.61 Clause 11 of the draft Bill puts this recommendation into effect.

6.62 Clause 11(3) adds that the defence relating to statutory designation, in clause 11(1)(c), is not available if the designation was already in force when the conservation covenant was created. This is because the parties, when creating the covenant, have the opportunity to take into account the existing status of the land and of other rights over it. If they do create obligations that are incompatible with existing rights (as we said in the context of a freehold reversion, a right of way, or rights of common) then the pre-existing right is unaffected and will, in effect, prevail. In practice the terms of the conservation covenant will simply be ineffective because the responsible body will be unable to enforce them. The courts will not award an injunction or specific performance that will require the landowner to infringe another's right.

6.63 So far as the compulsory purchase regime is concerned, we make a further recommendation.

6.64 We recommend that when land subject to a conservation covenant is compulsorily purchased the relevant responsible body should be served with notice under section 12 of the Acquisition of Land Act 1981.

6.65 Paragraph 3 of schedule 3 to the draft Bill puts this recommendation into effect.

LIMITATION PERIODS

6.66 A conservation covenant can be created in writing or by deed. The limitation periods under the Limitation Act 1980 differ between the two forms of instrument, prescribing a 12-year period for an action brought on a deed. In the interests of certainty and simplification, we recommend that the limitation period of six years in section 5 of the Limitation Act 1980, for actions founded on a simple contract, apply to any claims arising under a conservation covenant irrespective of whether it is a deed, a contract, or a simple unilateral obligation. This provides sufficient time for a claimant to consider his or her position once aware of the facts of any alleged breach, to take legal advice, to investigate any breach and to try and negotiate a resolution. It balances the interests of the claimant and defendant.

6.67 We recommend that for the purpose of the Limitation Act 1980, an action founded under a conservation covenant is to be treated as founded on simple contract and therefore to be subject to a limitation period of six years.

6.68 Clause 12 of the draft Bill gives effect to our recommendation on limitation periods.

THE RESPONSIBLE BODY'S REMEDIES

6.69 In the Consultation Paper we then turned to consider the remedies that should be available to a responsible body where a landowner had breached his or her obligations. We bore in mind that a responsible body, seeking to enforce a conservation covenant, brings proceedings as a party to the conservation covenant, but it does so in the public interest. Overseas examples generally pointed to the use of injunctions (or similar orders) and damages, though in Australia there was also some provision for "self-help" orders allowing a covenantee to enter land to make good a breach.

6.70 We proposed that injunctions and damages should be available to a responsible body. We noted, though, that there are risks in pursuing enforcement action against a landowner and that such actions would not be undertaken lightly. We also emphasised that nothing in a statutory scheme should prevent the parties from agreeing further enforcement provisions within a conservation covenant. We anticipated, for example, that interim steps such as compliance warnings with a defined period to remedy a breach might be appropriate in some contexts.

Injunctions

6.71 Our starting assumption was that an injunction was likely to be the most useful tool for a responsible body to enforce a breach. Injunctions are intended to address the action or inaction of a party. As an equitable remedy, an injunction is issued at the discretion of the court. We thought that the following would be needed:

(1) where the obligation is restrictive, a prohibitory injunction, requiring the defendant to refrain from or cease doing something;

(2) where the obligation is positive, a mandatory injunction, requiring the defendant to do something; and

(3) where the responsible body seeks the correction of damage caused by a breach of a conservation covenant, a mandatory injunction to require the defendant to undo something which has been done.

6.72 It seemed clear that final injunctions should be available to a responsible body; we also thought that a statutory scheme should include provision for interim injunctions, given the speed at which irreversible damage to a habitat or heritage site could occur. An interim injunction will usually be prohibitory in nature.[22] The principles which determine whether an interim injunction should be granted are set out in *American Cyanamid Co v Ethicon Limited (No 1)*.[23] The court will ask:

(1) Is there a serious question to be tried? If the answer is "yes", two further questions arise.

[22] M A Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2010) para 29-17.

[23] [1975] AC 396.

(2) Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction?

(3) If not, where does the "balance of convenience" lie?[24]

6.73 In considering the second question the court will consider whether, if the claimant should be successful at trial, he or she would be adequately compensated by damages for loss caused by the refusal to grant an interim injunction.[25] Our concern with this approach was that damage to a responsible body *itself* may be minimal. A court which solely considered a responsible body's loss might not be inclined to grant an interim injunction, as damages would likely be an adequate remedy. This, we thought, was an unsatisfactory outcome, as the loss to the public interest in the damage to conservation generally could nonetheless be significant. However, the *American Cyanamid* principles may be weighed against other considerations, including the public interest.[26] This seemed an appropriate consideration in the case of a conservation covenant. We concluded that the court should be required to consider the public interest when determining an application for an interim injunction.

6.74 Finally, we noted that the court should be able to issue a *quia timet* injunction (that is, one that seeks to prevent an anticipated breach) in respect of a conservation covenant.[27] This remedy is an exception to the general rule that a claimant may not seek a remedy until a cause of action has accrued; in certain cases the court may issue an injunction to prevent conduct which would lead to damage.[28] The court's discretion to do so will only be exercised where (1) there is proof of imminent danger, and (2) there is proof that the apprehended damage will, if it comes, be very substantial.[29]

6.75 We provisionally proposed that, on proof of a breach of a conservation covenant, the court should have the power to issue a final injunction.[30]

6.76 We provisionally proposed that the court should have the power to issue an interim injunction in respect of a breach of a conservation covenant. In determining whether an interim injunction should be issued, the court should be required to consider the public interest.[31]

[24] "It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises": Lord Diplock in *American Cyanamid Co v Ethicon Ltd* (No 1) [1975] AC 396, at 408.

[25] *American Cyanamid Co v Ethicon Ltd* (No 1) [1975] AC 396, at 408, as cited by Browne LJ in *Fellowes & Son v Fisher* [1976] 1 QB 122, at 137.

[26] M A Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2010) paras 29-19 and 29-21.

[27] Consultation Paper, para 6.40.

[28] M A Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2010) para 29-14.

[29] *Fletcher v Bealey* (1885) 28 Ch D 688, at 698 by Pearson J.

[30] Consultation Paper, para 6.41.

[31] Consultation Paper, para 6.41.

Response to the consultation

FINAL INJUNCTIONS

6.77 Consultees were broadly in agreement with our proposal in respect of final injunctions: 24 agreed with a further 10 agreeing with some qualification, whilst only two disagreed. Meetings with consultees gave support to our assumption that the ability to seek an injunction would be useful in the context of conservation, though consultees also felt there was a place for damages.

6.78 Among those who agreed, a small number were concerned that the nature of an injunction was so serious and potentially costly that responsible bodies would be reluctant to seek this remedy. The British Mountaineering Council (whose comments were echoed by the Open Spaces Society and the Ramblers) said:

> The BMC agrees but again we wish to draw attention to the reluctance which responsible bodies may have towards seeking an injunction. Experience with, for example, the Dartmoor Commoners Council is that, although they have powers to take action against anyone in breach of their grazing rights, the risk of failure (which would lessen the deterrent effect of the Council's existence), the cost and the loss of goodwill deter them from taking action.

6.79 Professor Reid expressed a similar concern:

> Injunctive relief is the appropriate remedy where other attempts to resolve the matter have failed, but in terms of costs, delay and formality, does the standard court process provide a proportionate remedy for the sort of failings likely in this context? This is important since if formal proceedings are seen as being a cumbersome tool to deploy, covenant holders may be reluctant to intervene at the early stages when harm can be prevented. For example, if the costs of failing in court are very high, bodies, rather than stepping in earlier, may wait until there is indisputable evidence of breaches and harm, by which time biodiversity may have suffered.

6.80 On the other hand UKELA disagreed outright with the proposal, both as to final and interim injunctions; it favoured an entirely different set of processes:

> The use of injunctions is not recommended. It would be time consuming and costly. A better option would be if disputes and breaches were considered by the Lands Chambers [of the Upper Tribunal] who have the relevant expertise and experience. Ideally breaches should be subject to criminal sanction. This would require changes to the Lands Chamber [of the Upper Tribunal's] statutory role and responsibilities. However, if the option of injunction is to be adopted the power to issue 'quia timet' injunctions is needed.

6.81 Some consultees also felt there was a place for alternative and more tailored remedies as a precursor to an injunction (this was also noted in Professor Reid's comments on proportionality, above). Dr Nsoh felt there should be statutory provision for other methods of resolution prior to seeking a final injunction. The Forestry Commission was concerned that an injunction was a "heavyweight" response, and disproportionate to what might be relatively low-level breaches. Instead, it advocated a staged process with proportionate steps built in, culminating in an injunction as a last resort. The National Farmers' Union felt strongly about this issue, in relation both to interim and final injunctions:

> Whilst we accept that injunctive relief would ultimately be available to a responsible body in respect of a breach of a conservation covenant, and the Court should have the power to issue a final injunction, in our view, this should only be the case for the most serious of breaches. We do not think that the consultation paper has explored other options and processes in sufficient detail, particularly proportionality in any response to a breach. In our view, there should be specific statutory steps that should be taken by the responsible body before litigation is considered. Breaches of covenants could range from very minor incidents, with little or no impact on the site (perhaps a reporting requirement, where that has been agreed by the parties), to serious incidents.

6.82 Finally, the National Trust agreed that a final injunction should be available, but that modifications to the system were needed:

> The National Trust strongly agrees that on proof of a breach of a conservation covenant, the court should have the power to issue a final injunction. Further, we believe that a final injunction should, if requested, be awarded as of right on proof of a breach of a conservation covenant rather than being a discretionary remedy. …
>
> Also where the claimant had disentitled him or herself from equitable relief by his or her conduct the court may not, currently, award a final injunction. However, we believe that it would be unacceptable for the public interest and a conservation asset to be prejudiced as a result of a responsible body's conduct. Each responsible body should be capable of being held to account for their conduct through judicial review, Freedom of Information requests or regulation by the Charity Commission. The public interest would be best served if a conservation asset is protected despite a responsible body's mismanagement of that conservation asset. This position is also more compatible with the proposal … that Government or a statutory conservation body should have the power to enforce a conservation covenant where a responsible body has failed or is unable to do so.

6.83 Again, this proposal enjoyed strong support, with 27 consultees agreeing in whole or in part, with only five opposed. Professor Cheever's experience of the American system led him to think that a specific ability to seek an interim injunction for breach of a conservation covenant would be useful; he noted that injunctions issued in the US Federal Court use a "public interest balancing test". Similar to its suggestion in respect of final injunctions, the National Trust favoured the award of an interim injunction as of right on proof of a breach, rather than as a discretionary remedy.

6.84 Natural England (which we understand has considerable experience of interventions where a site is at risk) thought that an interim injunction "would allow responsible bodies to stop the immediate threat of harm, and then re-evaluate once the matter has been fully investigated or the risk of harm passes". The Berkeley Group also thought that "interim injunctions should only be sought in limited circumstances when time is of the essence because irreversible damage may otherwise be caused and consideration of the loss to conservation in the public interest should be paramount".

6.85 The use of a public interest test in the court's decision to issue an interim injunction was commented on or queried by some consultees. Charles Cowap and RICS felt that the definition of "the public interest" was variable, particularly if conservation covenants were used in semi-commercial contexts like payment for eco-system services. Professor McLaughlin thought our proposal was too broad, preferring a reference to "the public interest in continuing to protect the environmental or heritage values that are the subject of the covenant". The Country Land and Business Association and the Central Association for Agricultural Valuers both queried the meaning of "public interest" in relation to a conservation covenant, with the latter noting:

> The public interest could be a broad concept. National defence may seem obvious but access to important minerals once zoned for working by local plans? With badger culling for TB now public policy in England would that override a conservation covenant to protect wildlife? In short, would covenants enable parties to seek to frustrate public policy?

6.86 Finally, both Professor Reid and the RSPB suggested that we should consider whether the rule that a person seeking an interim injunction must give a cross-undertaking as to damages should apply to a responsible body seeking to prevent a breach. Professor Reid was particularly concerned about this in light of previous cases:

> Will the body seeking to enforce a covenant be required to provide a cross-undertaking in damages, a requirement which has proved a major obstacle to seeking interim relief in other environmental contexts (e.g. *Lappel Bank case*; see now *Financial Services Authority v Sinaloa Gold plc* [2013] UKSC 11)?

Discussion

INJUNCTIONS AND SPECIFIC PERFORMANCE

6.87 Most consultees supported our approach in terms of injunctions, and we remain of the view that an injunction – whether interim or final – is an essential tool for a responsible body seeking to prevent or remedy a breach. We think that an injunction should remain a discretionary remedy, and should not (as the National Trust suggests) be obtained as of right. Leaving the granting of an injunction to the discretion of the court is an important safeguard to ensure that the rights of the parties are balanced, and that all of the circumstances of the case are taken into account.

6.88 We understand the concern raised by some consultees that the serious and potentially costly nature of an injunction application may discourage a responsible body from seeking this remedy, or may make it delay in proceeding against a landowner. But these are matters which a responsible body should weigh up when considering whether and how to proceed; an injunction should not be sought lightly.

6.89 In addition, a responsible body should also be able to apply to the court for an order requiring specific performance of a landowner's positive obligations. Our reasoning is that there is a difference between a mandatory injunction and specific performance; the former is used to order the undoing of work done in breach of an obligation. On the other hand, the latter is used to compel the performance of a positive obligation.[32]

INTERIM INJUNCTIONS

6.90 We had proposed that, when considering whether to issue an interim injunction, the court should consider the public interest. English Heritage observed: "public interest should be the reason for the existence of the conservation covenant and so should be the reason for protective action such as an interim injunction". In addition to requiring the court to consider the public interest when considering an application for an interim injunction, we think it should do the same when considering an application for a final injunction. We have provided that both injunctions and damages may be sought; consideration of the public interest will be an important factor to help the court decide whether an injunction or damages is appropriate. We accept that the public interest is a broad concept, but we think that the courts will not have difficulty in applying it in this context.

[32] J McGhee (ed), *Snell's Equity* (32nd ed 2010), ch 17, and para 12-005 and following.

6.91 Professor Reid and the RSPB queried the position on a cross-undertaking in damages; this arises where an interim injunction is sought. Interim injunctions are a discretionary remedy, granted as a "stop gap" measure where the picture that the court must consider is incomplete.[33] Because of this, the court will want to be satisfied that if an applicant is later unsuccessful in proving its case, it will compensate the respondent for damage it suffers as a result of the activity being prevented by the interim injunction. Under the current law, reassurance is achieved by requiring the applicant to give a cross-undertaking in damages.

6.92 However, as Professor Reid noted a responsible body may be in a special position, such that a cross-undertaking should not be required. In *Financial Services Authority v Sinaloa Gold plc*,[34] the court considered the position of the Financial Services Authority in fulfilling its public duties in proceedings (including seeking an injunction) to enforce a breach of the Financial Services and Markets Act 2000; and whether it should be required to give to the court a cross-undertaking in damages in relation to third party loss. In reviewing the case law, the court noted that a general distinction still exists between private claims and law enforcement actions, "where a public authority is seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoys only the resources which have been assigned to it for its functions".[35] It concluded that no general rule existed that the FSA should be required to give a cross-undertaking in respect of loss suffered by the defendants or third parties (nor were there reasons for it to do so in this case).

OTHER REMEDIES

6.93 Some have suggested that something more by way of a remedy is needed; either because mediation or some other preliminary step is needed to protect a landowner, or because some further more conservation-specific remedy is needed to assist a responsible body. It would not be appropriate to mandate mediation or other preliminary steps as a breach may demand urgent action, though it would be sensible for these matters to be considered when the conservation covenant is drafted, and even included in model terms. Nor do we think there is a case for a new type of remedy to be created; this project has its origins in private law, and any further remedy desired can be the subject of negotiation between the parties, and included in the conservation covenant.

THE DISCRETION TO GRANT AN INJUNCTION

6.94 Recent developments in case law mean that we have to say more about the court's discretion to grant an injunction. Section 50 of the Senior Courts Act 1981 provides:

[33] J McGhee (ed), *Snell's Equity* (32 ed 2013) para 18-066.

[34] [2013] UKSC 13.

[35] *Financial Services Authority v Sinaloa Gold plc* [2013] UKSC 13, [2013] 1 WLR 725, at [31].

> Where the Court of Appeal or the High Court has the jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.[36]

6.95 The case of *Shelfer v City of London Electric Light Company*[37] reviewed criteria to be considered when a court decides whether to award damages in substitution for an injunction. In that case, A L Smith LJ set out his "good working rule" that damages may be substituted for an injunction if:

(1) the injury to the claimant's legal rights is small;

(2) the damage suffered by the claimant is capable of being estimated in money;

(3) the claimant can be adequately compensated by a small monetary payment; and

(4) the case is one in which it would be oppressive to the defendant to grant an injunction.[38]

6.96 It is common for damages in this scenario to be payable on the basis of what the defendant might have paid as consideration for a negotiated release of the right or interest. But it would be inappropriate for the landowner to buy his or her way out of a conservation covenant , and damages should not be able to be awarded as if this was possible. We asked consultees for their views about the appropriateness of the award of damages on this basis,[39] and most agreed with our view that it would be inappropriate.

6.97 The *Shelfer* case and the question of when damages should be awarded instead of an injunction were recently considered by the Supreme Court in the case of *Coventry v Lawrence.*[40] The case is complex and the various judgments of the Supreme Court justices leave room for the law to develop in a number of directions; we briefly examine below the law as it stands following *Coventry v Lawrence* in so far as it would relate to conservation covenants.

6.98 In his judgment Lord Neuberger states that there are two problems with the way that *Shelfer* has been applied and interpreted:

[36] The county courts have an identical power by virtue of section 38 of the County Courts Act 1984.

[37] [1895] 1 Ch 287.

[38] *Shelfer v City of London Electric Light Company* [1895] 1 Ch 287, at 322, and see J McGhee (ed), *Snell's Equity* (32 ed 2010) para 18-044.

[39] Consultation Paper, para 6.55.

[40] [2014] UKSC 13, [2014] 2 WLR 433, [2014] 2 All ER 622.

(1) the "tension, and at worst … inconsistency" between the observations in *Slack,*[41] *Miller,*[42] *Kennaway,*[43] *Regan*[44] and *Watson,*[45] which appear to support a rigid application of the *Shelfer* test with damages being awarded in lieu of an injunction only exceptionally, and the approach adopted in *Colls*,[46] *Kine*[47] and *Fishenden*[48] which support "a more open-minded approach, taking into account the conduct of the parties";[49] and

(2) the "unsatisfactory way in which it seems that the public interest is to be taken into account" when considering whether to award damages in lieu of an injunction.[50]

6.99 As regards the first problem, Lord Neuberger considered that the test should be "much more flexible than that suggested in the recent cases of *Regan* and *Watson*". He explained that an "almost mechanical" application of the *Shelfer* test and an approach of awarding damages only in "very exceptional circumstances" are "each simply wrong in principle, and give rise to a serious risk of going wrong in practice".[51]

6.100 Lord Neuberger then went on to discuss the nature of the court's discretion:

> The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in *Regan* and *Watson*. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good.[52]

[41] *Slack v Leeds Industrial Co-Operative Society Ltd* [1924] 2 Ch 475.

[42] *Miller v Jackson* [1977] QB 966.

[43] *Kennaway v Thompson* [1981] QB 88.

[44] *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135.

[45] *Watson v Croft Promosport Ltd* [2009] 3 All ER 249.

[46] *Colls v Home & Colonial Store Ltd* [1904] AC 179.

[47] *Kine v Jolly* [1905] 1 Ch 480.

[48] *Fishenden v Higgs & Hill Ltd* (1935) 153 LT 128.

[49] *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433, [2014] 2 All ER 622, at [117].

[50] *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433, [2014] 2 All ER 622, at [118].

[51] *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433, [2014] 2 All ER 622, at [119].

[52] *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433, [2014] 2 All ER 622, at [120].

6.101 As for where this leaves the four tests in *Shelfer*, Lord Neuberger concluded that:

> While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in *Fishenden* 153 LT 128, 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.[53]

6.102 The court's discretion is, therefore, wide and what is a relevant consideration will depend on the circumstances of the particular case.

6.103 As regards the ability of the court to take into account the public interest in deciding whether to grant damages in lieu of an injunction, Lord Neuberger "[found] it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor". However, the public interest in a conservation covenant will be relevant in the context of applications for injunctions to enforce them as they must by definition be entered into for the public good. It will, therefore, be something that we would expect the courts to take into account when considering applications for an injunction and also considering whether damages in lieu of an injunction are appropriate.[54] In the context of conservation covenants, the relevant public interest is in the performance of a conservation covenant. The thinking behind the *Shelfer* test, that an injunction may be irrelevant or inappropriate where compensation will suffice, is unlikely ever to resolve the issue in the case of a conservation covenant.

Compensatory and exemplary damages

6.104 In the Consultation Paper, having set out our view of when and how injunctions should be available to a responsible body, we then turned to consider damages. Our starting point was the law of contract, which provides for compensatory damages on proof of a breach. In considering a claim for damages, the court should follow the approach set out in *Livingstone v Rawyards Coal Co*:[55] the aim is to put the responsible body in the position it would have been in (so far as money can do so) had the contract been performed.[56] Such an approach would mean that contractual rules of remoteness would also apply.

[53] *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433, [2014] 2 All ER 622, at [123].

[54] Where conservation covenants are concerned, it is possible that the court will have to weigh competing public interests; for example, a conservation covenant to preserve a site as a grass meadow may be breached by the owner of the land in order that it can be used to build affordable housing.

[55] (1880) 5 App Cas 25.

[56] H McGregor, *McGregor on Damages* (18th ed 2009) para 1.023.

6.105 In the context of conservation, however, compensatory damages are likely to be insufficient either to deter or to punish. The problem we identified in relation to injunctions – that the loss suffered by the responsible body may be minimal – also arises in relation to damages. A responsible body will usually not own neighbouring land, and the impact on it of a landowner breaching a conservation covenant may be negligible. The loss to conservation in the public interest, however, may be much more significant. Moreover, environmental and architectural damage may be irreparable; an order for compensatory damages cannot be an adequate remedy for the destruction of ancient woodland or an historic home. We are keen to ensure that landowners cannot evade conservation obligations cheaply by destroying property.

6.106 In the Consultation Paper we therefore considered a more significant remedy: exemplary damages, designed to punish rather than to compensate. We reviewed the key arguments about the use of exemplary damages, noting that concerns have been raised about the use of such a remedy in essentially private, civil matters. We noted *Rookes v Barnard*, which sets out three grounds on which exemplary damages may be claimed:

(1) where there has been oppressive, arbitrary or unconstitutional action taken by servants of the government;

(2) where a defendant's conduct is intended to make a profit which may exceed the compensation payable to the plaintiff; and

(3) where an award of exemplary damages would be expressly authorised by statute.[57]

6.107 We referred to Lord Devlin's description of the second category:

> [Where a defendant] with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object – perhaps some property which he covets – which he either could not obtain at all or not obtain except at a price greater than he wants to put down.[58]

[57] *Rookes v Barnard* [1964] AC 1129, at 1226 to 1227.

[58] *Rookes v Barnard* [1964] AC 1129, at 1227.

6.108 This strikes us as precisely the situation which may arise under a conservation covenant; in rare cases, a landowner may intentionally destroy a heritage building or habitat with a view to constructing a large, profit-making development on that site. Such cases strike at the core purposes of a statutory scheme for conservation covenants, and should expose a landowner to a serious penalty. We thought that a specific provision allowing the court to impose exemplary damages would be appropriate, and we sought views from consultees on the circumstances in which exemplary damages should be awarded.

6.109 We provisionally proposed that, on proof of a breach of a conservation covenant by a landowner, the court should have the power to order:

(1) the payment of compensatory damages to the responsible body; and

(2) the payment of exemplary damages to the responsible body.

We invited consultees' views on the way this remedy should be framed in a statutory scheme, and the circumstances in which such an award should be made.[59]

Response to the consultation

6.110 Responses to this question varied between:

(1) those who gave a single response in relation to the questions (with 28 agreeing or mostly agreeing and one disagreeing); and

(2) those who addressed a particular type of damages, with four expressly in favour of compensatory damages, and three expressly disagreeing with the proposal for exemplary damages.

6.111 There was good support for our proposals, even from consultees who we might have expected would oppose a scheme of compensatory and exemplary damages. Professor McLaughlin told us that the Restatement (Third) of Property in relation to servitudes recommends the use of punitive damages in certain cases relating to conservation easements. We have reproduced the text of paragraph 8.5 of the Restatement in Appendix E, because it provides an interesting discussion of the rationale for various remedies available in the US. The National Trust's response summed up the basis for providing both forms of damages:

> The loss or disadvantage suffered by the responsible body itself as a result of a breach of a conservation covenant could be insignificant, and the loss or disadvantage suffered to public benefit may well be unquantifiable in monetary terms. So we believe it is important that the court should have the power to order exemplary damages in addition to compensatory damages.

[59] Consultation Paper, para 6.51.

6.112 The Berkeley Group, the Central Association of Agricultural Valuers, and the Country Land and Business Association supported our proposal, though all were at pains to express concern at the possibility of widespread usage of exemplary damages. However, they acknowledged that in a small number of cases ("the most serious and flagrant breaches", as the Berkeley Group put it, or "where the perpetrator has committed the act with a view to making a financial gain" in the words of the Country Land and Business Association), exemplary damages should be available. The Central Association of Agricultural Valuers noted recent examples of significant breaches which were analogous to our proposal:

> Examples we have recently heard of include the felling of a tree subject to a Tree Preservation Order, in order to open up coastal views for a residential property; and the ploughing of semi-natural grassland for use as arable land. In both these cases, the intrinsic conservation value is lost and the property owner believes that they stand to gain as a result. It, therefore, seems appropriate that there should be a measure in place which can act as a deterrent to such action and exemplary damages might be one answer.

6.113 A small number of consultees were opposed to the use of exemplary damages: Christopher Jessel, the National Farmers' Union, and Trowers and Hamlins LLP. Christopher Jessel thought that exemplary damages are "of dubious validity and may be subject to challenge"; he was concerned that the court may be reluctant to award exemplary damages.

6.114 Some consultees took the view that, where damages were obtained, statutory provision should be made to ensure the responsible body used the money for conservation purposes. This view was advanced by Professor Reid, the RSPB, Natural England, Link, the Wildlife Trusts and English Heritage. Professor Reid argued:

> There should be a provision on the use of the damages received. Where the covenant holder has limited legal purposes (e.g. a conservation charity), this will be unnecessary, but where it has a broader purpose (e.g. a local authority) there should be a way of ensuring that the award is used for conservation purposes.

6.115 Finally, several consultees confirmed our view that a responsible body would prefer to remedy or prevent a breach in the first instance (which we take to mean via an injunction), and then seek damages where this could not occur.[60] The Forestry Commission thought that "the first priority should be to ensure that things are put right if this can be done", followed by the availability of damages. The Wildlife Trusts agreed that the court should have power to award exemplary damages but said:

[60] This included the Wildlife Trusts, Link, the Forestry Commission, Natural Resources Wales, and the War Memorials Trust.

> The first step should be remedial action by the landowner to try and improve the condition of the site. If this is not possible and the site has been lost, then an equivalent site should be sought and sufficient compensation achieved to secure the site. The Wildlife Trusts would suggest that, following a breach of a conservation covenant, the minimum should be no net loss of coverage and extent of a conservation covenant. Any monetary compensation should be calculated as the cost of recreating the same habitat(s) in the vicinity of the existing conservation covenant. The economic benefits received or realised by the landowner from breaching the covenant should also be considered when calculating the exemplary damages that should be awarded to the responsible body to invest in other conservation projects that provide the public benefit lost when a conservation covenant is breached.

Discussion

6.116 It seems clear that a responsible body should have the ability to seek compensatory damages (though we agree, as some consultees noted, that in most cases the preference will be for an injunction). Our proposal for exemplary damages drew criticism from a small group of consultees, but there was general support for it, including from those who represent landowners. It seemed to be generally acknowledged that, in a very small number of cases, a punitive measure would be appropriate. Such a remedy also acts as an important deterrent against future breaches. We think that making specific provision in a statute will ensure that the court's ability to award exemplary damages is clear.

