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The *Commons Bill* [HL]

Bill No 115 of 2005-06

The *Commons Bill* [HL] would change the system for registering common land and town or village greens in England and Wales from that set out by the *Commons Registration Act 1965*.

It would provide new powers to enable the establishment of commons management associations. These associations would have powers to control agricultural practices and the exercising of certain rights on common land.

The Bill also provides greater protection against unauthorised works and agriculture practices on common land and town or village greens and clarifies the regulations that protect unclaimed common land.

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Summary of main points

The Commons Bill is divided into three main parts.

Part 1 of the Bill would provide a new system through which common land and the rights of those who can use the common are registered.

The *Commons Registration Act 1965* established two short periods for the registration of common land and town or village greens in England and Wales. The Act required commons registration authorities to set out registers holding information on areas of common land and greens, the owners of the land and the rights of commoners over the land. The registration process was inadequate. Land was registered incorrectly and some land was left unregistered. The Act provided no provisions to amend the registers or update the registers as the nature of the land changed. The *Commons Bill* would allow this to happen. The Bill would also limit the way in which common land and rights over the land can be altered. It prohibits the severance of rights from the land and describes the processes for reducing, increasing or dividing rights.

Part 2 of the Bill provides statutory powers for the establishment of commons management associations.

The management of common land is an important issue for agricultural, environmental and recreational reasons. There are currently few powers that prevent commoners or owners of common land from abusing their rights to the detriment of a common. Commons management associations would have powers to restrict the way that commons are used in relation to the agricultural practices, the management of vegetation and the exercising of rights over the land. The Bill provides an open and voluntary framework through which commoners, landowners and others with interests in a common can establish associations to exercise these powers.

Part 3 of the Bill would establish new regulations to protect common land from certain works and agricultural practices.

The *Law of Property Act 1925* provides commons and greens with protection from works only if they were established at the time of enactment. The Bill would provide protection from certain new works for all registered common land and greens. It would provide anybody or any local authority with the power to apply for an order to remove works which did not have consent from Defra or the National Assembly for Wales. The Bill would also provide powers to enable the relevant national authority to prevent unauthorised agricultural activity. It also confers powers on local authorities to protect common land and greens with no registered owner from any unlawful interference.

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I Introduction

About 4% of the total land area in England and Wales is registered common land. Common land is a valuable agricultural, environmental and recreational resource. The *Commons Bill* would introduce a new statutory framework to protect common land by providing legislation to enable:

- New powers to amend the registers of common land.
- The setting up of commons associations with powers relating to the agricultural management of common land, the management of vegetation and the exercising of commoners' rights over common land.
- Greater powers to prohibit works on common land.

The Government's policy on common land and village greens has been developed over several years, with a White Paper in 1995, *Rural England*, initiating research that led to a set of good practice guidelines while also highlighting possible areas for legislative changes to improve the management of common land. The consultation *Greater Protection and Better Management of Common Land in England and Wales,* of February 2000, built on this research and proposed a number of measures to safeguard common land. In the *Rural White Paper* of November 2000, the Government committed to legislate and introduce the proposals from the February consultation when parliamentary time allowed. In July 2002 the Government published their *Common Land Policy Statement* setting out how this was to be done.

The *Commons Bill* supplements and amends legislation developed in the 1950s and 60s. In 1955 a Royal Commission was set up to enquire into the balance of needs of common land owners, commoners and the public. They reported in 1958 recommending legislation to allow the registration of common land and village greens, to improve public access to common land and to promote better management of common land. The *Commons Registration Act* was enacted in 1965 to enable the registration aspect of the Commission's recommendations. The Act established definitive registers of common land and village greens in England and Wales. However, in practice the registration process was overly complicated and a large number of commons were not registered or were registered incorrectly. Furthermore the Act did not provide the necessary provisions for correcting the registers. The *Commons Bill* would rectify this situation.

II What is common land

The term *common land* is frequently misunderstood. It is often, wrongly thought that common land is land owned by the public, the Crown or nobody. This is not the case. Nor until the *Countryside and Rights of Way Act 2000* was there a right of public access to common land. The term *common land* refers to the fact that certain people hold rights of common over the land. The *Commons Registration Act 1965* recognises common land as being land subject to rights of common.

A. Rights of Common

Common land is a remnant of the manorial system under which the manor was the basic unit of land ownership. The lord of the manor owned all the land of the manor but others had rights to use this land which were recognised by the courts. For example, while crops were grown by the Lord of the Manor on the most productive land, the *demesne land*, which remained under control of the Lord, the open fields and the *waste land* of the manor could have been used by others to gather firewood or to graze their cattle.

Rights over such land vary but consist of allowances to take the produce of the soil. The rights exist in common with the rights the landowner holds and are thus known as *rights of common.* Examples of such rights include:

- Common of pasture – rights to turn stock onto a common to graze
- Common of estovers –rights to take wood
- Common of turbary – rights to take peat or turf for fuel
- Common of pannage – rights to turn pigs out to forage on beechmast or acorns
- Common in the soil - rights to sand gravel or stone
- Common of piscary – rights to take fish

Those who have a right to exercise a right of common are known as *commoners.* Thus a *right of common* exists for a *commoner* over an area of *common land*.

Historically most rights of common were *appurtenant* to, or attached to, particular plots of land within the manor. The commoner holding these rights would be the owner or the tennant of that land at the time. When a new tennant or owner moved in they would aquire the associated rights. This plot of land is distinct from the common land. The land to which these rights are attached is known as the *dominant tenement*, while the land over which the rights apply, the common land, is known as the *servient tenement*.

Some rights are not attched to specific *dominant tenements*. These rights are known as *rights in gross* and usually arise where an appurtenant right has been detached from the land. The detachment of rights of common from a commoner's plot of land is known as *severence.* Through severence, rights may be sold on to others.

B. Facts and Figures

Defra provide the following information on common land in England on their website (information is taken from the DETR-sponsored biological survey of common land undertaken by J. Aitchison at the University of Wales and the Countryside Agency mapping of registered common for the access provision under the Countryside Rights of Way Act 2000):

Facts and figures
Please note that the data below relate only to England.

Area

- There are 374,000 hectares of registered common land in England (about 3% of the total land area) although this figure does not include the New Forest, Epping Forest, or certain other commons exempted from registration under the Commons Registration Act 1965. These excluded areas account for a further 22,800 ha of common land (not including the Forest of Dean). The figures below relate only to land which is registered common land, and not to exempted common land.
- There are 175,000 hectares of finally registered common land in Wales (about 8.4% of the total land area).
- Nearly 55% (200,318 ha) of common land is designated as a Site of Special Scientific Interest (SSSI)
- Over 47% (178,500 ha) also lies mainly within national parks
- 30% (113,134 ha) is wholly or partially within Areas of Outstanding Natural Beauty (AONB)
- 51.3% of all registered common land units (3,608) are less than 1 ha in area - a total area of 1072 ha
- 1.3% (89 commons) are 1000 ha or more in area - a total of 192,057 ha
- Over half of England's common land is in Cumbria and North Yorkshire (30.7% and 21% respectively).

Rights

- Of 7039 common land units in England, only 34.6% had registered rights of common and these commons accounted for nearly 88% of the total area of common land
- Of the commons with registered rights, 65% had five registered rights or fewer, 13.7% had 20 rights or more
- Rights to graze cattle were registered on 20% of commons, sheep on 16%, horses and ponies on 13% and rights of estovers on 10%, the other main rights categories came in at below 10%
- 24,157 rights entries were finalised in the registers but such figures are indicative given that cross-referencing, duplication of rights on adjacent commons etc., create an extremely complex situation.

