

Warcop Training Area

MoD Responses to Points made by Consultees

Introduction

1. Warcop Training Area is a Ministry of Defence (MOD) live firing area situated in Cumbria. It covers approximately 9,715 hectares of land of which two thirds is MOD freehold, with the balance in private ownership. In 2003 the MOD extinguished all rights of common using compulsory powers, having established the need to do so in the national interest to secure the long-term future of Warcop Training Area at a local Public Inquiry. The land ceased to be common land and the extinguished rights have been removed from the commons register. As part of the extinguishment process the Secretary of State for Defence gave two undertakings. However these Common Land Undertakings were given in the context of the law then applicable to secure the status of the land in the long term as common land. However since these undertakings were given, the law of commons has been fundamentally changed by the Commons Act 2006 which is being brought into force in stages.
2. Therefore the MOD has recently undertaken a public consultation on proposed changes to the undertakings to ensure that their original purposes are maintained under the new legislation and that the operation

of military training is not compromised. This paper is MOD's response to comments raised during this consultation exercise.

3. In light of the responses received, it is worth repeating that the purpose of the consultation exercise was to examine the means by which the same objective could be achieved under the current law as was expected to be the position at the time the undertakings were given in 2001. There appears to be some misunderstanding about the proposals. Some consultees see them as the MOD seeking to resile from its promises. This is not the case. The consultation exercise has been necessary to recognise the changes that have been brought about, or will be brought about, by the Commons Act 2006 which were not in contemplation when the undertakings were given in 2001. It should be borne in mind that the objective remains the same, namely, that at such time as the land becomes surplus to the MOD's requirements rights of common will be reinstated over the land, but that until then there will be no rights that would be capable of interfering with the MOD's operations over the land. These issues fall to be considered in the context that the main purpose of the MOD holding Warcop Training Area is to ensure that military training objectives are successfully achieved.
4. It is also worth making a further general point. Some consultees have pointed out that the Commons Act 2006 is not fully in force in relation to Warcop Training Area as yet. This is correct. Nonetheless, parts of the 2006 Act are in force and, in addition to the consequences of those parts, it is also necessary for the MOD to plan now in advance of the remaining changes being brought into force.

Responses Received

5. The following people and organisations responded to the consultation:

- 5.1. Open Spaces Society
- 5.2. Friends of the Lake District
- 5.3. Federation of Cumbria Commoners
- 5.4. Gaynham King & Mellor, Solicitors, on behalf of two farmers the MOD were in discussion with regarding the grant of new rights of common at Warcop Training Area
- 5.5. Mr Owen Wynne
- 5.6. Mr T J Parkin

Open Spaces Society ('OSS')

6. This section sets out the points made by the Open Spaces Society ('OSS') and responses to them.

Section 13(a) Commons Registration Act 1965 was in force at time of the decision to extinguish the rights of common

7. The point is made that the legislation (section 13(a) of the Commons Registration Act 1965) allowing for the commons register to be amended where land ceases to be common land was in force at the time of the Inspector's decision and remains in force. The undertaking given not to deregister the land (even though the rights of the commoners were to be and have now been extinguished using compulsory powers), should be retained.

MOD Response

8. It is agreed that section 13(a) was in force at the time of the decision to extinguish the rights of common. The MOD had the ability, if no undertaking had been given, to apply under section 13(a) for the land to be de-registered. Section 13(a) has been repealed but remains in force in relation to circumstance such as those at Warcop Training Area. The MOD

has not made an application under section 13(a) because of its undertaking not to do so.

9. What has changed is the enactment of the Commons Act 2006. This has raised the issues that the MOD have consulted on in relation to its proposal to cancel its undertaking not to de-register the land and to make the application to de-register the land. These issues were not anticipated in 2001 when the undertakings were given (see the introductory remarks in paragraph 1 above)

There is no certainty that Part 1 of the Commons Act 2006 will ever be applied to Cumbria Commons

10. OSS state: the impetus for the proposed restructuring is stated to be the Commons Act 2006. However Part 1 of the Act, which deals with updating the registers, is only in force in seven pilot areas. National rollout has been delayed and the Society suggest that, from their discussions with the Department for Environment, Food and Rural Affairs, as a member of the National Common Land Stakeholder Group, there is no certainty when or if this will take place.

MOD Response

11. The Commons Act 2006 is on the statute book and requires only a commencement order to bring sections into force. It is necessary that the MOD plans now before the changes come into force (and see paragraph 4 above).
12. Furthermore, whilst Part 1 of the Commons Act 2006 has not been brought fully into force across England, there are a number of provisions in the Act which are in force now and already have application across England. For example, sections 26 to 37 of the Commons Act 2006 (Part 2 of the Act dealing with Commons Councils) apply across England now.

Where section 1 of has not been brought into force, references in Part 2 of the Act to registers of common land take effect as references to the registers kept under the Commons Registration Act 1965 (Article 3 of The Commons Act 2006 (Commencement No. 5) (England) Order 2010 as amended by The Commons Act 2006 (Commencement No. 1 and Savings (England and Wales) and Commencement No. 5 (England) (Amendment)) Order 2010).