6.117 As a final point, we do not think it is feasible to set out in statute how a responsible body which is awarded damages must use that money. Although we acknowledge that it is possible that a body which has mixed purposes might not put the damages towards conservation, we return to our earlier argument that in limiting the types and number of responsible bodies, we have managed the risks associated with them as much as possible. All of our proposed responsible bodies have their functions confined in one way or another, and they are all, broadly speaking, required to act in the public interest. The position might be different if, for example, a private sector company acted as a responsible body. In any event, we expect that awards of damages – whether compensatory or exemplary – will be rare.

6.118 There were few comments on the precise circumstances to which exemplary damages should be limited, other than that they should only apply where there had been a very serious or flagrant breach of obligations, or where something could not be replaced or repaired. In any event we do not want to limit the court's ability to consider all of the circumstances of the case. The power to award exemplary damages should not be confined to any particular circumstances.

6.119 We bring our formal recommendations about remedies together at the end of the following section.

LANDOWNER'S REMEDIES

6.120 As noted in Chapter 5, we think that a conservation covenant could be limited to setting out landowner obligations, or could contain both landowner and responsible body obligations. If the latter, then a landowner must have a means of remedying a breach of those obligations (though we think that breaches by a responsible body will be rare). In the event that such action was necessary, we proposed that the law of contract should govern the remedies available; this will include damages, injunctions and specific performance. In some cases we thought other remedies might be available as well: if the responsible body is a statutory or Government body, it might be possible to bring an application for judicial review.[61]

6.121 We provisionally proposed that, on proof of the breach of a responsible body's obligations under a conservation covenant, the court should have the power to order remedies in accordance with general principles of contract law.[62]

Response to the consultation

6.122 This proposal enjoyed strong support from consultees, with 29 agreeing or mostly agreeing with the proposal, and only three disagreeing. Generally those who agreed did not expand on their reasons for doing so. However, the Salmon and Trout Association thought that "for conservation covenants to be attractive to landowners there must be a mechanism for landowners to remedy failings on the part of responsible bodies". And both Charles Cowap and RICS felt that the use of contractual remedies was consistent with the possibility that conservation covenants would enable development of a market in natural goods and services (for example, via payment for eco-system services arrangements).

6.123 Professor McLaughlin disagreed with the proposal: she argued that the position of a responsible body was such that it should be deemed to have a fiduciary obligation in respect of the conservation covenant. To that end she proposed a wider range of remedies to ensure that the public interest was protected. Professor McLaughlin provided examples of cases in the US in which a responsible body had inappropriately modified or discharged a conservation covenant, in contravention of its fiduciary duties. Action had been taken by the State Attorneys-General against the responsible bodies.

6.124 A small number of other consultees proposed that a wider range of remedies should be available to a landowner: Christopher Jessel, Professor Cheever, UKELA and Trowers and Hamlins LLP all advocated this approach. Christopher Jessel argued that remedies should not be limited to contract law:

[61] In the case of charities, in a limited range of serious matters a landowner may raise a complaint with the Charity Commission.

[62] Consultation Paper, para 6.61.

> The distinction between contract, tort, statutory duty and proprietary remedies (for breach of covenant) is again … artificial in the context. A court should have a wide jurisdiction to award any remedy available including declaratory relief. In practice it seems unlikely that most responsible bodies would undertake substantial obligations except possibly regular inspection and supervision. Most grants would be made at the outset. Of course if there is an obligation on the responsible body to make regular or occasional payments they should be enforced like any contract. More difficult is where the responsible body undertakes to provide specialised services such as to give advice or to supply an expert in reconstructing dry stone walls. The landowner would presumably have to take advice or engage an expert elsewhere and that might be difficult or expensive.

Discussion

6.125 Our suggestion that contractual remedies were the most appropriate way for a landowner to enforce the responsible body's obligations was broadly supported by consultees. We think that Professor McLaughlin's proposal would not be feasible, and in any event is directed at a larger problem: the general poor performance of a responsible body (for example in discharging a conservation covenant contrary to the public interest). We have proposed certain safeguards to address the risks posed by responsible bodies (limiting the categories of responsible bodies, and providing for the Secretary of State and Welsh Ministers to list or de-list). Beyond that, we think it would be unnecessarily regulatory and burdensome to treat responsible bodies as having a fiduciary duty in respect of conservation covenants. We are also not persuaded that anything more than ordinary contractual remedies is necessary.

6.126 However, having considered this matter further we consider that the remedies that are available to a landowner should correspond to those that are available to a responsible body to enforce a conservation covenant with the exception of exemplary damages. There is no reason why they should differ. The exception with regard to exemplary damages is not required because of the safeguards built into the provisions for listing responsible bodies and because of the likely nature of responsible body obligations.

6.127 We recommend that on proof of a breach of a conservation covenant, the court should have the power to;

(1) grant a final injunction;

(2) make an order requiring specific performance of a conservation covenant;

(3) order the payment of damages; and

(4) in the case of breach by a landowner, order the payment of exemplary damages.

6.128 We recommend that the court should have the power to grant an interim injunction in respect of an alleged breach of a conservation covenant;

6.129 We recommend that when determining whether an injunction should be granted, the court should be required to take account of the public interest in the performance of the conservation covenant.

6.130 Clause 10 of the draft Bill puts this recommendation into effect.

CHAPTER 7
MODIFICATION AND DISCHARGE

INTRODUCTION

7.1 In this Chapter we consider one of the more challenging aspects of a statutory scheme: when and how should a conservation covenant be modified or brought to an end? In the Consultation Paper we proposed that the responsible body should be able to discharge a conservation covenant unilaterally, and we begin the Chapter by explaining why we have changed our view on this. We then discuss consensual modification by the two (or more) parties to the covenant. Thirdly, we discuss what happens if one party wishes to discharge the covenant or to have its terms changed, but the parties cannot agree. We discuss whether the Lands Chamber of the Upper Tribunal ("the Lands Chamber") is the correct forum for such disputes and, if so, what should be the grounds for modification or discharge. Finally, we consider the circumstances where a conservation covenant may be extinguished by section 237 of the Town and Country Planning Act 1990, and analogous provisions.

UNILATERAL DISCHARGE BY THE RESPONSIBLE BODY

7.2 A conservation covenant may need to be brought to an end where the subject matter of the covenant has changed substantially, perhaps due to climate change or a natural disaster, or because of the behaviour of a species of animal or plant; it is easy to imagine circumstances where no further purpose is served by the covenant. Generally the parties should be able to agree to discharge the covenant in such circumstances; but disagreement could arise.

7.3 In the Consultation Paper we provisionally proposed that unless a conservation covenant expressly provided otherwise, the responsible body might unilaterally discharge the obligations contained in it.[1]

7.4 We observed that other jurisdictions allow a responsible body to discharge a conservation covenant in this way; some Australian states provide for this where the covenant has become unnecessary or its purposes can no longer be achieved on the land.[2] In Scotland, a conservation burden can be discharged if the responsible body registers a deed of discharge against the burdened property.[3] We noted that there were disadvantages in allowing unilateral discharge, but we felt that our proposal to limit responsible bodies would act as a safeguard of the public interest in conservation covenants.

[1] Consultation Paper, para 7.10.

[2] See for example Nature Conservation Act 1992 (Queensland), s 47(2)(a).

[3] Title Conditions (Scotland) Act 2003, s 48.

7.5 We invited consultees' views on whether the responsible body's ability to discharge should be limited to certain circumstances, and, if so, what circumstances would be appropriate.[4]

Response to the consultation

7.6 This was one of the few proposals which provoked strong disagreement from consultees. Only eight agreed entirely with the proposal, with a further 11 agreeing with some qualification; and 18 disagreed.[5] A key argument against our proposal was that unilateral discharge by a responsible body – where a landowner had not been consulted – was inconsistent with the parties' "consensual relationship" (in the words of the Institute for Archaeologists). This point was raised by the Berkeley Group, the Central Association of Agricultural Valuers, the Institute for Archaeologists, South West Water, Trowers and Hamlins LLP, the Agricultural Law Association, the Game and Wildlife Conservation Trust, the Wildlife Trusts, and the Country Land and Business Association.

7.7 The Central Association of Agricultural Valuers argued:

> The covenant is essentially a contract freely entered into by the parties and on which they can both expect to rely. It should not be capable of unilateral repudiation but should only be able to be discharged by agreement or on application to the Lands Chamber. The examples we have in mind of eco-system services and off-setting are likely to require significant and long term changes to the land which the landowner will undertake or allow in reliance on the terms of the covenant. It would not only be outrageous for the grantee (a "responsible" body perhaps) to walk out of the agreement but it would undermine the basis for confidence in the entire regime if the party that had changed its land use was so exposed.

[4] Consultation Paper, para 7.11.

[5] Those who agreed, or agreed with qualification, included Merthyr Tydfil Partnership, the AONB Team at Denbighshire County Council, the National Farmers' Union, officials from Warwickshire County Council, Derbyshire County Council, the Woodland Trust, English Heritage, Natural Resources Wales, Christopher Jessel, Dr Nsoh, Charles Cowap, the Institute for Historic Building Conservation, the Salmon and Trout Association, the Bar Council, Natural England, RICS, the Wildlife Trusts, Link, and the National Trust. Those who disagreed included the British Mountaineering Council, Professor McLaughlin, Professor Cheever, Professor Reid, the Berkeley Group, the Ramblers, the Open Spaces Society, the Central Association of Agricultural Valuers, the Institute for Archaeologists, Robert McCracken QC, UKELA, the RSPB, the War Memorials Trust, South West Water, Trowers and Hamlins LLP, the Agricultural Law Association, the Game and Wildlife Conservation Trust, and the Country Land and Business Association.

7.8 Some of the concerns related specifically to responsible bodies whose purposes were not solely conservation-related. Professor Reid and Dr Nsoh thought that certain responsible bodies would be subject to conflicting pressures, making them more likely to discharge a conservation covenant. Professor McLaughlin thought this concern related to all responsible bodies, as all would be subject to pressure for development of limited land resources. On the other hand, some consultees agreed that the proposal to limit responsible bodies (and in particular not to include for-profit, private companies) meant that unilateral discharge was appropriate; this point was made by Christopher Jessel and Natural England.

7.9 In responding to both questions, several consultees argued that further oversight would be needed if unilateral discharge was available; this might involve gaining the approval of a court, tribunal, or public body, or via a requirement for public notification and/or consultation. Those in favour of further oversight included Professor Cheever, Dr Nsoh, Robert McCracken QC, UKELA, the Institute for Historic Building Conservation, Natural England, the Salmon and Trout Association, the RSPB, the Bar Council, and Link. Alternatively, a backstop approach was advocated by the Woodland Trust and Link; Link argued in favour of providing for a "holder of first resort" in the conservation covenant – another responsible body nominated to take it over in certain circumstances.

7.10 The Wildlife Trusts nonetheless thought unilateral discharge should be limited to certain circumstances (such as where catastrophic damage has occurred to a site rendering the conservation covenant ineffective). Professor McLaughlin, Charles Cowap and RICS thought that further provision would be needed requiring the responsible body to compensate a landowner where it had discharged a conservation covenant. There was a small group in favour of a public interest test when a conservation covenant was to be discharged unilaterally; this was suggested by the Salmon and Trout Association, English Heritage, and Natural Resources Wales. In a similar vein, Christopher Jessel suggested the possibility of a responsible body certifying that release of the conservation covenant was in the public interest. He also made the pragmatic point that release of a conservation covenant should be registered.

7.11 Some consultees were unconvinced that there should be significant limitations on the circumstances in which a responsible body could discharge a conservation covenant. The British Mountaineering Council and the Ramblers argued the case for general circumstances to be developed through case law. Both the National Farmers' Union and officials from Warwickshire County Council thought that non-statutory guidance would be sufficient, whilst the Agricultural Law Association thought it would be "extraordinarily difficult to compose a series of circumstances which might be permissible".

7.12 Finally, we note the response of the National Trust:

> The National Trust agrees that a responsible body should have the ability to unilaterally discharge "certain" obligations contained in a conservation covenant. A responsible body should have the ability to unilaterally discharge obligations which fall to be observed by the covenantor for the time being or any other third party. A responsible body should not have the ability to unilaterally discharge any obligation which it has to perform or observe itself.

This would be analogous to the National Trust's approach to managing covenants in its favour under section 8 of the National Trust Act 1937. The National Trust regards itself as legally free to discharge stipulations in such covenants, or to relax them. However, and particularly where the covenants had been secured with public support (financial or otherwise), the National Trust would want to make sure it was taking account of legitimate expectations on the part of its supporters and others, and that it was able to articulate clearly why such discharge or relaxation was appropriate.

Where there are any obligations under a conservation covenant which a responsible body cannot unilaterally discharge, the responsible body should have the ability to apply to the Lands Chamber to modify or discharge their obligations under a conservation covenant. It would be unreasonable for a responsible body to be bound indefinitely by an obligation in a conservation covenant where it no longer serves to protect a conservation asset.

Discussion

7.13 The question of whether responsible bodies should have the power to discharge a consultation covenant unilaterally was a controversial one. A number of consultees were concerned that the proposal was at odds with the general aim for conservation covenants to be consensual and could undermine arrangements made for the public good. There are counter-arguments against that view. A conservation covenant is not a *wholly* consensual arrangement; not least because it will bind subsequent landowners whether they agree or not. And in some cases the public interest might favour allowing a responsible body to discharge a conservation covenant unilaterally, rather than taking further burdensome steps to continue to operate it or to seek permission to discharge it.

7.14 Instances of unilateral discharge would probably be few. We are recommending that a responsible body will be able to transfer a conservation covenant to another responsible body; so in circumstances where the reason why discharge is wanted is not the redundancy of the covenant but the difficulties faced by the responsible body, the body is likely to be keen to transfer the covenant rather than discharge it; the select group of organisations which will be responsible bodies are all likely to favour conservation efforts wherever possible.

7.15 Nevertheless, we accept that there is a risk that unilateral discharge could take place in circumstances where the covenant was still providing a conservation benefit. There may be a particular risk of unilateral discharge where a responsible body has competing resource demands. That may especially be the case with local authorities or central Government who may face difficult decisions prioritising public funding.

7.16 We are also troubled by the situation where a conservation covenant includes both landowner and responsible body obligations. We can see the potential risk for conflict in allowing a responsible body to discharge its own obligations. For example, a conservation covenant may provide for payments to the landowner in return for the latter's obligations; it would clearly be unfair to allow the responsible body to avoid its obligations by ending the covenant. It would be possible for a landowner to exclude unilateral discharge in cases such as these by express provision when the conservation covenant was created; alternatively, any specific obligations and payments could be (and, as we have observed elsewhere, generally would be) included in a separate management agreement. But that could not entirely preclude the possibility of a landowner acting to his or her detriment under a conservation covenant that was subsequently unilaterally discharged by the responsible body.

7.17 We have concluded that the availability of unilateral discharge has the potential to undermine confidence in the conservation covenants scheme. In many cases conservation covenants will have been entered into by a landowner for solely philanthropic reasons and will represent a significant commitment to conservation by the landowner. We are concerned that to permit unilateral discharge by a responsible body could seriously risk landowner engagement.

7.18 We do not think that the answer is to impose controls on the exercise of a power of unilateral discharge. Whilst oversight (such as seeking the approval of a court or tribunal for a discharge, or requiring a public consultation) is theoretically attractive, we consider that these steps would be disproportionately burdensome for a responsible body.

7.19 We think the better course is for the responsible body only to be able to discharge the conservation covenant unilaterally if provision is expressly made for that in the terms of the conservation covenant. The ability for the parties to provide for this – either generally, or in the form of review and break clauses – meets the concern that responsible bodies would in some cases be otherwise reluctant to enter into covenants. The need for responsible bodies to consider requesting a power of unilateral discharge when negotiating the terms of the agreement should be noted in guidance. Landowners, equally, would need to consider whether to accept such a provision.[6]

7.20 We recommend that a responsible body should only be able to discharge a conservation covenant unilaterally if express provision is made to that effect in the terms of the conservation covenant.

MODIFICATION AGREED BY THE PARTIES

7.21 In the Consultation Paper we provisionally proposed that the parties to a conservation covenant for the time being might agree to modify it.[7]

[6] The terms of such a provision would have to specify the procedure for unilateral discharge (including, for example, the need to notify the relevant local land charges registrar), as well as any restrictions upon the circumstances in which it might take place.

[7] Consultation Paper, para 7.16.

7.22 We made that proposal in the context of our views about unilateral discharge, reasoning that although discharge might be achieved unilaterally it would not be appropriate for the terms of the conservation covenant to be amended without agreement. Having now rejected the idea that the responsible body might be able to discharge a conservation covenant unilaterally (except where the terms of the covenant enable it to do so), we have to consider whether the parties should be able to modify or to discharge the conservation covenant by agreement.

7.23 In this context we have to consider the competing priorities of flexibility for the parties, and protecting the conservation interest. The parties can define the scope of their obligations in a conservation covenant, so it should also be possible for them to change or, by agreement, discharge those obligations. Such steps should not be taken merely for convenience, in view of the public interest in conservation. Once a conservation covenant has been created, the parties have in a sense signed up to the public interest in their conservation project, and should not later ignore that.

7.24 There is a varied approach to this issue in the other jurisdictions we have looked at; several allow the parties to modify a conservation covenant between themselves, but some American states limit the ability to do this, or impose a public interest test. This latter approach also appears to be the case for New Zealand open space covenants. Our provisional view in the Consultation Paper was that limiting the range of responsible bodies, and subjecting them to the further test of inclusion on a list made by the Secretary of State or Welsh Ministers, would guard against the risk of inappropriate modification.

Response to the consultation

7.25 Twenty-two consultees were wholly in support of our proposal, along with 12 who agreed with some qualification; and only five disagreed with what we had proposed. A number simply agreed without explaining why.[8]

7.26 Charles Cowap and RICS thought that this form of modification was essential to account for natural changes over time, and the dynamic nature of land management. The Wildlife Trusts, supporting our proposal, referred to the unpredictability of natural systems which would require flexibility; and the National Trust noted that changes brought about by the covenant itself might necessitate a change to the agreed obligations. The RSPB, which agreed with our proposal, made the important point that agreed modification might need to be limited in the case of biodiversity offsetting, where greater rigidity is needed to ensure the permanence of the offset site.

[8] This included the Land Trust, the Berkeley Group, the Institute for Archaeologists, officials from Warwickshire County Council, Natural England, South West Water, Trowers and Hamlins LLP, Derbyshire County Council, the Agricultural Law Association, the Game and Wildlife Trust, and the Country Land and Business Association.

7.27 Some consultees thought that agreed modification should be allowed within certain limits. One suggestion was that modifications should be able to be agreed so long as they fulfilled the ultimate purpose of the conservation covenant.[9] Alternatively, Christopher Jessel, the Salmon and Trout Association, Link, and English Heritage thought that modifications should be allowed so long as they were in the public interest. Christopher Jessel also argued that modification in this way should be registered.

7.28 A range of other steps to limit the ability to modify were proposed. Robert McCracken QC (who disagreed with our proposal) thought that public participation and approval by Natural England were necessary. UKELA agreed with us, but argued that modification should be subject to non-statutory guidance and public participation; the Bar Council, the War Memorials Trust and the AONB Team at Denbighshire County Council also favoured some form of advertising, publication or consultation process for significant modifications. Natural Resources Wales simply thought there should be "a good reason" for a modification beyond the convenience of the parties. And the Central Association of Agricultural Valuers, agreeing with our proposal, nonetheless thought that if a responsible body proposed modifying a conservation covenant, a landowner should be given a notice suggesting that they take advice before agreeing.

7.29 Professor Reid remained concerned that giving the parties a free hand would render the conservation interest vulnerable to the interests of the parties. Professor Cheever argued that modifications should be limited to those which do not affect the conservation values of the covenant, worrying that otherwise the conservation covenant would be vulnerable to the "death of 1000 cuts" as provisions are modified incrementally over time.

Discussion

7.30 We have not required the parties to include a statement of purpose in a conservation covenant (though we think in many cases they will), so it would be difficult to require them to agree modifications within the purposes of the covenant. We also do not want to prevent new conservation purposes being achieved within an existing conservation covenant. We have set out elsewhere the purposes for which a conservation covenant can be created;[10] this includes ensuring that the conservation covenant serves public, rather than private, interests. This would also be the case for any modification to a conservation covenant; it must continue to serve the public interest, otherwise it will not be a valid conservation covenant.

[9] Made by Merthyr Tydfil Partnership, Professor McLaughlin, Professor Cheever, the Ramblers, the British Mountaineering Council, and the Open Spaces Society.

[10] See para 3.38, above.

7.31 As to the arguments advanced in favour of a further form of oversight (such as public participation), we do not think that the case for this is strong. Where a responsible body and a landowner can agree, it is reasonable to expect sufficient protection of the landowner against inappropriate new burdens, and preserve the conservation and public good element of the covenant. More generally, it is necessary to allow agreed modifications to a conservation covenant to ensure that they remain sufficiently attractive to both landowners and responsible bodies; there is no value in a system which cannot be flexible enough to account for changed circumstances. Whilst we acknowledge concerns that excessive modification might de-value a conservation covenant, allowing the parties flexibility is important, and there are checks and balances in place to guard against inappropriate modification.

7.32 We were interested in the Central Association of Agricultural Valuers' proposal that landowners should be encouraged to take advice before agreeing a modification. Whilst we do not want to make this mandatory, this is a sensible suggestion to incorporate in guidance to responsible bodies. It also reflects comments made to us by conservation charities such as the National Trust, which emphasised the need to work in collaboration with landowners.

7.33 We note the point made by the RSPB, that further provision might be needed in respect of biodiversity offsetting schemes (where extensive modification might not be appropriate). This is another issue which Defra will need to consider in its determination about how offsetting is to be delivered.

7.34 We recommend that the parties to a conservation covenant for the time being may agree to modify it.

7.35 Clauses 13, 14 and 15 of the draft Bill relate to consensual discharge and modification. Clauses 13 and 14 allow the parties to bring obligations under a conservation covenant to an end, by agreement in writing. Clause 15 enables the modification of obligations, again by agreement in writing (clause 15(3)), and ensures that modifications take effect not only between the parties to it but are also effective against later owners of the land or of interests in it (clause 15(4)). However, the clause does not enable the parties to make a modification that results in a provision which – if it had been part of the agreement in the first place – would not have been a qualifying term of the conservation covenant[11] (in the language of the draft Bill) in the first place. An example might be a provision that could not have been regarded as being for the public good.

7.36 When a conservation covenant is modified or discharged, the responsible body will be under a duty to ensure that the local land charges register is also updated.[12]

[11] That is, a provision that would not have fallen within clause 1(2)(b) and would therefore not have been given effect to by clause 4.

[12] The originating authority in relation to a local land charge is required to supply to the registering authority information about the variation or modification of a charge so that the register can be amended see rule 8(2) of the Local Land Registration Rules 1977, SI 1977 No 985.

ADJUDICATION BY THE LANDS CHAMBER

7.37 We have to address the position where one party to a conservation covenant wants to discharge it or to modify its terms and the other does not agree. We consider who should be able to apply, the grounds for modification and discharge, and the possibility of compensation. We also address the possibility that the parties to a conservation covenant may need a judicial declaration as to its status.

The forum for adjudication

7.38 As we explained in the Consultation Paper, the Lands Chamber is an obvious forum for adjudication of such disputes, because it already has an analogous jurisdiction under section 84(1) of the Law of Property Act 1925. That section gives the Lands Chamber power to modify or discharge restrictions, whether arising from a covenant or otherwise, that affect land,[13] on application by any person interested in the affected land.[14] In our earlier Report on Easements, Covenants and Profits à Prendre ("the Easements Report"), based on strong consultee support, we proposed that the jurisdiction of the Lands Chamber should be extended to allow consideration of land obligations.[15]

7.39 Accordingly, we provisionally proposed that the Lands Chamber should have the power to determine applications for the modification and discharge of statutory conservation covenants.[16]

Response to the consultation

7.40 There was strong support for this proposal. Twenty-seven consultees agreed, with a further eight agreeing with some qualification. Only two consultees disagreed. The Central Association of Agricultural Valuers, Charles Cowap, RICS and the Game and Wildlife Conservation Trust noted that the Lands Chamber had the requisite expertise to consider applications of this nature. On the other hand, Robert McCracken QC argued that there should be no such power, but if it was to be exercised Natural England should adjudicate; he felt that the expertise of the Lands Chamber lay in development rather than conservation.

7.41 A small number wondered whether the Property Chamber of the First-tier Tribunal would be more appropriate: this was suggested by Professor Reid, Charles Cowap and RICS. Professor Reid thought that this might offer greater accessibility whilst limiting expense to the parties.

[13] That is, freehold land, or leaseholds granted for a term of over 40 years of which 25 or more have expired: s 84(12).

[14] This relates to any type of interest, including mortgagees, option holders and purchasers under uncompleted or conditional contracts: A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (4th ed 2013) paras 16.31 to 16.48.

[15] Easements Report, para 7.35.

[16] Consultation Paper, para 7.48.

7.42 The Property Bar Association wondered if there might be value in bringing applications relating to a section 106 obligation into the jurisdiction of the Lands Chamber as well; section 106 obligations would often be entered into alongside conservation covenants, and could usefully be dealt with together.

Discussion

7.43 We met Mr Justice Lindblom, the President of the Lands Chamber. He indicated that he is content with the proposal in the Consultation Paper. It seems clear that consultees are supportive of the Lands Chamber as the appropriate venue.

7.44 At this stage we do not think that the First-tier Tribunal is the appropriate venue, because section 84(1) disputes remain with the Lands Chamber, and because of the finely-balanced issues in play in respect of conservation covenants.

7.45 It is not within the scope of this project to suggest amendment of the way section 106 obligations may be amended or discharged, as the Property Bar Association suggested.

Who may apply to the Lands Chamber?

7.46 Clearly a landowner will need to be able to apply to the Lands Chamber to modify or discharge a conservation covenant, if a responsible body will not agree. But would a responsible body also need the ability to apply? In the Consultation Paper we argued that to allow such applications would be an unacceptable burden on landowners. We said that if a responsible body wished to modify a conservation covenant it must agree revised terms with the landowner. At that stage we took the view that a responsible body might unilaterally discharge the conservation covenant; so we felt that it was unnecessary to make provision allowing a responsible body to apply to the Lands Chamber to modify or discharge a conservation covenant.

7.47 We provisionally proposed that it should not be possible for a responsible body to apply to the Lands Chamber for modification or discharge of a conservation covenant.[17]

[17] Consultation Paper, para 7.71.

Response to the consultation

7.48 A majority of consultees were against our proposal; 18 disagreed with it,[18] whilst 11 supported, or partly supported it[19] (and three were uncertain). The Berkeley Group and the Salmon and Trout Association, which both agreed with our proposal, thought that modification by the Lands Chamber, at the request of the responsible body, would move away from the consensual nature of the agreement. On the other hand, UKELA, Trowers and Hamlins LLP, Derbyshire County Council, and the Agricultural Law Association all indicated that fairness between the parties demanded that the responsible body should have the right to apply. Professor Reid, Professor McLaughlin, and Dr Nsoh all supported a responsible body's right to apply to the Lands Chamber, but this was in the context of a wider argument against agreed modification by the parties, which they felt lacked the necessary oversight.

7.49 Some consultees gave examples of when a responsible body would need to apply. The Central Association of Agricultural Valuers referred to a situation in which the conservation covenant's terms were not delivering its overall aims, or an income payment by a charity was no longer feasible; this latter point was also made by the National Trust. Both the Wildlife Trusts and Link (which both disagreed with our proposal) thought that provisions in respect of access might be sought by a responsible body. But the Central Association of Agricultural Valuers, Charles Cowap, and RICS cautioned that modification should not increase the burden on a landowner.