Ownership

- At the time of the analysis, 1900 commons had no known owners, (totalling 4000 hectares).[1]
- At the time of registration, 1740 commons (other than the 47 in the ownership of traditional estates) were in private ownership, 679 had private owners for parts of the land, 1230 were owned by parish and other councils and 431 were owned by a variety of organisations including charities, trusts etc. Many commons had multiple owners. [2]

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[1] Defra, *Common Land Policy Statement*, July 2002.
[2] http://www.defra.gov.uk/wildlife-countryside/issues/common/facts-figures.htm

III Background to the legislation

Legislation on common land dates back to the Norman conquest and the establishment of the manorial system. Early legislation was concerned with the provision of entitlements to commoners as manorial tenants who were allowed to exploit the common land, owned by the lord of the manor, to provide fire wood, grazing or other rights for themselves.

Interest grew in making the land more profitable as the population increased and agricultural methods improved. Legislation from the late sixteenth century onwards enabled landowners to *inclose* common land and remove the rights of commoners. Powers to inclose waste land (*approvement*) were made possible through earlier thirteenth century legislation though the powers of landowners to do this were limited. Instead agreements with tenants were required or, more forcibly, private acts were used to inclose commons. These procedures were simplified by a number of General Inclosure Acts passed in the first half of the nineteenth century.

At the same time as the passing of the General Inclosures Acts, provisions came into force which enabled land to be set aside for the benefit of the poor of the parish. The medieval courts regarded longstanding recreational use of an open space by the community as a custom, and recognised the land used for such customs, in law, as a village green. This offered some protection, though it was not until the nineteenth century that the importance of open spaces for recreation was recognised in legislation. The *Metropolitan Commons Act 1866* was introduced to protect and manage common land around London. The *Commons Acts* of 1876 and 1899 also served to protect common land as did the founding of the Commons, Open Spaces and Footpaths Reservation Society in 1865.

During the twentieth century the theme of protection continued while new pressures on common land made the need to legislate more pressing. The *Law of Property Act 1925* provided the most powerful protection so far at the same time as enabling new rights of public access. Section 193 of the Act provided the public with access rights to commons in urban areas, while section 194 prohibited certain works on common land, particularly work that may impede access.

During the Second World War large amounts of common land were requisitioned by the Minister of Agriculture and Fisheries to be ploughed up for agricultural production. However, difficulties arose when the land was to be handed back to the owners. The identification of the landowners was often impossible and uncertainties about how the land would subsequently be used caused concern.

In 1955 a Royal Commission was set up to enquire into possible changes to common land legislation and to address the issues highlighted following the war. In July 1958 the Commission presented its proposals. They recommended legislation should be established to:

- Enable the registration of common land and village greens
- Promote public access
- Improve management

The Commission's access proposals were clear and called for all common land to be opened up for public access. These have since been provided for in the *Countryside and Rights of Way Act 2000.*

The management structure proposed by the Commission included recommendations for an increase in the role of local authorities and recommended the establishment of management schemes for each common by those with interests in the land (e.g. commoners, landowners, local authority and local inhabitants). It was also recommended that commons registration authorities (established under the registration proposals) would have a duty to inspect commons on a ten yearly basis.

It was not until the *Commons Registration Act 1965* that an amended version of the registration element of these changes was implemented. The 1965 Act established registers of common land and village greens which were drawn up by commons registration authorities (usually county councils). The registration process was overly complicated and a large number of commons were not registered. Furthermore rights associated with commons were wrongly recorded, in many cases grazing rights were registered beyond the carrying capacity of the land. The resulting state of affairs was further compounded by the lack of any mechanism in the Act to correct these errors. It has been suggested that if the Commission's proposals had been followed entirely and immediately some of the difficulties under the Act could have been avoided.[3]

Following the 1965 Act a number of recommendations emerged for more comprehensive legislation to be brought in fully to address the problems highlighted by the 1958 report. This included recommendations from an Inter-departmental Working Group (1977) and the Common Land Forum (1986).

However, it was not until the Rural White Paper in 2000 that a commitment to legislate was given by the Government. This followed the DEFRA consultation on *Greater Protection and Better Management of Common Land in England and Wales*.[4] The consultation looked at three main areas of concern; Registration, Fencing and Works on Common Land, and Agricultural Use and Management. Information on the consultation is available on the Defra Website:

http://www.defra.gov.uk/wildlife-countryside/issues/common/legislation/clps.htm

The analysis of the consultation responses led to the 2002 *Common Land Policy Statement* which forms the basis of the *Commons Bill*.[5] The statement proposed to address the following issues:

- Registration issues:
  - Create powers to amend commons registers.
  - Vesting of unclaimed common land in appropriate bodies.

[3] Ros Oswald, Common Land and the Commons Registrations Act 1965, 1989.
[4] http://www.defra.gov.uk/wildlife-countryside/consult/common/index.htm
[5] http://www.defra.gov.uk/wildlife-countryside/issues/common/legislation/commons-bill/clps.pdf

  - Improving the registers by introducing a mandatory requirement to register alterations of common land

- Works and Fencing on Common Land:
  - Expand the protection of commons from works beyond that provided by *Law of Property Act 1925*
  - Increase enforcement powers of local authorities

- Town and Village Greens:
  - Create powers to amend wrongly registered village greens
  - Increased protection from works on village greens

- Agricultural Use and Management:
  - Establish commons management associations to manage agricultural practices on common land

Following an announcement in the Queen's Speech on 17 May 2005, the *Commons Bill* was brought before the House of Lords on 27 June 2005 with this accompanying press release:

BILL TO PROTECT AND ENHANCE COMMON LAND PUBLISHED

Common land in England and Wales would be better protected from development and the ancient rights of commoners safeguarded and enhanced under legislation published today.

The Commons Bill would protect commons from development, allow them to be managed more sustainably, improve protection from neglect and abuse, and modernise the registration of commons to ensure all commons enjoy the same protection.

Rural Affairs Minister Jim Knight said the Bill aimed to update notoriously complicated and often archaic laws managing our commons by modernising the registration of commons and giving commoners the ability to make decisions locally.

"Our common land is an important part of our national heritage, with the roots of commoning set in the Dark Ages, well before Parliament passed the first Commons Act in 1235," he said.

"Common land is an integral part of both agricultural and cultural life in our rural communities, as well as containing some of our most precious landscapes and our rarest wildlife. Common land is vital to farming, particularly in upland areas, as well as being greatly valued for its heritage, the recreation it provides, and as a source of treasured green space.

"This Bill would protect our common land, now and for future generations, and produce real benefits in terms of sustainable farming, public access, and biodiversity."

In England, 3% of all land is common land, while common land covers around 8% of land in Wales. Although most commons are in National Parks, Areas of Outstanding Natural Beauty, or are designated Sites of Special Scientific Interest, much of this land is at risk as a result of overgrazing, abuse, encroachment and unauthorised development.

Mr Knight said one of the Bill's most important provisions would stop the loss of common land through deregistration, which can occur if a landowner buys out the commoners' rights.

"Around two-thirds of commons could be at risk of deregistration, which means that land would lose its special protection and become vulnerable to development, threatening long-standing green spaces," he said.
"This Bill would give our common land continued protection by generally stopping commons from being deregistered, unless the landowner provided an equally good or better piece of land."
The Bill would also enable commoners to voluntarily form statutory Commons Associations, allowing them to manage their commons locally with the power to make decisions by majority. At present, all commoners must agree on a course of action and a single dissenter can obstruct the intentions of the majority.
Commons Associations would be flexible in the way they are set up and function, ensuring that they are best suited to the local circumstances. They would have powers to regulate grazing and other agricultural activities, while having regard to the public interest.
Mr Knight said the ability to form Commons Associations meant commoners would be able to manage the land more sustainably.
"This will also make it much easier for commoners to access funding through agri-environment schemes and other environmental programmes as well as protecting some of the most valuable parts of our landscape," he said.
The Bill would ban the "severance" of common rights, preventing commoners from selling, leasing or letting their rights away from the property to which rights are attached.
"Severance often means that common rights end up in the hands of farmers or graziers who do not live near the common, have no knowledge of the common itself, and disrupt the livestock management practices there," Mr Knight said.
"This makes it difficult to manage agriculture on commons sustainably, causes problems for local rights holders grazing on the common, and reduces the economic efficiency of grazing common land.
"We have responded to the requests of farming organisations for this ban, which would take effect from today, ensuring local control of grazing on the commons."
The Bill also aims to overhaul the outdated and flawed registration system for commons, enabling some commons originally missed off to be registered now, affording them continued protection and making them available for public access under the Countryside and Rights of Way Act 2000. It would also enable wrongly-registered land to be removed from the registers, subject to safeguards.
The Commons Bill would also streamline and modernise the system for obtaining consents to carry out works and fencing on commons. [6]

IV The Commons Bill

The Commons Bill is set out in three main sections:

- Registration
- Management
- Protection

A fourth section contains supplementary and general provisions. These will not be covered in this paper.