13. Similarly, Part 3 of the Commons Act 2006 (control of works) applies across the whole of England, with references in Part 3 of the Act to registers of common land taking effect as references to the registers kept under the Commons Registration Act 1965 (Article 3 of The Commons Act 2006 (Commencement No. 3, Transitional Provisions and Savings) (England) Order 2007).
14. It is necessary to recognise (as was pointed out in the Consultation documents) that there is a difference of language between section 194 of the Law of Property Act 1925 and section 38 of the Commons Act 2006. The prohibition on carrying out certain works in section 38 of the Commons Act 2006 (in Part 3 of the Act) applies to land “registered as common land”. It replaces section 194 of the Law of Property Act 1925 which applied where land was subject to rights of common as at 1 January 1926 but ceased to apply where the rights of common were extinguished under any statutory provision (section 194(3)(a) of the Law of Property Act 1925).
15. In relation to Warcop Training Area, by virtue of section 194(3)(a) of the 1925 Act, the control of works under section 194 ceased to apply to the land that was formerly Murton, Hilton and Warcop commons when the rights of common were extinguished in March 2003. Neither the continued registration of the rights (since removed) nor the continued registration of the land as common land (under the 1965 Act) prevented the cessation of the control of works under section 194. Under the 2006 Act the control of

works on land registered as common land is re-imposed through section 38 (which is now in force in respect of Warcop Training Area, as explained above). This is a result that was not anticipated in 2001.

16. Accordingly, for the reasons explained above, whilst Defra has just announced that full implementation of Part 1 is unlikely to happen within the life of the present Parliament (i.e. before 2015), due to a combination of a lack of resources and other priorities, the issues on which the MOD has consulted need to be addressed now.

Commons Council risks exaggerated

17. OSS state: the risks referred to about the possible difficulties if a commons council were to be established are greatly exaggerated. The common rights (to be created) are limited, plus the process of obtaining substantial support means it is extremely unlikely that an order for a commons council (in accordance with the regulations) would be made.

MOD Response

18. The difficulty for the MOD is that the risk of a commons council being created cannot be quantified. The decision by the appropriate national authority (in England, the Secretary of State) to create a statutory commons council would have to be made taking account of all relevant facts and circumstances at the time of the decision. It is difficult if not impossible to predict what those future facts and circumstances might be.
19. In deciding whether there is substantial support for the creation of a commons council the Secretary of State must have particular regard to representations made by: (a) persons having rights (other than rights of common) in relation to, or occupying, land specified in the draft order; (b) persons who are entitled to exercise rights of common (and in particular persons exercising rights of common) over any such land; and

(c) persons with functions under an enactment which relate to the maintenance or management of any such land (Commons Act 2006, s27(5)). There are therefore others, besides the new commoners and the MOD, who would have a significant voice, including any farmers occupying the land by virtue of agreements granted to them by the MOD.

20. Because the risk of a commons council cannot be quantified, the MOD does not consider that it has exaggerated that risk. It is a risk that would not have existed under the law as it stood when the MOD gave its undertaking and, given the importance of the operations carried out at Warcop Training Area, even if the risk is small, it is not one which the MOD should have to take or wishes to take.

Nothing has changed in the relation to the Countryside and Rights of Way Act 2000

21. OSS refer to the fact that reference is made in the consultation documents to the effect of the Countryside and Rights of Way Act 2000 on the undertakings. They go on to say that this Act was in force and referred to during the inquiry: nothing has changed.

MOD Response

22. It is agreed that nothing has changed. The reference in the consultation documents to the rights of access under the Countryside and Rights of Way Act 2000 demonstrates that the proposed restructuring will not affect those rights of access.

The Long Term Status of the Land must be secured

23. OSS state that, if there is to be a restructuring, it must ensure that the status of the land as common will be protected in the long- term.

MOD Response

24. The long term status of the land as common land is secured by the proposed new undertaking to create new rights of common if Warcop Training Area is ever disposed of. In this way, the same result is achieved as was originally intended (and see the introductory remarks in paragraph 1 above).

Access commitments must be finalised and routes put on the definitive maps

25. OSS states that it is essential that the commitments concerning access arrangements are finalised and that the routes are put on the definitive map.

MOD Response

26. The new public rights of way at Warcop Training Area have been agreed with Cumbria County Council. They exist on the ground. All that remains is to complete the legal documentation for the formal dedication of the public rights of way. It is expected that this will be achieved by the end of October 2012.

Long-term land management plans must be in place and regularly reviewed

27. OSS state: The Secretary of State in his decision letter of 3 July 2002 accepted the Inspector's recommendation that the status of the commons as common land would be protected and the commons managed in the interests of nature conservation and to meet other aspirations. It is essential that long term land management plans are in place and regularly reviewed

MOD Response

28. As referred to in the consultation documents, the MOD, in accordance with its undertakings, has in place at Warcop Training Area an Environmental Steering Group, and an Integrated Land Management Plan was launched in 2003. These arrangements are not affected by the MOD's proposals to restructure the Common Land undertakings. The land management plans will continue to be reviewed by the Environmental Steering Group.