7.50 Several consultees also made the link with our proposal to allow a responsible body unilaterally to discharge a conservation covenant. English Heritage, the Institute for Archaeologists, Charles Cowap and RICS all agreed with the proposal, on the basis that a responsible body would still be able to discharge the whole agreement if necessary. However, the Country Land and Business Association thought that our position on unilateral discharge was inconsistent with use of the Lands Chamber for modification on the application of a landowner, and argued for a responsible body to be able to apply as well.

[18] Including the British Mountaineering Council, the AONB Team at Denbighshire County Council, Professor McLaughlin, the Land Trust, the Ramblers, Robert McCracken QC, Dr Nsoh, UKELA, Derbyshire County Council, the Agricultural Law Association, Link, and the National Trust.

[19] Including Merthyr Tydfil Partnership, the Berkeley Group, the Open Spaces Society, the Institute for Archaeologists, the National Farmers' Union, the Salmon and Trout Association, the RSPB, the Forestry Commission, the Bar Council, Natural England, South West Water, the Woodland Trust, English Heritage, and Natural Resources Wales.

Discussion

7.51 Because we do not recommend that responsible bodies should be able to discharge a conservation covenant without the landowner's agreement, and in the light of consultees' comments, we now take the view that both the landowner and the responsible body will need to have the ability to apply to the Lands Chamber for modification or discharge. We have contemplated further scenarios where such an application might be needed, such as where land is subdivided, or where conservation covenants contain obligations which fall to a responsible body.

Relevant factors on an application to the Lands Chamber

7.52 On what grounds should such applications be granted? Although it is tempting to use the provisions of section 84 of the Law of Property Act 1925, relevant to the modification and discharge of restrictions, as a starting point, it seems clear that something specifically designed for conservation covenants is required. We argued in the Consultation Paper that the Lands Chamber should look at an application in the light of a number of equally weighted factors, balancing an applicant's private rights against those of the public.

7.53 The Scottish legislation requires the Lands Tribunal to consider all of the circumstances, weighing them up as a whole,[20] but does not include factors specific to conservation; this same approach exists in respect of some of the Australian conservation covenant schemes, and has been criticised there. We proposed that a clearer articulation of factors relating to conservation was needed for conservation covenants.

7.54 In the Consultation Paper we provisionally proposed that on the application of a landowner, the Lands Chamber may modify or discharge a conservation covenant where it is reasonable to do so, having regard to all of the circumstances and in particular the following matters (where relevant):

(1) changes in circumstances since the conservation covenant was created (including changes in the character of the property or the neighbourhood);

(2) the extent to which the conservation covenant confers a benefit on the public;

(3) the extent to which the purposes for which the conservation covenant was created, or any other purposes for which a conservation covenant may be created, are served by the conservation covenant;

(4) the extent to which the conservation covenant prevents the landowner's enjoyment of the land;

(5) the extent to which it is practicable or affordable for both the landowner and future landowners to comply with the conservation covenant; and

[20] See section 100 of the Title Conditions (Scotland) Act 2003, and *George Wimpey East Scotland Ltd v Fleming* 2006 SLT (Lands Tr) 2.

(6) whether the purposes for which the conservation covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged.[21]

7.55 We felt that change of circumstances would be the most likely reason for needing to change or discharge a conservation covenant. We drew the scope of this widely, but suggested it should include the specific examples of changes in the character of the property or the neighbourhood, as these were familiar grounds for consideration under section 84(1).

7.56 The next two factors reflected the need to consider the current status and function of the covenant in the light of the key elements required to be present at its creation. So we wanted the Lands Chamber to assess whether the covenant was still benefiting the public, and whether it continued to serve one or more of the purposes for which it was created.

7.57 Factors 4 and 5 emphasised the need for a balance between private rights and the public benefit. We suggested that the Lands Chamber should consider the landowner's right to enjoyment of the land, as well as the practicability and affordability of continuing the obligations for the current and future landowners. Our focus was on the objective feasibility of compliance with obligations rather than with the individual circumstances of a landowner, although we did think that genuine hardship would be relevant.

7.58 Finally, in factor 6, we contemplated the potential for incorporating a "no net loss" approach to conservation in the factors to be considered. A landowner could apply for discharge where the same conservation purposes could be achieved by an alternative scheme on a different site which he or she owned. But we cautioned that the public benefit in conservation covenants must not be lost, and this ground should be limited to cases where it was possible for the landowner to create a new conservation covenant on another property to an equivalent extent and within the same period of time, to make up for the covenant to be discharged.

[21] Consultation Paper, para 7.63.

Response to the consultation

7.59 Considering those who responded to the whole proposal, the figures suggest a majority supported it, with 28 supporting it in whole or in part,[22] and only four against. But this is slightly misleading, as several consultees addressed the six different factors, or some of them, and for these responses the picture is more mixed.

7.60 A small number of consultees raised general objections. The AONB Team at Denbighshire County Council thought that modification or discharge should be subject to statutory consultation. Robert McCracken QC disagreed with the entire proposal, and thought the circumstances were far too broad, whilst Trowers and Hamlins LLP advocated use of the factors set out in section 84(1) (consistent with their preference for restrictive freehold covenants). The Forestry Commission was content with the list but thought it should be weighted in favour of conservation. Similarly, Natural England disagreed with the proposal as framed. It advocated a presumption against modification or discharge where this was opposed by the responsible body, and was concerned that the existing proposal was too heavily weighted in favour of discharge at the request of the landowner.

7.61 Link and the Wildlife Trusts, which both disagreed with the proposal, also thought our model was wrong, but in a different way. They said that only factor (5), in relation to affordability and practicability would benefit from independent consideration; all other factors should be a matter for negotiation with the responsible body. Professor Farrier objected to the use of "reasonableness", arguing that it was too flexible, and only imperative reasons of overriding public interest should lead to modification or discharge. The RSPB focussed on the application of these factors in the context of biodiversity offsetting. It argued that factors (4), (5) and (6) were entirely inappropriate where a conservation covenant had been used to create an offset site. This was because offset sites require a high level of permanence and stability. A replacement conservation covenant would also not be suitable until the new site (the offset for the offset, so to speak), had reached the same level of biodiversity or conservation value as that which it was replacing; this could take an extremely long time.

7.62 Two other points of interest were noted in relation to our general proposal. Renewable UK was concerned about the difficulty which might arise where planning permission was granted for the creation of renewable energy infrastructure (for example a wind turbine) over a site which was subject to a conservation covenant. It argued that the Lands Chamber should consider the public interest in allowing wind turbines to be erected, "because the public needs electricity"; and it noted that in guidance relating to the release or exchange of common land, wind turbines are provided as an example of a reason in the public interest.

[22] Consultees who supported all six proposed factors included the Country Land and Business Association, the Woodland Trust, the Game and Wildlife Trust, RICS, South West Water, the Bar Council, the Institute for Historic Building Conservation, officials from Warwickshire County Council, the National Farmers' Union, the Central Association of Agricultural Valuers, the Open Spaces Society, the Berkeley Group, the Land Trust and Merthyr Tydfil Partnership. Professor Reid and Dr Nsoh also supported the six factors, but added further suggestions in respect of factor (6) which we address below.

FACTOR (1) – CHANGE IN CIRCUMSTANCES

7.63 Consultees seemed generally content with this factor, and did not mention it in their responses; even those who disagreed with other grounds seemed to accept that this was a sensible inclusion. Three comments are worth noting here.

(1) The Institute for Archaeologists felt it would be helpful to make clear that a change of circumstances was not limited to physical changes, but might include changes of learning about conservation or development practice.

(2) The National Trust proposed that consideration of a change of circumstances should be limited to changes which directly and adversely affect the conservation asset.

(3) Professor Farrier thought it should be possible to modify or discharge a conservation covenant in light of environmental changes, such as those caused by climate change.

FACTOR (2) – THE EXTENT TO WHICH THE CONSERVATION COVENANT CONFERS A BENEFIT ON THE PUBLIC

7.64 Of the consultees who addressed the factors individually, this proposed factor was supported by 10 consultees,[23] but provoked no specific comments; it was opposed by only Robert McCracken QC (who did not explain his reasoning). The National Trust suggested extending this factor to cover the extent to which the conservation covenant is likely in the future to confer a benefit on the public.

FACTOR (3) – ACHIEVING THE PURPOSES FOR WHICH A CONSERVATION COVENANT CAN BE CREATED

7.65 Likewise, amongst consultees looking at individual factors, 10 supported this proposal,[24] and one (Robert McCracken QC) opposed it. The National Trust, which agreed it should be included, suggested extending it to include "the extent to which the purposes "are likely to be served" by the conservation covenant.

FACTOR (4) – THE LANDOWNER'S ENJOYMENT OF THE LAND

7.66 This proposed factor came in for particular criticism from consultees, with the British Mountaineering Council, Professor McLaughlin, Christopher Jessel, the Salmon and Trout Association, Natural England, Link, the National Trust, English Heritage, Natural Resources Wales, and Professor Farrier all expressing varying degrees of concern.

[23] Christopher Jessel, UKELA, the RSPB, Professor Reid, the Institute for Archaeologists, Dr Nsoh, the Agricultural Law Association, the Salmon and Trout Association, English Heritage, and the National Trust.

[24] Christopher Jessel, UKELA, the RSPB, Professor Reid, the Institute for Archaeologists, Dr Nsoh, the Agricultural Law Association, the Salmon and Trout Association, English Heritage, and the National Trust.

7.67 At least seven consultees thought it was inappropriate for a landowner to subsequently seek changes or the removal of a conservation covenant where he or she had created it, or bought the land knowing of the obligations. Consultees felt that the landowner had already expressed a willingness to limit his or her own enjoyment, and should not be allowed to resile from that. Professor Farrier asked "why should a future purchaser who buys land with full knowledge that his or her wishes to use it in particular ways are blocked by a conservation covenant be able to argue … that his or her "enjoyment" of the land is thereby affected?" English Heritage thought the better principle to be "that a degree of limitation on enjoyment is accepted … but … where this is to increase, perhaps through change of circumstances in the nature of management, then factor (4) may come into play".

FACTOR (5) – PRACTICABILITY AND AFFORDABILITY FOR THE LANDOWNER AND FUTURE LANDOWNERS

7.68 This provoked a strong negative response from a number of consultees.[25] Christopher Jessel thought the law should not have regard to the impecuniosity of a landowner, arguing that "if the landowner cannot afford to perform the covenant then the land should be sold or given to someone who can". Professor Farrier reiterated that a person considering taking on a conservation covenant should assess the practicability and affordability of compliance first. In any event, he asked "why would the original covenantor have agreed to a covenant with which it was impracticable to comply (unless this is a reference to changed environmental circumstances)"? The National Trust thought that practicability and affordability should be assessed against "the significance, heritage value and importance of the conservation asset in question".

FACTOR (6) – ACHIEVING THE SAME CONSERVATION PURPOSES ON A DIFFERENT SITE

7.69 Consultees were divided on this proposal: five supported it, or supported with some qualification,[26] whilst five disagreed with what we suggested.[27] One concern was that this factor was only relevant to environment sites; the Institute for Archaeologists and English Heritage pointed out that a "like for like" replacement would not be available in respect of an historic site. UKELA supported the inclusion of this factor, but suggested a guidance framework would be helpful. But Christopher Jessel's experience of the Lands Chamber suggested it did not have sufficient expertise to craft a new conservation covenant or scheme; he thought specialist advice would be needed from, for example, English Heritage or Natural England.

[25] Of those addressing the factors individually, Professor Farrier, Professor McLaughlin, Christopher Jessel, Robert McCracken QC, UKELA, the Salmon and Trout Association, Natural England, and the National Trust all took issue with this aspect of the proposal; though Professor Reid, Link, the Institute for Archaeologists, Dr Nsoh, and English Heritage supported it.

[26] The National Trust, the Salmon and Trout Association, Professor Reid, the Institute for Archaeologists, and UKELA.

[27] Christopher Jessel, Professor Hodge, Robert McCracken QC, Dr Nsoh, and English Heritage.

7.70 Professor Reid and Dr Nsoh were concerned to ensure that any replacement scheme was in place before the covenant was released. Professor Hodge advanced the following argument:

> This may in principle be a reasonable case, but there is a clear risk. This goes back to the earlier point that the value of a covenant depends on the threat that the value could be lost. Thus even if the conservation value of the alternative is regarded as being the same, the value of a covenant over it will only be the same if it is facing the same level of threat. And this is unlikely to be the case by definition because someone is seeking to remove the covenant in the former case and willing to accept one in the latter. Thus it would seem preferable that this modification or discharge should not be permitted unless the conservation gain from the alternative site is clearly superior or it is subject to a demonstrably equivalent or greater level of risk that is being resisted by the presence of the covenant. Of course, this argument applies equally to offsetting more generally.

Discussion

7.71 A preliminary issue is that several consultees thought that the factors considered by the Lands Chamber should be more heavily weighted towards conservation, with a presumption against modification or discharge. We take these arguments seriously, because the core purpose of the statutory scheme we propose is conservation itself. However, we cannot rule out the possibility that there may be genuine and entirely appropriate reasons unrelated to conservation which favour changing or removing a conservation covenant, or that the public interest itself may favour granting a landowner's application.

7.72 Turning to the first factor, most consultees seemed to acknowledge the need for the Lands Chamber to take account of changes of circumstances. We think the issues raised by the Institute for Archaeologists and Professor Farrier would be included within "changes of circumstances", and do not need to be specifically referred to. We are not persuaded that changes should be limited to those which affect the conservation asset, as the National Trust suggested.

7.73 Likewise, consultees supported inclusion of the second and third factors: assessing the extent to which the conservation covenant conferred a benefit on the public, and the extent to which it achieved the purposes for which a conservation covenant can be created. We do not think the extra words suggested by the National Trust, relating to future conferral of a benefit or achieving purposes in the future are necessary; we think the wording we recommend, below, is sufficient to encompass the future.

7.74 Turning to the fourth factor, consultees were clearly unhappy with our suggestion that the Lands Chamber should consider the landowner's enjoyment of the land; even where this was just one factor amongst many that it would be required to consider. We agree with consultees that where a landowner willingly enters into a conservation covenant, or takes on land which is subject to a conservation covenant, a simple change of heart should not be sufficient to allow an application to modify or discharge to succeed. Nor indeed should any factor personal to the individual landowner. This is also true in the case of our fifth proposed factor (the practicability and affordability, for the landowner and future landowners, of complying with the conservation covenant).

7.75 But we want to ensure that changes, particularly those that were unforeseeable when the covenant was created, or are beyond the control of the landowner, are accounted for. This might include situations which restrict his or her enjoyment of the land in a way that was not contemplated when the covenant was created, leads to a new and unexpected expense, or prevents the performance of other legal obligations from being feasible. This means that the Lands Chamber can consider, for example, a significant increase in the cost of delivering a positive obligation as a result of a change to the climate; or where continuation of certain conservation obligations on one part of a farm would prevent a farmer from working on other parts. Our recommendation below (at paragraph 7.79) reflects this, by restricting consideration of the landowner's enjoyment, or the affordability and practicability of the performance of the covenant, to cases where circumstances have changed.

7.76 Our sixth proposed factor for consideration related to the possibility that a conservation covenant's purposes could be achieved on a different site, where it is possible to create a new conservation covenant in substitution for the covenant to be discharged. We acknowledge that these are likely to be rare cases. As consultees pointed out, this factor will not be possible for heritage properties.

7.77 In terms of "like for like" substitution we acknowledge the concern raised by Professor Hodge. At the point of a Lands Chamber application, it may be difficult, perhaps impossible, to know whether efforts under a conservation covenant on a replacement site will achieve the same level of conservation on the site whose covenant is to be discharged. Ultimately this will be a matter for consideration by the Lands Chamber (which will consider this factor amongst others and in all the circumstances of the case). It is likely that a landowner would have to mount an extremely convincing case, accompanied by extensive evidence about the replacement site he or she owns, in order to succeed in this scenario. But inclusion of this factor may also mean that the creation of substitute sites is offered as part of an application where they would otherwise not exist; that is, to strengthen an application for discharge.

7.78 Finally, the RSPB pointed out that different provision may be needed in the case of an offsetting site; in effect, that a stronger and more permanent system of conservation covenants is needed for this particular scenario. This is an issue that Defra may wish to consider in its formulation of offsetting policy.

7.79 We recommend that:

(1) the current landowner of the land to which a conservation covenant relates, and/or anyone else bound by the conservation covenant (for example a lessee) and the responsible body should be able to apply to the Lands Chamber of the Upper Tribunal for a conservation covenant to be either modified or discharged.

(2) the Lands Chamber of the Upper Tribunal may modify or discharge a conservation covenant where it is reasonable to do so, having regard to all of the circumstances and in particular the following matters (where relevant):

(a) Any change in circumstances since the conservation covenant was created, including:

(i) changes in the character of the property or the neighbourhood;

(ii) changes which affect the landowner's enjoyment of the land; and

(iii) changes in the extent to which it is practicable or affordable for both the landowner and future landowners to comply with the conservation covenant.

(b) The extent to which the conservation covenant is in the public interest and designed to benefit the public.

(c) The extent to which the purposes for which the conservation covenant was created when it was entered into are served by the conservation covenant.

(d) Whether the purposes for which the covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged.

7.80 Clause 16 of, and schedule 1 to, the draft Bill put this recommendation into effect. Clause 16(1) simply gives effect to schedule 1, which contains the detailed provisions that realise this recommendation. Clause 16(3) prevents the parties from making an application in respect of a conservation covenant pursuant to section 84(1) of the Law of Property Act 1925 – which gives the Lands Chamber jurisdiction to modify or discharge restrictive covenants. This ensures that the jurisdiction in relation to conservation covenants is independent of and separate from the established jurisdiction.

7.81 Schedule 1, paragraphs 1 and 2 make provision for application for discharge, and provide that the Lands Chamber must add as parties as necessary – depending upon who has made the application – the responsible body and everyone who is

currently bound by or entitled to the benefit of the obligation concerned.

7.82 Paragraph 3(1) of schedule 1 provides that the Lands Chamber may make an order discharging an obligation when it considers it reasonable to do so in all the circumstances of the case. Paragraph 3(2) (along with 3(4)) gives effect to our list of matters to which the Lands Chamber must have regard.

7.83 Paragraph 3(3) requires the Lands Chamber to consider whether the purpose for which the obligation in question was created could equally well be served by the creation of another conservation covenant on other land held by the landowner, so as to give effect (together with paragraph 5) to the recommendation at paragraph 7.79(2)(d) above.

7.84 Similar provision is then made for the modification of an obligation under a conservation covenant under schedule 1, paragraphs 6 to 9 and 11, together with paragraph 12 which provides for modifications (that is, the obligations in the conservation covenant as now modified) to bind later owners of the land.

Compensation for modification or discharge

7.85 We noted in the Consultation Paper that under the current law, where the Lands Chamber orders discharge or modification of a restriction on land, it can award compensation to any person entitled to the benefit of a restriction. We asked whether consultees envisaged any situations in which compensation should be payable to a responsible body for modification or discharge of a conservation covenant by the Lands Chamber.[28]

Response to the consultation

7.86 Many consultees thought that there were circumstances in which compensation should be payable to a responsible body.[29] Only the Merthyr Tydfil Partnership, the Open Spaces Society, the National Farmers' Union, and the Bar Council could not envisage circumstances where compensation would be appropriate.

7.87 Consultees offered a range of circumstances in which compensation might be payable. Suggestions included:

[28] Consultation Paper, para 7.68.

[29] This included the British Mountaineering Council, the AONB Team at Denbighshire County Council, Professor McLaughlin, the Land Trust, Professor Reid, the Berkeley Group, the Central Association of Agricultural Valuers, the Institute for Archaeologists, Robert McCracken QC, Dr Nsoh, Charles Cowap, UKELA, officials from Warwickshire County Council, the RSPB, the Forestry Commission, Natural England, South West Water, Trowers and Hamlins LLP, RICS, the Woodland Trust, Link, English Heritage, the National Trust, the Country Land and Business Association, and Natural Resources Wales.

(1) "We could envisage a situation in which the BMC (as responsible body) had invested money to allow climbing at a covenanted site (e.g. creation of paths, installation of fixed equipment, clearing of loose material). If the covenant were revoked (or modified to remove the obligation to allow access), then the spending would become nugatory and compensation should be payable."[30]

(2) "Compensation should be payable to the holder in any circumstance in which the modification or discharge of the covenant increases the value of the burdened land – and this can be determined using the "before and after" method of valuation, where the subject property's market value is appraised immediately before the discharge or modification and immediately after the discharge or modification. … The holder should be required to use any compensation received to protect similar environmental or heritage values elsewhere – i.e. the public's or the donor's investment in environmental or heritage protection should not be lost."[31]

(3) For the reimbursement of costs and expenses, and any grants paid by the responsible body.[32]

(4) "Where costs have been specifically incurred in terms of hire of staff, purchase of specialist equipment, modifications to management plans, modifications to agri-environment agreements etc, other ongoing contractual commitments."[33]

(5) Where a responsible body has paid for or undertaken work which will not have the chance to mature because of a change or discharge; this money should be compensated rather than being written off.[34]

(6) Where a responsible body has expended funds in a conservation covenant, such as in its creation, for the cost of repairs or management costs, if the modification or discharge negates the benefit of the management.[35]

(7) In some circumstances, there should be repayment of money paid to the landowner by the responsible body.[36]

[30] British Mountaineering Council.

[31] Professor McLaughlin.

[32] Christopher Jessel.

[33] Land Trust.

[34] Professor Reid, Dr Nsoh, Charles Cowap, RICS, and Trowers and Hamlins LLP.

[35] Woodland Trust, English Heritage, National Trust, and Natural Resource Wales.

[36] Institute for Archaeologists and National Trust.

(8) On the discharge of a conservation covenant which protects a biodiversity offsetting site, the local planning authority as responsible body may wish to seek reparations to account for the original planning permission granted.[37]

(9) "A person purchases a house which includes an artificial bat loft – installed as mitigation for a previously licensed extension to the house which destroyed a bat roost – which is subject to a covenant. In time, the new householder decides that they can no longer live in a house with bats (perhaps someone in the house develops a phobia of bats). The court may (and perhaps would very likely) agree to the householder's request to discharge the covenant and allow the roost to be destroyed. (NB it is government policy in cases where a person cites health reasons for closing a bat roost in a house that Natural England issues licences to allow the roost to be closed). In these circumstances, compensation should be provided to the responsible body to allow it to fund the construction of another roost to replace that lost."[38]

(10) "A company applies to extend its premises to include an area subject to a conservation covenant. In this case, this is the only realistic option for the company to expand. If the court decides that the circumstances favour discharging the covenant then it may be appropriate for compensation to be provided so the responsible body can purchase a new area of land and to manage or develop it to replace the lost habitat."[39]

7.88 The Central Association of Agricultural Valuers, the Country Land and Business Association, and the Agricultural Law Association all made the further suggestion that compensation should be available to a landowner, payable by a responsible body, in appropriate circumstances. The latter suggested this might include a situation where a landowner would no longer receive payments as a result of a modification to a conservation covenant.

Discussion

7.89 The theme that emerges from these responses is that there will be cases where expenditure has been incurred on the basis that the conservation covenant will continue, which may then be wasted if the covenant is modified or discharged. Expenditure may be incurred by either party. We take the view that the Lands Chamber should have the power to order either party to compensate the other. That power will not invariably, and perhaps will not often, be exercised; there will be cases where both sides are placed at a financial disadvantage as a result of the loss of the covenant, or where it is fairer for the loss to lie where it falls.

[37] Officials from Warwickshire County Council.

[38] Natural England.

[39] Natural England.

7.90 We recommend that the Lands Chamber of the Upper Tribunal should have the power to order either party to make a reimbursement to the other of sums paid on the basis that the conservation covenant was going to continue.

7.91 Paragraphs 4 and 10 of schedule 1 to the draft Bill give effect to this recommendation.

Declarations about the status of a conservation covenant

7.92 Section 84(2) of the Law of Property Act 1925 gives the court power to declare whether freehold land[40] is burdened by a restrictive covenant. Provision is also made for the court to rule on the construction and actual or potential enforceability of instruments purporting to impose restrictions. Any person interested in the land or the covenant may apply for such a declaration. This power is generally used to "clear off unenforceable covenants and to discover in advance whether certain development would be permissible".[41] We anticipate that a similar power would be useful in the context of conservation covenants, particularly as a valid covenant can become invalid over time by ceasing to be for the public good. It is easy to imagine circumstances where someone needed to know the status of a covenant, either in order to resist an action enforcing a breach or because the land was wanted for a different use.

7.93 The Consultation Paper explained that we thought it would be appropriate to expand the court's jurisdiction under section 84(2), so as to enable both the court and the Lands Chamber to determine whether land was burdened by a conservation covenant, and rule on its construction and enforceability.[42]

Response to the consultation

7.94 This proposal was fairly uncontroversial; a majority of consultees (24 out of 28) responding to the proposal agreed. Professor McLaughlin and RICS both qualified their agreement. Professor McLaughlin thought that the remit of section 84(2) should be limited to protect the public interest against parties who would go to great lengths to release the land from restrictions. She, therefore, suggested that the Lands Chamber should be required to have regard to the public nature of (and possible charitable investment in) a conservation covenant.

[40] Or leaseholds granted for a term of over 40 years of which 25 or more have expired: s 84(12).

[41] A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (4th ed 2013) para 15.10.

[42] Consultation Paper, para 7.74.

7.95 UKELA and Robert McCracken QC disagreed with the proposal. Both consultees thought conservation covenants should bind in perpetuity, but no further explanation was provided. It would appear that they misunderstood the nature of the proposal; section 84(2) is concerned with the court's power to declare a position, and does not give a power to change things. RICS suggested that the jurisdiction to hear applications under section 84(2) should be given to the new "Property Chamber of the First-Tier Tribunal" ("the Property Chamber"), with the Lands Chamber performing an appellate role.[43]

Discussion

7.96 It is uncontroversial that the court's jurisdiction under section 84(2), and the proposed jurisdiction of the Lands Chamber, should be expanded to include conservation covenants. We are mindful of Professor McLaughlin's suggestion, but we do not think it is necessary in this instance. When deciding an application under section 84(2) the court or Lands Chamber will consider whether the conservation covenant meets the required defining features. At the heart of those features is a requirement that the conservation covenant must be created, and continue to exist, for purposes which serve the public good.

7.97 We note RICS's suggestion about the Property Chamber, but we think that for the time being it would be sensible for this jurisdiction to sit with the Lands Chamber, alongside the jurisdiction to discharge and modify.

7.98 Accordingly, we take the view that the courts and the Lands Chamber should have the power to make a declaration upon the application of any person interested about obligations under a conservation covenant, under a new and specific jurisdiction which is analogous to, but independent from, section 84(2) of the Law of Property Act 1925.

7.99 We recommend that the courts and Lands Chamber of the Upper Tribunal should have jurisdiction to make declarations about obligations under a conservation covenant.

7.100 Clause 24 of the draft Bill gives effect to this recommendation, and ensures that an application for a declaration relating to a conservation covenant is made pursuant to the statute and not under section 84(2) of the Law of Property Act 1925.

SECTION 237 OF THE TOWN AND COUNTRY PLANNING ACT 1990 AND ANALOGOUS PROVISIONS

7.101 We turn finally to consider one further way in which conservation covenants may be brought to an end, this time by the use of powers in planning legislation.

[43] Derbyshire County Council also queried whether the Lands Chamber was the best forum; their agreement with the proposal was based on the absence of a specialist environmental court or tribunal.