[6] DEFRA News Release 270/05, 28 June 2005

All parts of the Bill apply to England and Wales. Common land as described above is subject to a different regime in Scotland or Northern Ireland. Powers made available by the Bill to be conferred on the appropriate national authority would be exercisable by the Secretary of State for England and the National Assembly for Wales. Commencement orders for provisions in Wales would be made by the National Assembly for Wales. Many of the provisions in the Bill are to be implemented fully by secondary legislation.

A. Registration

Part 1 of the *Commons Bill* amends and adds to the powers provided in the *Commons Registrations Act 1965* to keep and amend registers of common land and town and village greens. It effectively replaces the existing registration system whilst maintaining the existing registers.

1. Commons registration authorities, the registers and greens

The 1965 Act required that registers were established by commons registration authorities. Following local government reorganisation in 1985 a county council, metropolitan district council or London Borough Council became the commons registration authority for their area. The Act required the authorities to establish two registers to be open for public inspection; one of common land and one of town and village greens. The registers consist of a register map and three sections describing the land, the rights and the ownership of the land.

When an application for entry into the registers was made the authority was under a duty to create an entry in the register and publicise that entry so that objections could be made. The authorities were able to make registrations without application.

The registers were open to registration over two limited periods; from 2 January 1967 to 30 June 1968 and from 1 July 1968 to 2 January 1970. Objections for the first period had to be made by 30 September 1970 and for the second by 31 July 1972.

The Act provided that the following were to be registered:

- Common Land
- Town or village greens
- Rights of common over the land
- Owners of such land

The Act defined common land as land subject to rights of common or waste land of the manor not subject to rights of common. A town or village green was described as land allotted under any Act for the exercise of recreation of the inhabitants of a locality; or on which inhabitants have a customary right to recreation; or have indulged in such pastimes for not less than 20 years.

However, the registration process was ineffective and large amounts of common land were incorrectly registered or were not registered at all.

a. Common Land Forum

In 1984 the Countryside Commission set up the Common Land Forum to examine, amongst other things the inadequacies of the registration process under the 1965 Act. The report by the sub committee summarised the problem:

> It is often claimed by those concerned with the interests of commons and commoners that the provisions in the [1965] Act for registration of commons and rights of common have proved deficient since they allowed registration of many applications which ought never to have been allowed, we agree with this view.[7]

The report proposed a number of measures to improve the situation and recommended a limited re-opening of the registers as the most acceptable solution. At the time a full re-registration programme was considered un-workable. It would have been unpopular with the public who had already seen ten years spent on the process.

b. Greater Protection and Better Management of Common Land in England and Wales Consultation

The Government's *Greater Protection and Better Management of Common Land in England and Wales Consultation* in 2000 proposed that legislation should be revised to enable applications to be made to the Commons Commissioners for an order to de-register any land which was incorrectly registered as common land following the 1965 Act. (Commons Commissioners were set up under the 1965 Act to arbitrate over disputes arising from registration.)

> In some instances, land including houses and gardens has been wrongly recorded as common in the registers. This causes difficulties to the owners when trying to sell, develop or make use of the land. Some people may not even be aware of the registration if there has been no change of ownership since registration was made. As a one off measure, the Common Land (Rectification of Registers) Act 1989 was introduced with the aim of correcting errors affecting domestic property but due to its strict criteria and time-limited application, not all the inaccuracies were picked up. A new provision to address this situation is proposed with the burden of proving incorrect registration resting with the applicant (the owner of the land). Wherever it can be proved that there were no rights of common lawfully exercisable and that the land did not constitute 'manorial wasteland', the other category which can be registered as common land, the land may be deregistered.
>
> Proposal 1:
> Legislation should be revised to enable applications to be made to the Commons Commissioners for an order to de-register any land which was incorrectly registered as common land following the 1965 Act – e.g. houses and gardens

[7] Common Land Forum, Report of the Sub-Committee to the Common Land Forum on deficiencies in the operation of the Commons Registration Act 1965, 1986.

> where no rights of common were lawfully exercisable at the date of provisional registration, and which were included by mistake. [8]

A majority of respondents to the consultation expressed support for these measures. Reservations were made about the establishment of proof before changes are made:

> Of 219 respondents, a majority of 203 supported this proposal while three were opposed.
> A further 13 respondents commented without indicating firm support or opposition.
> Views differed on whether all wrongly registered land should be de-registrable (18 respondents expressly supported this), or only certain types, e.g. land covered with buildings at registration or today; and whether wrongly registered farmland in particular should be excluded or included in the provision.
> Three respondents expressed reservations about securing satisfactory proof so long after registration. Seven specifically expressed support for placing the burden of proof on the applicant while two professional bodies advocated the opposite.
> Four respondents said that other parties besides the landowners should be eligible to apply for de-registration, six wanted various forms of publicity or consultation over applications.
> The minority who opposed the proposal were concerned about the risk of creating a loophole, breaches of the European Convention on Human Rights and encouraging encroachments.[9]

c. The Bill

Provisions included in the *Commons Bill* would allow for the registers to be amended as, under specific circumstances, rights of common are removed, common land is deregistered or new towns and village greens are created.

Clauses 1-5 set out the content and purpose of the registers. Commons registration authorities are required to keep existing registers. The registers are to contain the same information as was set out in the 1965 Act. Commons registration authorities are to remain as functioning bodies.

Clause 15 sets out the criteria under which land may be registered as a town or village green. Land may be registered if it has been used as a place for lawful sport or pastimes for a period of at least 20 years. If use has ceased, an application must be made within two years.

Clause 19 enables a Commons Registration Authority to correct certain clerical errors in the registry.

Clause 20 provides a public right of access to commons registers.

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[8] DETR, Greater Protection and Better Management of Common Land in England and Wales, February 2000.

[9] Defra, Summary Report on the responses to the consultation paper: "Greater Protection and Better Management of Common Land in England and Wales", July 2002.

Clause 22 gives effect to Schedule 2 of the Bill. This makes provisions for the rectification of mistakes in the registers created under the 1965 Act. Regulations may be made later to set a cut-off date for this. Paragraph 2 of Schedule 2 enables land, that was not registered because of objections, to be registered. Paragraph 3 enables certain lands registered as common land to be transferred to the register of town and village greens. Paragraph 4 enables the deregistration of land wrongly registered as common land. Paragraph 5 enables the deregistration of town or village greens.

Clause 23 gives effect to Schedule 3. The 1965 Act did not require that registers were kept up to date. Schedule 3 enables the appropriate national authority to set regulations that would allow the registers to be updated and take account of any changes to commons that have occurred since the two initial registration periods.

d. Reaction to the Bill

The measures present in the Bill to amend previous mistakes have been welcomed and are recognised as a necessity. However, the Local Government Association (LGA) raised concerns about the resources required for the alterations process prior to the Bill's second reading in the Lords on 20 July 2006.

LGA view

The LGA welcomes the provisions of the bill which will enable amendment and rectification of the registers to provide a definitive record of common land and the ownership of rights of common.

The LGA is concerned that the resource implications for CRAs are potentially very large [and] should be accurately assessed and provided for. These concerns are addressed in the points below.