Is it agreed that the effect of the Commons Act 2006 on the existing undertakings will be to produce a result that is contrary to what was intended at the Warcop public inquiry?

29. The MOD indicated in the consultation documents that, whilst the MOD would welcome comments on all aspects of its proposals, it would be helpful if consultees addressed a number of specific issues. One of the issues was this: whether it is agreed that the effect of the Commons Act 2006 on the existing undertakings will be to produce a result that is contrary to what was intended at the Warcop public inquiry.
30. In response to this, OSS state: If Part 1 of the Commons Act 2006 is brought into force the registers are required to be updated and any extinguishment may then be ineffective until the commons register has been amended. The position at the moment, even with the undertakings, is that the rights have been removed from the register, and the land is not common land, due to the compulsory extinguishment of the rights.

MOD Response

31. Although Part 1 of the Commons Act 2006 is not fully in force, there are provisions of the Act that apply now with references in the Act to land registered as common land taking effect as if these were references to land registered in the 1965 Act registers: see paragraph 12 above and

those following. Furthermore, as is pointed there, section 38 of the Commons Act 2006 is in force at Warcop Training Area. The wording of section 38 is different from section 194 of the Law of Property Act 1925 which it replaces and produces a quite different result from what was anticipated in 2001 (when the undertakings were given) with section 194 ceasing to apply after the MOD's Vesting Deeds in March 2003: see paragraphs 14 and 15 above). This is contrary to what was intended in 2001 (and see the introductory remarks in paragraphs 1 and 4 above).

Is it considered that the proposed undertakings will not carry out the intention of the existing undertakings as explained to the Warcop public inquiry, and, if it is considered that they will not, in what respect they will not?

32. Another specific issue raised in the consultation documents was this: Whether it is considered that the proposed undertakings will not carry out the intention of the existing undertakings as explained to the Warcop Public Inquiry, and, if it is considered that they will not, in what respect they will not.
33. In response to this, OSS state: If Part 1 is brought into force, there may be a requirement to amend the register to de-register the land as it is no longer common land. The existing undertaking would then become ineffective.

MOD Response

34. This links back to the Society's view that there is uncertainty over when Part 1 might be applied to Cumbria. Provisions apply now even though Part 1 is not fully in force (see paragraph 12 above and those following; see also the introductory remarks in paragraphs 1 and 4 above).

35. The MOD has also considered what the position would be if Part 1 were not fully in force and the land declared surplus. The land having been de-registered, with new rights of common being granted immediately prior to the disposal, the land would be reinstated as common land and would be re-registered as common land. The result would therefore be the same as originally envisaged under the old undertakings and would be achieved at the same time as originally envisaged. There would therefore be no prejudice to what was originally envisaged if Part 1 is not brought fully into force and the land is declared surplus.

Is it considered that there are any problems with the proposed undertakings which would not arise under the existing undertakings?

36. Another specific issue raised was this: Whether it is considered that there are any problems with the proposed undertakings which would not arise under the existing undertakings.
37. In response to this issue OSS state: they had no issue with the creation of rights proposed to be granted to six farmers. They were concerned how the proposals would work in respect of the proposal to transfer a token piece of land to a national amenity society. More information needs to be provided and consulted on. The location and size of the land should be agreed before any undertaking is given.

MOD Response

38. The proposal to transfer a suitable piece of land at Warcop Training Area to a national amenity society immediately prior to any disposal of the training area is something that can only be addressed at the time. There are no current proposals to dispose of Warcop Training Area and all the indications at the moment point to a continuing future requirement for the training area.

39. It is not possible to identify any land that might be transferred to a national amenity society in the future because there is currently no surplus land at Warcop Training Area. This is a matter that has to be addressed at the time. If Warcop Training Area were ever declared surplus, there would be sufficient areas of land within the training area to provide a suitable piece of land of appropriate size and location for a national amenity society.

Are there any comments on the wording of a specific undertaking or its content and any changes which should be made?

40. The fourth specific issue consultees were invited to comment on was this: Whether there are any comments on the wording of a specific undertaking or its content and any changes which should be made.
41. In response to this issue OSS state: The undertaking in respect of the transfer of land to an amenity society needs to be reworded (see above). The land is at present access land because it is on the register as common land. It would remain access land even if the land is deregistered. However, an undertaking should be given that the MOD will not permit any activity which will cause it to cease to be CROW access land.