7.102 Section 237 of the Town and Country Planning Act 1990 enables a local authority that acquires land or uses its own land for planning purposes, to override certain rights in the land and in effect, to extinguish them. The operation of section 237 is explained in another Law Commission consultation paper[44] as follows:

> The effect of section 237 is that where a local authority acquires or appropriates[45] land for planning purposes, the authority or any person to whom it sells or leases the land may use the land or build on it in accordance with a planning permission even though doing so would interfere with a neighbour's interest or right, including a right to light. Although the section only refers to "overriding" the right (suggesting that the right remains in existence, albeit unenforceable), the section has generally been interpreted as having the effect of extinguishing the right altogether.[46] The owner of the right is entitled to compensation.[47]

7.103 Accordingly, the owner of the dominant tenement loses for ever the right to injunctive relief from the interference, though he or she will be entitled to compensation.[48]

7.104 In the Consultation Paper we proposed that section 237 of the Town and Country Planning Act 1990 should enable the overriding of conservation covenants.[49]

[44] Rights to Light: A Consultation Paper (2013) Law Com Consultation Paper No 210, para 2.50.

[45] Appropriation describes the process whereby a local authority formally resolves to hold its own land for a new purpose. For an example of an appropriation of recreational land for the purpose of residential development see *R v Leeds City Council, ex parte Leeds Industrial Co-operative Society Ltd* (1997) 73 P & CR 70.

[46] *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65, at [34] by Peter Smith J: "[the right is] overridden *and extinguished* subject to a right of compensation" (emphasis added). See also *R (Derwent Holdings Ltd) v Trafford Borough Council* [2009] EWHC 1337 (Admin), at [8] by CMG Ockleton (sitting as a deputy High Court judge).

[47] Town and Country Planning Act 1990, s 237(4). The compensation payable is calculated on the basis of the diminution in the value of the neighbour's land, and will not include the loss of a bargaining position or a share of the profit enabled by the interference (see *Clift v Welsh Office* [1999] 1 WLR 796).

[48] *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65, at [34] by Peter Smith J: "[the right is] overridden *and extinguished* subject to a right of compensation" (emphasis added). See also *R (Derwent Holdings Ltd) v Trafford Borough Council* [2009] EWHC 1337 (Admin), at [8] by CMG Ockleton (sitting as a deputy High Court judge).

[49] Consultation Paper, para 7.80.

Response to the consultation

7.105 The proposal met with mixed views. Of those that responded, 12 agreed,[50] eight qualified their agreement,[51] 11 disagreed,[52] and one response was uncertain.[53] Those in support of the proposal tended to agree wholeheartedly, adding little to our reasoning.[54] The Property Bar Association's support was based on consistency between the new scheme and the planning regime. It was thought that in this instance the planning regime must prevail. The Association also placed the use of section 237 in context by adding:

> [I]n practice many local planning authorities are reluctant to enter into arrangements using section 237 to override covenants and private rights; what is more such arrangements involve the planning authority acquiring an interest in the land to be developed – this involves an additional layer of cost and complexity.

7.106 English Heritage presented its reasoning in the following way:

> We agree on the basis that if a local authority has acquired land for development and intends to apply section 237 we presume that the planning and acquisition process will properly have taken into account the effect on any conservation covenant on the land in question.

7.107 Network Rail agreed with our proposal. It pointed out that a number of public and statutory bodies hold powers similar to section 237. It was noted that these powers are almost always used in conjunction with a compulsory purchase power.[55] In light of this, Network Rail suggested that our proposal should be extended to allow other similar powers to override a conservation covenant.

[50] Network Rail, the Property Bar Association, Christopher Jessel, the Central Association of Agricultural Valuers, the National Farmers' Union, officials from Warwickshire County Council, Trowers and Hamlins LLP, RICS, the Agricultural Law Association, English Heritage, the Country Land and Business Association, and Natural Resources Wales.

[51] The AONB Team at Denbighshire County Council, Professor McLaughlin, Professor Reid, the Institute of Historic Building Conservation, the Salmon and Trout Association, the RSPB, Natural England, and the Wildlife Trust.

[52] Professor Farrier, Merthyr Tydfil Partnership, the Land Trust, the Berkeley Group, the Open Spaces Society, the Institute for Archaeologists, Robert McCracken QC, the UK Environmental Law Association, the Woodland Trust, Link, and the National Trust.

[53] The Forestry Commission.

[54] These consultees were Christopher Jessel, the National Farmers' Union, officials from Warwickshire County Council, RICS, Trowers and Hamlins LLP, the Agricultural Law Association, the Country Land and Business Association, the Central Association of Agricultural Valuers, and Natural Resources Wales.

[55] We discuss issues relating to compulsory purchase at para 6.56, above.

7.108 The majority of consultees who qualified their agreement did so because they wanted additional safeguards in place to prevent abuse of the section 237 power.[56] For example, Professor Reid thought a conservation covenant might be vulnerable in the face of conflicting pressures: "at the very least there should be some procedural hurdle to ensure that the overriding of a conservation covenant is not done lightly". Consultees suggested a range of potential safeguards, including a public interest test,[57] placing local authorities under a duty to show the necessity of overriding the conservation covenant, that no reasonable alternative could be found,[58] and a public consultation or participation requirement.[59]

7.109 The Wildlife Trusts' reasoning differed, as did their suggested solution:

> The Wildlife Trusts are not opposed to development and we appreciate and understand the need to "design a statutory scheme which protects and preserves the conservation values of, but does not sterilise, land in England and Wales". The Wildlife Trusts would request transparent guidance on situations and circumstances when local authorities are permitted to override the conservation covenants and would request that there should be no net loss in the overall coverage and extent of land within a conservation covenant. Resulting compensation to a responsible body should be adequate to compensate investment in land and recreate a similar asset in the vicinity.[60]

7.110 The reasons presented by consultees for disagreeing with our proposal varied. Professor Farrier thought that the inclusion of section 237 would discourage conservation-minded landowners from entering into conservation covenants. The Land Trust and the Open Spaces Society thought that the proposal would significantly weaken the effectiveness of a conservation covenant. The Institute for Archaeologists' reasoning was twofold. First, it argued that the planning system, and use of section 237, is driven by economic growth and not a legitimate concern for environmental protection. Secondly, the Institute thought that the expense and uncertainty of judicial review undermines its value as a safeguard against the use of section 237.

[56] A total of seven out of eight consultees (the AONB Team at Denbighshire County Council, Professor McLaughlin, Professor Reid, the Institute of Historic Building Conservation, the Salmon and Trout Association, the RSPB, and Natural England).

[57] Suggested by the AONB Team at Denbighshire County Council and the Salmon and Trout Association.

[58] Suggested by Professor McLaughlin.

[59] Suggested by the RSPB.

[60] The Wildlife Trusts also noted that particular provision might be needed for offsetting sites.

7.111 The Berkeley Group advanced a different line of reasoning; the inclusion of section 237 would undermine conservation covenants as a favourable alternative to planning obligations. The appeal of a conservation covenant was the requirement to seek external adjudication in respect of discharge; something that is not provided with planning obligations. In light of this, it suggested that local authorities should have to apply to the Lands Chamber to use the section 237 power. Others echoed this desire for external adjudication.[61]

Discussion

7.112 We continue to take the view that section 237 (and the analogous provisions[62]) should apply to conservation covenants. We found the responses of the Property Bar Association and English Heritage encouraging. The use of section 237, and like powers, must be viewed in context. The objective that underlies section 237 is that, provided work is done in accordance with planning permission, a local authority (and other quasi-public bodies such as Network Rail) should be permitted to develop its land in a manner that it considers to serve the public interest. When a local authority makes that decision, it does so in the public interest,[63] and if the public interest is in favour of development a conservation covenant should not stand in the way. It is also worth reiterating that we think the number of cases involving section 237 and a conservation covenant would be minimal.

7.113 We note suggestions that section 237 should be subject to additional safeguards. It would be inappropriate to tamper with an existing planning law mechanism. This statutory power is well-established, and its use is reserved to local authorities which are subject to scrutiny via a number of different means. Local authorities are also bound to consider the conservation and enhancement of the natural and historical environment when granting planning permission.[64] Moreover, the safeguards provided and oversight undertaken during the planning and acquisition process ensures adequate protection of the public interest.

7.114 To address the Berkeley Group's concerns, we think that it would be inappropriate to require local authorities to seek the approval of the Lands Chamber to remove a conservation covenant in this context. Section 237 applies to private rights, and whilst a conservation covenant has a public element it remains a private voluntary agreement; it would be unduly burdensome to require local authorities to seek external approval.

[61] The Institute for Archaeologists, the Woodland Trust, and Link.

[62] Local Government, Planning and Land Act 1980, Sch 28; New Towns Act 1981, s 19; Housing Act 1988, Sch 10; and Housing and Regeneration Act 2008, Sch 3.

[63] Dyson J in the *Citizens of London v Royal London Mutual Insurance Society, ex p The Master Governors and Commonality of the Mystery of the Barbers of London* [1996] 2 EGLR 128.

[64] Department for Communities and Local Government, *National Planning Policy Framework* (March 2012) paras 109, 126 and 131; and Welsh Government, *Planning Policy Wales* (5th ed, November 2012) Parts 5 and 6.

7.115 We recommend that section 237 of the Town and Country Planning Act 1990 and analogous provisions should be amended so as to apply to conservation covenants.

7.116 Schedule 3 to the draft Bill puts this recommendation into effect.

CHAPTER 8
STATUTORY COVENANTS

INTRODUCTION

8.1 In the Consultation Paper we examined statutory powers in England and Wales which, in particular circumstances, already allow individuals to agree obligations which can bind the land without the need for neighbouring benefitted land. We set out these covenants in Appendix A to the Consultation Paper. We also identified two statutory covenants relating to conservation which we felt might usefully be replaced by a statutory scheme of conservation covenants, namely National Trust covenants and Forestry Commission covenants.[1] In this Chapter we examine those two specialist covenants and then look briefly at other statutory covenants.

NATIONAL TRUST COVENANTS

8.2 Section 8 of the National Trust Act 1937 gives the National Trust the power to agree and enforce restrictive covenants that do not benefit any of the Trust's land. There is no qualifying requirement for the characteristics of the land itself. The National Trust may agree a covenant if it thinks fit; the terms can contain "conditions restricting the planning development or use [of the land] in any manner" (which we take to mean that positive obligations are excluded).[2]

8.3 Our initial view was that a statutory system of conservation covenants would provide a more effective scheme for the National Trust to enter into binding conservation agreements with landowners. In particular, conservation covenants would enable the imposition of positive obligations. They could include, for example, requirements for public access to the property, or for the maintenance of gardens or the care of woodland..

8.4 Accordingly we did not think that section 8 covenants should have any continuing role to play if conservation covenants were introduced. However, given the special role that the National Trust plays in conservation in England and Wales we asked consultees whether covenants made under section 8 of the National Trust Act 1937 present any advantages for the National Trust or for the public that were not replicated in our provisional proposals for a statutory conservation covenants scheme.[3]

Response to the consultation

8.5 Very few consultees addressed this question. Not surprisingly, the most detailed response came from the National Trust. Its main concern was that the purposes for which a conservation covenant could be made are narrower that those under section 8.

[1] For further information on both the National Trust and Forestry Commission covenants, see the Consultation Paper, ch 8.

[2] National Trust Act 1937, s 8.

[3] Consultation Paper, para 8.16.

8.6 The Trust noted that the founders of the National Trust deliberately avoided being too prescriptive, so as to enable the Trust to shift its emphasis and adapt to meet national priorities; this has occurred over the years as the Trust has responded to different challenges. Accordingly the powers afforded to the Trust under section 8 are broader than the opportunity that would be offered under the conservation covenants scheme. For example, the Trust has the ability to agree any condition which restricts the development or use of land in any manner which the National Trust deems appropriate.

8.7 The National Trust went on to highlight a number of advantages offered by section 8, which are not replicated in the conservation covenants scheme. Section 8 enables the National Trust to protect the setting of heritage assets and provides greater flexibility because the Trust can create covenants for purposes that it considers to carry merit, such as a view to or from land, the remoteness of the land, or the tranquillity or spirituality experienced in an area.

8.8 The Trust commented:

> … necessarily the parameters for the imposition of conservation covenants, given the wide range of bodies which may be able to hold them, will be tighter than is the case for the National Trust's own section 8 covenant.
>
> The parameters of conservation covenants may also be susceptible to change over time, which is much less likely to be the case with section 8 covenants. And, of course, the proposals envisage that the Secretary of State would be able to de-nominate a responsible body. For these reasons we cannot see that it would be prudent for our trustees to contemplate the removal of the power which the National Trust currently has under section 8 … .

8.9 Whilst the National Trust did not consider it appropriate to repeal section 8, it did express its support for the introduction of conservation covenants:

> We warmly welcome and support the provisional proposal to create a robust mechanism for imposing and enforcing conservation covenants, and to make that available to appropriate conservation organisations. We are excited by the prospect of it becoming easier for conservation organisations to encourage the responsible management of beautiful and important places so that everyone can enjoy them.
>
> The National Trust very much hopes that it would be nominated as a responsible body, so that it would be able to make use of conservation covenants in appropriate cases. There are many features of such covenants which would be of real value to us, including the ability to impose positive obligations, the ability to secure rights to inspect, registration of the covenants, and the overall clarity of the proposed regime … .

Discussion

8.10 Overall we are persuaded by the general arguments advanced by the National Trust. Section 8 covenants may have uses beyond those of our proposed scheme of conservation covenants; in particular, section 8 covenants are limited only by the purposes of the National Trust, and this may not align with the purposes for which a conservation covenant can be created. Accordingly we do not recommend that section 8 of the National Trust Act 1937 be replaced by a statutory scheme of conservation covenants.

8.11 We recommend that section 8 of the National Trust Act 1937 should not be replaced by a statutory scheme of conservation covenants.

FORESTRY COMMISSION COVENANTS

8.12 Section 2 of the Forestry Act 1947 introduced "forestry dedication covenants", now governed by section 5 of the Forestry Act 1967; this section enables the Forestry Commission to agree a forestry dedication covenant over any land in England and Wales (without owning neighbouring land). It appears that they can only be restrictive.[4] In the pre-consultation period we were told by the Forestry Commission that its policy was to create no new forestry dedication covenants and to release existing ones where this was requested. Again, we saw this as an opportunity to remove an unnecessary legislative provision where it could be replaced by a more comprehensive conservation covenants scheme. We, therefore, provisionally proposed that section 5 of the Forestry Act 1967 should be replaced by a statutory conservation covenants scheme.[5]

8.13 Our proposal related only to repealing the section so as to prevent new covenants being created under it; we did not suggest that existing covenants made under section 5 ought to be extinguished.

Response to the consultation

8.14 The majority of consultees that responded to this proposal were in favour of repealing the provision; in general this was because they were persuaded by our suggestion that the covenants were no longer in use. On the other hand, the National Trust thought that forestry dedication covenants had been used not for the conservation of woodlands, but to ensure adequate supplies of timber. It thought "there may well be a continuing role for covenants imposed on woodland for purposes other than conservation in the (necessarily) narrow terms envisaged in the definition of conservation covenants".

[4] See I Hodge, R Castle and J Dwyer, *Covenants as a conservation mechanism* (1993) para 2.6.

[5] Consultation Paper, para 8.25.

8.15 Link did not disagree with the proposal to repeal section 5, but did not agree that conservation covenants were an appropriate replacement. First, like the National Trust, it did not consider that the objectives sought to be achieved by the Forestry Commission through its existing covenants could be realised through conservation covenants; this was because "the dedication of an area of land to forestry may be contrary to the nature conservation interest of that land." Second, Link noted that the Forestry Commission's statutory functions do not necessarily relate directly to conservation.

8.16 Three consultees disagreed with the proposal, including the Forestry Commission, which said:

> We do not see this as a priority action that needs to be addressed in this context. The publication (in January 2013) of the Government's Forestry and Woodland Policy Statement set out a future direction that will require new forestry legislation to be taken forward. We consider that this would be a more appropriate arena to address any shortcomings in the Forestry Act.

Discussion

8.17 We accept the arguments advanced that the nature of covenants under section 5 of the Forestry Act 1967 might not necessarily match the purposes for which a conservation covenant could be created, and accordingly that the case for the repeal of this provision begins to fall away. Moreover, as the Forestry Commission points out, any forthcoming forestry legislation arguably offers a better vehicle for changes to the Forestry Act.

8.18 We do, however, note that conservation covenants have an important part to play in the forestry context. In January 2013, the Government published its Government Forestry and Woodlands Policy Statement,[6] which included the Government's response to the report of the Independent Panel on Forestry.[7] The Policy Statement noted the potential use of conservation covenants:

> The Law Commission is currently exploring the potential for giving legal recognition in England and Wales to conservation covenants. These covenants, which are used in other countries such as Scotland, the USA and Australia, enable landowners voluntarily to agree to binding obligations relating to the achievement of environmental or heritage objectives. They could be used to ensure that woodland cover and benefits valued by the community, such as access or biodiversity, continue to be protected in perpetuity … .[8]

8.19 We recommend that section 5 of the Forestry Act 1967 should not be replaced with a statutory scheme of conservation covenants.

6 Department for Environment, Food and Rural Affairs, *Government Forestry and Woodlands Policy Statement* (2013).

7 Independent Panel on Forestry, *Final Report* (July 2012).

8 Department for Environment, Food and Rural Affairs, *Government Forestry and Woodlands Policy Statement* (January 2013) p 17.

OTHER STATUTORY COVENANTS

8.20 In the course of our research, we have examined a number of statutory provisions which have features in common with conservation covenants.[9] For example, agreements may be made under section 17 of the Ancient Monuments and Archaeological Areas Act 1979. The agreement must be made over an ancient monument or land that adjoins it or is in its vicinity, and covenantees can be the Secretary of State or the Welsh Ministers, English Heritage (for land in England), and a local authority.[10]

8.21 Another example is a management agreement made under section 7 of the Natural Environment and Rural Communities Act 2006. Natural England can make such an agreement over any land in England with anyone who holds an interest in it. These agreements may impose positive or restrictive obligations,[11] but Natural England must be satisfied that the agreement will further its general purpose, "to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development".[12]

8.22 These provisions were extremely useful in helping us to develop a sense of how a new statutory scheme might work. But we did not think that there was sufficient overlap between these other statutory covenants and our proposals such that we could propose removing them. We did, however, ask consultees for their views on this matter.[13]

8.23 Our assumption that the other statutory covenants identified should not be replaced by the introduction of a conservation covenants scheme was strongly supported by consultees. In particular, there were a number of consultees with experience of these covenants, whose responses made clear that we were right to conclude that they could not be replaced. Interestingly, both the British Mountaineering Council and the Ramblers referred us to what they considered to be analogous arrangements under the Inheritance Tax Act 1984. Under the Act, property owners may be exempted from paying inheritance tax for properties of cultural, historic or amenity value. We had mentioned this exemption in the Consultation Paper (in a different context), but note that these two consultees regard this scheme as operating akin to a statutory covenant.

8.24 Accordingly we do not recommend that any other statutory covenants be replaced by a statutory scheme of conservation covenants.

[9] Consultation Paper, Appendix A.

[10] Ancient Monuments and Archaeological Areas Act 1979, s 17(1), (1A) and (2).

[11] Natural Environment and Rural Communities Act 2006, s 7(2).

[12] Natural Environment and Rural Communities Act 2006, ss 2(1) and 7(1).

[13] Consultation Paper, para 8.28.

CHAPTER 9
LIST OF RECOMMENDATIONS

CHAPTER 2: CURRENT LAW AND THE CASE FOR REFORM

9.1 We recommend the introduction of conservation covenants into the law of England and Wales by statute. There should be:

(1) provision for a voluntary agreement to be made between a landowner and a responsible body for a conservation purpose and for the public good;

(2) no requirement for there to be benefitted land;

(3) the ability to agree positive as well as negative obligations; and

(4) provision for those obligations to bind successors in title.

[Paragraph 2.98]

9.2 We recommend that non-statutory guidance should be developed by the Secretary of State, or the Welsh Ministers as appropriate. This guidance should be developed through a consultation process.

[Paragraph 2.99]

9.3 We recommend that conservation covenants be a statutory burden on land, rather than either contractual rights or conventional property rights within section 1 of the Law of Property Act 1925.

[Paragraph 2.100]

CHAPTER 3: CONSERVATION PURPOSES

9.4 We recommend that a conservation covenant should be an agreement made between a landowner and a responsible body requiring either party to do or not do something on land. It should be made for the public good, and for the purpose of conserving, protecting, restoring or enhancing:

(1) the natural environment, including flora, fauna or geological features of the land;

(2) the natural resources of the land;

(3) cultural, historic, archaeological, architectural or artistic features of the land; or

(4) the surrounding, setting or landscape of any land which has any of these features.

[Paragraph 3.38]

9.5 We recommend that a conservation covenant may contain provision for public access to the land concerned.

[Paragraph 3.39]

CHAPTER 4: RESPONSIBLE BODIES

9.6 We recommend that the following should be able to be responsible bodies:

(1) any Secretary of State (for England);

(2) the Welsh Ministers (in Wales);

(3) any of the following specified as responsible bodies by the Secretary of State or Welsh Ministers by order:

(a) a local authority;

(b) a public body whose purposes or functions are, or are related to or connected with, at least one of the purposes set out at paragraph 9.4; or

(c) a registered or exempt charity whose purposes or functions are, or are related to or connected with, at least one of the purposes set out at paragraph 9.4.

[Paragraph 4.57]

9.7 We recommend that the Secretary of State and Welsh Ministers should develop and publish criteria by reference to which they will specify responsible bodies.

[Paragraph 4.58]

9.8 We recommend that when the responsible body which holds a conservation covenant ceases to exist, or ceases to be a responsible body, and fails to transfer its conservation covenants, those conservation covenants should pass to a holder of last resort.

[Paragraph 4.77]

9.9 We recommend that the holder of last resort should be the Secretary of State for the Department with responsibility for nominating responsible bodies (in England) or the Welsh Ministers (in Wales).

[Paragraph 4.78]

9.10 We recommend that when a conservation covenant passes to the holder of last resort, the latter should not be liable for fulfilling any obligations imposed upon the responsible body by the covenant unless it notifies the landowner of its intention to take on liability and notifies the local land charges office.

[Paragraph 4.83]

CHAPTER 5: THE FORMATION AND TRANSFER OF CONSERVATION COVENANTS

9.11 We recommend that freeholders, and the holder of a leasehold estate of more than seven years, should be able to create conservation covenants.

[Paragraph 5.20]

9.12 We recommend that a conservation covenant created by a freeholder should bind land in perpetuity, or for any shorter term specified in the covenant. If created by a leaseholder, a conservation covenant should endure for the term of the lease or for any shorter period expressed in the covenant.

[Paragraph 5.44]

9.13 We recommend that a conservation covenant must be created in writing and signed by the parties.

[Paragraph 5.54]

9.14 We recommend that a conservation covenant should be a local land charge.

[Paragraph 5.66]

9.15 We recommend that once a conservation covenant is registered as a local land charge it should be effective against future owners of the land. Restrictive obligations will be effective against:

(1) the landowner who created the conservation covenant, and all subsequent owners of that landowner's estate; and

(2) the owner of any other leasehold interest created out of that estate after the registration of the conservation covenant.

Positive obligations will be effective against:

(3) the landowner who created the conservation covenant, and all subsequent owners of that landowner's estate; and

(4) the owner of any other leasehold interest created out of that estate after the registration of the conservation covenant; but *not*

(5) the owner of a leasehold estate granted for a period of seven years or less.

[Paragraph 5.67]

9.16 We recommend that responsible bodies should be encouraged to publish information about conservation covenants voluntarily, with the agreement of the relevant landowner.

[Paragraph 5.86]

9.17 We recommend that responsible bodies should report, on an annual basis, information on the conservation covenants that they hold, to the Secretary of State or the Welsh Ministers. The information contained in the report should be:

(1) the number of covenants to which the responsible body is party; and

(2) the extent of land covered by those covenants.

[Paragraph 5.87]

9.18 We recommend that a conservation covenant should be capable of being transferred from one responsible body to another and that notice of any such transfer should be given to the landowner.

[Paragraph 5.107]

9.19 We recommend that when a conservation covenant is transferred, the conservation covenant will not be enforceable by the transferee unless the change of responsible body has been notified to the local land charges office.

[Paragraph 5.108]

9.20 We recommend that if land which is the subject of a conservation covenant is subdivided, the owners of the subdivided land should be severally liable for the conservation covenant obligations, unless the conservation covenant is modified to provide otherwise.

[Paragraph 5.116]

9.21 We recommend that where a responsible body in respect of a conservation covenant acquires land which is subject to that covenant, the conservation covenant should remain in force unless discharged.

[Paragraph 5.125]

CHAPTER 6: MANAGEMENT AND ENFORCEMENT

9.22 We recommend that a person who is bound by a restrictive obligation in a conservation covenant breaches it by doing something which it prohibits, or by permitting or suffering someone else to do so; and that a person who is bound by a positive obligation breaches it if the obligation is not performed.

[Paragraph 6.36]

9.23 We recommend that the following be defences to an action for breach of a conservation covenant:

(1) that the breach of the obligation was due to a matter outside the party's control;

(2) that the breach of the obligation arose in an emergency where action, or inaction, was essential to prevent injury or loss of life;

(3) that compliance with the conservation covenant would contravene any statutory control applying as a result of the public notification or designation of the land to which the conservation covenant relates, taking effect after the conservation covenant was agreed; and

(4) statutory authority, which will be relevant in cases where land subject to a conservation covenant is compulsorily purchased.

[Paragraph 6.60]

9.24 We recommend that when land subject to a conservation covenant is compulsorily purchased the relevant responsible body should be served with notice under section 12 of the Acquisition of Land Act 1981.

[Paragraph 6.64]

9.25 We recommend that for the purpose of the Limitation Act 1980, an action founded under a conservation covenant is to be treated as founded on simple contract and therefore to be subject to a limitation period of six years.

[Paragraph 6.67]

9.26 We recommend that on proof of a breach of a conservation covenant, the court should have the power to:

(1) grant a final injunction;

(2) make an order requiring specific performance of a conservation covenant;

(3) order the payment of damages; and

(4) in the case of breach by a landowner, order the payment of exemplary damages.

[Paragraph 6.127]

9.27 We recommend that the court should have the power to grant an interim injunction in respect of an alleged breach of a conservation covenant.

[Paragraph 6.128]

9.28 We recommend that when determining whether an injunction should be granted, the court should be required to take account of the public interest in the performance of the conservation covenant.

[Paragraph 6.129]

CHAPTER 7: MODIFICATION AND DISCHARGE

9.29 We recommend that a responsible body should only be able to discharge a conservation covenant unilaterally if express provision is made to that effect in the terms of the conservation covenant.

[Paragraph 7.20]

9.30 We recommend that the parties to a conservation covenant for the time being may agree to modify it.

[Paragraph 7.34]

9.31 We recommend that:

(1) the current landowner of the land to which a conservation covenant relates, and/or anyone else bound by the conservation covenant (for example a lessee) and the responsible body should be able to apply to the Lands Chamber of the Upper Tribunal for a conservation covenant to be either modified or discharged.

(2) the Lands Chamber of the Upper Tribunal may modify or discharge a conservation covenant where it is reasonable to do so, having regard to all of the circumstances and in particular the following matters (where relevant):

(a) Any change in circumstances since the conservation covenant was created, including:

(i) changes in the character of the property or the neighbourhood;

(ii) changes which affect the landowner's enjoyment of the land; and

(iii) changes in the extent to which it is practicable or affordable for both the landowner and future landowners to comply with the conservation covenant.

(b) The extent to which the conservation covenant is in the public interest and designed to benefit the public.

(c) The extent to which the purposes for which the conservation covenant was created when it was entered into are served by the conservation covenant.

(d) Whether the purposes for which the covenant was created could be achieved to an equivalent extent and within the same period of time by an alternative scheme on a different site which the landowner owns, and it is possible to create a new conservation covenant on that site in substitution for the covenant to be discharged.

[Paragraph 7.79]

9.32 We recommend that the Lands Chamber of the Upper Tribunal should have the power to order either party to make a reimbursement to the other of sums paid on the basis that the conservation covenant was going to continue.

[Paragraph 7.90]

9.33 We recommend that the courts and Lands Chamber of the Upper Tribunal should have jurisdiction to make declarations about obligations under a conservation covenant.

