



**Law
Commission**
Reforming the law

Conservation Covenants A Summary

**Consultation Paper No 211 (Summary)
28 March 2013**

THE LAW COMMISSION'S CONSULTATION PAPER ON CONSERVATION COVENANTS

EXECUTIVE SUMMARY

Introduction

- 1.1 Green spaces and unique habitats, remarkable buildings, and historic places are valuable to us. They give us a sense of identity and community, they help us to be healthier, they broaden understanding of our social and cultural heritage, they provide opportunities for recreation and relaxation, and they contribute to our economy.
- 1.2 Over the years different methods have been used to protect land in order to conserve and restore our natural and built environment. This project examines a legal tool which is used for conservation purposes, known as a “conservation covenant”. Conservation covenants are used in many other jurisdictions, but do not exist in the law of England and Wales. They allow landowners voluntarily to create binding obligations on their own land to meet a conservation objective, such as preserving woodland, cultivating a particular species of plant or animal, or farming land in a certain way.
- 1.3 The Law Commission has examined whether there is a case for introducing conservation covenants into the law; and if so, what elements a new statutory scheme might need. Our findings and provisional proposals for reform are set out in a Consultation Paper, Conservation Covenants.¹ This Executive Summary sets out some of the main issues we have considered and our initial findings. The purpose of this consultation is to seek information about conservation and development practices, and generate responses to our discussion and provisional proposals. We invite responses to this Consultation Paper by Friday 21 June 2013. After the consultation period we will review how to take the project forward in the light of consultees’ views. If the project proceeds to a final Report with a draft Bill, we anticipate that publication will be in late 2014.

The need for reform

- 1.4 A conservation covenant is a voluntary agreement entered into by a landowner, who promises to do something or not do something to achieve a conservation objective on his or her land. A conservation covenant is usually perpetual; that is, both the current landowner and any future landowners will be bound by the promise. Why is this not already possible? For hundreds of years the law has been extremely cautious about allowing people to create perpetual obligations on their land, because of concerns about “dead hand” control: allowing landowners to dictate what happens on their land, long after their death. This caution is because (it is said) each subsequent owner of that land should have the freedom to make his or her own decisions about how the land is used; and land should be controlled by the living, who can adapt its use to whatever is most efficient for that particular time.

¹ This can be downloaded at <http://lawcommission.justice.gov.uk/areas/conservation-covenants.htm>.

- 1.5 A large body of law has, as a result, built up restricting the circumstances in which binding obligations on freehold land (known as “covenants”) can be created. In general, there are very limited circumstances in which an obligation will be able to endure beyond the landowner who created it. The courts have said that it is only possible to create a binding (that is, perpetual) covenant on freehold land if:
- (1) it is created for the benefit of the neighbouring land (for example, a promise by a landowner not to build above a certain height so that his or her neighbour’s view from their land is preserved); and
 - (2) it is a promise not to do something (a “restrictive” obligation), rather than a promise to do something (a “positive” obligation)
- 1.6 Against this background, there has been increasing interest in landowners being able to create binding positive and restrictive obligations not for the benefit of their neighbour, but for the purpose of conservation generally (which is for the benefit of the public). In fact, for some time there have been statutory exceptions to the rules about covenants that relate to conservation. For example, the National Trust can create statutory covenants with landowners for the purposes of conserving land, even where the National Trust does not hold neighbouring land. A National Trust covenant will bind the landowner who agrees it, and all subsequent owners of the land.
- 1.7 As well as these statutory exceptions, people have started to develop quite complex and unwieldy ways to get around the restrictive rules about covenants. For example, people can enter into complex schemes whereby a landowner gives or sells the freehold to a conservation organisation, which in turn grants a very long lease back to the landowner.
- 1.8 So we know that there are ways to get around the rules about covenants; but they are either limited to certain special organisations, or they involve using complex, insecure and potentially expensive workarounds. Should it then be possible to create a covenant that is especially for the purpose of conservation, and not limited by the rules about covenants?
- 1.9 In several other jurisdictions the law has created an exception for covenants which are intended to help conservation: these are generally referred to as “conservation covenants”. Conservation covenants are used in places like Scotland, the USA, Canada, Australia and New Zealand. Many of these places also have the traditional rules about covenants which exist in England and Wales; but they have decided to make a special exception for conservation covenants, which allow binding obligations to be created on land for the purposes of conservation. This means that individual landowners have the opportunity, using a private agreement, to contribute to conservation efforts.