MOD Response

42. The location and size of the piece of land to be transferred to the national amenity society will be decided by the MOD in consultation with the national amenity society at the time. The undertaking is amended to take account of this.
43. The primary purpose of the MOD holding Warcop Training Area is to ensure that military training objectives are successfully achieved. As noted in the consultation documents, the MOD has the proper management arrangements in place at Warcop to ensure that the land has proper

stewardship whilst at the same time ensuring that military training objectives are achieved. The Secretary of State in his decision letter of 3 July 2002 accepted the Inspector's recommendation that the status of the Commons as common land would be protected and the commons would be managed in the interests of nature conservation and to meet other aspirations.

44. It would not be appropriate for the MOD to give the undertaking suggested by the Society that the MOD will not permit any activity which will cause current access land to cease to be access land. Such an undertaking would be too prescriptive and might result in military training objectives being compromised. Such an undertaking is unnecessary because, as referred to above, there are already in place at Warcop Training Area the proper management arrangements to ensure that military training objectives are achieved whilst also ensuring that the land will be managed in the interests of nature conservation and to meet other aspirations, including public access.

The Secretary of State must be involved in the decision

45. OSS state that this matter must be referred to the Secretary of State for consideration, before it can be finalised.

MOD Response

46. It is proposed that the decision will be taken at MOD ministerial level.

Friends of the Lake District ('FLD')

47. This section sets out the points made by the Friends of the Lake District ('FLD') and responses to them.

Exchange land must be provided

48. FLD state: The Commons Act 2006 sets out a clear statement that common land was important and that the stock of common land should not be reduced. As such, proposals to remove common land should be paralleled with proposals for exchange land to prevent such stocks falling. FLD do not therefore agree with the proposal to apply to de-register the land as common land with no alternative land being provided as common as it is reducing this stock. The MOD should therefore stick to its original undertaking not to deregister the land as common land. If there are restructured undertakings, they must ensure that the status of the land as common land is protected for future generations as stated in the Secretary of State's decision letter.

MOD Response

49. As explained in the opening paragraphs, the purpose of the restructuring is to achieve the same objective as was envisaged at the time the undertakings were given in 2001. It was not anticipated that effective exercisable rights could be in place while the MOD required the land for operational purposes, but effective rights would be in place if the land were ever disposed of. This remains the position.
50. The proposed new undertaking to create new rights in the future will protect the status of the land as common land for future generations if MOD were ever to dispose of the land. If Part 1 of the 2006 is not fully in force when, or if, Warcop Training Area is declared surplus, there is no prejudice, as explained above (see paragraph 35 above).

There is no certainty that Part 1 of the Commons Act 2006 will ever be applied to Cumbria Commons

51. FLD state: The Commons Act 2006 has come into force since the Inquiry,

but not all of it is actually in place yet. We find the assessment of the impact of the Act on Warcop to be highly exaggerated. Part 1 of the Act is not currently in force in Cumbria and Defra can give no definitive time as to when it will be.

MOD Response

52. This is the same point made by the OSS. See paragraph 11 above and those following.

Commons Council risks exaggerated

53. FLD state: We consider it to be highly unlikely that 6 commoners with rights for one day only could successfully apply to establish a Commons Council. Substantial support has to be shown and it is difficult to see how this could happen with only six common rights holders and one gross rights holder. In addition, the cost of establishing such Councils is estimated to be several thousand pounds and again it is highly unlikely that the seven common rights holders would find this kind of money given their limited rights. We do not consider the highly unlikely if not almost impossible possibility of a Commons Council being established to be a worthy justification for amending the undertakings

MOD Response

54. This similar to the points made by the OSS: see paragraph 18 above and those following.
55. In relation to the question of the cost of establishing a commons council, whilst it might be true that individual farmers might not wish to be involved in that expense, the same might not be true of the national amenity society holding a right of common.

56. As explained above, because the risk of a commons council cannot be quantified, the MOD does not consider that it can be said that the MOD has exaggerated the risk. It is a risk that would not have existed under the law as it stood when the MOD gave its undertaking and, given the importance of the operations carried out at Warcop Training Area, even if the risk is small, it is not one which the MOD should have to take or wishes to take.

Section 38 Works control risks exaggerated

57. FLD state: Paragraph 2.62 of the report refers to the possibility of further works on the commons and paragraph 2.65 stated that “it is not appropriate that the controls of works on common land should be re-imposed through section 38”. Again we feel that this is over exaggerating the reality of the case. The requirement to apply for s38 consent in no way implies it will necessarily not be forthcoming. FLD believe that the MOD need to be open and transparent in their activities and committing to abide by s38 would demonstrate this. It is suggested that any potential works will be minor only, so the need for s38 consent will not really be an impediment.

MOD Response

58. In determining an application for consent under section 38 in relation to works on land to which that section applies, the Secretary of State must have regard to— (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it); (b) the interests of the neighbourhood; (c) the public interest; (d) any other matter considered to be relevant. The reference in this context to the public interest includes the public interest in— (a) nature conservation; (b) the conservation of the landscape; (c) the protection of public rights of access to any area of land; and (d) the

protection of archaeological remains and features of historic interest: s39(1) and (2) of the Commons Act 2006.