- Updating and maintaining the registers will have real resource implications for local government, both in terms of the direct costs of implementing the measures and follow-up costs. The LGA therefore emphasises the need for early negotiations with government to agree both areas of responsibility and the precise nature of support for implementation.
- The bill (Clause 19) provides for "a right of public access to the commons registers and to records held in conjunction with applications for registration". Some CRAs have many hundreds of folders of documents containing "personal data" dating back to the 1960s. In making records available, CRAs would need to ensure that confidential information was not disclosed. Obtaining consent to disclose personal data or making the documents anonymous in order to comply with the Data Protection Act 1998 will be an enormous, if not impossible task for CRAs, unless the Clause is to have a retrospective effect.
- The transitional period for updating the registers (clause 22 and schedule 2) may require a CRA to "take steps to discover information relating to qualifying events" which could entail reviewing numerous documents and attempting to identify persons to be invited to apply for amendment of the register. This could represent a significant resource implication for local authorities.
- It is recognised that the provision for fees to be charged in connection with applications will assist in covering the cost to CRAs. It is unclear who will be responsible for deciding the level of these fees. The LGA would welcome early and in depth discussions with central government on this matter.

- Support from Defra during the initial registration update phase, when costs are expected to be highest, is also welcome.
- Clause 50 states that the improving and updating of the commons registers is expected to be phased in, so that not all local authorities will be required to undertake the work at the same time. It also states that the prioritisation process will identify those authorities who will commence the work first will focus initially on those with the largest areas of common land. While the lengthy lead-in time and phased implementation period will assist CRAs in dealing with the enormity of the task of maintaining an up-to-date register, the resolution of issues that require the existence of an up-to-date register are not confined solely to those areas with extensive areas of common land – on that basis there is an argument for the initial pilot programme to embrace a wider and more diverse range of situations and circumstances rather than just those with the largest areas of common land.[10]

e. Lords Amendments

In the Bill's passage through the House of Lords, a number of amendments were made to the clauses above. With regard to the content of registers, an amendment was made in Grand Committee to include ancillary information and grazing rights other than rights of common in the registers. The registration of village greens was clarified at report stage. Amendments prevent temporary statutory closure of greens from establishing 20 years of use, and also enable landowners to voluntarily register greens.

2. The recording of changes to common land

The *Commons Bill* would also allow certain future changes of common land to be recorded in the registers.

a. Creation

The 1965 Act does not allow new rights of common to be registered over common land. Clause 6 of the Bill prevents new rights from being created by prescription. It would allow new rights to be created by express grant of the landowner. These rights must be attached to land (a dominant tenement). If new rights are created on land unregistered as common land, it would cause the land to become registerable. New rights of common would only be registered if the commons registration authority believes the land can sustain the right.

The basis of prescription is that if a right has been exercised for a long time the law will presume it has been exercised since the limit of legal memory. The *Prescription Act 1832* sets out that if a right is practiced on common land for thirty years or more it can be regarded to have been practised since the limit of legal memory and so be claimed as a right of common.

[10] LGA, Commons Bill: Lords Second reading briefing, July 2005.

b. Variation

Clause 7 of the Bill would allow rights of commons to be varied by application. This includes when rights are made exercisable over land in addition to or instead of the land the rights apply to. Variation can also include changes in the quantification of rights, i.e. an increase in the number of animals that can be grazed. A commons registration authority would consent to applications only if the land can sustain the varied rights with regard to grazing.

c. Apportionment

Apportionment is the process by which the rights of common are divided when a dominant tenement to which the rights are attached is split. It is not the intent of the Bill that all apportioned rights should be fully recorded. Instead the registers would serve as historic records from which apportioned rights could be traced. However, Clause 8 of the Bill enables the registers to be amended if necessary. If apportioned rights are not recorded, Clause 8 sets out provisions that allow the rights to be regarded as if they were. Apportionment is to be conducted on a *pro rata* basis.

d. Severance

Section 15 of the 1965 Act required that grazing rights of common were to be quantified when registered. This resulted in the severance of rights of common from the tenements to which they were attached. Prior to the 1965 Act the courts had made it impossible to sever unquantified rights from a dominant tenement. In practice grazing rights would have been restricted by the size of the tenement and the number of livestock the tenement could have supported over-winter, at which time livestock would have been brought in from the common land. Following the quantification of rights in the registers the House of Lords ruled that such rights could then be sold off as rights in gross in severance.[11] Clause 9 prohibits any further severance from taking place, unless subject to any other Act of Parliament or under the exceptions set out in Schedule 1 of the Bill.

e. Attachment

Clause 10 of the Bill would enable rights in gross to be attached, or re-attached to land (a dominant tenement).

f. Re-allocation of Rights

Under Clause 11 of the Bill rights of common attached to a dominant tenement can be re-allocated to existing parts of the tenement through application. For example if a proportion of a tenement is developed for a non-agricultural use, the *pro rata* apportionment rule would mean the commoner would lose the same proportion of their rights of common. The tenement holder can apply to retain the full rights in such case.

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[11] *Bettison and another v. Langton and others*, [2001] 1 AC 27.

g. Transfer of rights in gross

Clause 12 of the Bill states that rights in gross shall operate in law only if recorded. It also provides that regulations can be created to describe the process of transferring rights.

h. Surrender and extinguishment

Clause 13 of the Bill prevents existing common law operations from extinguishing rights of common. Instead rights would only be extinguished from the register when the requirements set out in the Bill regulations are met.

i. Statutory dispositions

Clause 14 would allow regulations to be made through which commons registers can be amended when through statute any common land, village or town green, or right of common is acquired, removed or altered.

j. Deregistration, exchange and associated orders

Clause 16 of the Bill would repeal section 147 of the *Inclosure Act 1845*. Section 147 provides a mechanism through which substitute land can be given in exchange for common land or town or village greens. Clause 16 replaces this by allowing the owner of registered common land to apply to the appropriate national authority for land to be released from registration. If the land is more than 200 square metres an application must be made at the same time to register replacement land. If the application is successful, the national authority will make a release order to direct the commons registration authority to alter the register as appropriate.

k. Reaction to the Bill

The NFU provided comment on these aspects of the Bill for the Lords Second reading:

> We understand that this part will not substantially alter the objective of the 1965 Act to record/register the extent of common land and rights on this land. We welcome the decision not to re-open the registration of rights and/or of common land. Both have proved highly contentious, yet it is the exercise of rights registered which has the greatest bearing on the outcome desired by all – that is well managed commons and village greens.
>
> Clause 7 provides for the variation of rights of common in particular circumstances, for example where new land is involved. Subsection (4) obliges the registration authority to refuse an application for variation if in their opinion it would increase the burden on the land over which the right is exercisable. How will an authority reach an informed view on this matter, which implies an agricultural judgment? Some commons have been overgrazed and this is clearly undesirable. However some commons may be undergrazed in which case an increase in the burden on the common may be just what is needed; we wonder if the drafting of the clause might run counter to this objective.
>
> Regarding apportionment (Clause 8) the Bill and subsequent secondary legislation should allow for rights to be apportioned in such a way that reflects the

> predominant use of land severed from the original dominant tenement. Hence it may be the case that an original tenement, while it has been subdivided still remains in agricultural use, while other subdivisions are in non-agricultural use. The Bill must provide for the vendor of land to choose an appropriate allocation of rights.
>
> The severance of rights of common from the farms to which they are attached is prohibited under clause 9. Case law following the 1965 Act has had the unintended consequence of permitting rights to be severed and bought and sold separately from the land to which they were originally attached. We support the view that severance is undesirable in principle as it can lead to a break in local links if grazing rights are sold to persons who may not be local and have any interest in the welfare and future of the common. We welcome the provision to bring the prohibition into force on 28 June 2005 (the day after the Bill was introduced) so as to prevent a rush of attempts to sever rights from land.
>
> The Government's intentions regarding the exemptions to the prohibition on severance needs to be explored. For example, for how long will leasing of rights be permitted and could that continue under the rules of a commons association? What would happen to rights acquired by Natural England or the Countryside Council for Wales (CCW) under subsection (3), bearing in mind that commons associations cannot themselves hold rights? Should commoners not be consulted by these agencies before they exercise a power to sever rights? Will ministers publish a draft of the crucial regulations on this issue before the Bill is considered in committee? [12]

Some of the NFU's concerns were addressed during the Lords stages of the Bill. Clause 7 on variation was amended so that variation can occur only on the basis of what a common can sustain. The issue of apportionment was addressed through amendment in Grand Committee enabling rights to be apportioned with regard to land use. The issue of severance was set out more clearly with the introduction of Schedule 1 at Third Reading.