- 1.10 We examine the statutory exceptions, the workarounds currently being used, and the extensive use of conservation covenants overseas in Chapters 2 and 3 of the Consultation Paper. We conclude on the basis of that analysis that there is a gap in the law. We think that reform is needed in the form of a new statutory scheme for conservation covenants. We make a number of provisional proposals for reform and ask for consultees' comments on whether conservation covenants should be made available in England and Wales, and on the detail of how they should operate. We also seek consultees' views on certain conservation practices, as well as areas where there is more than one option for reform. We summarise our main proposals below, but stress that this is only a summary – readers should refer to the Consultation Paper for details.

A statutory scheme for conservation covenants

- 1.11 What should be the key elements of a statutory scheme for conservation covenants? In considering this question we draw on the experiences of other jurisdictions (outlined in Chapter 3), as well as examples of statutory covenants which exist in England and Wales (which we consider in Chapter 8 and Appendix A).

Who can create a conservation covenant?

- 1.12 It may seem obvious that a person who owns land should be able to create obligations over it: but in fact, there are different ways that land can be “owned”. It seems clear that a freehold owner should be able to create a conservation covenant over their land; but are there cases in which leaseholders should be able to do the same? We examine this in Chapter 4, and provisionally propose that both freeholders, and leaseholders whose lease has at least seven years still to run, should be able to create a conservation covenant over their own land.
- 1.13 What about the other party to the conservation covenant? Under a traditional covenant a landowner's neighbour has an incentive to ensure that the landowner fulfils his or her obligations. But with a conservation covenant, there is no neighbouring landowner; who should monitor the obligations and ensure that they are fulfilled? We think that the best approach is to limit the range of potential holders to organisations which are sufficiently permanent, securely-resourced, and whose decisions are open to scrutiny. We propose that the Secretary of State, or the Welsh Ministers, should have the power to designate an organisation as a “responsible body”, if it is:
- (1) a public body (that is, an organisation created by statute) whose objects include the purposes we discuss below;
 - (2) a registered charity whose objects include the purposes we discuss below; or
 - (3) a local authority.

What should a conservation covenant be for?

1.14 Keeping relatively tight control over who can be a responsible body is one way to ensure that conservation covenants are not created inappropriately. Another way to do this is to have a defined list of the purposes for which a conservation covenant may be created. We expect that a responsible body will only enter into conservation covenants whose purposes align with the statutory definition. But finding the precise wording for that definition is challenging, because of the many different activities which fall within the concept of “conservation”. In Chapter 4 we propose a relatively simple set of purposes which we think captures the different ways in which conservation covenants should be used. We propose that the purpose of a conservation covenant should be an obligation to do or not do something on land, for the public benefit, to preserve, protect, restore or enhance the land’s:

- (1) natural environment, including its flora and fauna;
- (2) natural resources; or
- (3) cultural or built heritage features.

Oversight of conservation covenants

1.15 Some countries impose extra checks on the creation of conservation covenants; for example, Government approval might be required. This ensures that conservation covenants are not created inappropriately (for example, where land is not genuinely being conserved). It can also mean that the public has a greater role: because after all, conservation covenants are for the public benefit. On the other hand, additional oversight may create barriers to the use of a statutory scheme, and would add an unnecessary level of regulation.

1.16 A related concern arises in Chapter 6 where we look at remedies available for a breach of a conservation covenant. In addition to a responsible body, should Government, or a statutory body, have the power to bring proceedings for a breach? This might be necessary, for example, if a responsible body is unwilling or unable to. As we note in Chapters 4 and 6, the arguments on these issues are finely balanced, and we encourage consultees to share their views.

Creating and registering a conservation covenant

1.17 In Chapter 5 we look at some technical issues. We propose that conservation covenants should be statutory obligations rather than traditional property rights. We also look at how a conservation covenant could be made, how long it should run for, some terms which we think should be excluded, and how conservation covenants would interact with other statutory schemes binding land (such as Sites of Special Scientific Interest). We also examine the importance of registration: we think that conservation covenants should be registered as local land charges. This means that any would-be purchaser of land can easily find out if that land is subject to a conservation covenant.