59. The MOD's concern is that in considering how this statutory scheme might apply at Warcop Training Area, the result of an application for consent cannot be prejudged. The various competing factors would have to be weighed and all the relevant facts and circumstances at the time of the decision taken into account.
60. In contrast to the statutory scheme, the MOD has established a land management mechanism to balance the competing interests, namely the Environmental Steering Group and the Integrated Land Management Plan. As Stated at paragraph 2.64 of the Consultation Report, "the MOD has the proper management arrangements in place at Warcop to ensure that the land has proper stewardship whilst at the same time ensuring that military training objectives are achieved. The Secretary of State in his decision letter of 3 July 2002 accepted the Inspector's recommendation that the status of the Commons as common land would be protected and the commons would be managed in the interests of nature conservation and to meet other aspirations (paragraphs 9(1)(e) and 10)".
61. It should also be remembered that there is a difference in wording between section 38 and section 194 which has produced a result that was not anticipated in 2001: see paragraphs 14 and 15 above.

New rights now, and clarification needed for land to be transferred to the national amenity society

62. FLD state: In terms of the creation of the new rights of common, we believe this should go ahead as soon as possible. We feel that the proposal to transfer a token piece of land to a national amenity society needs further clarification. How big and where will this piece of land be? Will it be registered as common land? Will it be a part of one of the

original commons and if not then how can the right relate to the original commons?

MOD Response

63. Whether the new rights should be granted now depends on whether the other points made by FLD and other consultees are sufficiently persuasive to lead the MOD to decide not to grant the new rights.
64. The points in relation to the token piece of land are similar to points raised by OSS: see paragraphs 38, 39, and 42 above.
65. As mentioned at paragraph 3.4(b) of the Consultation Report, the piece of land at Warcop Training Area to which the right will be attached will be outside the area of land (the common) over which the right will be granted and take effect. The piece of land will not itself be registered as common land but the granting of the new rights of common will mean that the land over which the new rights are granted (which, in accordance with the proposed undertaking, will extend over the whole of the area in respect of which the old rights have been extinguished excluding areas, such as that used for construction of the new car park at Murton) will be capable of being registered as common land.

Federation of Cumbria Commoners ('FCC')

66. This section sets out the points made by the Federation of Cumbria Commoners ('FCC') and responses to them

Breadth of consultation process questioned

67. FCC state: we wish to question the breadth of the consultation. The Federation is an interested party in this consultation, but we have neither received information about the consultation process, nor have we been

invited to the public meetings. We note that the Federation was not in existence at the time of the Public Inquiry... but informing "all those who attended the public inquiry (as far as is possible)" (p 26, Consultation Report April 2012) while necessary is not sufficient for a consultation process ten years on, as new stakeholders/interested parties will emerge in the intervening 10 years

MOD Response

68. The MOD tried to reach as many people as possible. As well as contacting all parties who attended the public inquiry (as far as possible), the MOD inserted notices in two local newspapers (the Westmorland Gazette and the Cumberland & Westmorland Herald) at the beginning of May 2012 giving notice of the public consultation as well as notice of the two public meetings. The consultation documents were also available on the MOD website.
69. It is considered that the MOD has properly consulted on its proposals.
70. Although the FCC's response arrived after the official closing date for the consultation, the MOD has taken account of the points made in that response.

Commons Council highly unlikely to be set up

71. FCC state: we question the assertion that a Commons Council will pose a threat to MOD's management of the common land at Hilton, Murton and Warcop on the basis that is highly unlikely that a Commons Council could ever be established in the first place. To set up a Commons Council you need to demonstrate substantial support from those with legal rights including the owners and rights holders. The Secretary of State cannot make the order unless satisfied that there is 'substantial support' for a council. This judgement will be made on a case-by-case basis based on

the relative weighting of the different interests (see p 17 Part 2 of the Commons Act 2006: Commons Councils. Technical Guidance on setting up a Commons Council, Feb 2010). As the MOD is the major stakeholder, the Secretary of State will have to be reassured that the MOD is in favour of establishing a Commons Council before making the order. Thus we believe that a major part of the argument to cancel the first of the Common Land Undertakings is flawed.

MOD Response

72. This is similar to points made by others. See paragraph 18 above and following.

Land is 'waste of the manor' and cannot be de-registered

73. FCC state: We believe that the land is currently classified 'waste of the manor' and therefore cannot be de-registered.

MOD Response

74. The MOD does not consider that the land is waste of the manor. The land is grazed by a significant number of sheep, about 3,000, under grazing agreements entered into by local farmers with the MOD. The grazing is controlled by the MOD and the numbers agreed with Natural England. The land is clearly occupied and therefore not manorial waste: see Gadsden on Commons and Greens, 2nd Edition, pages 146-151, paragraphs 3-46 to 3-52.
75. The MOD considers that an application under s13(a) would be successful. An application would have to be made to Cumbria County Council, the Commons Registration Authority. The County Council will not be bound by MOD's consultation exercise, but it was appropriate for the MOD to consult on its proposals before deciding whether to make the application.