[Paragraph 7.99]

9.34 We recommend that section 237 of the Town and Country Planning Act 1990 and analogous provisions should be amended so as to apply to conservation covenants.

[Paragraph 7.115]

CHAPTER 8: STATUTORY COVENANTS

9.35 We recommend that section 8 of the National Trust Act 1937 should not be replaced by a statutory scheme of conservation covenants.

[Paragraph 8.11]

9.36 We recommend that section 5 of the Forestry Act 1967 should not be replaced with a statutory scheme of conservation covenants.

[Paragraph 8.19]

(*Signed)* DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
21 May 2014

APPENDIX A
DRAFT CONSERVATION COVENANTS BILL AND EXPLANATORY NOTES

Conservation Covenants Bill

CONTENTS

A

B I L L

TO

Make provision for conservation covenants

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Creation of conservation covenant

1 Conservation covenants

(1) A conservation covenant is an agreement to which this Act applies.

(2) This Act applies to an agreement between a landowner and a responsible body if—

(a) the agreement is in writing signed by the parties,

(b) it contains provision which—

(i) is of a qualifying kind,

(ii) has a conservation purpose, and

(iii) is for the public good, and

(c) it appears from the agreement that this Act is intended to apply to it.

(3) The reference in subsection (2)(b)(i) to provision of a qualifying kind is to provision—

(a) requiring the landowner—

(i) to do, or not to do, something on land specified in the provision in relation to which the landowner holds a qualifying estate specified in the agreement for the purposes of the provision, or

(ii) to allow the responsible body to do something on such land, or

(b) requiring the responsible body to do something on such land.

(4) For the purposes of subsection (2)(b)(ii), provision has a conservation purpose if its purpose is—

(a) to conserve the natural environment of the land to which it relates or the natural resources of that land,

(b) to conserve the land to which it relates as a place of archaeological, architectural, artistic, cultural or historic interest, or

(c) to conserve the setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic, cultural or historic interest.

(5) In this section—

"conserve" includes protect, restore and enhance;

"qualifying estate" means—

(a) an estate in fee simple absolute in possession, or

(b) a term of years absolute granted for a term of more than seven years from the date of the grant and in the case of which some part of the period for which the term of years was granted remains unexpired;

references to the natural environment of land includes its flora, fauna and geological features.

2 Responsible bodies: England

(1) In relation to land in England, the following are responsible bodies for the purposes of this Act—

(a) the Secretary of State, and

(b) a qualifying body specified for the purposes of this section by the Secretary of State by order made by statutory instrument.

(2) The following are qualifying bodies for the purposes of this section—

(a) a county, district or London borough council,

(b) the Common Council of the City of London,

(c) the Council of the Isles of Scilly,

(d) a registered charity,

(e) an exempt charity,

(f) a body established by a public general Act, and

(g) a body established under a public general Act and funded by money provided by Parliament.

(3) The power under subsection (1)(b), so far as relating to a body falling within subsection (2)(d), (e), (f) or (g), is exercisable only if the Secretary of State is satisfied that at least one of the purposes or functions of the body is, or is related to or connected with—

(a) conservation of the natural environment or natural resources,

(b) conservation of places of archaeological, architectural, artistic, cultural or historic interest, or

(c) conservation of the setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic, cultural or historic interest.

(4) In this section—

"conservation" includes protection, restoration and enhancement;

"exempt charity" has the same meaning as in the Charities Act 2011;

"registered charity" means a charity which is registered under the Charities Act 2011.

3 Responsible bodies: Wales

(1) In relation to land in Wales, the following are responsible bodies for the purposes of this Act—

(a) the Welsh Ministers, and

(b) a qualifying body specified for the purposes of this section by the Welsh Ministers by order made by statutory instrument.

(2) The following are qualifying bodies for the purposes of this section—

(a) a county borough council,

(b) a county council in Wales,

(c) a registered charity,

(d) an exempt charity,

(e) a body established by a public general Act, and

(f) a body established under a public general Act and funded by money provided by Parliament.

(3) The power under subsection (1)(b), so far as relating to a body falling within subsection (2)(c), (d), (e) or (f), is exercisable only if the Welsh Ministers are satisfied that at least one of the purposes or functions of the body is, or is related to or connected with—

(a) conservation of the natural environment or natural resources,

(b) conservation of places of archaeological, architectural, artistic, cultural or historic interest, or

(c) conservation of the setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic, cultural or historic interest.

(4) In this section—

"Act" includes an Act or Measure of the National Assembly for Wales;

"conservation" includes protection, restoration and enhancement;

"exempt charity" has the same meaning as in the Charities Act 2011;

"registered charity" means a charity which is registered under the Charities Act 2011.

Effect of conservation covenant

4 Statutory effect

(1) Provision of a conservation covenant has effect by virtue of this Act if it is, or is ancillary to, provision in respect of which the qualifying conditions are met.

(2) If a conservation covenant includes provision for public access to land to which provision of the covenant which meets the qualifying conditions relates, the provision for public access is to be treated for the purposes of this Act as ancillary to that provision.

(3) In this section, "qualifying conditions" means the conditions in section 1(2)(b).

5 Local land charge

(1) A conservation covenant is a local land charge.

(2) For the purposes of the Local Land Charges Act 1975, the originating authority, as respects a conservation covenant, is the person by whom an obligation of the landowner under the covenant is enforceable.

(3) In section 2 of the Local Land Charges Act 1975 (matters which are not local land charges), the references in paragraphs (a) and (b) to a covenant or agreement made between a lessor and a lessee do not include a conservation covenant.

(4) In its application to conservation covenants, section 10(1) of the Local Land Charges Act 1975 (compensation for non-registration or defective official search certificate) has effect with the following modifications—

(a) in the words preceding paragraph (a), omit the words from the beginning to "but",

(b) omit paragraph (a) (non-registration), and

(c) in paragraph (b), for the words from "in existence" to the end substitute "registered in that register at the time of the search but was not shown by the official search certificate as so registered".

6 Duration of obligation

(1) An obligation under a conservation covenant has effect for the default period, unless the covenant provides for a shorter period.

(2) The default period for the purposes of subsection (1) is—

(a) if the qualifying estate in relation to the obligation is an estate in fee simple absolute in possession, a period of indefinite duration, and

(b) if the qualifying estate in relation to the obligation is a term of years absolute, a period corresponding in length to the remainder of the period for which the term of years was granted.

7 Benefit and burden of obligation of landowner

(1) An obligation of the landowner under a conservation covenant is owed to the responsible body under the covenant

(2) Subject to the following provisions, an obligation of the landowner under a conservation covenant binds—

(a) the landowner under the covenant, and

(b) any person who is a successor in title of the landowner under the covenant by virtue of holding, in respect of any of the land to which the obligation relates—

(i) the qualifying estate, or

(ii) an estate in land derived (whether immediately or otherwise) from the qualifying estate after the creation of the covenant.

(3) An obligation of the landowner under a conservation covenant ceases to bind the landowner under the covenant in respect of land—

(a) which ceases to be land to which the obligation relates, or

(b) in relation to which the landowner ceases to be the holder of the qualifying estate.

(4) Subsection (2)(b) does not apply if—

(a) the obligation is positive and the person is a successor in title by virtue of holding a term of years absolute granted for a term of seven years or less from the date of the grant,

(b) the conservation covenant was not registered in the appropriate local land charges register at the time when the successor in title acquired the estate in land concerned, or

(c) the successor's immediate predecessor in title was not bound by the obligation in respect of the land to which the successor's interest relates.

(5) The reference in subsection (4)(b) to the time when the successor in title acquired the estate in land concerned is, if the successor acquired that interest under a disposition which took effect only when registered in the register of title kept under the Land Registration Act 2002, to be read as a reference to the time when the disposition was made.

8 Benefit of obligation of responsible body

(1) Subject to the following provisions, an obligation of the responsible body under a conservation covenant is owed—

(a) to the landowner under the covenant, and

(b) to any person who is a successor in title of the landowner under the covenant by virtue of holding, in respect of any of the land to which the obligation relates—

(i) the qualifying estate, or

(ii) an estate in land derived (whether immediately or otherwise) from the qualifying estate after the creation of the covenant.

(2) An obligation of the responsible body under a conservation covenant ceases to be owed to the landowner under the covenant in respect of land—

(a) which ceases to be land to which the obligation relates, or

(b) in relation to which the landowner ceases to be the holder of the qualifying estate.

(3) Subsection (1)(b) does not apply if the obligation is ancillary to an obligation of the landowner under the covenant which does not bind the successor in title.

Breach and enforcement

9 Breach of obligation

(1) A person bound by a negative obligation under a conservation covenant breaches the obligation by—

(a) doing something which it prohibits, or

(b) permitting or suffering another person to do such a thing.

(2) A person bound by a positive obligation under a conservation covenant breaches the obligation if it is not performed.

10 Enforcement of obligation

(1) In proceedings for the enforcement of an obligation under a conservation covenant, the available remedies are—

(a) specific performance,

(b) injunction,
(c) damages, and
(d) order for payment of an amount due under the obligation.

(2) On an application for a remedy under subsection (1)(a) or (b), a court must, in considering what remedy is appropriate, take into account any public interest in the performance of the obligation concerned.

(3) Subject to subsection (4), contract principles apply to damages for breach of an obligation under a conservation covenant.

(4) In the case of breach of an obligation of the landowner under a conservation covenant, a court may award exemplary damages in such circumstances as it thinks fit.

11 Defences to breach of obligation

(1) In proceedings for breach of an obligation under a conservation covenant it is a defence to show-
(a) that the breach occurred as a result of a matter beyond the defendant's control,
(b) that the breach occurred as a result of doing, or not doing, something in an emergency in circumstances where it was necessary for that to be done, or not done, in order to prevent loss of life or injury to any person, or
(c) that at the time of the breach—
(i) the land to which the obligation relates was, or was within an area, designated for a public purpose, and
(ii) compliance with the obligation would have involved a breach of any statutory control applying as a result of the designation.

(2) If the only reason for the application of subsection (1)(c) was failure to obtain authorisation, the defendant must also show that all reasonable steps to obtain authorisation had been taken.

(3) The defence under subsection (1)(c) does not apply if the designation was in force when the conservation covenant was created.

(4) The defence of statutory authority (which applies in relation to the infringement of rights such as easements by a person acting under statutory authority) applies in relation to breach of an obligation under a conservation covenant.

(5) In this section—
"authorisation" means any approval, confirmation, consent, licence, permission or other authorisation (however described), whether special or general;
"statutory control" means control imposed by provision contained in, or having effect under, an Act.

12 Limitation period

For the purposes of the Limitation Act 1980, an action founded on an obligation under a conservation covenant is to be treated as founded on simple contract.

Discharge, release and modification

13 Discharge of obligation of landowner by agreement

(1) The responsible body under a conservation covenant and a person who holds the qualifying estate in respect of any of the land to which an obligation of the landowner under the covenant relates may, by agreement, discharge from the obligation any of the land in respect of which the person holds that estate.

(2) The power under this section is exercisable by agreement in writing signed by the parties which specifies—

(a) the obligation to which the discharge relates,

(b) the land to which the discharge relates, and

(c) the estate in land by virtue of which the power is exercisable.

14 Release of obligation of responsible body by agreement

(1) A person to whom an obligation of the responsible body under a conservation covenant is owed may, by agreement with the responsible body, release the responsible body from the obligation in respect of any of the land in respect of which the person is entitled to the benefit of the obligation.

(2) The power under this section is exercisable by agreement in writing signed by the parties which specifies—

(a) the obligation to which the release relates,

(b) the land to which the release relates, and

(c) the estate in land by virtue of which the power is exercisable.

15 Modification of obligation by agreement

(1) A person bound by, or entitled to the benefit of, an obligation under a conservation covenant may, by agreement with the responsible body under the covenant, modify the obligation in its application to any of the land in respect of which the person is bound by, or entitled to the benefit of, it.

(2) The power under subsection (1) does not include power to make a change which, had it been included in the original agreement, would have prevented the provision of the agreement that gave rise to the obligation being provision in relation to which the conditions in section 1(2)(b) were met.

(3) The power under this section is exercisable by agreement in writing signed by the parties which specifies—

(a) the obligation to which the modification relates,

(b) the land to which the modification relates, and

(c) the estate in land by virtue of which the power is exercisable.

(4) If an obligation under a conservation covenant is modified by an agreement under this section, the modification binds—

(a) the parties to the agreement, and

(b) any person who, as respects any of the land to which the modification relates, becomes a successor in title of a person bound by the modification.

16 Discharge or modification of obligation by Upper Tribunal

(1) Schedule 1 (which makes provision about the discharge or modification of an obligation under a conservation covenant on application to the Upper Tribunal) has effect.

(2) Where any proceedings by action or otherwise are taken to enforce an obligation under a conservation covenant, any person against whom the proceedings are taken may in such proceedings apply to the High Court or the county court for an order giving leave to apply to the Upper Tribunal under Schedule 1 and staying the proceedings in the meantime.

(3) No application under section 84(1) of the Law of Property Act 1925 (which enables the Upper Tribunal on application to discharge or modify a restriction arising under covenant or otherwise) may be made in relation to an obligation under a conservation covenant.

Replacement etc. of responsible body

17 Power of responsible body to appoint replacement

(1) The responsible body under a conservation covenant may appoint another responsible body to be the responsible body under the covenant, unless the covenant otherwise provides.

(2) The power under subsection (1) is exercisable by agreement in writing signed by the appointor and appointee.

(3) In the case of a conservation covenant registered in the appropriate local land charges register, an appointment under subsection (1) only has effect if the appointor supplies to the authority responsible for that register ("the registering authority") the information necessary to enable that authority to amend the registration.

(4) Subsection (3) does not apply to an appointment by the registering authority.

(5) Appointment under subsection (1) has effect to transfer to the appointee—

(a) the benefit of every obligation of the landowner under the conservation covenant, and

(b) the burden of every obligation of the responsible body under the covenant.

(6) Appointment under subsection (1) does not have effect to transfer any right or liability in respect of an existing breach of obligation.

(7) A body appointed under subsection (1) as the responsible body under a conservation covenant must notify its appointment to every person who is bound by an obligation of the landowner under the covenant.

(8) If a conservation covenant relates both to land in England and to land in Wales, the power under subsection (1) is exercisable separately in relation to the land in England and the land in Wales.

18 Body ceasing to be qualified as responsible body: England

(1) Subsections (2) and (3) apply if a body which is the responsible body under a conservation covenant ceases to be—

(a) a qualifying body for the purposes of section 2, or
(b) specified under that section by the Secretary of State.

(2) The body ceases to be the responsible body under the conservation covenant, so far as relating to land in England.

(3) The following transfer to the Secretary of State—
(a) the benefit of every obligation of the landowner under the covenant, so far as relating to land in England, and
(b) the burden of every obligation of the responsible body under the covenant, so far as relating to such land.

(4) Subsection (3) does not have effect to transfer any right or liability in respect of an existing breach.

(5) If subsection (3) has effect in relation to a conservation covenant, the Secretary of State becomes custodian of the covenant, so far as relating to land in England, until—
(a) an appointment under section 17(1) by the Secretary of State has effect in relation to the covenant, or
(b) the Secretary of State makes an election under subsection (6) in relation to the covenant.

(6) If custodian of a conservation covenant, the Secretary of State may elect to be the responsible body under the covenant, so far as relating to land in England, by giving written notice of election to every person who is bound by an obligation of the landowner under the covenant, so far as relating to such land.

(7) The Secretary of State may, as custodian of a conservation covenant—
(a) enforce any obligation of the landowner under the covenant, so far as relating to land in England, and
(b) exercise in relation to the covenant any power conferred by this Act on the responsible body under the covenant, so far as relating to such land.

(8) In relation to any period as custodian of a conservation covenant, the Secretary of State has no liability with respect to performance of any obligation of the responsible body under the covenant.

19 Body ceasing to be qualified as responsible body: Wales

(1) Subsections (2) and (3) apply if a body which is the responsible body under a conservation covenant ceases to be—
(a) a qualifying body for the purposes of section 3, or
(b) specified under that section by the Welsh Ministers.

(2) The body ceases to be the responsible body under the conservation covenant, so far as relating to land in Wales.

(3) The following transfer to the Welsh Ministers—
(a) the benefit of every obligation of the landowner under the covenant, so far as relating to land in Wales, and
(b) the burden of every obligation of the responsible body under the covenant, so far as relating to such land.

(4) Subsection (3) does not have effect to transfer any right or liability in respect of an existing breach.

(5) If subsection (3) has effect in relation to a conservation covenant, the Welsh Ministers become custodian of the covenant, so far as relating to land in Wales, until—

(a) an appointment under section 17(1) by the Welsh Ministers has effect in relation to the covenant, or

(b) the Welsh Ministers make an election under subsection (6) in relation to the covenant.

(6) If custodian of a conservation covenant, the Welsh Ministers may elect to be the responsible body under the covenant, so far as relating to land in Wales, by giving written notice of election to every person who is bound by an obligation of the landowner under the covenant, so far as relating to such land.

(7) The Welsh Ministers may, as custodian of a conservation covenant—

(a) enforce any obligation of the landowner under the covenant, so far as relating to land in Wales, and

(b) exercise in relation to the covenant any power conferred by this Act on the responsible body under the covenant, so far as relating to such land.

(8) In relation to any period as custodian of a conservation covenant, the Welsh Ministers have no liability with respect to performance of any obligation of the responsible body under the covenant.

Miscellaneous

20 Effect of obligation ceasing to be for the public good

If an obligation under a conservation covenant ceases to be for the public good—

(a) that obligation ceases to have effect, and

(b) any other obligation under the covenant which is ancillary to that obligation ceases to have effect, to the extent that it is so ancillary.

21 Effect of acquisition or disposal of affected land by responsible body

(1) The acquisition by the responsible body under a conservation covenant of an interest in land to which an obligation under the covenant relates does not have effect to extinguish the obligation.

(2) In relation to a landowner whose immediate predecessor in title is the responsible body under a conservation covenant section 7 has effect with the omission of subsection (4)(c).

22 Effect of deemed surrender and re-grant of qualifying estate

If a term of years absolute which is the qualifying estate in relation to an obligation under a conservation covenant is deemed to be surrendered and re-granted by operation of law, then, in the application of sections 7, 8 and 13 to the period after the deemed surrender, references to the qualifying estate are to be read as including a reference to the term of years deemed to be granted.

23 Land passing as bona vacantia

If, as a result of the passing as bona vacantia of an interest in land to which an obligation of the landowner under a conservation covenant relates, the person to whom the interest passes is bound by the obligation, that person has no liability in respect of the obligation until such time as that person takes possession or control of the land or enters into occupation of it.

24 Declarations about obligations under conservation covenants

(1) The court or Upper Tribunal may on the application of any person interested declare—

(a) whether any land is land to which an obligation under a conservation covenant relates,

(b) whether any person is bound by, or entitled to the benefit of, an obligation under a conservation covenant and, if so, in respect of what land, or

(c) what, upon the true construction of any instrument by means of which an obligation under a conservation covenant is created or modified, is the nature of the obligation.

(2) No application under section 84(2) of the Law of Property Act 1925 (which enables the court on application to make declarations about restrictions under instruments) may be made in relation to an obligation under a conservation covenant.

(3) In this section, "the court" means the High Court or the county court.

25 Duty of responsible bodies to make annual return

(1) A body specified for the purposes of section 2 must make an annual return of the following information to the Secretary of State—

(a) the number of conservation covenants under which an obligation relating to land in England is owed to it as the responsible body under the covenant, and

(b) the extent of the land in England in relation to which it is owed an obligation as the responsible body under a conservation covenant.

(2) A body specified for the purposes of section 3 must make an annual return of the following information to the Welsh Ministers—

(a) the number of conservation covenants under which an obligation relating to land in Wales is owed to it as the responsible body under the covenant, and

(b) the extent of the land in Wales in relation to which it is owed an obligation as the responsible body under a conservation covenant.

(3) Returns under subsection (1) or (2) must—

(a) relate to such twelve month periods as the authority to which the return is to be made may specify by notice, and

(b) be made by such date as that authority may so specify.

Supplementary

26 Crown application

(1) This Act binds the Crown.

(2) Schedule 2 (which makes provision about the application of this Act to Crown land) has effect.

27 Interpretation

(1) In this Act, references to an obligation under a conservation covenant are to an obligation under provision of a conservation covenant given statutory effect by section 4(1).

(2) In this Act, references to the qualifying estate, in relation to an obligation under a conservation covenant, are to the estate in land by virtue of which the condition in section 1(2)(b)(i) was met in relation to the provision giving rise to the obligation or, as the case may be, the provision to which the provision giving rise to the obligation was ancillary.

(3) In this Act, references to the land to which an obligation under a conservation covenant relates are, in the case of an obligation under provision given statutory effect by section 4(1) by virtue of being ancillary to another provision, to the land to which the obligation under the other provision relates.

28 Consequential amendments

Schedule 3 (which makes consequential amendments) has effect.

29 Short title, commencement and extent

(1) This Act may be cited as the Conservation Covenants Act 2014.

(2) This Act comes into force—

(a) in relation to land in England, on such day as the Secretary of State may by order made by statutory instrument appoint, and

(b) in relation to land in Wales, on such day as the Welsh Ministers may by order made by statutory instrument appoint.

(3) This Act extends to England and Wales only.

SCHEDULES

SCHEDULE 1

Section 16

DISCHARGE OR MODIFICATION OF OBLIGATION BY UPPER TRIBUNAL

PART 1

DISCHARGE

Power to discharge on application by landowner or responsible body

1 (1) The Upper Tribunal may, on the application of a person bound by, or entitled to the benefit of, an obligation under a conservation covenant by virtue of being the holder of an estate in land, by order discharge the obligation in respect of any of the land to which it relates.

(2) The Upper Tribunal must add as party to the proceedings on an application under sub-paragraph (1) the responsible body under the covenant.

2 (1) The Upper Tribunal may, on the application of the responsible body under a conservation covenant, by order discharge an obligation under the covenant in respect of any of the land to which it relates.

(2) The Upper Tribunal must add as party to the proceedings on an application under sub-paragraph (1) any person who, by virtue of being the holder of an estate in land, is bound by, or entitled to the benefit of, the obligation to which the application relates.

Deciding whether to discharge

3 (1) The Upper Tribunal may exercise its power under paragraph 1(1) or 2(1) if it considers it reasonable to do so in all the circumstances of the case.

(2) In considering whether to exercise its power under paragraph 1(1) or 2(1), the matters to which the Upper Tribunal is to have regard include—

(a) whether there has been any material change of circumstance since the making of the original agreement, in particular—

(i) change in the character of the land to which the obligation relates or of the neighbourhood of that land;

(ii) change affecting the enjoyment of the land to which the obligation relates;

(iii) change affecting the extent to which performance of the obligation is, or is likely in future to be, affordable;

(iv) change affecting the extent to which performance of the obligation is, or is likely in future to be, practicable;

(b) the extent to which the obligation in question is for the public good;

(c) the extent to which the obligation in question serves any conservation purpose it had when the original agreement was entered into.

(3) In considering whether to exercise its power under paragraph 1(1), the matters to which the Upper Tribunal is to have regard also include—

(a) whether any conservation purpose which the obligation in question had when the original agreement was entered into could be served equally well by an obligation relating to different land in respect of which the applicant holds a qualifying estate;

(b) whether, if an order under paragraph 1(1) were made, such an alternative obligation could be created by means of an agreement to which section 1 applies.

(4) In considering, for the purposes of this paragraph, affordability or practicability in relation to performance of an obligation, change in the personal circumstances of a person bound by the obligation is to be disregarded.

(5) In this paragraph—

"qualifying estate" has the same meaning as in section 1;

references to the original agreement, in relation to an obligation under a conservation covenant, are to the agreement containing the provision which gave rise to the obligation.

Supplementary powers

4 (1) The Upper Tribunal may include in an order under paragraph 1(1) or 2(1) provision requiring the applicant to pay compensation in respect of loss of benefit resulting from the order.

(2) Compensation under sub-paragraph (1) shall be payable to such person at such time and be of such amount as the order may provide.

5 (1) The Upper Tribunal may, if it considers it reasonable to do so in connection with the discharge under paragraph 1(1) of an obligation under a conservation covenant, include in the order discharging the obligation provision making the discharge conditional on the entry by the applicant and the responsible body under the covenant into an agreement to which this Act applies containing such provision as the order may specify.

(2) The power under sub-paragraph (1) is exercisable only with the consent of the applicant and the responsible body.

PART 2

MODIFICATION

Power to modify on application by landowner or responsible body

6 (1) The Upper Tribunal may, on the application of a person bound by, or entitled to the benefit of, an obligation under a conservation covenant by virtue of being the holder of an estate in land, by order modify the obligation in respect of any of the land to which it relates.

(2) The Upper Tribunal must add as party to the proceedings on an application under sub-paragraph (1) the responsible body under the covenant.

7 (1) The Upper Tribunal may, on the application of the responsible body under a conservation covenant, by order modify an obligation under the covenant in respect of any of the land to which it relates.

(2) The Upper Tribunal must add as party to the proceedings on an application under sub-paragraph (1) any person who, by virtue of being the holder of an estate in land, is bound by, or entitled to the benefit of, the obligation to which the application relates.

8 The power under paragraph 6(1) or 7(1) does not include power to make a change to an obligation which, had it been included in the original agreement, would have prevented the provision of the agreement which gave rise to the obligation being provision in relation to which the conditions in section 1(2)(b) were met.

Deciding whether to modify

9 (1) The Upper Tribunal may exercise its power under paragraph 6(1) or 7(1) if it considers it reasonable to do so in all the circumstances of the case.

(2) In considering whether to exercise its power under paragraph 6(1) or 7(1), the matters to which the Upper Tribunal is to have regard include—

(a) whether there has been any material change of circumstance since the making of the original agreement, in particular—

(i) change in the character of the land to which the obligation relates or of the neighbourhood of that land;

(ii) change affecting the enjoyment of the land to which the obligation relates;

(iii) change affecting the extent to which performance of the obligation is, or is likely in future to be, affordable;

(iv) change affecting the extent to which performance of the obligation is, or is likely in future to be, practicable;

(b) the extent to which the obligation in question is for the public good;

(c) the extent to which the obligation in question serves any conservation purpose it had when the original agreement was entered into.

(3) In considering, for the purposes of this paragraph, affordability or practicability in relation to performance of an obligation, change in the personal circumstances of a person bound by the obligation is to be disregarded.

Supplementary powers

10 (1) The Upper Tribunal may include in an order under paragraph 6(1) or 7(1) provision requiring the applicant to pay compensation in respect of loss of benefit resulting from the order.

(2) Compensation under sub-paragraph (1) shall be payable to such person at such time and be of such amount as the order may provide.

11 (1) The Upper Tribunal may, if it considers it reasonable to do so in connection with the modification under paragraph 6(1) of an obligation under a conservation covenant, include in the order modifying the obligation provision making the modification conditional on the entry by the applicant

and the responsible body under the covenant into an agreement to which this Act applies containing such provision as the order may specify.

(2) The power under sub-paragraph (1) is exercisable only with the consent of the applicant and the responsible body.

Effect of modification

12 The modification of an obligation by an order under this Part binds—

(a) the parties to the proceedings in which the order is made, and

(b) any person who, as respects any of the land to which the modification relates, becomes a successor in title of a person bound by the modification.

Interpretation

13 In this Part, references to the original agreement, in relation to an obligation under a conservation covenant, are to the agreement containing the provision which gave rise to the obligation.

SCHEDULE 2

Section 26

APPLICATION TO CROWN LAND

PART 1

GENERAL

1 Subject to the provisions of this Schedule, this Act applies to Crown land as it applies in relation to any other land.

2 For the purposes of this Schedule, "Crown land" means land an interest in which—

(a) belongs to Her Majesty in right of the Crown or in right of Her private estates,

(b) belongs to Her Majesty in right of the Duchy of Lancaster,

(c) belongs to the Duchy of Cornwall, or

(d) belongs to a government department or is held in trust for the purposes of a government department.