B. Management

Part 2 of the Bill allows for the establishment of commons associations. Commons associations would have powers relating to agricultural practices, the management of vegetation and the practicing of rights of common on common land.

1. Commons Associations

The third recommendation of the 1958 Royal Commission was that owners of common land, commoners and local authorities should be able to promote schemes for managing common land. The Commission saw the management schemes as a way of improving common land through which vegetation could be removed and the land be made more accessible. Their recommendations on management were linked to their proposals to open up public access rights to common land. It was suggested that, where required, schemes could be set up by submissions made to the proposed commons registration

[12] NFU, Briefing on Commons Bill, 12 July 2005.

authorities. The schemes would involve the commoners and local authorities as representatives of the public.

The recommendations from the Royal Commission were developed by the Inter-departmental working group and set out in their unpublished report in 1977[13]. The group presented a system by which each management scheme would be approved by the Secretary of State.

In the Report of the Common Land Forum it was decided that a more expedient arrangement would be required to set up the management groups. This would best be done by the registration authorities. The Common Land Forum also suggested a broader purpose for the management schemes, including the conservation of common land and the promotion of better farming practices:

> It shall be the purpose of a model scheme of management to continue the exercise of commoners' and owners' rights in or over the common; to maintain the common and to promote better standards of livestock husbandry thereon; and to promote the conservation and enhancement of the natural beauty of the common and access to it by persons for the purpose of quite enjoyment. [14]

In March 1997 the Agriculture Select Committee reported on an inquiry into Environmentally Sensitive Areas and Other Schemes under the Agri-Environment Regulations. Agri-Environment Schemes were established in the UK in 1987, and are part-funded by the European Commission under their agri-environment programme. They provide the Government's main mechanism for compensating farmers for income lost when establishing or improving environmentally beneficial practices on farmland. During evidence session the National Farmers' Union pointed out that non-cooperation by a minority of graziers could jeopardise the success if such schemes were applied to common land. They proposed that legislation should be brought forward from which commons associations could be set up. The associations could enforce rules on the management of grazing practices if they carried 75% of the votes of active graziers. The Government agreed to consider what steps were needed to improve management of commons.

Research was then carried out by the Countryside and Community Research Unit of the Cheltenham and Gloucester College of Higher Education. This led to the publication in June 1998 of the *Good Practice Guide on Managing the Use of Common Land*. The Research Unit also highlighted possible areas for legislative and non-legislative changes and confirmed that control of grazing practices was a key issue in the management of commons.

Prior to this the Dartmoor Commons Act 1985 was enacted. This established a Commoners' Council with powers to regulate the exercise of rights of common on Dartmoor. The Commoners' Council became a template for the commons associations.

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[13] Department of the Environment, *Common Land Preparations for: comprehensive legislation*, 1977 (unpublished).

[14] Countryside Commission, *Report of the Common Land Forum*, 1996.

The Dartmoor Commoners' Council was set up for the maintenance of, and the promotion of proper standards of, livestock husbandry on the commons in and about the Dartmoor National Park. The Council is made up of 26-28 members including 20 elected by the commoners and representing both large and small graziers from each quarter of Dartmoor, 2 appointed members from the Dartmoor National Park Authority, 1 representative of the Duchy of Cornwall, 2 representing other landowners, and 1 independent veterinary surgeon.

Under the terms of the Act, the Council has to draw up regulations to ensure the good husbandry and maintenance of health of all animals kept on the commons. The first Council was elected in 1986 following the preparation of a voting register of all commoners using the commons. The Council is financed by a fee levied on both active graziers (30 pence/livestock unit) and non-active right holders (5 pence/ livestock unit).[15]

a. Greater Protection and Better Management of Common Land in England and Wales consultation

In 2000 the *Greater Protection and Better Management of Common Land in England and Wales* consultation set out an updated agenda for better agricultural management of common land by exploring possible controls on grazing rights. The consultation paper recognised that there remained a lack of effective mechanisms for managing grazing on commons. Although some Local Acts of Parliament were obtained to allow for the management of certain commons, such as the Dartmoor Commons Act 1985, for many commons there was still no reliable means by which the commoners themselves, or any other interest group could effectively control or regulate how rights were practised. And so on many commons the good practice guidance was being ignored. In particular, issues with overgrazing and undergrazing especially on the lowland commons in the south and east were making it difficult for the Government to achieve a number of environmental targets. These included.

- Obligations under the European Habitats Directive (sites of international conservation importance);
- Achievement of the Government's Public Service Agreement target to get 95% of the area of Sites of Special Scientific Interest (SSSI) into favourable or recovering condition by 2010
- Restoration and maintenance of habitats and species populations of high biodiversity value under the UK Biodiversity Action Plan.
- One option proposed by the consultation was that statutory powers could be implemented to allow self regulating commons associations to be formed:

Statutory powers of self-regulation:
4.21 There have been calls, notably from farmers and commoners' associations, for powers for the majority of graziers on a common to pass binding resolutions to regulate grazing practices. There are already powers, under the Commons Act

[15] Dartmoor National Park Authority:
http://www.dartmoor-npa.gov.uk/lab-dartmoorcommons

> 1908, for binding majority resolutions for a very specific and limited purpose and for wider purposes under the Dartmoor Commons Act 1985.
> 4.22 This idea raises issues both of principle and practice. On the principle, it would be important to ensure that the rights and interests of the minority were properly protected. The management association would have to be properly constituted and representative with, perhaps, a 'double-lock' mechanism so that it required the support of, for example, holders of 85% of the rights on the common and 85% of the commoners. There would probably need to be a right of appeal to a statutory body.
> 4.23 In practice, the research carried out for the DETR by the Cheltenham and Gloucester College concluded that even where statutory powers have been provided, as on Dartmoor, they do not necessarily provide an effective and efficient solution to the problems. The members of an association may be reluctant to take action against each other. They may also be interested only in the productivity of the land in the short or medium term rather than in its conservation in the longer term. Adjoining commons could pose another practical problem and it might have to be possible for these to be managed by a single association.[16]

The majority of respondents to the consultation were, in principle, supportive of statutory powers for self-regulation (117 of 159 respondents).[17] However, a number of concerns were also raised. These included how to balance agricultural and wider public interests, whether management associations should be statutory and/or compulsory, what would be the precise functions of such bodies, what voting arrangements would be needed, would there be a statutory appeals body and what means of enforcement might the associations have.

The *Common Land Policy Statement* presented, in 2002, the Government's proposals to develop statutory commons associations:

> While the Government favours a voluntary approach to commons management, we recognise that such voluntary arrangements do not always work since they normally require the agreement of all commoners involved. The consultation paper noted that some organisations, notably farmers' representatives and existing commoners' associations, have called for new powers to allow the majority of active graziers on a common to pass binding resolutions. The consultation exercise confirmed that there is strong support for such powers.
>
> **The Government accepts the need to develop statutory provisions to enable commons management associations to operate more effectively.** But there are a number of issues to address before legislation can be drafted. In particular, we will need to consider:
> - to what sort of association, or other body, should statutory powers of self-regulation be granted;
> - the extent of the body's membership, powers, duties and responsibilities;
> - how such bodies will operate (including their regulatory powers);
> - the means by which these measures will be enforced;

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[16] DETR, Greater Protection and Better Management of Common Land in England and Wales, February 2000.

[17] Defra, Summary Report on the responses to the consultation paper: "Greater Protection and Better Management of Common Land in England and Wales", July 2002.

- how the interests of individual commoners, landowners, tenants and licensee graziers should be safeguarded; and,
- how the associations should be advised as to what constitutes acceptable grazing intensity.

