



## Open Spaces Society response to the Department for Environment, Food & Rural Affairs' consultation on conservation covenants

March 2019

1. The Open Spaces Society was founded in 1865 and is Britain's oldest national conservation body. It campaigns to protect common land, village greens, open spaces and public paths, and people's rights to enjoy them.
2. The society is a consultee for all works on common land and applications in relation to the exchange of common land in England.
3. The society has in the past held and managed land. At present it owns an open space at Parliament Piece in Warwickshire which is leased to Warwick District Council.
4. The society responded to the Law Commission's consultation on conservation covenants in June 2013 and welcomes the opportunity to respond to this consultation.
5. One of the main concerns is to ensure that the public will benefit from any conservation covenant and have access to land that is the subject of such a covenant.
6. We welcome, in general, the conclusions of the Law Commission report published in 2014.

## The 2014 Report

7. In the 2014 report it is stated at 3.4(2) that the overall purposes of conservation covenants should be for public benefit. At 3.15 reference is made to the concerns of this society and other bodies that in the original 2013 consultation there was no specific reference to public access.
8. However we remain concerned that from 3.16 to 3.36 (2014 report) it is stated that a conservation covenant should produce a benefit for the public, and not just for an individual or a commercial organisation. But it concludes that this does not mean that the public should automatically have a right of access to the land.
9. The 'holistic' approach references the purposes of conservation covenants as the conservation of sites, and protection of vulnerable species and of delicate physical features, and the general public well-being. However whether or not the public is able to visit will worryingly be left to the judgement of landowners and responsible bodies. (3.22 in the 2014 report).
10. 'Public good' (3.23), defined as 'intended to capture public benefit or what is in the public interest in the widest sense', falls far short of requiring or even encouraging public access to form part of conservation covenants. The conclusion at 3.36 that the statute cannot require public access to be a feature of all conservation covenants is a missed opportunity. It leaves an open door for restrictions on access, or no access at all, to feature in conservation covenants.
11. The society is disappointed that the recommendation (3.39) states that a conservation covenant may contain a provision for public access to the land. We believe such provision should be mandatory, as it would help to facilitate good health and well-being for the general public.
12. It is essential that the reassurance at 3.42 is retained to ensure that provision about public access is considered alongside the other qualifying terms of the agreement.
13. However, the stark fact remains that conservation covenants are (in spite of any statutory footing) voluntary, and landowners could put in anything that they want. Ultimately this may include restricting or curtailing access in perpetuity over land, depending on what length of time the statutory mechanism provides for.

## **Response to Questions**

We have only responded to those questions which are relevant to the work of the society.

### **Question 1: Should conservation covenants be introduced into the law of England?**

The society believes that, if the right mechanism and content can be designed, conservation covenants should be introduced into the law in England.

Conservation covenants could help the government to achieve its aim to leave the environment in a better state than it found it and assist in reaching the goals of the 25 Year Environment Plan.

Conservation covenants could deliver long-lasting environmental and conservation outcomes, including the health and well-being of the public, increased access and recreational and sporting opportunities.

They could also assist in delivering the new Environmental Land Management Schemes.

### **Question 2: What demand do you foresee for conservation covenants? What is the basis for your view?**

If the mechanism is relatively straightforward then there may well be widespread use but it is difficult to envisage, especially when there are already statutory mechanisms (many included in Appendix A of the 2013 Law Commission consultation) available, what the demand will be. These range from those available to the National Trust, to planning obligations under a section 106 agreement.

### **Question 3: What potential do you foresee for conservation covenants to deliver lasting conservation outcomes? What is the basis for your view?**

Scenarios could include one where a landowner inherits land. A conservation covenant could be used to ensure the land is managed so that the public can continue to have access to it. Conservation covenants could be used for environmental gain in a wider sense to include landscape, amenity value and public access, and also biodiversity net gain. In order to deliver lasting outcomes landowners must not be restricted in what they can do on access.

**Question 4: What use would you make of conservation covenants?**

The society would want to see enhancement and protection of landscapes, including access, for instance where existing public law designations (such as SSSI) are not appropriate.

It would be a means to protect land which has a conservation value but which does not fall within that existing system of land designation.

There should be explicit acknowledgement that conservation covenants will not be used to undermine current processes to apply for public rights of way as a result of 20 years use. It should be stated that the existing mechanisms under the Highways Act 1980, of lodging a deposit/map, should be used by landowners. Otherwise the original wording of a conservation covenant may be interpreted in a different way in the future.