3 (1) In this Schedule, "appropriate authority" means—

(a) in the case of land which belongs to Her Majesty in right of the Crown, the Crown Estate Commissioners or other government department having management of the land in question;

(b) in the case of land which belongs to Her Majesty in right of Her private estates, a person appointed by Her Majesty in writing under the Royal Sign Manual, or, if no such appointment is made, the Secretary of State;

(c) in the case of land which belongs to Her Majesty in right of the Duchy of Lancaster, the Chancellor of the Duchy;

(d) in the case of land which belongs to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints;

(e) in the case of land which belongs to a government department or is held in trust for Her Majesty for the purposes of a government department, that department.

(2) If any question arises under this paragraph as to what authority is the appropriate authority in relation to any land, that question is to be referred to the Treasury, whose decision is final.

4 In this Part, references to Her Majesty's private estates are to be read in accordance with section 1 of the Crown Private Estates Act 1862.

PART 2

CROWN CONSERVATION COVENANTS

Agreements for the purposes of section 1

5 (1) If an interest in Crown land held by or on behalf of the Crown is held by a person other than the appropriate authority, the appropriate authority may, as respects that interest, enter into an agreement for the purposes of section 1 in place of the holder of the interest.

(2) An authority which enters into an agreement by virtue of sub-paragraph (1) is to be treated for the purposes of section 1 as the holder of any interest held by the person in whose place the authority enters into the agreement.

(3) If the agreement which an authority enters into by virtue of sub-paragraph (1) is a conservation covenant, any obligation of the authority under the covenant is to be treated for the purposes of this Act as an obligation of the landowner.

6 (1) In its application to an obligation treated by virtue of paragraph 5(3) as an obligation of the landowner under a conservation covenant, section 7 has effect with the following modifications.

(2) In subsection (2)—

(a) in paragraph (a), the reference to the landowner under the covenant is to be treated as a reference to the appropriate authority, and

(b) in paragraph (b), the reference to the landowner under the covenant is to be treated as a reference to the original landowner.

(3) In subsection (3)—

(a) the reference in the opening words to the landowner under the covenant is to be treated as a reference to the appropriate authority, and

(b) the reference in paragraph (b) to the landowner is to be treated as a reference to the original landowner.

(4) Subsection (4)(c) does not apply if the successor's immediate predecessor in title was the original landowner.

7 (1) In its application to an obligation of the responsible body under a conservation covenant to which an agreement entered into under paragraph 5(1) gives rise, section 8 has effect with the following modifications.

(2) In subsection (1)—

(a) in paragraph (a), the reference to the landowner under the covenant is to be treated as reference to the appropriate authority, and

(b) in paragraph (b), the reference to the landowner under the covenant is to be treated as a reference to the original landowner.

(3) In subsection (2)—

(a) in the opening words, the reference to the landowner under the covenant is to be treated as reference to the appropriate authority, and

(b) in paragraph (b), the reference to the landowner under the covenant is to be treated as a reference to the original landowner.

Interpretation of Part

8 (1) This paragraph applies for the purposes of this Part.

(2) References to the appropriate authority, in relation to an obligation under a conservation covenant to which an agreement entered into under paragraph 5(1) gives rise, are to the appropriate authority with respect to the estate in land of the original landowner which is the qualifying estate in relation to the obligation.

(3) References to the original landowner, in relation to an obligation under a conservation covenant to which an agreement entered into under paragraph 5(1) gives rise, are to the person who held the qualifying estate in relation to the obligation when the agreement was entered into.

PART 3

OBLIGATIONS UNDER NON-CROWN CONSERVATION COVENANTS

9 (1) This paragraph applies if the estate in land by virtue of which a person is a successor in title of the landowner under a conservation covenant is held by or on behalf of the Crown by a person other than the appropriate authority.

(2) Sections 7(2)(b) and 8(1)(b) have effect as if the estate in land were held by the appropriate authority.

(3) Section 7(4)(c) has effect, in relation to a disposal of the estate in land, as if the successor's immediate predecessor in title were the appropriate authority.

(4) Section 8(3) has effect as if the reference to the successor in title were to the appropriate authority.

PART 4

MODIFICATION OF SECTIONS 13 TO 15

Agreements under section 13(1)

10 (1) If, in respect of any of the land to which an obligation of the landowner under a conservation covenant relates, the qualifying estate is held by or on behalf of the Crown by a person other than the appropriate authority, that

authority may enter into an agreement under section 13(1) in place of the holder of that estate.

(2) An agreement entered into by virtue of sub-paragraph (1) is to be treated for the purposes of section 13(2)(c) as entered into by virtue of the estate in land held by the person in whose place the appropriate authority enters into the agreement.

Agreements under section 14(1)

11 (1) This paragraph applies if the responsible body under a conservation covenant enters into an agreement under section 14(1) in relation to an obligation which it owes to the other party to the agreement ("the obligor") by virtue of paragraph 7(2)(a) or 9(2).

(2) If the obligor is entitled to the benefit of the obligation by virtue of paragraph 7(2)(a), the reference in section 14(2)(c) to the estate in land by virtue of which the power is exercisable is to be read as a reference to the estate in land held by the person in whose place the obligor acted in entering into the agreement which gave rise to the obligation.

(3) If the obligor is entitled to the benefit of the obligation by virtue of paragraph 9(2), the reference in section 14(2)(c) to the estate in land by virtue of which the power is exercisable is to be read as a reference to the estate in land which the obligor is treated by paragraph 9(2) as holding.

Agreements under section 15(1)

12 (1) If the power under section 15(1) is exercised by a person—

(a) bound by an obligation of the landowner under a conservation covenant by virtue of paragraph 6(2)(a), or

(b) entitled to the benefit of an obligation of the responsible body under a conservation covenant by virtue of paragraph 7(2)(a),

the reference in section 15(3)(c) to the estate in land by virtue of which the power is exercisable is to be read as a reference to the estate in land held by the person in whose place that person acted in entering into the agreement which gave rise to the obligation.

(2) If the power under section 15(1) is exercised by a person—

(a) bound by an obligation of the landowner under a conservation covenant by virtue of paragraph 9(2), or

(b) entitled to the benefit of an obligation of the responsible body under a conservation covenant by virtue of paragraph 9(2),

the reference in section 15(3)(c) to the estate in land by virtue of which the power is exercisable is to be read as a reference to the estate in land which the person is treated by paragraph 9(2) as holding.

SCHEDULE 3

Section 28

CONSEQUENTIAL AMENDMENTS

Local Government, Planning and Land Act 1980 (c. 65)

1 (1) In Schedule 28 to the Local Government, Planning and Land Act 1980, paragraph 6 is amended as follows.

(2) In sub-paragraph (1), for the words from "interference" to the end substitute—

"(a) interference with an interest or right to which this paragraph applies, or

(b) a breach of—

(i) a restriction as to the user of land arising by virtue of a contract, or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(3) In sub-paragraph (1A)(b), the words after "breach of" become sub-paragraph (i) and after that sub-paragraph insert ", or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(4) In sub-paragraph (4), for "(1) or (1A)" substitute "(1)(a) or (b)(i) or (1A)(a) or (b)(i)".

New Towns Act 1981 (c. 64)

2 (1) Section 19 of the New Towns Act 1981 is amended as follows.

(2) In subsection (1)(b), the words after "breach of" become sub-paragraph (i) and after that sub-paragraph insert ", or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(3) In subsection (1A)(b), the words after "breach of" become sub-paragraph (i) and after that sub-paragraph insert ", or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(4) In subsection (4), for "(1) or (1A)" substitute "(1)(a) or (b)(i) or (1A)(a) or (b)(i)".

Acquisition of Land Act 1981 (c. 67)

3 (1) The Acquisition of Land Act 1981 has effect with the following modifications if the land comprised in a compulsory purchase order, or draft compulsory purchase order, includes land to which an obligation under a conservation covenant relates.

(2) Part 2 (purchases by local and other authorities) has effect as if—

(a) the person entitled to the benefit the obligation were a qualifying person for the purposes of section 12(1) (duty of acquiring authority to give notice of compulsory purchase order), and

(b) an objection by such a person were a relevant objection.

(3) Schedule 1 (purchases by Ministers) has effect as if—

(a) the person entitled to the benefit of the obligation were a qualifying person for the purposes of paragraph 3(1) (duty of Minister to give notice of draft compulsory purchase order), and

(b) an objection by such a person were a relevant objection.

Housing Act 1988 (c. 50)

4 (1) In Schedule 10 to the Housing Act 1988, paragraph 5 is amended as follows.

(2) In sub-paragraph (1), for the words from "interference" to the end substitute—

"(a) interference with an interest or right to which this paragraph applies, or

(b) breach of—

(i) a restriction as to the user of land arising by virtue of a contract, or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(3) In sub-paragraph (1A)(b), the words after "breach of" become sub-paragraph (i) and after that sub-paragraph insert ", or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(4) In sub-paragraph (4), for "(1) or (1A)" substitute "(1)(a) or (b)(i) or (1A)(a) or (b)(i)".

Town and Country Planning Act 1990 (c. 8)

5 (1) Section 237 of the Town and Country Planning Act 1990 is amended as follows.

(2) In subsection (1)(b), the words after "breach of" become sub-paragraph (i) and after that sub-paragraph insert ", or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(3) In subsection (1A)(b), the words after "breach of" become sub-paragraph (i) and after that sub-paragraph insert ", or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(4) In subsection (4), for "(1) or (1A)" substitute "(1)(a) or (b)(i) or (1A)(a) or (b)(i)".

Housing and Regeneration Act 2008 (c. 17)

6 (1) Schedule 3 to the Housing and Regeneration Act 2008 is amended as follows.

(2) In paragraph 1, in sub-paragraphs (1)(b) and (3)(b), the words after "breach of" become sub-paragraph (i) and after that sub-paragraph insert ", or

(ii) an obligation under a conservation covenant within the meaning of the Conservation Covenants Act 2014."

(3) In paragraph 2(1), after "paragraph 1" insert "(1)(a) or (b)(i) or (3)(a) or (b)(i)".

EXPLANATORY NOTES

INTRODUCTION

A.1 These explanatory notes relate to the draft Conservation Covenants Bill, which gives effect to the recommendations made by the Law Commission in its report Conservation Covenants, published in June 2014.[1]

A.2 A conservation covenant is an agreement made between a landowner and a conservation body which ensures the conservation of natural or heritage features on the land. It is a private and voluntary agreement made in the public interest, which continues to be effective after the land changes hands.

TERRITORIAL EXTENT AND APPLICATION

A.3 The draft Bill extends to England and Wales. It applies separately in relation to land in England and land in Wales.

SUMMARY

A.4 The draft Bill contains 29 clauses, and can be summarised as follows:

(1) Clauses 1 to 3 are concerned with the creation of a conservation covenant. They set out the conditions that an agreement must satisfy if it is to be a conservation covenant and specify who can enter into such an agreement, including the bodies ("responsible bodies") with whom an agreement in relation to land in England or Wales may be entered into.

(2) Clauses 4 to 8 specify the legal effects of a conservation covenant as a statutory obligation, including its duration, its status as a local land charge, and provisions as to who is bound by a conservation covenant and who can enforce it.

(3) Clauses 9 to 12 deal with breach and enforcement of a conservation covenant, explaining what constitutes breach of a conservation covenant and setting out the remedies available for breach, defences and the limitation period.

(4) Clauses 13 to 16 contain provisions in respect of the discharge, release and modification of a conservation covenant by agreement or by means of an application to the Upper Tribunal of the Lands Chamber. Schedule 1 contains detailed provisions about discharge and modification by the Lands Chamber.

[1] Conservation Covenants (2014) Law Com 439.

(5) Clauses 17 to 19 enable a responsible body to transfer a conservation covenant to another responsible body, and makes provision for the case where a body ceases to qualify as a responsible body.

(6) Clauses 20 to 28 relate to miscellaneous matters and supplementary provisions including the application of the Bill to the Crown (to which Schedule 2 relates) and consequential amendments (to which Schedule 3 relates).

THE BILL – COMMENTARY ON CLAUSES

Clause 1 – Conservation covenants

A.5 Clause 1(1) states that a conservation covenant is an agreement to which the draft Bill applies.

A.6 Clause 1(2) describes the conditions that an agreement must meet for the draft Bill to apply. It must be an agreement between a landowner and a "responsible body" and meet specified conditions, namely it must be in writing signed by the parties, contain a provision which is of "a qualifying kind", have a "conservation purpose" and be for the public good. The meaning of "conservation purpose" is detailed in clause 1(4), along with the definition of "conserve" in clause 1(5).

A.7 Clause 1(2) also states that for the agreement to be a conservation covenant it must be apparent from the agreement that the draft Bill is intended to apply to it; no particular wording is specified for that purpose. The intention of that requirement is to ensure that agreements do not, as a result of the application of the Bill, take effect as conservation covenants contrary to the wishes of the parties.

A.8 Clause 1(3) states that a provision of "a qualifying kind" is of one of two kinds. First, it may require the landowner to do, or not to do, something on specified land or to allow the responsible body to do something on such land. Secondly, it may require the responsible body to do something on such land.

A.9 Clause 1(3) provides that the landowner must hold a "qualifying estate" in the land to which the provision in question relates and this must be specified in the agreement. A "qualifying estate" is a freehold, or a leasehold estate of more than seven years; see clause 1(5). Clause 1(5)(b) provides that a conservation covenant can only be created by a lessee during the fixed term of the lease, and not during any subsequent period of statutory continuation of the lease (for example, under section 24(1) of the Landlord and Tenant Act 1954).

A.10 If an agreement is one to which the draft Bill applies (i.e. if it is a conservation covenant), any provision of the agreement which meets the conditions in clause 1(2)(b) is given statutory effect by clause 4 and so becomes an obligation under a conservation covenant – see clause 27(1) (Interpretation).

Clauses 2 and 3 – Responsible bodies

A.11 A conservation covenant is an agreement between a landowner and a responsible body. The responsible body is able to enforce compliance with the landowner's obligations under the conservation covenant. It may or may not also be made subject to obligations under the conservation covenant.

A.12 Clauses 2 and 3 define "responsible bodies" in relation to land in England and land in Wales respectively, being the bodies that are able to be party to a conservation covenant. The functions under the clauses are conferred (in relation to land in England) on the Secretary of State and (in relation to land in Wales) on the Welsh Ministers.

A.13 In relation to land in England, the responsible bodies are, on the one hand, the Secretary of State and, on the other hand, any "qualifying body" specified in an order made by the Secretary of State. In relation to land in Wales, the Welsh Ministers are a responsible body and any "qualifying body" that they specify by order is also a responsible body.

A.14 The practical consequence of this is that where the land that is subject to a conservation covenant is in England, the responsible body must be one of those specified by the Secretary of State; where the land is in Wales it must be one of those specified by the Welsh Ministers. In the event that any conservation covenant straddles the border, then the responsible body could be chosen from those organisations that are specified in both England and Wales.

A.15 To be capable of being specified as a responsible body, a body must come within one of the categories of "qualifying body" listed in clauses 2(2) and 3(2). These include local authorities (as defined), registered charities, exempt charities and bodies established by or under a public general Act. However, a charity, or a body established by or under a public general Act, can only be specified if at least one of its purposes or functions is (or relates to or is connected with) any of the matters set out in clauses 2(3) and 3(3) respectively – and which correspond to the conservation purposes set out in clause 1. For example, the National Parks Authorities are created by an order made in exercise of the power conferred by section 63(1) of the Environment Act 1965 and accordingly fall within clauses 2(2)(g) and 3(2)(f).

A.16 By virtue of section 14 of the Interpretation Act 1978, power to make an order by statutory instrument implies (unless the contrary appears) power to revoke an order previously made under the power by making a further order to that effect. Accordingly, clauses 2 and 3 by implication give the Secretary of State and Welsh Ministers power to remove a qualifying body from the list of responsible bodies.

Clause 4 – Statutory effect

A.17 This clause gives statutory effect to any provision contained in a conservation covenant which meets the conditions in clause 1(2)(b).

A.18 Clause 4 also gives statutory effect to a provision which is ancillary to a provision which meets the qualifying conditions. An ancillary provision is provision that does not itself meet those conditions but is related to the performance of provision that does so – for example, provision for payment for work done on the land, or a provision relating to the way in which work is to be performed. Ancillary provisions may not themselves have a conservation purpose or be, taken in isolation, for the public good; they are nevertheless closely linked with provision of the agreement that does meet the qualifying conditions and so are given statutory effect along with them. Both provisions that meet the qualifying conditions, and terms that are ancillary to such provisions, are given statutory

effect by clause 4 and are referred to in the rest of the draft Bill as obligations under a conservation covenant.

A.19 This clause also provides that provision for public access to land, which is the subject of a conservation covenant, is to be treated as ancillary to provision given statutory effect by this clause. Provision for public access to land may not itself meet the qualifying conditions because it may not itself have a conservation purpose; by treating such provision as ancillary provision, clause 4(2) makes sure that the provision is given statutory effect.

A.20 Any provision given statutory effect by clause 4 will be an obligation under a conservation covenant: see clause 27(1) (Interpretation).

Clause 5 – Local land charge

A.21 Clause 5(1) provides that a conservation covenant is a local land charge.

A.22 As a result sections 5(1) and (2) of the Local Land Charges Act 1977 apply; these impose a duty upon the responsible body to apply for registration of the conservation covenant as a local land charge – or, where the responsible body is itself the registering authority, simply to register it.

A.23 Clause 5(3) amends the application of section 2 of the Local Land Charges Act 1977 so as to ensure that a conservation covenant between a lessor and a lessee is not excluded from being a local land charge.

A.24 Clause 5(4) modifies section 10(1) of the Local Land Charges Act 1977 (in its application to conservation covenants. The modifications reflect the fact that a conservation covenant is effective against subsequent owners of the land only once it has been registered as a local land charge (clause 7(3)(b)). This differs from the general position where the enforceability of a local land charge is unaffected by whether or not it is registered. Accordingly, the registering authority cannot incur liability for non-registration. However, liability for a defective search result remains in the usual way.

Clause 6 – Duration of obligation

A.25 This clause provides that each obligation that results from the application of the draft Bill to an agreement has a specified duration, either as a result of this clause, or as a result of alternative provision in the agreement.

A.26 Unless the conservation covenant provides for a shorter period, an obligation under a conservation covenant has effect for the "default period", which is:

(1) a period of indefinite duration where the relevant qualifying estate is an estate in fee simple absolute in possession; or

(2) the remainder of the term where the relevant qualifying estate is a term of years absolute.

A.27 Accordingly, a conservation covenant created by a freeholder will be of indefinite duration unless it provides for a shorter duration. The duration of a conservation covenant created by a leaseholder cannot exceed the remainder of the term of the lease but, again, the conservation covenant may specify a shorter term.

Clause 7 – Benefit and burden of obligation of landowner

A.28 This clause sets out who is responsible for complying with an obligation under a conservation covenant entered into by a landowner and, therefore, the person against whom any enforcement action can be taken in the event of breach. It also spells out who may take such action.

A.29 Clause 7(1) provides that an obligation under a conservation covenant is owed by a landowner to the responsible body under the conservation covenant.

A.30 Clause 7(2) has the effect that a conservation covenant will bind the landowner who created it ("the original covenantor"), and burden the estate in land which enabled the landowner to create it ("the qualifying estate"). A conservation covenant will bind anyone who acquires the original covenantor's estate in the land (or part of the land), or who is granted a lease of the whole or part of the land – but only if the conservation covenant was registered as a local land charge at the time the successor in title acquired the estate in the land (clause 7(4)(b)). An estate in land is "acquired" for these purposes at the time of the disposition (for example, a sale, a gift, a grant of a lease), even if that disposition is required to be completed by registration at the Land Registry (clause 7(5)).

A.31 A conservation covenant will not bind anyone whose interest in the land pre-dates the conservation covenant. If a freeholder grants a lease, and then enters into a conservation covenant relating to the land the subject of the lease, and the lessee is not a party to the conservation covenant, the lessee will not be bound by any obligation of the landowner under the conservation covenant. On the other hand, where a freeholder enters into a conservation covenant of indefinite duration, which is registered as a local land charge, and then grants a lease of the land, the leaseholder will be bound by the conservation covenant throughout the term of the lease

A.32 Clause 7(4)(a) provides that a lessee under a lease granted for seven years or less is not bound by positive obligations under a conservation covenant. Accordingly, where a freeholder creates a conservation covenant which is registered as a local land charge, and then grants a periodic tenancy, the lessee will be bound by negative obligations in the conservation covenant but not by positive ones. The same result follows where a lessee under a lease for more than seven years, granted after the creation of a conservation covenant, holds over on a periodic tenancy after expiry of the lease.

A.33 Corresponding results follow where a conservation covenant is created by a lessee of a term of more than seven years (see clause 1(5) and the definition of "qualifying estate") who then sub-lets the land.

A.34 Clause 7(3) provides that the original covenantor's liability in respect of an obligation under a conservation covenant comes to an end on parting with the whole of his or her qualifying estate in the land, or if the land is no longer bound by the conservation covenant. If the original covenantor ceases to own only part of the land, he or she will continue to be bound by the obligation but only in relation to the retained land. If an obligation is partially discharged the application of clause 7(1)(b) is correspondingly reduced because the land to which the obligation relates diminishes. In the case of modification, the obligation continues, but needs to be read as modified as respects the land to which the modification relates.

A.35 Clause 7(4)(c) provides that a successor in title will not be bound by a conservation covenant if his or her immediate predecessor was not bound. This could arise in the context of the discharge of a conservation covenant in respect of part of the land to which it related or where a conservation covenant is registered late. For example, a landowner, A, and a responsible body enter into an agreement for a conservation covenant. Before the responsible body registers the conservation covenant as a local land charge, A transfers part of the land to B, who later transfers it to C. Even if the conservation covenant is subsequently registered as a local land charge, C will not be bound by it because B was not bound by it at the time B transferred it to C.

Clause 8 – Benefit of obligation of responsible body

A.36 This clause sets out who has the benefit of an obligation on the part of the responsible body under a conservation covenant and who can, therefore, enforce it.

A.37 It provides that such an obligation is owed to the landowner with whom the responsible body entered into the conservation covenant ("the original covenantor") and anyone who later holds either the relevant qualifying estate or an estate in land derived from this. For example, a transferee of the land, or a lessee, can enforce the responsible body's obligations. However, the original covenantor can only do so while he or she holds an estate in the land (clause 8(2)).

A.38 Clause 8(3) ensures that if a successor in title to the original covenantor is not bound by certain obligations – in particular, by positive obligations because he or she holds a lease for less than seven years – then that successor will not take the benefit of any of the responsible body's obligations that are ancillary to those obligations.

Clause 9 – Breach of obligation

A.39 Clauses 9(1) and 9(2) set out what amounts to a breach of negative and positive obligations, respectively. Where a landowner undertakes a negative obligation he or she must not breach or allow others to breach it; where he or she takes on a positive obligation there is a responsibility to ensure that it is performed. These will be relevant considerations where the landowner grants a lease of the land after the creation of the covenant.

Clause 10 – Enforcement of obligation

A.40 Clause 10 sets outs the remedies that are available in proceedings for the enforcement of an obligation under a conservation covenant. It also provides that when considering, in the context of an application for equitable relief, what remedy is appropriate, the court must take into account any public interest in the performance of the obligation concerned.

A.41 Contract principles apply to awards of damages (clause 10(3)), and in particular the rules that determine remoteness of damage. Contractual damages compensate the claimant for loss; and in most cases the direct loss to the responsible body as a result of breach of an obligation in a conservation covenant may be insignificant. For that reason it is expected that in most cases the remedy sought will be an injunction, or an order for specific performance of the obligation. In considering claims for an injunction the court has discretion to award damages instead,[2] and in that context it is expected that a consideration of the public interest will be particularly significant.

A.42 Clause 10(4) enables the court to award exemplary damages where a landowner has breached his or her obligations. This is to ensure that a landowner is not able to profit from a breach of an obligation in a conservation covenant, for example by developing the land in contravention of the covenant in circumstances where compensatory damages may be very small. In such circumstances the court can make an award of damages that will strip the landowner of his or her profit from the beach of covenant.[3]

Clause 11 – Defences to breach of obligation

A.43 Clause 11 sets out defences to proceedings for breach of an obligation under a conservation covenant: where the breach occurred because of something beyond the defendant's control (clause 11(1)(a)), as a result of something done in an emergency (for example, to control flood water; clause 11(1)(b)), or in circumstances where it is not possible to comply with an obligation under a conservation covenant without breaching a statutory control applying as a result of the designation of the land for a public purpose (clause 11(1)(c)).

A.44 The latter defence will only be available if the land was designated for a public purpose after the conservation covenant was created and the defendant can show that he or she took all reasonable steps to obtain any authorisation that would have enabled compliance with the obligation and that permission was refused.

A.45 For example, land may be subject to a conservation covenant which requires the landowner to carry out specified works. The land is subsequently designated as a

[2] Senior Courts Act 1981, s 50.

[3] See *Rookes v Barnard* [1964] AC 1129.

Site of Special Scientific Interest.[4] The works specified in the conservation covenant are likely to damage the special interest features for the site and cannot be done without the consent of Natural England.[5] Natural England refuses consent. If the landowner carries out the works required by the conservation covenant he or she will commit an offence under section 28P of the Wildlife and Countryside Act 1981. In these circumstances the landowner could rely on this latter defence.

A.46 Subsection (4) provides that the defence of statutory authority applies to conservation covenants. The intention is that when a public body such as a local authority acquires, and uses, land in accordance with its statutory powers it can override a conservation covenant that binds the land, in the same way that it can override an easement affecting the land. The conservation covenant is not extinguished. This means that in the event that the acquiring authority sells the land, the purchaser as its successor in title will be bound by the conservation covenant. This contrasts with the position under section 237 of the Town and Country Planning Act 1990 and analogous provisions where the conservation covenant would in effect be extinguished.

Clause 12 – Limitation period

A.47 Clause 12 provides that the limitation period in respect of an action for breach of an obligation under a conservation covenant is the same as the limitation period under section 5 of the Limitation Act 1980 for an action founded on simple contract. This means that any proceedings in respect of a conservation covenant shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Clause 13 – Discharge of obligation of landowner by agreement

A.48 This clause provides that the responsible body under a conservation covenant, and the person who, in respect of any land, holds a qualifying estate in relation to an obligation of the landowner under the covenant can by agreement discharge any of that land from the obligation. An agreement to do this must be in writing signed by the parties and identify the relevant land, obligation and qualifying estate.

A.49 If the whole of the land to which an obligation of the landowner under a conservation covenant relates is discharged from the obligation, the effect is to modify the covenant or, if it is the only obligation under the covenant, to discharge it. Rules 8(1) and (2) of the Local Land Charges Rules 1977[6] require details to be given to the Local Land Charges Register following the modification

[4] Sites of Special Scientific Interest are designated by Natural England under section 28 of the Wildlife and Countryside Act 1981, where it is of the opinion that land is of special interest by reason of any of its flora, fauna, or geological or physiographical features.

[5] See section 28E of the Wildlife and Countryside Act 1981.

[6] SI 1977 No 985.

or discharge of a registered charge.

A.50 If an area of land is discharged from an obligation of the landowner under a conservation covenant, the effect will be that the obligation relates to a smaller area of land because some land will have been freed from the obligation. Clause 7(3)(a), ensures that a landowner is no longer bound by an obligation in respect of land which has been discharged from it.

Clause 14 – Release of obligation of responsible body by agreement

A.51 This clause provides that a person to whom the responsible body under a conservation covenant owes an obligation under the covenant may by agreement release it from the obligation. This can be done in respect of part or all of the relevant land.

A.52 If the responsible body under a conservation covenant is released from an obligation under the covenant, that is a modification of the covenant for the purposes of rules 8(1) and (2) of the Local Land Charges Rules 1977 so that details of the modification have to be given to the authority responsible for the relevant Local Land Charges Register.