82. These are matters that we shall want the working group to examine. The Government's preliminary views are, however, as follows. Almost all these proposals would require primary legislation.[18]

b. Common land Stakeholder Working Group

In November 2002, Defra and the Welsh Assembly Government established a Stakeholder Working Group in line with the commitment in the Common Land Policy Statement 2002. The group met four times between November 2002 and February 2003 to develop detailed proposals for the agricultural use and management of common land. Full details of the group's activities are available on the Defra website:

http://www.defra.gov.uk/wildlife-countryside/issues/common/legislation/stakeholder.htm

In April 2003 a final report of the group was released, recommending:

- Commoners, common owners and others with an interest in a common should be able to establish statutory commons associations, with powers to pass majority resolutions and make regulations regarding the agricultural use and management of one or more commons. Regulations would be enforceable against all commoners, but would need the approval of the Secretary of State or National Assembly for Wales. Associations would need to conform to prescribed rules in the conduct of their business to ensure fairness to all.

- Statutory regional advisory bodies should be established, primarily to advise the Secretary of State or National Assembly on whether or not to confirm regulations put forward by commons associations, and also to advise on whether the use of reserve powers would be justified. The report also calls for a non-statutory national advisory body to promote good practice and provide a medium for communication between the Government and those with an interest in common land.

- The Secretary of State and the National Assembly should take reserve powers to intervene in the unsustainable agricultural use of common land. The powers would be similar to those exercised by the nature conservation bodies on sites of special scientific interest.

- People entitled to exercise rights of common should no longer be able to let or lend the rights to third parties. (Most rights are attached to a farm holding, or a particular part of it, so the working group took the view that only the occupier of that holding should be entitled to exercise the rights.) The Government has already committed to prohibiting the severance of rights of common (so that the rights cease to be attached to any farm

[18] Defra, *Common Land Policy Statement*, July 2002.

holding, and are held as a freely tradable right of grazing another person's land).

- The group was unable to reach a view on whether lapsed or unusable rights of common (e.g. those which had become attached to a residential dwelling) should be extinguished or remain dormant.

- "Live registers" - databases about the exercise of common rights, which contain more, and more up-to-date, information than the official statutory registers allow - were commended as a prerequisite to other reforms.[19]

The Working Group's report was followed by a consultation in August 2003. The consultation proposed the following.

- New measures to enable commons to be self-regulated by statutory commons associations, with powers to require all commoners to abide by decisions made by the majority.

- New powers of last resort for the Secretary of State, National Assembly for Wales and nature conservation bodies in relation to common land that is not being managed sustainably. They would be able to assume the powers of the owner of the common to take court action restraining any unlawful exercise of rights of common, and would be able to refer the rights registered over a common for review by the Commons Commissioner.

- New regional advisory bodies to provide advice to commons associations on good practice, to comment on regulations made by commons associations, and to advise the Government on the exercise of its powers of last resort.

- A ban on lending rights of common, other than in exceptional cases.

- A new facility for holders of common rights to surrender them unilaterally.[20]

A full report on the consultation can be found on the Defra website along with a summary of the consultation responses:

http://www.defra.gov.uk/corporate/consult/common-land/index.htm

[19] Defra, Information Bulletin, *Agricultural management of common land – stakeholders report*, 16 April 2003 http://www.defra.gov.uk/news/2003/030416b.htm

[20] Defra, News Release, *Reform of agricultural management of common land*, 22 August 2003 http://www.defra.gov.uk/news/2003/030822a.htm

c. *Common Land as an Environmental Resource*

Common land is an important nature conservation asset. Nearly 55% of common land is designated as a Site of Special Scientific Interest. Almost all the commons in England and Wales support semi-natural vegetation. Much of this is of high nature conservation value. *The Common Lands of England - A Biological Survey* research project was commissioned by the former Department of the Environment in 1985. This study noted common land in England is a very significant resource that serves multiple purposes:

> The summary review of vegetation patterns provided here confirms that this is the case, as does the strong association of commons with designated conservation areas (e.g. SSSIs, NNRs etc). The situation has been shown to vary from region to region, and from common to common, but the overall picture is of a natural resource that has largely maintained its unimproved status and biodiversity in the face of numerous anthropogenic pressures.[21]

> Protection that has been accorded to them since the middle part of the 19th century, and the diverse settings in which they are encountered, commons contribute greatly both to the richness and diversity of the biological heritage and to the scenic character of many areas; at the same time they continue to serve the economic interests of farming communities in both upland and lowland regions. Finally, commons continue to be widely used for both active and passive forms of recreation. [22]

d. *The Bill*

Part 2 of the *Commons Bill* provides for the voluntary establishment of commons associations. The Bill provides an open format for how the associations should be set up and provides them with limited powers in regulating certain rights of common over the land they are attached to.

Clauses 26 and 27 enable the appropriate national authority to establish commons associations related to registered common land. These are to be established by order, of which a draft must be made and representations invited for. A local enquiry may be held if there is controversy over the establishment of a commons association.

Clauses 28 to 30 describe the status of commons associations. Commons associations are required to have regard to the interest of the public. This includes a regard for nature conservation. The appropriate national authority is to produce a standard constitution for all commons associations. This may be adapted for individual associations. Clause 37 allows for the disbanding of commons associations.

Clauses 31 to 35 describe the functions of commons associations. These functions are limited to those relating to the management of agricultural activities, the management of vegetation and the management of rights of common. It is not necessary for a commons association to have functions relating to all these matters. Commons associations are

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[21] Department of the Environment, Transport and the Regions, The Common Lands of England and Wales a Biological Survey, August 2000

[22] Department for Environment, Food and Rural Affairs, The Common Lands of England a Biological Survey: Executive summary, September 2002

also able to make rules affecting the rights of the land owner to use land surplus to the rights of common. Ancillary powers are also provided to enable commons associations to carry out their functions. These include powers to raise money and powers to enter into agri-environment schemes.

e. Lords Debate

During second reading a number of specific questions were answered on the subject of Commons Associations by Lord Bach, Under-Secretary of State, Department for Environment, Food and Rural Affairs :

- An overview:

> Let me say this for today: we want commons associations to improve the management of agricultural activities on common land. That includes the social, economic and environmental aspects of agriculture for current and future generations. The noble Lord, Lord Tyler, spoke of the generations to come. We believe that such management will contribute to a wider range of public benefits on commons, and I remind noble Lords that commons associations will also be able to make rules to bind all those sharing the resource.
> The phrase "sustainable agriculture" can be defined in many ways. A rigid definition set out in the Bill would restrict the ways in which individual associations could function on different commons. Activities that are appropriate for a large, privately owned upland common might not be suitable on one owned by the National Trust, which must balance agricultural use with providing for public enjoyment, or on a common designated as a SSSI, where nature conservation might be of paramount importance.[23]

(The reference to sustainable agriculture was later amended[24])

- Imposition:

> The noble Lord put several questions to me. Can the relevant national authority impose commons associations on an area? As I pointed out in my opening remarks, commons associations will be formed from the bottom up, and there must be substantial support from the key interests in the common before the relevant national authority would establish the association. We know that trying to impose such organisations on commoners will just not work. The proposal needs their full support.[25]
>
> The noble Earl, Lord Caithness, asked a number of pertinent questions. He asked whether commons associations would be formed if land owners or commoners opposed their creation. We do not believe that full support from all interests is necessary for the establishment of a commons association, but prior to establishing an association, the Secretary of State must consult local interests and can establish an association only where there is substantial support. An association is therefore unlikely to be established where there is significant

[23] HL Deb 20 July 2005 c1523
[24] HL Deb 2 November 2005, GC116
[25] HL Deb 20 July 2005 c1524

opposition from key interests. If the vast majority of commoners on a common want to establish an association and the owner opposes it, our view is that the association may still be created.[26]

- Support:

The noble Viscount, Lord Ullswater, asked what level of "substantial support" was required for creating a commons association. I can repeat what I said earlier: substantial support will be required depending on local circumstances. It may be that I shall be pressed on that at a later stage. For a large group of commons with several landowners, commoners and other interests such as sporting rights, the term "substantial support" might imply that a majority of all interests must be in favour of establishing an association. On the other hand, on a single common with only one landowner and a large number of rights holders, the support of the majority of commoners might be enough to establish an association.
I was asked about sustainable agriculture, husbandry, and the balance that needed to be struck if we were to pass a satisfactory Act of Parliament. We believe that commons associations will make it easier to achieve the difficult balancing act between the economic, social and environmental aspects of sustainable agriculture, thus allowing the different interests in a common—the landowners, the rights holders and other interests—to work together. That is the aim.
The noble Baroness, Lady Byford, raised a number of issues. She asked what area a commons association would cover. The noble Lord, Lord Tyler was also interested in that question. A commons association can be formed for a single common or for a group of commons in an area. We expect that in most cases associations will be formed for groups of commons in a region or local area. [27]

- Rights of Common:

I was asked how the rights of owners would be dealt with in any association. All the major interests in a common will be represented on the governing body of the association. An association can manage only agricultural activities on a common. That does not mean that it can always override the rights of landowners. Our intention is for the establishment order to determine the procedure for obtaining consent and specifically to identify where, for what activities and from whom consent is required.[28]

f. Comment

The NFU provided comment on the implications for their members on the establishment of commons associations contained in part 2 of the Bill:

The NFU welcomes the provisions in this Part of the Bill to allow the establishment by order of statutory commons associations. It is reasonable that the Secretary of State in England, or the National Assembly in Wales (NAW), should have to be satisfied of “substantial support” for a proposal to establish a commons association. Subsection (5) obliges particular regard to be had to

[26] HL Deb 20 July 2005 cc1526-7
[27] HL Deb 20 July 2005 c1524
[28] HL Deb 20 July 2005 c1527

representations from, amongst others, those who hold rights of common. However this should be strengthened to focus on those who actively exercise their rights (as the Bill provides for in relation to consent for works on commons, see clause 37(1)(a)); inactive commoners should not be enabled to in effect have a right of veto on a proposal for an association which might have much promise and support amongst others.

We agree with Defra's view, reflected in clause 27, that commons associations should not have a duty imposed on them to further the conservation and enhancement of the flora and fauna of SSSIs as this could act as a serious deterrent to their establishment. Moreover if they were given such a duty they would be ineligible for agri-environment funding. The minister or the Assembly can judge the good environmental intentions of associations at the establishment stage.

Whilst there may well be merit in having some standard constitution terms for associations as provided for in clause 28, we welcome the flexibility therein to supplement, disapply or replace standard terms. The prevailing conditions vary from one common to another and it would be wrong to deter associations being established by a 'one size fits all' approach.
Nonetheless the Government's intentions should be clarified on the question of membership of the association, for example there can be no case for inactive commoners to be as well represented as active commoners - their remedy is of course to become active!

We agree that the principal function of associations should be to make rules relating to the agricultural use of the land. The concept of "the protection and promotion of sustainable agriculture" (clause 30(2)) will vary from one common to another. It is reasonable that in discharging their functions associations should have regard to nature conservation, landscape conservation, and public rights of access to the common.

The broad powers for commons associations provided for in clause 31 (1) are welcome and necessary. We note that sub-section (2) does not include the maintenance of a register of active commoners, nor of the rights exercised at any one time. Whilst the desirability of maintaining a "live register" need not be on the face of the Bill, we would expect statutory associations to perform this function. The provision in clause 31(4) for an association to perform its functions without the consent of a person with an interest in land is critical to overcoming the impasses that can presently arise where one person can thwart the collective will of the overwhelming majority. This right is qualified by subsection (6) under which an obligation to obtain consent can be retained in the establishment order; this issue should be looked at in terms of the implications for persons like owners of commons.

The power in clause 34 [now clause 37] for the minister or the NAW to vary, revoke regulations, local Acts and schemes to assist commons associations is wide. It raises the general issue in relation to the Bill of the balance between primary and secondary legislation. Clearly matters of administrative detail like prescribed forms should be decided by regulations. However apart from section 49 orders (power of the minister or NAW to amend the application of Acts to

common land) which attract affirmative resolution Parliamentary control, all other orders and regulations under the Bill are subject to the negative procedure. We expect peers will wish to consider this.[29]

C. Protection

The third part of the Commons Bill contains measures to prevent certain works from being carried out on common land without the consent of the appropriate national authority. It would also enable local authorities with powers to deal with unauthorised agricultural activities on common land and clarifies the powers of local authorities to protect unclaimed common land.

1. Prohibition of Works on Common Land

The law currently prohibits work from being carried out on common land in most situations, though it does recognise that in certain circumstances works are required for the convenience and use of the land. There are procedures that allow buildings to be constructed, such as sports pavilions, or new roads to pass through common land. There are three pieces of legislation, each requiring the consent of the Secretary of State, which can be used.

- Section 194 of the *Law of Property Act 1925* is the main protective piece of legislation. It prevents the erection of any fence or building or the construction of any other work on most common land without the consent of the Secretary of State. Common land is defined as land which at the commencement of the Act was subject to rights of common (including town and village greens).

- Section 19 of the *Acquisition of Land Act 1981* provides that if common land is the subject of a compulsory order from a public authority, the authority must provide in exchange land of at least the same area that is *equally advantageous*. If land is not to be given in exchange the order is subject to special parliamentary procedure.

- Section 22 of the *Commons Act 1998* regulates the acquisition and enclosure of common land by statutory authorities by agreement.[30]

a. Royal Commission Report

In considering the safeguarding of common land the Commission recognised the importance of protective legislation from the mid nineteenth century in creating the special character of the common land. The Commission proposed recommendations with a mind to maintaining that character. It was recommended that permanent inclosure of common land should not be allowed and that the preservation of common land should

[29] NFU, Briefing on Commons Bill, 12 July 2005.
[30] Open Spaces Society, *Our Common Land*, 2003

not simply rest within the normal planning process. The Commission also put forward a number of proposals on the reclamation of commons in poor states of repair.

b. Common Land Forum

The Common Land forum provided a review of the legislation on the protection of common land in their 1986 report. The Forum agreed that Section 194 of the *Law of Property Act* provided an essential safeguard against unwanted works on common land and that such a safeguard should be continued in all future legislation. Further to this the Forum recommended that county councils should be provided with powers to take action against those responsible for the construction of works on commons without the required consent.

The Forum provided an in depth study of the problem associated with fencing in and around commons.[31] The study noted that a number of issues exist with the internal and perimeter fencing of common land, and suggested that the protection and management of common land could not be addressed successfully without tackling these issues.

Recommendations were also provided by the Forum with regard to the protection of unclaimed common land. The Interdepartmental Working group on Common Land had previously estimated that 2,000 areas of common land were unclaimed by landowners, covering around 10,000 acres in all.[32] The Forum examined the evidence and proposed:

> The Forum recommends that these areas of unclaimed common land should normally be vested in the parish or community council. Where a common crosses the boundary of two or more parishes it should be open to their councils to agree an arrangement for joint management or, where only a very small part of a common was in one parish, management [should be by] the parish with the majority holding. Where there was no local council or where arrangement for joint or majority management could not be agreed, ownership should be vested in the district council.[33]

c. Greater Protection and Better Management of Common Land in England and Wales consultation

The 2000 consultation set out a number of proposals to strengthen the powers protecting common land in England and Wales and restructure the application process to apply for works on common land. The consultation put forward a number of suggestions for comment:

- Extend the application of section 194 to all common land. The *Law of Property Act 1925* only applies to land that was subject to rights of Common at the time of enactment.

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[31] E Harris and J Taylor, Fencing of, and on common land, in Common Land Forum, *Report of the Sub-Committee to the Common Land Forum on deficiencies in the operation of the Commons Registration Act 1965*, 1986.

[32] Defra currently estimate 1900 commons have no known owners.

[33] Countryside Commission, *Report of the Common Land Forum*, 1996.

- Delegate the consent procedure to local planning authorities. The Government suggested that local planning authorities were best placed to judge consent for works, though they recognised that some cases could be of national importance.