Gaynham King & Mellor, Solicitors ('GKM')

76. This section sets out the points made by Gaynham King & Mellor ('GKM') and responses to them.

The MOD is seeking to break its promise. What weight can be given to the proposed new undertaking?

77. GKM state: It is apparent that the rationale for the decision of the Secretary of State was underpinned by the Undertakings given. The MOD is now seeking to break its promise. This is a serious and weighty matter and any decision to do so should not be taken lightly. It is proposed that the Undertakings be "cancelled" and replaced with "re-structured Undertakings". However, to do so begs the question "What weight can be placed on the 're-structured Undertakings'".
78. GKM further state: The concerns of the MOD set out in the Consultation Report appear to be somewhat overstated and it is doubtful that they warrant the breaching of the Undertakings with all the consequences which flow from that. The proposal, if given effect to, would be likely to cause greater uncertainty owing to the fact that it would be perceived to be liable to change again should new primary or secondary legislation be put in place in circumstances were to arise which made it expedient for the MOD to do so.

MOD Response

79. Reference is made to the opening paragraph above. The MOD is not proposing to proceed in breach of the substance of the existing undertakings. The MOD is responding to the fundamental changes brought about by the Commons Act 2006. One of the changes means that the MOD cannot, as a matter of law, comply with the undertaking to grant

new rights since the undertaking includes the granting of a right in gross (a right not attached to any land) which is now prohibited by the Act.

80. The MOD is taking this seriously. That is why the MOD has consulted publicly on its proposals and has considered all the responses before coming to a decision. The MOD is seeking to achieve the same result as the undertakings given in 2001 but by different means to take account of the 2006 Act which (in Defra's words) "radically changes the landscape for the registration, management and protection of common land". This is an entirely appropriate way for the MOD to proceed.
81. At the Warcop Public Inquiry, the Inspector, in reaching his decision, accepted that MOD's undertakings were serious commitments and noted that the undertakings would in practice have a weight equivalent to that of conditions attached to planning permissions. As stated at paragraph 2.14 of the Consultation Summary document, "The MOD recognises that the undertakings relating to the status of the land as common land are important and would not contemplate changing them unless there was good reason to do so".
82. Any revised undertaking the MOD give as a result of the consultation will have the same weight and status as the original undertakings, and will achieve an outcome as close as possible to that which was originally intended.

Level of concern if the 7 new rights were immediately exercisable is misplaced

83. GKM state: the level of concern that the 7 rights created can be immediately exercised under the Commons Act 2006 is misplaced given that the rights are extremely limited in nature being for one sheep and exercisable only on Christmas day. It is highly unlikely that a Court would grant an injunction, as stated in the Consultation Report, should a

commoner bring an action for interference. As for an award of damages, in the circumstances, these could only be negligible. It is verging on hyperbole to suggest that the creation of the 7 rights brings implied uncertainty sufficient to be contrary to the MOD's interests in the successful attainment of training objectives.

MOD Response

84. The point is made at paragraph 2.37 of the Consultation Report that, "The Secretary of State in his decision letter dated 3 July 2002 (Appendix 1) accepted the Inspector's view that there was an inevitable conflict between two essentially incompatible activities – military training on the one hand and grazing of animals by a relatively large number of independent graziers on the other (paragraph 7.3.7). The Inspector also made the point, in rejecting voluntary acquisition as a way of MOD achieving its objectives, that "a small number of remaining commoners would have very considerable financial and other bargaining power in negotiations with the MOD ..."
85. Warcop Training Area is a live firing area where military training takes place using live ammunition. The Training Area's Danger Area (defined as the area beyond which specific ammunition may not be expected to travel, ricochet or fragment – see Glossary to the Consultation Report) extends into the former common land.
86. In these circumstances it is considered that there is a risk that the MOD could face claims by commoners that could have an impact on the military's use of the Training Area. This was not a factor with the original undertaking under the Commons Registration Act 1965 since the new rights would have been unexercisable (for the reasons explained in the Consultation Report).

87. If it is right, as suggested, that any damages would be negligible, that would seem to strengthen the argument for an injunction on the basis that damages would not be an adequate remedy.
88. This is a risk that the MOD did not expect to be subject to when the original undertakings were given in 2001. It is a risk which the MOD considers it should not have to accept given the importance of its operations at Warcop Training Area.

Creation of Commons Council unlikely

89. GKM state: the risk of a Commons Council being created is surely so small as to negate any justification for the restructuring of the Undertakings with all the implications thereof. The requirements for establishing a Statutory Commons Council are set out in sections 26 and 27 under Part 2 of the Commons Act 2006. It is not a casual or easy matter. An Order authorising the establishment is required which may not be given until a public inquiry has been held. It is unlikely, under all the circumstances prevailing on this common, that a Commons Council would be established.