Managing and enforcing a conservation covenant

- 1.18 As we note in Chapter 6, the creation of a conservation covenant is merely the beginning of the work. Once it is in place the parties will have different responsibilities. The landowner will have obligations, but the responsible body will also need to monitor the performance of those obligations, and if necessary, take steps to ensure they are completed. There will be a range of ways in which responsible bodies will manage conservation covenants. Because of this, we do not think it is appropriate to provide for management powers in a statute; instead, these provisions should be agreed between the parties.
- 1.19 In rare cases landowners may breach their obligations, and responsible bodies will need to consider how to address the breach. A breach may have serious and possibly irreparable consequences, such as the destruction of a habitat or historic building. It is therefore important that there is a robust system to address failures to comply with conservation covenants. Having considered what would qualify as a breach of a conservation covenant, we then look at two potential remedies: injunctions, and damages.
- 1.20 An injunction is likely to be the main remedy sought by a responsible body; this is targeted at remedying a landowner's action or inaction. We think that a responsible body should be able to seek an interim or final injunction for a breach of a conservation covenant. We also look at cases where a responsible body might seek damages for the breach of a conservation covenant. If a responsible body seeks compensatory damages the court should aim to put the responsible body in the position it would have been in (so far as money can do so) had the contract been performed.
- 1.21 But often the damage to a responsible body will be minimal, and so will the amount of damages which can be awarded. What about the more significant damage to conservation in the public interest? We explore the concept of "exemplary damages", which are punitive in nature, and propose that a responsible body should be able to seek punitive damages for a breach. But we are keen to hear consultees' views on which circumstances should lead to an award of exemplary damages being made.

Modifying or discharging a conservation covenant

- 1.22 Our statutory scheme aims to combine permanence (to ensure conservation goals are realised) with sufficient flexibility so that land remains useful. For this reason, we have considered ways that a conservation covenant should be able to be modified and, if necessary, brought to an end. These are found in Chapter 7, and we outline some of them below.
- 1.23 We begin by considering whether a responsible body should be able to bring a conservation covenant to an end. It might do this in consultation with a landowner; or it may decided of its own accord that the agreement should cease. So, for example, if migration patterns change and a species which is protected by a conservation covenant has moved away from land, a responsible body might decide that its funds are better spent on other conservation work. Whilst we think it is right to allow a responsible body to take this action, we would like to hear from consultees about whether they think this sort of step should be limited to certain circumstances.

- 1.24 We also think it is important that the parties – that is, a landowner and the relevant responsible body – should be able to agree between themselves that a conservation covenant should be amended. This gives flexibility to the parties, and reflects the private nature of a conservation covenant; but the involvement of the responsible body also ensures that decisions will be taken appropriately.
- 1.25 Finally, we look at the situation where a landowner wishes to modify or terminate a conservation covenant, but cannot obtain the agreement of the responsible body. In these cases a form of external adjudication is needed, and we propose that the Lands Chamber of the Upper Tribunal (which already has the power to amend or discharge freehold covenants) should provide this. The Lands Chamber's existing power under section 84(1) of the Law of Property Act 1925 is considered, but we conclude the grounds for applications under this section are not adequate in this context. Instead we propose new grounds under which an application to modify or discharge a conservation covenant should be considered. These aim to balance the different interests of conservation and private land ownership.

The potential impact of conservation covenants

- 1.26 In Chapter 9 we discuss potential impacts of the current law and of our provisional proposals, and we ask for consultees' help in assessing these potential impacts.

Responding to our Consultation Paper

- 1.27 Copies of the Consultation Paper are available to download free of charge from our website at <http://lawcommission.justice.gov.uk/areas/conservation-covenants.htm>. We seek responses to the Consultation Paper by 21 June 2013:
- (1) by email to propertyandtrust@lawcommission.gsi.gov.uk; or
 - (2) by post to Luke Campbell, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
- 1.28 We will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and we may attribute comments and include a list of all respondents' names in any final Report we publish. If you wish to submit a confidential response, you should contact us before sending the response. Please note that we will disregard automatic confidentiality statements generated by an IT system.