Clause 15 – Modification of obligation by agreement

A.53 Clause 15(1) creates a means of modifying an obligation by agreement between the responsible body and a landowner bound by (or having the benefit of) an obligation under a conservation covenant. The power can be exercised in relation to any of the land affected by the conservation covenant in respect of which the landowner is bound by, or entitled to the benefit of, the obligation.

A.54 Clause 15(2) has the effect that the power to modify an obligation under a conservation covenant cannot be exercised so as to produce a result which could not have been achieved by the original agreement (because inconsistent with the requirements of clause 1(2)(b)).

A.55 Clause 15(3) sets out requirements for the content of the agreement, and clause 15(4) provides that any modification will bind the parties to the agreement and their successors in title in respect of any of the land to which the obligation, as modified, relates.

A.56 For example, X enters into a conservation covenant and then transfers part of the land to Y, leases another part to Z, and retains part of the land himself. The original obligation may, following devolution of parts of the original landowner's interest, bind X, Y and Z. X then enters into an agreement with the responsible body to modify the obligation. This particular modification will only bind X. It will not bind Y and Z as they are not parties to the modification agreement. In the case of X (and his or her successors), the obligation under the conservation covenant is then read with the modification. In the case of Y and Z (and their successors), the obligation under the covenant has effect without modification.

A.57 Rules 8(1) and (2) of the Local Land Charges Rules 1977 require details to be given to the authority responsible for the relevant Local Land Charges Register following the modification of a registered charge.

Clause 16 – Discharge or modification of obligation by the Upper Tribunal

A.58 Clause 16 gives effect to Schedule 1 which makes provision about the discharge or modification of an obligation under a conservation covenant on application to the Upper Tribunal.

A.59 An application for discharge or modification may in some circumstances be found useful as a response to proceedings brought to enforce an obligation under a conservation covenant. Clause 16(2) gives a person, who is the subject of enforcement proceedings, the right to apply to the High Court or the county court for an order giving leave to apply to the Upper Tribunal under Schedule 1 and staying the enforcement proceedings in the meantime.

A.60 Clause 16(3) provides that an application cannot be made under section 84(1) of the Law of Property Act 1925 to discharge or modify a negative obligation under a conservation covenant, thus ensuring that obligations under a conservation covenant are modified or discharged by the Lands Chamber of the Upper Tribunal only on the basis designed for conservation covenants.

Clause 17 – Power of responsible body to appoint replacement

A.61 Clause 17(1) enables the responsible body under a conservation covenant ("the appointor") to transfer both the benefit and the burden of its obligations to another responsible body ("the appointee") by appointing it the responsible body under the covenant by agreement in writing signed by the appointor and appointee (clause 17(2)). A conservation covenant can exclude the power to do this.

A.62 Clause 17(3) provides that where the conservation covenant has been registered as a local land charge, the transfer to the appointee only has effect if the appointor gives to the authority responsible for the relevant Local Land Charges Register sufficient information to enable it to amend the register, as it is required to by rule 8(2) of the Local Land Charges Rules 1977. Clause 17(3) does not apply where the appointor is itself the registering authority (which may be the case where the responsible body is a local authority) (clause 17(4)).

A.63 Clause 17(5) describes the effect of the appointment. It transfers to the appointee the benefit of every obligation of the landowner under the conservation covenant and the burden of every obligation of the responsible body. This is subject to qualification in clause 17(6) that the transfer of a conservation covenant does not transfer to the appointee any rights or liabilities in respect of an existing breach of an obligation under the conservation covenant. It only has effect in relation to future performance. The appointee cannot take, or continue, enforcement action in respect of a breach which pre-dates the transfer. If the breach is a continuing one the appointee may be able to take enforcement action in respect of the continuing breach after the transfer.

A.64 Clause 17(7) requires the appointee to give notice of its appointment to every person who is bound by an obligation of the landowner under a conservation covenant.

A.65 Clause 17(8) concerns the situation where a conservation covenant relates to land in both England and Wales. It provides that the power may be exercised separately in respect of the land in England and the land in Wales.

Clause 18 – Body ceasing to be qualified as responsible body: England

A.66 This clause concerns the situation where the responsible body under a conservation covenant ceases to be a qualifying body under clause 2(2) or to be specified as a responsible body by the Secretary of State by an order under clause 2(1). There is no specific provision for the situation where a responsible body has itself ceased to exist because in these circumstances it will cease to be a qualifying body and, therefore, come within this provision.

A.67 Clause 18(2) provides that in such circumstances the body will cease to be the responsible body under the covenant, so far as relating to land in England.

A.68 Clause 18(3) describes what happens in these circumstances. The benefit of every obligation of the landowner under the covenant and the burden of every obligation of the responsible body under the covenant will transfer to the Secretary of State. The transfer does not have effect as regards any rights or liabilities in respect of an existing breach of obligation. It only has effect in relation to future performance (clause 18(4)).

A.69 Clause 18(5) provides that when the transfer described in clause 18(3) takes place, the Secretary of State becomes the custodian of the conservation covenant until either he or she appoints another responsible body and transfers the conservation covenant to it, or decides to take on the role of responsible body.

A.70 Clause 18(6) provides that as custodian the Secretary of State may elect to become the responsible body under the conservation covenant by giving written notice to every person who is bound by an obligation of the landowner under the covenant.

A.71 Clause 18(7) gives the Secretary of State the power as custodian of a conservation covenant to enforce any obligation of the landowner under the covenant in respect of land in England and to exercise any power that was conferred on the responsible body in respect of such land.

A.72 Clause 18(8) states that no enforcement action can be taken against the Secretary of State during the period for which he or she is the custodian of a conservation covenant or subsequently in respect of the period of custodianship. The Secretary of State will only become liable to perform the obligations of the responsible body under the conservation covenant if he or she makes an election under clause 18(6).

Clause 19 – Body ceasing to be qualified as responsible body: Wales

A.73 This clause makes provision equivalent to clause 18 for obligations under conservation covenants relating to land in Wales except that these transfer to the Welsh Ministers rather than to the Secretary of State.

Clause 20 – Effect of obligation ceasing to be for the public good

A.74 Provision of a conservation covenant is given statutory effect by clause 4 if it meets the requirements in clause 1(2)(b). Of those requirements, the requirement that the provision be for the public good is a continuing one. Accordingly, clause 20 provides that if an obligation under a conservation covenant ceases to be for

the public good – for example because of a change in the nature of the land, or the departure of a species of animal or plant from an area – it ceases to have effect. The same applies to any obligations ancillary to it.

Clause 21 – Effect of acquisition or disposal of affected land by responsible body

A.75 Generally when land that is burdened by an obligation or interest (for example, a restrictive covenant or an easement), and the land that benefits from that interest, come into the same ownership, the interest comes to an end. If the land subsequently returns to separate ownership, the interest does not revive. This is known as the doctrine of unity of seisin, or unity of ownership.

A.76 By contrast, clause 21(1) provides that where the responsible body under a conservation covenant acquires an interest in land to which an obligation under the covenant relates, this does not extinguish the obligation. When the responsible body disposes of land, the obligation remains in force.

A.77 Clause 21(2) disapplies clause 7(4)(c) and clause 8(3)(a) where a landowner's immediate predecessor in title is the responsible body under a conservation covenant. This ensures that when the responsible body disposes of land to which an obligation under the covenant relates the obligation will bind the responsible body's successor in title.

Clause 22 – Effect of deemed surrender and re-grant of qualifying estate

A.78 Clause 1 requires that a conservation covenant be created by a landowner who holds a "qualifying estate" in the land to which the agreement relates; and the qualifying estate must be a freehold, or a lease granted for a term of more than seven years.

A.79 Clause 22 sets out what is to happen where the qualifying estate is a lease which is surrendered and re-granted by operation of law – which takes place in circumstances where a radical amendment to its terms is agreed between the lessor and lessee. In particular, where the lessor and lessee agree an extension of the term of the lease, there is a deemed surrender and re-grant. Special provision is needed owing to the role in the draft Bill of the qualifying estate; the position of successors in title, under clauses 7 and 8, depend upon those successors holding the qualifying estate. But the qualifying estate ceases to exist on a surrender and re-grant. Accordingly, clause 22 provides that in these circumstances clauses 7 (Burden of obligation of landowner) and 8 (Benefit of obligation of responsible body) are to be read as if the "qualifying estate" is a reference to the term of years deemed to be granted by operation of law. Accordingly, the lessee of the extended lease, and his successors, remain liable under the conservation covenant.

A.80 However, clause 6 is not affected. The duration of the conservation covenant therefore remains unchanged; it will either be the length of the original lease (that is, the default period under clause 6(2)(b)) or such shorter period as the parties originally agreed (under clause 6(1)).

Clause 23 – Land passing as bona vacantia

A.81 Due to the feudal origins of land law, land can revert back to the Crown as bona vacantia, that is, as ownerless property. This occurs in particular where a person dies intestate and no-one is entitled to his or her estate under the intestacy rules (contained in the Administration of Estates Act 1925), or where a company is dissolved. In these circumstances property becomes vested in the Crown.

A.82 Clause 23 provides for what happens if an estate in land to which an obligation under a conservation covenant relates passes as bona vacantia. It replicates the general rule of land law in relation to property that vests in the Crown by operation of law by providing that the Crown is not liable under an obligation in a conservation covenant until it takes possession or control of the land or enters into occupation of it. If the Crown subsequently transfers the interest to another, that person will be a successor in title for the purposes of clause 7(2)(b) and 8(1)(b).

Clause 24 – Declarations about obligations under conservation covenants

A.83 Clause 24(1) gives the High Court, the county court or the Upper Tribunal, on the application of any person interested, the power to make a declaration as to whether land is subject to an obligation under a conservation covenant, who is bound by it or has the benefit of it, and its construction. It will be for the court or the Upper Tribunal to decide whether an applicant has sufficient interest to make an application. The power to make a declaration extends to any agreement or order that modifies a conservation covenant.

A.84 Clause 24(2) provides that an application cannot be made under section 84(2) of the Law of Property Act 1925 in respect of an obligation under a conservation covenant.

Clause 25 – Duty of responsible bodies to make annual return

A.85 Clause 25 requires a responsible body to make an annual return and specifies to whom it should be made and the information that it should contain.

A.86 A conservation covenant may relate both to land in England and to land in Wales, and in such a case it may involve one responsible body (specified under both clauses 2 and 3), or two different responsible bodies. Any conservation covenant held by a single responsible body, relating to land in both jurisdictions, will have to be mentioned on each of the two annual returns made by that body, one to the Secretary of State in relation to the land in England, and one to the Welsh Ministers in relation to the land in Wales.

A.87 Clause 25(3) gives the Secretary of State and Welsh Ministers the power to specify the relevant 12 month period and the date by which returns must be made.

Clause 26 – Crown application

A.88 Clause 26 provides that the draft Bill binds the Crown, and gives effect to Schedule 2 which makes provision for cases where the land bound by a conservation covenant is Crown land.

Clause 27 – Interpretation

A.89 This clause sets out definitions of terms that are used in the draft Bill.

Clause 28 – Consequential amendments

A.90 This gives effect to Schedule 3 which makes consequential amendments.

SCHEDULE 1

Discharge or modification of obligation by Upper Tribunal

A.91 Schedule 1, introduced by clause 16(1), enables the Upper Tribunal to discharge land from an obligation under a conservation covenant, or to modify such an obligation, on application. Any landowner bound by, or entitled to the benefit of, such an obligation, or the responsible body under the covenant, can apply. In practice application will be made to the Lands Chamber, and procedure will be governed by the Tribunal Procedure (Upper Tribunal) (Lands Chamber Rules 2010.[7]

A.92 Separate provision is made for discharge and modification, in Parts 1 and 2 respectively. Application may be made for either, but in some circumstances will be made for both in the alternative.

Part 1 - Discharge

A.93 Paragraphs 1 and 2 make provision for application for discharge, and provide that the Tribunal must add as parties as necessary – depending upon who has made the application – the responsible body and everyone who is currently bound by or entitled to the benefit of the obligation concerned.

A.94 Paragraph 3(1) provides that the Upper Tribunal may make an order discharging an obligation when it considers it reasonable to do so in all the circumstances of the case. Paragraph 3(2) sets out the matters that the Upper Tribunal must have regard to when considering whether or not to exercise its discretion. When considering the extent to which the performance of an obligation is, or is likely in the future to be, affordable or practicable (paragraph 3(2)(a)(iii) and (iv)), paragraph 3(4) requires the Upper Tribunal to disregard the personal circumstances of the person bound by the obligation.

A.95 Paragraph 3(3) requires the Tribunal to consider whether the purpose for which the obligation in question was created could equally well be served by the creation of another conservation covenant on other land held by the landowner. In other words, the Tribunal is to consider whether any form of like for like substitution is possible. If it is, paragraph 5 comes into play.

[7] SI 2010 No 2600.

A.96 Paragraph 4 gives the Upper Tribunal the power to include in an order a requirement that the applicant pay compensation in respect of any resulting loss of benefit.

A.97 Paragraph 5 enables the Upper Tribunal, with the consent of the landowner and the responsible body, to make an order discharging an obligation conditional on entry into a new conservation covenant. This may be an option where an obligation under a new conservation covenant will be able to fulfill the same purpose as the obligation to be discharged. If this is the position, then the landowner and responsible body can enter into an agreement for the purposes of clause 1 in relation to the replacement land.

Part 2 – Modification

A.98 Paragraphs 6 and 7 make provision for application for modification, and provide that the Tribunal must add as parties as necessary – depending upon who has made the application – the responsible body and everyone who is currently bound by or entitled to the benefit of the obligation concerned.

A.99 Paragraph 8 has the effect that the Upper Tribunal's powers to modify an obligation under a conservation covenant cannot be exercised so as to produce a result which could not have been achieved by the original agreement (because inconsistent with the requirements of clause 1(2)(b)). For example, it would not be possible to modify an obligation in such a way that it was no longer for the public good.

A.100 Paragraph 9(1) provides that the Upper Tribunal may make an order modifying an obligation when it considers it reasonable to do so in all the circumstances of the case. Paragraph 9(2) sets out the matters that the Upper Tribunal must have regard to when considering whether or not to exercise its discretion. When considering the extent to which the performance of an obligation is, or is likely in the future to be, affordable or practicable (paragraph 9(2)(iii) and (iv)), paragraph 9(3) requires the Upper Tribunal to disregard the personal circumstances of the person bound by the obligation.

A.101 Paragraph 10 gives the Upper Tribunal the power to include in an order a requirement that the applicant pay compensation in respect of any resulting loss of benefit.

A.102 Paragraph 11 enables the Upper Tribunal, with the consent of the landowner and the responsible body, to make an order modifying an obligation conditional on the applicant and the responsible body entering into an agreement for a new conservation covenant containing such provision as the order may specify.

A.103 Paragraph 12 describes the effect of a modification to a conservation covenant, which must for the future be read as modified by the Upper Tribunal's order as respects the land to which the modification relates. The parties to the proceedings will be bound by the order of the Upper Tribunal as will their successor in title.

SCHEDULE 2

Application to Crown land

A.104 Schedule 2 is introduced by clause 26(2) and makes provision for the draft Bill to have effect with modifications in certain cases where an interest in Crown land is held by or on behalf of the Crown.

A.105 Paragraph 2 defines "Crown land" and who is the appropriate authority in relation to each of the categories of Crown land. In cases where it is the appropriate authority that holds an interest in Crown land held by or on behalf of the Crown, the draft Bill can be left to operate in the normal way. The appropriate authority is the landowner and can create a conservation covenant. Any obligation of the authority under the covenant will be an obligation of the landowner in the ordinary way. In cases where that is not the case, the intention is that any obligation under a conservation covenant created by the Crown, or under a conservation covenant affecting land acquired by the Crown, should be an obligation of the appropriate authority, rather than of the Crown entity that holds the relevant estate in land.

A.106 To that end, paragraph 5 enables a conservation covenant to be created, not by the Crown entity that holds the relevant estate in land, but by the appropriate authority acting in its place. An obligation of the appropriate authority under such a conservation covenant is then treated for the purposes of the draft Bill as an obligation of the landowner. Paragraphs 6 and 7 consequentially modify clauses 7 and 8 to deal with the fact that, in this special case, an obligation of the landowner needs to bind the appropriate authority, but the provisions about successors in title still have to operate by reference to the actual landowner, i.e. the Crown entity that holds the relevant estate in land.

A.107 Paragraph 9 deals with the case where an interest in land to which an obligation under a conservation covenant relates is acquired by the Crown and the relevant estate in land is not held by the appropriate authority. In this case, the intention is that it should be the appropriate authority that is subject to any obligation of the landowner under the covenant, or entitled to the benefit of any obligation of the responsible body under the covenant, instead of the Crown entity that holds the relevant estate in land. To that end, paragraph 9 provides for clauses 7 and 8 to have effect, in relation to this special case, with appropriate modifications.

A.108 Paragraphs 10 to 12 provide for clauses 13 to 15 to have effect with modifications to deal with the fact that Parts 2 and 3 of the Schedule may produce the result, exceptionally, that the appropriate authority may be bound by an obligation of the landowner under a conservation covenant, or entitled to the benefit of an obligation of the responsible body under a conservation covenant, without being the holder of the relevant estate in land.

SCHEDULE 3

Consequential amendments

A.109 The amendments in this Schedule fall into two groups.

A.110 On the one hand there are the modifications to the Acquisition of Land Act 1981 made by paragraph 3. The modifications have the effect that a person entitled to the benefit of an obligation under a conservation covenant is to be notified if a

compulsory purchase order is made or proposed with respect to land to which the obligation relates. Any objection made in response to such a notice is to be treated as a "relevant objection" for the purposes of the Act.

A.111 On the other hand, the remaining paragraphs of the Schedule amend provisions which enable local authorities and other public and quasi-public bodies to override certain interests in land when it is acquired for particular purposes. The principal provision is section 237 of the Town and Country Planning Act 1990, which is dealt with in paragraph 5 and extended so as to add obligations under conservation covenants, which restrict the use of land, to the interests that can be overridden. Paragraphs 1, 2, 4 and 6 make the same amendments to analogous provisions.

APPENDIX B
LIST OF CONSULTEES

B.1 Below, we list those who responded to the consultation (as well as abbreviations used throughout this Report). We also list attendees at our Cardiff seminar, the Law Commission's biodiversity offsetting round-table meeting, and our meeting in Edinburgh to discuss Scottish conservation burdens.

RESPONSES TO THE CONSULTATION

Organisations

Agricultural Law Association

Bar Council

Berkeley Group Holdings

British Association for Shooting and Conservation

British Mountaineering Council

Campaign to Protect Rural England

Central Association of Agricultural Valuers

Clwydian Range and Dee Valley Area of Outstanding Natural Beauty Interim Joint Advisory Committee ("AONB Team at Denbighsire County Council")

Country Land and Business Association

Derbyshire County Council

English Heritage

Environment Bank

Forestry Commission

Game and Wildlife Conservation Trust

Institute for Archaeologists

Institute of Historic Building Conservation

Land Registry

Land Trust

Law Society

Lawyers in Local Government

Merthyr Tydfil County Borough Council ("Merthyr Tydfil Partnership")

National Farmers' Union

National Trust

Natural England

Natural Resources Wales

Network Rail

Open Spaces Society

Property Bar Association

Queen Elizabeth the Second National Trust

Registers of Scotland

RenewableUK

Royal Institution of Chartered Surveyors ("RICS")

Royal Society for the Protection of Birds ("RSPB")

The Ramblers

The Salmon and Trout Association

South West Water

Trowers and Hamlins LLP

UK Environmental Law Association ("UKELA")

War Memorials Trust

Warwickshire County Council

Wildlife and Countryside Link ("Link")

Wildlife Trusts

Woodland Trust

Individuals

Alison Finn

Charles Cowap (Rural Chartered Surveyor)

Christopher Jessel (Retired Solicitor)

Professor Colin Reid (University of Dundee)

Professor David Farrier (University of Wollongong, Australia)

Professor Fred Cheever (University of Denver, USA)

Professor Gerald Korngold (New York Law School, USA)

Professor Ian Hodge (University of Cambridge)

Professor Jessica Owley (Buffalo Law School, State University New York, USA)

John Bacon (Chair of VINE) (responding in his personal capacity)

John Box (Associate at ATKINS Global) (responding in his personal capacity)

Professor Nancy McLaughlin (University of Utah, USA)

Robert McCracken QC (Barrister, Francis Taylor Buildings)

Dr Walters Nsoh (University of Dundee)

ATTENDEES AT THE CARDIFF SEMINAR

Organisations

Cardiff County Council

Merthyr Tydfil County Borough Council

Royal Society for the Protection of Birds, Wales

Welsh Government (representatives from the Environment Team, Historic Environment Division, Planning Division and Natural Resources Team)

Welsh Historic Gardens Trust

Individuals

Lori Frater (Research Student, University of Cardiff)

Dr Victoria Jenkins (University of Swansea)

ATTENDEES AT THE LAW COMMISSION ROUND-TABLE MEETING ABOUT BIODIVERSITTY OFFSETTING AND CONSERVATION COVENANTS

Organisations

Berkeley Group Holdings

Chartered Institute of Ecology and Environmental Management

Department for Environment, Food and Rural Affairs

Devon County Council

EDF Energy

Environment Bank

Natural Capital Committee

Natural England

Warwickshire County Council

Individuals

Professor Colin Reid (University of Dundee)

ATTENDEES AT THE SCOTTISH EVENT ON CONSERVATION BURDENS

Organisations

Burness Paull and Williamson LLP

Forestry Commission UK

Law Society Scotland

Morton Fraser LLP

Registers of Scotland

Scottish Government

Scottish Law Commission

Tods Murray LLP

Individuals

Professor Colin Reid (University of Dundee)

APPENDIX C
SPECIAL PROVISION FOR BIODIVERSITY OFFSETTING

INTRODUCTION

C.1 In Chapter 1 we explain that Government should consider whether there should be either specific requirements or targeted guidance when a conservation covenant is used in an offsetting context.[1] This Appendix makes some suggestions about the matters that might need to be considered. Guidance, if that is the method chosen, would be addressed to developers and to local planning authorities. It would enable them to consider what might amount to a sufficiently robust conservation covenant that is likely to deliver and protect the biodiversity offset that is intended and also to command public confidence.

C.2 There may be other circumstances in which the general scheme for conservation covenants that we have devised should be amended to take account of factors specific to those circumstances; for example, in the context of payment for ecosystem services.

THE PARTIES TO A CONSERVATION COVENANT

C.3 There may be arguments in favour of restricting the range of responsible bodies able to take on a conservation covenant for offsetting purposes, in the interests of public confidence and of the permanence of the site.

C.4 Alternatively, it might be appropriate for a separate list of bodies to be developed for this particular context; it could even be decided that in the case of offsetting it would be appropriate to allow specified for-profit organisations to participate.

C.5 We offer no view on the merits of either restricting the range of potential responsible bodies in the offsetting context or enabling the participation of organisations who could not qualify as responsible bodies under the general conservation covenants scheme; it would be a matter for those involved in the policy debate on offsetting to determine.

DURATION OF CONSERVATION COVENANTS

C.6 Several consultees were of the view that perpetuity would be desirable for all conservation covenants used for offsetting. Whilst again we do not take a view on this, we note that there is merit in the argument that an offset site should be protected in perpetuity. It might, therefore, be appropriate to consider whether the parties' ability to determine duration should be restricted in relation to covenants used in an offsetting context.

[1] Para 1.15 above.

MODIFICATION AND DISCHARGE

C.7 Similarly, specific provision might be needed in relation to modification and discharge; it might be appropriate for the terms of a covenant relating to an offsetting site to restrict the parties' ability to modify or discharge a conservation covenant without judicial oversight.

OVERSIGHT

C.8 Although we made no recommendation for a general provision of oversight for conservation covenants,[2] it might be necessary to make special provision for the oversight of conservation covenants when they are used in an offsetting context. Similarly, it might be appropriate to introduce elements of public consultation and participation in these circumstances, depending upon the nature of the site and of the biodiversity loss from the development.

[2] See para 4.85 and following above.

APPENDIX D
THE CONTENT OF NON-STATUTORY GUIDANCE

INTRODUCTION

D.1 We have recommended that non-statutory guidance should be produced to accompany our proposed statutory scheme of conservation covenants.[1] We take the view that this guidance should be drafted through collaborative work between the Secretary of State for the Environment, Food and Rural Affairs, or the Welsh Ministers in Wales, and the organisations likely to use the scheme. The involvement of a range of organisations is necessary to ensure that different interests are represented and that practical experience of how conservation is realised at a grass-roots level is taken on board.

D.2 Guidance, of course, is not law; it would be produced to assist landowners and responsible bodies but would not address issues which are for the courts to decide under the statutory scheme. The guidance would not seek to define or interpret certain aspects of the legislative provisions.

D.3 In this Appendix, we look at the possible content of the non-statutory guidance in more detail, and in doing so we provide a checklist of issues for those drafting the guidance to consider.

GENERAL CONTENT

D.4 The non-statutory guidance on the dedication of land as access land under section 16 of the Countryside and Rights of Way Act 2000, recently produced by Defra, is a good example of what we have in mind. It explains, in plain English, what dedication of land is, who could do it, how to dedicate land and the procedure for the registration of a section 16 dedication. It also includes two template forms: Form A is a model form of instrument of dedication and Form B is a template form for applying to register the dedication, detailing the information that should be provided to the registering authority.

D.5 We anticipate that guidance for conservation covenants will set out an explanation of the statutory scheme, refer to further resources (including overseas models), and make note of some examples of when conservation covenants might be used.

MODEL TERMS

D.6 We think that the non-statutory guidance for the conservation covenants scheme should include a conservation covenants template. This would cover issues such as the parties to the agreement, specific obligations, duration, and procedures for modification and discharge, and management and enforcement.

[1] See para 2.99 above.

D.7 We also think it essential that the guidance in relation to model terms explains that the parties must comply with the formalities for creating a conservation covenant; in particular it should be emphasised that the parties must make it clear that the conservation covenants scheme applies to the agreement.

RESPONSIBLE BODIES – LISTING AND DE-LISTING

D.8 We have recommended that a list of responsible bodies should be compiled and maintained by the Secretary of State or Welsh Ministers. The guidance could explain this process.

D.9 We have recommended that the Secretary of State or Welsh Ministers develop and publish a list of criteria against which they specify responsible bodies.[2] The non-statutory guidance might be an appropriate place for the criteria to be published; this will permit those applying to be a responsible body to see the criteria against which they will be assessed.

D.10 Similarly, a body can be removed from the list of responsible bodies. The removal of a responsible body would involve a similar assessment and process as that for listing. It would, again, be appropriate for the non-statutory guidance to explain this process.

REGISTRATION

D.11 Discussions with Jan Boothroyd, the author of *Garner's Local Land Charges* and Chief Executive of Land Data, indicated that guidance on registration requirements would be helpful, particularly for local authorities. The guidance could set out how practical aspects of registration are to be handled.

D.12 Specifically, we think that guidance on registration should cover the points noted below.

(1) It should explain which Part of the register the charge should be registered under; we propose that conservation covenants are registered under Part 4 of the Local Land Charges Rules 1977, which relates to miscellaneous charges not registrable in another part of the register.

(2) It should prescribe and provide a template form to be used for registration purposes.

(3) It should describe what information should appear on the register. We take the view that the relevant information would be a plan of the land affected and the name of the responsible body that holds the benefit of the covenant. We do not think that a copy of the conservation covenant should be submitted to the local land charges officer – the provision of the responsible body's name will allow any interested party to approach it about obtaining a copy of the covenant; and

(4) It should specify the registration period (that is, for how long the local land charges office has to register the charge).

[2] See para 4.58 above.

INFORMATION ABOUT THE EXISTENCE OF CONSERVATION COVENANTS

D.13 Since we are not recommending a statutory requirement for central recording of conservation covenants we think that the voluntary publication of information about conservation covenants should be encouraged amongst responsible bodies. The non-statutory guidance should encourage responsible bodies to keep public lists of the conservation covenants they hold.