MOD Response

90. This is similar to points made by other consultees. The points made at paragraph 18 above and following. are relevant.
91. There is reference to a public inquiry before a commons council is created, but, as noted in the Consultation Report (paragraph 2.51), "With the MOD having only recently established the need to extinguish rights of common in an open and transparent process by making the case at the Warcop public inquiry, it is right to ask whether it is appropriate or in the national interest that the MOD should potentially have to fight its case again at public inquiry if an inquiry is held on the creation of a statutory commons council as envisaged under the provisions of the 2006 Act"

Section 38 controlling works is not a reason to restructure the undertakings

92. GKM state: The third reason given is the provisions in section 38 of the Commons Act 2006 prohibiting restricted works on common land. However, there is a mechanism in section 45 of the Commons Act 2006 for consent to be obtained for such works and this is referred to at 2.61 of the Consultation Report. It is particularly noteworthy that an Order can be made to have general effect. Such an Order, once made, could be lifted at any time in the future once the reasons given in justification of it being made had fallen away.

MOD Response

93. It is assumed that the reference to section 45 should be a reference to section 43 which, as mentioned in GKM's letter, is addressed in the Consultation Report.
94. It is not considered that an exemption order is appropriate for the reasons set out in paragraphs 2.63 – 2.65 of the Consultation Report.
95. It should also be remembered that there is a difference in wording between section 38 and section 194 which has produced a result that was not anticipated in 2001: see paragraphs 14 and 15 above.

The MOD has not considered Article 8 of the European Convention on Human Rights

96. Referring to the Secretary of State's decision letter of 3 July 2002, GKM state: the Secretary of State satisfied himself in considering the claims made by objectors of interference under Article 8 of the European Convention on Human Rights by referring to the Undertakings given by the MOD and by stating that in his view by complying with them the MOD

will reduce any interference with Article 8. The MOD is now seeking to breach the said Undertakings and it is apparent that no consideration has been given in the Consultation Report to this aspect of the matter.

MOD Response

97. Article 8 of the European Convention on Human Rights is the Right to respect for the home and for private and family life. This was an issue at the Inquiry in relation to such matters as the noise that would be generated at Warcop Training Area following the extinguishment of the rights of common. The undertakings the MOD has given in relation to, for example, live firing times are relevant to that issue.
98. However, not every undertaking given by the MOD is relevant to the Article 8 issue and the two Common Land undertakings fall into that category. The other undertakings, including the undertakings on live firing times, are not affected by the MOD's proposals.
99. Article 8 has no application to the MOD's proposals.
100. The MOD has considered whether the expectation generated by the original undertaking to grant rights of common and the proposal to change the undertaking engages Article 1 of the First Protocol of the Human Rights Convention as a possession. As has already been set out, the objective of the restructuring is to achieve a result as close as possible to what was envisaged in 2001. Therefore, it is not accepted that there is any interference in substance. Even if the restructuring were considered to amount to an interference, having regard to the national interest in military training and the extent to which the restructuring might amount to interference with the proposed rights, it is considered that a fair balance would be struck by what is proposed which seeks as far as it is possible to do so in the new legal context to preserve the substance of the original undertakings.

The restructuring proposals are flawed since deregistration is not a foregone conclusion

101. GKM state: As for the "Re-structuring Proposals" these too seem flawed as they are based largely on the assumption that if the 7 rights are not created then there will be no bar to a successful application to de-register the land as common land under section 13(a) of the Commons Registration Act 1965. This is far from a foregone conclusion.

MOD Response

102. The MOD considers that an application under s13(a) would be successful. An application would have to be made to Cumbria County Council, the Commons Registration Authority. The County Council will not be bound by MOD's consultation exercise, but it was appropriate for the MOD to consult on its proposals before deciding whether to make the application.

It may be difficult to identify six farmers (or their successors) in the future

103. GKM state: it is proposed that the new rights will not be granted until such time as the MOD decides to sell or otherwise dispose of the land which may not be for many years. It may well be difficult to then identify or track down six farmers who held rights immediately prior to extinguishment (or their successors in title) and the farmers may by then have "lost touch" with the common.

MOD Response

104. The proposal to grant rights of common to former commoners or their successors is in many ways similar to the need to trace former owners under the Crichel Down Rules in relation to the obligation to offer surplus land back to the former owner. The MOD has had many years' experience

operating the Crichel Down Rules and it is not anticipated that there would be any difficulty operating the proposed revised undertaking.

105. The wording of the undertaking is revised in two ways. First, the reference in the undertaking to "successors" is expanded to explain that this means the persons on whom the rights of common, had they not been compulsorily extinguished, would clearly have devolved under the former commoner's will or intestacy; and may include any person who has succeeded, otherwise than by purchase, to the land to which the extinguished rights of common had been attached prior to the extinguishment. Secondly, the undertaking will state that the MOD will follow procedures to trace former commoners similar to those outlined in the Crichel Down Rules in ODPM Circular 06/2004 to trace former owners.