- Revise the criteria for determining applications. The Government considered that the terminology of the 1925 Act be revised by clarifying that determinations should be made while taking account of:
    - Public interests
    - The rights of commoners and landowners
    - The need for effective management of the common
    - The conservation of the commons natural and historic features
    - The impacts on public access rights.

- Application of fees for the procedure. The cost of processing applications is currently borne by the relevant national authorities.

- Improving enforcement against unlawful fencing and works. The 1925 Act relies on those with a legal interest in the common to apply to the county court for an order to remove fencing and works. The consultation suggested that local authorities be given powers to issue an enforcement notice to require the removal of works.

Majority support was given for all five of the above proposals in the consultation responses, although a number of oppositional points were made. Those opposed to the proposal to delegate consent procedures to local authorities argued that local authorities were subject to pressure from local, conservation or political interests that could compromise their impartiality, especially where planning consent was already granted.

Views also differed on the relative importance of each of the five factors put forward in determining consent.

A number of respondents said that local authorities should have a duty rather than discretion to take enforcement action, especially where sites of national or international interest were concerned.

A full summary of responses is available online:

http://www.defra.gov.uk/wildlife-countryside/issues/common/legislation/consult-response/summary.pdf

d. Common Land Policy Statement

The consultation procedure resulted in the Government confirming commitments to legislate and provide for all the above points apart from transferring consent procedures to local authorities. On this matter the Government stated:

> Although any speeding up of the decision process would be welcomed, there was a general concern about maintaining impartiality. There were concerns that it would be difficult for authorities to make objective section 194 decisions that might go against planning consent decisions already made by the same authority.

> We therefore conclude that the advantages of transfer to local authorities and National Park Authorities are outweighed by the need to maintain public confidence and clearly demonstrate impartiality in the decision making process; and the desirability of separating this function from other proposals that will enhance the role of local authorities in respect of commons. The resource and efficiency implications of dealing with a small number of cases, widely scattered over the country, also point towards a continuation of the present centralised system. The Secretary of State and the National Assembly for Wales will, therefore, retain this function, but we will consider whether there is scope for the work to be undertaken by another central body or improved in other ways.[34]

e. The Bill

Clause 38 of the Commons Bill prohibits the carrying out of *restricted works* on registered common land without the consent of the appropriate national authority. Restricted works are defined as works that impede access to or over the land and include new fencing, buildings, structures, ditches, trenches, embankments or works that involve newly surfacing the land with concrete or tarmac etc.

Clauses 39 and 40 outline the consent procedure. Consent must have regard to landowners and those with rights of common over the land, the interest of the neighbourhood, the public interest, or any matter considered to be relevant. The public interest is to include nature conservation, conservation of the landscape, protection of rights of way and the protection of historic features. Regulations are to be made setting out the procedures for making and determining applications.

Clause 41 enables any person or local authorities to apply to the courts for an order for the removal of works if no consent has been given.

Clauses 42 and 43 enable the appropriate national authority with powers to exempt certain works from requiring consent. This includes work on commons that are regulated by existing schemes (such as those prescribed by the Metropolitan Commons Act 1866 and the Commons Act 1899) that enable certain works to be carried out. Other works may be exempt by order.

Clause 44 and Schedule 4 allow the appropriate national authority to amend provisions about works on commons in local or private Acts enacted before commencement. More general powers to amend enactments relating to commons are contained in the supplementary and general part of the Bill.

Clause 45 provides local authorities with powers of intervention over common land. Though powers exist in the *Commons Registration Act 1965* that allow local authorities to protect common land with no registered owner, the Commons Bill would enable local authorities to institute proceedings against any person that unlawfully interferes with the land.

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[34] Defra, *Common Land Policy Statement*, July 2002

Clause 46 enables the appropriate national authority with powers to stop unauthorised agricultural activities on common land or town or village greens.

f. Lords Debate

The principle behind the control of works was outlined by Lord Bach during the Lords second reading:

> The controls on works in the Bill essentially repeat the controls contained in the 1925 Act. It is not the intention that minor management works that do not prevent or impede access to the common should be covered by the consent regime. All applications to undertake works are considered on their individual merits. Clauses 36 and 37 ensure that all proposals will be carefully considered in accordance with the criteria set before any decision is reached.[35]

Lord Bach also outlined the powers of national authorities to prevent unauthorised agricultural activity:

> The noble Lord also asked what the Secretary of State and the relevant quangos—his word—would use the intervention powers for. They concern in particular the interests of landowners. The powers will apply only when unauthorised agricultural activities are carried out on common land and where they prevent the protection or promotion of sustainable agriculture. That protects the public interest where damage to a common is occurring through unauthorised activity. I emphasise that it is not a general power for the Secretary of State to intervene in the management of common land where authorised agricultural activities are taking place; that is, activities carried out by the owner or with the owner's authority. [36]

g. Comment on the Bill

At the time of second reading the NFU provided the following comment on the control of works on common land provided by the Bill:

> **Part 3 - Protection**
> The provisions of this Part of the Bill replace the present procedures for consenting to works on common land under the Law of Property Act 1925. The consenting regime for works on common land is in need of radical overhaul. Consent decisions for relatively minor works like the erection of fencing to better manage the environment or to protect animals (e.g. from speeding traffic) can take many months to be determined as the process for considering objections is cumbersome. Moreover the requirements relating to applications for proposed works (e.g. advertising) can result in costs which are so high that worthy applications are deterred. The opportunity of the Bill should be taken to bring about this overhaul in the approach to consents, and accordingly these provisions need close examination.

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[35] HL Deb 20 July 2005 c1526
[36] HL Deb 20 July 2005 c1524

> We also have some doubts about the terms used, and the likely operation of the proposed procedures. The concept of "resurfacing" is not clear despite subsection (4). The inclusion of the digging of ditches and trenches and the building of embankments in the definition of "restricted works" could restrain normal management of the common for agricultural purposes.
>
> Enforcement procedures under clause 39 can be initiated by any person with a right of access to the land, which by virtue of the CRoW Act in effect means any member of the public; should the county courts be exposed in this way? How will the Government ensure that this provision will not be open to abuse from mischievous objections?
>
> Clause 41(3)(a) [now clause 43] should make provision for directions to be granted for works that can directly benefit animal welfare as well as the exercise of rights of common across registered land. In this way the appropriate national authority could direct a commons association to undertake fencing for specific purposes.
>
> Clause 44 [now 46] contains powers for ministers, the NAW, the CCW, and National Park authorities to take enforcement action against unauthorised agricultural activity. Whilst such activity should clearly be curbed, we hope that peers will question the justification for giving these bodies in effect a power to go over the heads of commoners, their associations and others with an interest in the land.[37]

Some of these points were tackled as the Bill passed through the Lords. Clause 46 no longer enables National Park Authorities and the Countryside Council for Wales with powers to prevent agricultural activities. Further to this the broadening of enforcement provisions will only apply to unlawful works constructed after the Bill's enactment.

More recently the Open Spaces Society provided a more critical appraisal as the Bill passed from the Lords to the Commons.

> While we have welcomed many elements of the new clauses on consent for works on common land, we are deeply concerned that the public is not to have the power to take action against those unlawful encroachments which existed before 28 June 2005. Lord Greaves, with support from Lords Judd and Tyler, sought to delete the Government's amendment to this effect, but with no success.
>
> The Government said it was not reasonable to allow the new powers to be used for existing works, but it did not say why. This is a real kick in the teeth and we shall raise the issue again in the House of Commons.
>
> At report stage and again at third reading Lord Greaves moved various amendments to give local authorities a duty to take action against unlawful works and to assume ownership of unclaimed land. The government agreed to issue guidance to local authorities encouraging them to use their existing powers, but in our view these are insufficient. The many unlawful works, and the many and neglected overgrown commons, will persist.[38]

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[37] NFU, Briefing on Commons Bill, 12 July 2005.
[38] Commons Bill – a fumbled chance, *Open Space*, Spring 2006.