D.14 We have recommended that there should be a central collection of information on conservation covenants in the form of annual reports from responsible bodies to the Secretary of State and the Welsh Ministers, about the conservation covenants to which they are a party. We have said that the report should contain information about the number of covenants that the responsible body is party to and the extent of land covered by those covenants but we think that the guidance could give further information about the form that these reports should take.

MODIFICATION AND DISCHARGE OF CONSERVATION COVENANTS

D.15 We have recommended that conservation covenants can be modified by agreement between the parties to the covenant. We were interested in the Central Association of Agricultural Valuers' proposal that landowners should be warned to take advice before agreeing a modification. Whilst we have not proposed that advice is made mandatory, this is a sensible suggestion to incorporate in non-statutory guidance. The guidance should make clear to landowners the importance of seeking advice about the effect of a proposed modification and should encourage responsible bodies to ensure that the landowner has sought such advice before the modification is agreed.

D.16 Similarly, non-statutory guidance should address the issue of discharge of a conservation covenant. The guidance should encourage the parties to consider this issue at the point of contract and highlight the options that are available to the parties around discharge; this includes explaining that the parties can include break-clauses when drafting conservation covenants or seek discharge at the Lands Chamber. As with modification, it would be wise to emphasise the importance of legal advice in this context.

ALTERNATIVE DISPUTE RESOLUTION ("ADR")

D.17 The statutory scheme does not make specific provision in relation to ADR. However, the non-statutory guidance should stress the importance of engagement with ADR processes, and note that it might be sensible to include an appropriate ADR clause in the covenant.

APPENDIX E
THE AMERICAN LAW INSTITUTE RESTATEMENT OF THE LAW (THIRD) PROPERTY (SERVITUDES)

E.1 The American Law Institute Restatement of the Law Third Property (Servitudes) says:

> § 8.5 A conservation servitude held by a governmental body or a conservation organization is enforceable by coercive remedies and other relief designed to give full effect to the purpose of the servitude.
>
> **Comment:**
>
> **a. Rationale**. There is a strong public interest in conservation servitudes. Statutes have been enacted to eliminate questions about their enforceability in all but three states; they are often purchased with public funds or money raised from the public; they are often subsidized with tax benefits and other governmental benefits. The resources protected by conservation servitudes provide important public benefits, but are often fragile and vulnerable to degradation or loss by actions of the holder of the servient estate. Until a conservation servitude is terminated in accordance with rules stated in Chapter 7, it should be vigorously protected by the full panoply of remedies available to protect property interests. Conservation servitudes are not subject to judicial modification to permit development prohibited by the servitude under the rule stated in § 7.11, and, under the rule stated in this section, a judgment for damages may not be substituted for coercive relief.
>
> Conservation servitudes often present a combination of restrictive covenants with easements and affirmative covenants, and appropriate coercive remedies will often include both prohibitory and mandatory injunctions. To give full effect to the purposes of the servitude, it may be necessary to order maintenance and restoration of the protected property to the condition contemplated by the servitude. In appropriate cases, additional remedies may be needed to compensate the public for irreplaceable losses in the value of the property protected by the servitude and other damages flowing from violation of the servitude. Remedies should also be designed to deter servient owners from conduct that threatens the interests protected by the servitude. In addition to punitive damages, which may be awarded in appropriate cases, remedies may also include restitution and disgorgement. Restitution of tax and other benefits received by the property owner on account of the servitude and disgorgement of profits reaped from violation of the servitude may be awarded in appropriate cases.

This section, in combination with § 7.11, is designed to protect the long-term utility of conservation servitudes by encouraging courts to enforce them as vigorously as possible and by discouraging servient owners from engaging in conduct that lessens the effectiveness of the servitude or frustrates its purpose.

b. Conservation servitudes held by others are enforceable under § 8.3. The only differences in enforcement between conservation servitudes covered by this section and others lie in the automatic entitlement to coercive relief and the emphasis placed on deterring servient owners from conduct detrimental to the servitude's purpose. Other conservation servitudes, like other servitudes generally may be enforced by the same remedies under § 8.3. Under § 8.3, however, judges may have more flexibility to modify servitudes that are not covered by this section under § 7.10.

APPENDIX F
CONSERVATION BODIES IN SCOTLAND

CRITERIA FOR LISTING A CONSERVATION BODY IN SCOTLAND

F.1 Section 38(4) of the Title Conditions (Scotland) Act 2003 gives the Scottish Ministers power to prescribe organisations as "conservation bodies". Bodies which are so prescribed may hold the benefit of conservation burdens.

F.2 Officials in the Scottish Government have provided us with the criteria used to select conservation bodies under the conservation burdens scheme in Scotland. When prescribing a body, Ministers would need to be satisfied that:

(1) it would be in the public policy interest to designate the body;

(2) the conservation burdens likely to be created in favour of the body would benefit the public;

(3) the conservation burdens likely to be created in favour of the body would preserve or protect the architectural or historical or other special characteristics of land; and

(4) the objectives of the body seeking designation as a conservation body could not be met through existing means (such as, for example, the land-use planning system).[1]

[1] Correct as at June 2013.

APPENDIX G
TEMPLATE OPEN SPACE COVENANT

QUEEN ELIZABETH THE SECOND NATIONAL TRUST OPEN SPACE COVENANT

Parties

(Covenantor) and

The Queen Elizabeth the Second National Trust (Trust)

Background

A The Trust is established under the Queen Elizabeth the Second National Trust Act 1977.

B Section 22 of the Queen Elizabeth the Second National Trust Act 1977 authorises the Trust to agree and enter into open space covenants with private land owners.

C The Covenantor wishes to protect and preserve certain significant natural environmental values and open space values associated with the covenant area as defined in this deed.

D The Covenantor and the Trust now wish to record the agreed objectives, terms and conditions of the open space covenant in this deed.

Operative provisions

Part A – Purpose and objectives

1 Creation of open space covenant

1.1 The Covenantor and the Trust agree to enter into an open space covenant within the meaning of section 22 of the Act in favour of the Trust on the terms and conditions set out in this deed with the intent that the covenant created by this deed shall run with and bind the land comprising the Covenant Area in perpetuity.

2 Purpose and objectives

2.1 The Covenantor and the Trust agree that the purpose of this deed is to protect, maintain and enhance the Open Space Values of the Covenant Area and in particular to achieve the following objectives:

2.1.1 The protection and enhancement of the natural character of the Covenant Area with particular regard to the indigenous flora and fauna;

2.1.2 The maintenance and enhancement of the landscape value of the Covenant Area;

2.1.3 The enhancement of the contribution the Covenant Area makes to the protection of indigenous biodiversity, by encouraging (where appropriate) the restoration of indigenous forest and vegetation cover on the Covenant Area; and

2.1.4 The prevention of subdivision (within the meaning of the Resource Management Act 1991 or any other equivalent replacement legislation) of the Covenant Area.

Part B – Terms and conditions

3 Disposition of the land comprising the Covenant Area

3.1 If the Covenantor wishes to sell or otherwise dispose of all or any part of the land comprising the Covenant Area the Covenantor must:

3.1.1 Notify the Trust of such sale or other disposition and provide the Trust with the name and contact address of the new owner, lessee or licensee; and

3.1.2 If any such sale or other disposition occurs before registration of this deed by the Registrar-General of Land:

(a) Ensure such sale or other disposition is made expressly subject to the objectives, terms and conditions of this deed; and

(b) Obtain the agreement of the party to whom such sale or other disposition is made to comply with and be bound by the objectives, terms and conditions of this deed.

3.2 If the Covenantor sells or otherwise disposes of all or any part of the land comprising the Covenant Area to a company, the covenants contained in this deed will bind a mortgagee in possession, receiver, the Official Assignee, liquidator, statutory manager or statutory receiver to the fullest extent permitted by law.

4 Appearance and condition of the Covenant Area

4.1 No act or thing may be done or placed or permitted to be done or remain on the Covenant Area which in the sole opinion of the Board materially alters the appearance or condition of the Covenant Area or is prejudicial to the Covenant Area as an area of open space as defined in the Act.

4.2 In particular, the Covenantor must not do nor permit others to do any of the following activities on and in respect of the Covenant Area without the prior written consent of the Trust, which consent will not be unreasonably withheld (and if given may be given with reasonable conditions imposed to any consent) if the Trust is satisfied that such activity does not conflict with the purpose and objectives of this deed:

4.2.1 Fell, remove, burn or take any native trees, shrubs or plants of any kind or in any state whatsoever;

4.2.2 Plant any trees, shrubs or plants or scatter or sow any seed of any trees, shrubs or plants, other than local native species sourced from the ecological district within which the Covenant Area is situated;

4.2.3 Introduce any noxious substance or substance otherwise injurious to plant life except in the control of pests;

4.2.4 Move or remove any rock or stone, blast, mark, paint, deface or otherwise disturb the ground;

4.2.5 Construct or erect any building or structure or undertake any exterior alterations to any existing building or structure;

4.2.6 Erect or display any sign, notice, hoarding or advertising material of any kind except for signs identifying the Covenant Area or indicating walking tracks that are or may be established on the Covenant Area;

4.2.7 Carry out any prospecting or exploration, mining or quarrying of any minerals, petroleum or other substance or deposit;

4.2.8 Deposit any rubbish, debris or other materials, except in the course of undertaking maintenance or approved construction works, provided that on completion of any such maintenance or construction works all rubbish, debris and other materials not required for the time being are removed as promptly as possible and the Covenant Area left in a clean and tidy condition;

4.2.9 Allow any livestock on the Covenant Area; or

4.2.10 Cause deterioration in the natural flow, supply, quantity or quality of water of any river, stream, lake, wetland, pond, marsh or any other water resource affecting the Covenant Area.

5 Third party access to the Covenant Area

5.1 If the Covenantor is notified by any person or authority of an intention to erect any structure or infrastructure, or carry out any other works on the Covenant Area, the Covenantor must as soon as reasonably possible:

5.1.1 Inform the person or authority of the existence of this deed;

5.1.2 Inform the Trust of the proposed intentions of any such person or authority; and

5.1.3 Not consent to or otherwise allow the undertaking of the proposed works or any other works by such person or authority without the prior written consent of the Trust.

5.2 Any such person or authority will be the responsibility of the Covenantor during the course of any approved works being carried out within the Covenant Area.

6 Management of the Covenant Area

6.1 The Trust may provide to the Covenantor technical advice or assistance as is appropriate and practical to assist in meeting the purpose and objectives set out in this deed.

Damage to Covenant Area

6.2 If any damage occurs to native vegetation on the Covenant Area the Covenantor must:

6.2.1 Notify the Trust as soon as possible of the nature of the damage;

6.2.2 Provide a proposal for restoration of the damage;

6.2.3 Comply with any reasonable direction of the Trust relating to the restoration of the damage; and

6.2.4 Complete the restoration of the damage in a timely manner, at the Covenantor's cost and to the reasonable satisfaction of the Trust.

Non-compliance by the Covenantor in management of the Covenant Area

6.3 If the Covenantor is in default of the Covenantor's obligations in respect of the management of the Covenant Area (including obligations arising under this deed or in any approved management plan), the following will apply:

6.3.1 The Trust may give notice to the Covenantor stating the nature of the Covenantor's default, the reasonable actions required to remedy the default and providing a reasonable timeframe within which the Covenantor must remedy the default (Default Notice);

6.3.2 If, on expiry of the timeframe specified in any Default Notice, the Covenantor's default has not been remedied the Trust will give further notice to the Covenantor advising that if the default advised of in the Default Notice is not remedied within a further reasonable timeframe specified by the Trust then the Trust will be entitled to arrange for the undertaking of any works required to remedy such default and may recover the cost in all things of doing so from the Covenantor as a debt payable on demand; and

6.3.3 If, on expiry of the further reasonable timeframe specified in clause 6.3.2, the Covenantor's default has not been remedied the Trust may arrange for the undertaking of any works required to remedy such default and may recover the cost in all things of doing so from the Covenantor as a debt payable on demand.

7 Pest plants and animals

7.1 The Covenantor must eradicate and control all weeds and pests in the Covenant Area to the extent required by any statute and in particular comply with the provisions of, and any notices given under the Biosecurity Act 1993 and the Wild Animal Control Act 1977.

7.2 In particular, the Covenantor must keep the Covenant Area free from any exotic species specified from time to time in any approved management plan for the Covenant Area.

8 Fire

8.1 If fire threatens the Covenant Area the Covenantor must, as soon as practical notify the appropriate fire authority.

9 Fences and gates

9.1 Except when the provisions of the Fencing Act 1978 apply, the Covenantor must keep and maintain all fences and gates on the boundary of the Covenant Area in good order, repair and condition (including replacement when that is reasonably required).

9.2 If, in the reasonable opinion of the Trust, the presence of certain stock types and/or stock levels on the land adjacent to any unfenced portion of the Covenant Area is likely to have a detrimental effect on the Covenant Area, then the Covenantor must at the Covenantor's cost erect appropriate stock-proof fencing on the affected unfenced boundary of the Covenant Area.

10 Entry and access

Trust access

10.1 The Trust may through its officers, employees, contractors or agents enter the Covenant Area for the purpose of:

10.1.1 Viewing the state and condition of the Covenant Area;

10.1.2 Ascertaining compliance by the Covenantor with the objectives, terms and conditions of this deed and any approved management plan; and

10.1.3 Remedying any default by the Covenantor pursuant to clause 6.4.3.

Public access

10.2 The Covenantor may, in its sole discretion, permit members of the public to have freedom of entry and access to the Covenant Area provided that in giving any such permission the Covenantor must:

10.2.1 Give due consideration to any specific management issues relating to the Covenant Area from time to time;

10.2.2 Ensure that regard is had to the purpose and objectives of this deed during such access; and

10.2.3 In particular, ensure that the prohibitions set out in clause 4.2 are complied with during such access.

Part C – General provisions

11 Variations

11.1 Subject to the unanimous approval of the Board, the Trust may vary the terms of this deed from time to time to provide for the necessary and appropriate protection of the Covenant Area, provided that any such variation is not contrary to the purpose and objectives of this deed.

11.2 No variation to the terms of this deed will have any force or effect unless it is in writing, signed by the Trust and the Covenantor and registered by the Registrar-General of Land.

12 Confidentiality

12.1 In recognition of the Covenantor's rights as a private person and/or landowner and the close relationship of trust, co-operation and partnership existing between the Covenantor and the Trust, the Trust will keep confidential all information in its knowledge and possession relating to the Covenantor, the Covenantor's activities in the Covenant Area, the management of the Covenant Area by the Covenantor and the monitoring of the Covenant Area by the Trust and will not disclose any such information without the prior written approval of the Covenantor except:

12.1.1 Where that is necessary to carry out the Trust's obligations and enforce the Trust's rights under this deed;

12.1.2 To the extent required by law or the order of any court of competent jurisdiction.

12.2 To the extent the Trust is required by law or court order to disclose any such information referred to in clause 12.1, the Trust shall seek to avoid or limit disclosure on whatever grounds are available (including, without limitation, the Covenantor's privacy, the existence of an obligation of confidence, the desirability of ensuring continued information flows from the Covenantor and, if relevant, commercial sensitivity), so as to protect the Covenantor's rights to confidentiality to the maximum extent possible.

13 Costs

13.1 The Covenantor may be required, at the Board's discretion, to pay the Board's legal costs (as between solicitor and client) of and incidental to the enforcement or attempted enforcement of the Board's rights, remedies and powers arising under and from this deed.

13.2 The Covenantor may be required, at the Board's discretion, to pay the Board's costs, including administration costs, associated with any variation, requested by the Covenantor, to the registered open space covenant provided for by this deed.

14 Questions related to this deed or management of the Covenant Area

14.1 If any question arises in relation to the management of the Covenant Area or any other matter touching or concerning this deed then the Covenantor and the Trust will use their best endeavours in good faith to promptly resolve the question amicably by conference and negotiation between the Covenantor and the Chief Executive of the Trust, provided that any resolution does not in any way diminish the purpose and objectives of this deed.

15 Notices

15.1 Any consent, approval, authorisation or notice to be given by the Board or the Trust may be given in writing signed by the Chief Executive and delivered or sent by ordinary post to the last known residential or postal address of the Covenantor or to the solicitor acting on behalf of the Covenantor.

16 Severability

16.1 If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause of this deed is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this deed, but the rest of this deed will not be affected.

17 Governing law

17.1 This deed is governed by the law of New Zealand. The covenantor and the Trust submit to the non-exclusive jurisdiction of its courts and will not object to the exercise of jurisdiction by those courts on any basis.

18 Waiver

18.1 A waiver of any right, power or remedy under this deed must be in writing signed by the party granting it. A waiver is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

18.2 The fact that a party fails to do or delays in doing something the party is entitled to do under this deed does not amount to a waiver.

19 Definitions and interpretation

19.1 In this deed unless the context requires otherwise, the following definitions apply:

Act means the Queen Elizabeth the Second National Trust Act 1977;

Board means the board of directors of the Trust in terms of section 4 of the Act;

Chief Executive means the person appointed under section 18(1)(a) of the Act;

Covenant Area means the area or areas of the land described in Schedule 2 and as outlined and indicated on any plan annexed to this deed;

Covenantor means the person, persons or other entity that from time to time is registered as the proprietor of the land comprising the Covenant Area; and

Open Space Values has the meaning given to it in section 2 of the Act.

19.2 In the event of any inconsistency between the general terms and conditions contained in Parts B and C of this deed and the special conditions contained in Schedule 1, Schedule 1 will prevail and in the event of any conflict between this deed, Schedule 1 and the Act, the Act will prevail.

19.3 In this deed, unless the context otherwise requires:

19.3.1 A reference to any law or legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;

19.3.2 A reference to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced from time to time;

19.3.3 A reference to a prohibition against doing any thing includes a reference to not permitting, suffering or causing that thing to be done;

19.3.4 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;

19.3.5 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this deed unless otherwise stated; and

19.3.6 All schedules and attachments to this deed form part of this deed.

Schedule 1 – Special Conditions

Special conditions relating to the Covenant Area

The following special conditions will apply in respect of the Covenant Area.

Schedule 2 – Schedule of land comprising the Covenant Area

Land Registry:	[ ]
Estate:	Fee Simple
Area:	Blocks [ ] and [ ] as delineated on the attached plan being [ ] hectares
Lot & D.P. No.	[ ]
(other legal description)	

Part Computer Freehold Register: [ ]

Execution and Date

Executed as a deed

Dated this day of 20[ ]

Signed by the Covenantor

_____

in the presence of:

Witness (Signed) .....

Name (Print) .....

Occupation .....

Address .....

The Common Seal of the QUEEN ELIZABETH THE SECOND NATIONAL TRUST was affixed in the presence of:

Chairperson ……..

Director ……..

Chief Executive ……..

OPEN SPACE COVENANT

Pursuant to section 22 of the

Queen Elizabeth the Second

National Trust Act 1977

.

Covenantor

AND

THE QUEEN ELIZABETH THE

SECOND NATIONAL TRUST

APPENDIX H
SCOTTISH CONSERVATION BURDENS

H.1 This Appendix contains an example of a conservation burden provided by Morton Fraser LLP, and an example of a conservation burden in favour of the John Muir Trust.

CONSTITUTIVE DEED

by

[◆]

in favour of

THE SCOTTISH MINISTERS

Subjects: [◆]

2013
Ref: [◆]

DRAFT

MORTON FRASER
SOLICITORS

FAS4958

I/WE, [*Enter details of the Grantee(s)*], hereby grant in favour of **THE SCOTTISH MINISTERS** the following conservation burdens over ALL and WHOLE [*Enter property description*] Together with [*Enter details from last Disposition*] which subjects are herein referred to as ("the Property"); I/We bind myself/ourselves and my/our successors as owners of the Property for a period of 15 years from the later of (i) the recording or registration of this Deed with the Registers of Scotland, or (ii) the date of our acceptance of any supplementary offer of grant made by the Scottish Ministers in our favour to defray the cost of repair and maintenance of the Property to (First) keep the Property in good repair and condition to the reasonable satisfaction of The Scottish Ministers who, in determining the standard of repair and condition shall have regard to the historic and architectural importance of the Property as part of the Nation's heritage; (Second) not to alter, extend or demolish the Property or part thereof without the prior written approval of the Scottish Ministers; (Third) allow the Scottish Ministers or their representatives on giving reasonable prior notice in writing access to the Property for the purpose of inspection of the state of repair and condition of the Property; (Fourth) have the fabric of any building on the Property inspected every 5 years from the date of registration of this deed by an architect who is a member of the Royal Incorporation of Architects in Scotland or by a buildings surveyor registered with the Royal Institution of Chartered Surveyors, who shall submit a copy of their report to the Scottish Ministers as soon as possible after their inspection; and (Fifth) not without the prior written approval of the Scottish Ministers (i) charge members of the public an admission fee to access the Property; (ii) increase any admission fee charged above the annual rate of inflation (being the rate of inflation indicated by the Consumer Price Index published in April of each year by the Office of National Statistics or such other rate nominated by the Scottish Ministers acting reasonably) in any one calendar year (iii) vary the parts of the Property for which an admission fee is charged; and, notwithstanding whether or not an admission fee is charged, submit a report to the Scottish Ministers annually detailing (i) the public access arrangements for the Property, (ii) the publicity given to the said access arrangements; and (iii) where appropriate, the number of visitors to the Property during the period of the report; In the event that we breach any of the obligations detailed at (First) to (Fifth) above, the Scottish Ministers shall be entitled to serve notice on us detailing the action required to be taken to remedy the breach within such period as they consider reasonable in the circumstances: IN WITNESS WHEREOF

[redacted]

DISPOSITION

by

THE JOHN MUIR TRUST

in favour of

[redacted]

[redacted]

Fyfe Ireland, LLP
32 Charlotte Square
Edinburgh EH2 2ET

Tel:- 0131 220 5100
Fax:- 0131 220 5101
Email:- mail@fyfeireland.com

WE, **THE JOHN MUIR TRUST** a Company incorporated in Scotland and having its Registered Office formerly at Sixteen Hope Street, Edinburgh and now at Forty One Commercial Street, Leith, Edinburgh EH6 6JD heritable proprietors of the subjects and others hereinafter disponed (who and whose successors as proprietors of the Retained Property (after defined) are hereinafter referred to as "the Disponers") IN CONSIDERATION OF THE SUM of [redacted] STERLING paid to us by [redacted] and [redacted] spouses and [redacted] all residing at [redacted] (who and whose successors as proprietors of the Disponed Property (after defined) are hereinafter referred to as "the Disponees") of which sum we acknowledge receipt and discharge them HAVE SOLD and DO HEREBY DISPONE to and in favour of the said [redacted] equally among them and to their respective executors and assignees whomsoever heritably and irredeemably ALL and WHOLE that plot or area of ground known as and forming [redacted] with ground pertaining thereto extending to Two hectares and fifty six decimal or one hundredth parts of an hectare (2.56 ha) or thereby shown coloured pink on the plan thereof annexed and signed as relative hereto excluding, for the avoidance of doubt, the foreshore *ex adverso* the said subjects and the whole salmon, sea trout, trout and all other fishing rights (in fresh water as well as in salt water) (which said subjects hereinbefore described under the exception referred to are hereinafter referred to as "the Disponed Property"); and which Disponed Property forms part and portion of ALL and WHOLE that part of the lands and estate of [redacted] extending to One thousand two hundred and fifty five hectares or thereby known as [redacted] and including for the avoidance of doubt the [redacted] more particularly described in, disponed by and shown delineated green on the plan annexed and signed as relative to Disposition by [redacted] in our favour dated Twenty second June and recorded in the Division of the General Register of Sasines applicable to the [redacted] on Sixteenth July both months in the year Nineteen hundred and eighty seven; (which said subjects known as [redacted] under exception of the Disponed Property are hereinafter referred to as "the Retained Property") TOGETHER WITH (One) the whole buildings and other erections on the said plot or area of ground; (Two) the heritable fittings and fixtures therein and thereon; (Three) the whole shooting and other sporting rights effeiring to the Disponed Property, subject as aforesaid; (Four) the whole timber, standing, blown or fallen on the

[redacted]

Disponed Property; and (Five) our whole right, title and interest, present and future therein and thereto; Together Also With an heritable and irredeemable non exclusive servitude right for all, if any, existing water supply or drainage pipes and septic tanks serving the Disponed Property and situated within the Retained Property together with rights of access thereto on all necessary occasions for the purpose of maintenance, repair and renewal thereof subject always to (i) payment of compensation for any damage caused and the restoration of the ground; and (ii) the cost of maintaining, repairing and/or renewing all pipes and tanks serving the Disponed Property and not maintained by the relevant authority being, in so far as any such pipes and tanks serve solely the Disponed Property the sole responsibility of the Disponees and in so far as they serve the Disponed Property and other properties, the cost will be divided between the Disponees and the proprietors of the other relevant properties, according to their use; which rights hereinbefore granted are declared to be servitude rights imposed on the Retained Property for the benefit of the Disponed Property; RESERVING ALWAYS to the Disponers heritable and irredeemable servitude rights for all, if any existing electricity, telephone and other cables and gas or water supply or drainage pipes and septic tanks and meters and all transmission media serving the Retained Property or any part or parts thereof together with a right of access to the Disponed Property on all necessary occasions by the Disponers for the purposes of inspection, repair, maintenance and renewal thereof subject always to payment of compensation for any damage caused thereby and restoration of the ground and to exercising these rights in such a way to cause the least inconvenience or disturbance practicable to the Disponees; Declaring that the foregoing servitude rights are servitude rights imposed on the Disponed Property for the benefit of the Retained Property; BUT ALWAYS WITH AND UNDER in so far as still valid subsisting and applicable the whole burdens conditions reservations and others specified and contained in (i) Disposition by the Executors and Trustees of the late [redacted] with consent therein mentioned in favour [redacted] dated Twenty first and recorded in the said Division of the General Register of Sasines on Twenty eighth both days of March, Nineteen hundred and thirty three; and (ii) the said Disposition by [redacted] in our favour dated and recorded as aforesaid; AND ALSO WITH AND UNDER the following Conservation Burdens (One) the Disponed Property will be used as the primary residence of the Disponees (but without obligation on them or any one of them to occupy the Disponed Property permanently); (Two) the dwellinghouse constructed on the Disponed Property will be used as a single dwellinghouse for

residential purposes by one family only in all time coming; (Three) the dwellinghouse constructed on the Disponed Property will not be increased in size to a footprint of greater than One hundred and eighty square metres and the said dwellinghouse will be retained as a one and one half storey dwellinghouse only: (Four) the Disponees are prohibited from introducing any non native invasive species of flora or fauna to the Disponed Property or any part or parts thereof; (Five) no other building, in respect of which the Disponees require planning consent, will be allowed to be erected on the unbuilt parts of the Disponed Property without the permission of us, the said The John Muir Trust which in the case of a building or structure pertinent to the use of the Disponed Property as a residential dwellinghouse for one family only will not be unreasonably withheld or delayed; (Five) the Disponees are prohibited from constructing any roads or vehicle tracks on the Disponed Property or any part or parts thereof; and (Six) the Disponees will be solely responsible for ensuring that the Disponed Property is bounded on all sides by stock proof fences and that, thereafter ensuring that the said stock proof fences are maintained, repaired and renewed in all time coming; which foregoing restrictions, prohibitions and obligations are hereby declared to be real conservation burdens imposed on the Disponed Property enforceable by the John Muir Trust as a conservation body in terms of Section 38 of the Title Conditions (Scotland) Act 2003; WITH ENTRY AND, subject always to the tenancy in favour of the Disponees, VACANT POSSESSION as at SIXTH DECEMBER TWO THOUSAND AND SIX notwithstanding the date or dates hereof: And we grant warrandice but excepting therefrom the said tenancy in favour of the Disponees and all rights of way, rights of access, wayleaves, servitudes and restrictions which are not specifically referred to in the Title Deeds of the Disponed Property: IN WITNESS WHEREOF

[redacted]

[redacted]

[redacted]

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