If the land is de-registered, the passage of time will make it less likely that the land is reinstated as common land

106. GKM state: the new proposals, should an application under section 13(a) of the Commons Registration Act 1965 Act be successful, may lead to the common attaining a new "status" which will, and particularly over time deepen, thereby distancing it from its pre-existing status of common land. With the passage of time the impetus and rationale underpinning the granting of new rights and the reinstatement of the land as common land at some distant and uncertain point in the future may then seem inconvenient and contrived and the likelihood that a further report will be produced setting out reasons why the new Undertakings should not then be honoured.

MOD Response

107. The terms of the undertaking will be properly noted in the MOD's estate records. The transparency of the process including the publication of

consultation documents and of the decision will ensure that the result stays properly recorded.

108. The MOD has the proper management arrangements in place at Warcop to ensure that the land has proper stewardship whilst at the same time ensuring that military training objectives are achieved. The Secretary of State in his decision letter of 3 July 2002 accepted the Inspector's recommendation that the status of the Commons as common land would be protected and the commons would be managed in the interests of nature conservation and to meet other aspirations (paragraphs 9(1)(e) and 10).
109. The revised undertaking is properly regarded as being a serious commitment (see paragraph 79 above and following).

Mr Owen Wynne

110. This section sets out the point made by Mr Wynne and response to it.

Effect of proposal to transfer land to national amenity society on operation of the Crichel Down Rules

111. Mr Wynne raised the issue of how the proposal to transfer a token piece of land at Warcop Training Area under the proposed new undertaking would affect land that should be transferred back to the former owners.

MOD Response

112. Whilst in general there is an obligation to offer surplus land back to the former owners, the Crichel Down Rules contain a number of exceptions. By way of example, the obligation to offer back does not apply to land that has materially changed in character since acquisition. Accordingly, it

is not the case that the Crichel Down Rules require land to be offered back in all circumstances.

113. The MOD's proposal is to undertake to transfer a suitable piece of land to a national amenity society immediately prior to any future disposal of Warcop Training Area for a new right of common for the national amenity society to be attached to it.
114. It is anticipated that, if Warcop Training Area ever becomes surplus, and if the proposed revised undertaking is in place, it will be possible for the MOD to find a suitable piece of land at Warcop Training Area (for example, in the area to the south of the A66 that forms Warcop Camp) that is not subject to the general obligation to offer it back to the former owner. It is therefore anticipated that it will be possible, if Warcop Training Area were to become surplus, for the MOD to comply with the Crichel Down Rules and at the same time to transfer a suitable piece of land to a national amenity society in accordance with the proposed new undertaking. Accordingly, the proposed new undertaking should not have any effect on the general obligation under the Crichel Down Rules to offer surplus land back to the former owners.

Mr T J Parkin

115. This section sets out the points made by Mr Parkin and responses to them.

Access to land

116. The proposal for the new rights of common is that access to the new common should be solely by the existing public right of way up Hayber Lane. Mr Parkin comments that he owns land at Hilton and that access to his land using Hayber Lane would be totally impractical.

MOD Response

117. The proposed new undertaking sets out how new commoners would be able to enter and leave the new common land (the details are the same as the existing undertaking in this respect). These access arrangements apply only to the new commoners. Existing access by land owners to their own land are not affected.
118. The proposed new undertaking will not have any effect on Mr Parkin's ability to continue farming his land.

Land should be returned to commoners

119. Mr Parkin states: one of the new rights would be granted to a national amenity society; in the event of the MOD not requiring the facility the land should be returned to the commoners to farm in conjunction with their own land so that the farming heritage of the area is maintained as it always has, providing jobs, income and prosperity to an otherwise deprived rural area.

MOD Response

120. What is suggested is not consistent with the intention of the original undertaking and the purpose of this consultation is to consider restructuring whilst retaining the substance of that intention.
121. The creation of new rights of common under the proposed new undertaking is designed to be a mechanism to protect the long-term status of the land as common land (just like the existing undertaking – as the MOD explained to the Public Inquiry). The importance of the grant of a right of common to a national amenity society is that the national amenity society will be most unlikely ever to sell the right of common.

122. If Warcop Training Area were ever disposed of, the Crichel Down Rules would have to be applied to the surplus land and, where required by those Rules, the land would have to be offered back to the former owners of the land. Land not accepted by the former owners, and land not subject to the obligation to offer it back to the former owners, would have to be disposed of in a way that achieved the best price for the land. This might be by way of a sale on the open market or by auction or by some other method depending on the circumstances at the time.
123. Former commoners might have an opportunity to buy the land, but it would be inappropriate for the MOD to make a commitment at this stage to return the land to former commoners, who in any event were paid full compensation for the extinguishment of their rights (through payment of the compensation by the MOD to the statutory commoners committees formed in connection with the statutory extinguishment).
124. In accordance with the proposed undertaking, immediately prior to any disposal the MOD would create the 7 new rights of common, and the land would be sold subject to those rights. As already explained at paragraph 35 above no prejudice is caused by restructuring the undertakings ahead of Part 1 of the Commons Act 2006 being brought fully into force.