A further unintended consequence is that landowners may be restricted in what they can do through conservation covenants on access in general, in particular if biodiversity is given priority rather than the health and well-being of the public.

Even if it is not intentional, without specific requirements it is possible access could be blocked or restricted and this may affect access goals of future Environmental Land Management Schemes, especially as conservation covenants can be amended.

In addition the content of conservation covenants could be entirely negative, as they are voluntary agreements made by a landowner.

**Question 6: What changes, if any, to the Law Commission proposals do you consider necessary to make conservation covenants more effective tools?**

We agree with the amendments to the Law Commission proposals to help make conservation covenants more effective. However in addition covenants should be made in perpetuity, and a robust enforcement and monitoring system should be put in place. We wonder what role the new body ( Office for Environmental Protection) will have in this respect.

**Question 7a: Should tenants be able to enter into conservation covenants?**

Yes we agree that tenants should be able to enter into conservation covenants.

**Question 7b: If so, do you agree that the qualifying threshold for the remaining length of a lease should be set at a minimum of 15 years?**

The society does not agree. A term of 15 years is still quite a low threshold and it is unlikely much long-lasting benefit could be obtained in such a short period.

**Question 7c: If not, what level would you set it at and why?**

At least 30 years, and preferably in perpetuity, to give sufficient time for a benefit to be delivered.

**Question 8a/8b: Should tenants be required to secure the agreement of the freeholder before entering into a covenant?**

A tenant must act within his or her existing legal obligations and it is likely that the agreement of a freeholder is required for particular actions.

**Question 8c: Should freeholders be required to secure the consent of a tenant before entering into a covenant when the land affected is leased?**

Yes a freeholder should secure the consent of a tenant before entering into a covenant.

**Question 9a: Should public oversight provisions require responsible bodies to provide details of the location and headline conservation objectives of conservation covenants held by them?**

Yes public oversight provisions should require responsible bodies to provide details of the location and objectives of conservation covenants held by them.

Conservation covenants are intended to deliver a public good and therefore it is essential that there is an adequate level of public oversight.

**Question 10a: Should for-profit bodies be able to hold conservation covenants?**

**Question 10b:**

**Should there be additional mechanisms introduced for for-profit bodies which provide assurances that the covenants they hold are delivering conservation outcomes for the public good? If so, what mechanisms would you suggest?**

The society does not agree that the 'responsible bodies' which can hold conservation covenants should be narrowly restricted, for instance, to bodies with a remit predicated on biodiversity alone.

There are many organisations with a wider remit which include public access such as this society, the British Horse Society, the Ramblers and the British Mountaineering Council, who are well placed to deliver the public benefits of conservation covenants. We would be happy to discuss further. There is no reason why carefully vetted for-profit bodies should not be able to hold conservation covenants. Subject to our comments in this response, the public oversight proposals at 8.3 are adequate mechanisms to enable delivery of conservation covenants for the public good.

**Question 11a: Do you consider the Law Commission proposals, with the proposed amendments set out above, as containing sufficient safeguards to ensure they are not abused? Question 11b: If not, what changes would you make?**

Subject to the above concerns about access being addressed, the proposed amendments do contain sufficient safeguards, as long as there is a clear definition of 'public good' and clear criteria for when a covenant can be modified or discharged.

**Question 12a: Do you consider the Law Commission proposals, with the proposed amendments set out above, as simple, practical and capable of delivering lasting conservation outcomes? Question 12b: If not, what changes would you make to them?**

If the proposed amendments ensure that the mechanism and content of conservation covenants does truly 'deliver public good' then, subject to the above concerns about access being addressed, the proposed amendments do contain sufficient safeguards.

**Question 13a: Do you consider the Law Commission proposals, with the proposed amendments set out above, contain sufficient safeguards to ensure they are not used to block development, or otherwise abused? Question 13b: If not, would you support additional safeguards? Please give details**

As above (please refer to answer in question 12a)

**Question 14: What alternative or supplementary processes might be used to seek remedies against breaches of conservation covenants? If so, what do you see as their advantages and drawbacks?**

Court action is often prohibitively expensive. It should not be possible for breaches to be allowed with just the sanction of a fine. This will not be a sufficient deterrent.

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