



**DEFRA
CONSERVATION COVENANTS**

**RESPONSE BY THE
AGRICULTURAL LAW ASSOCIATION**

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The Agricultural Law Association

Background

The Agricultural Law Association ('the ALA') was formed in 1976 and is the UK's largest inter-professional organisation devoted to the law and business of the countryside.

We focus on the law in a non-partisan, apolitical way in order to promote its knowledge, understanding and development among those who advise rural businesses.

The ALA has over 1400 members across diverse professions including lawyers, surveyors, accountants, farm business consultants, academics and members with specific expertise in international trade and investment. We have members from all the principal professional firms in the rural sector and, uniquely, all other principal member organisations within the rural sector.

We are a member of the following current sector cross organisation groups in the UK:

- Tenancy Reform Industry Group
- Agricultural Representatives Bodies Group (Taxation)
- Scottish Land Commission – Tenant Farming Advisory Forum
- Land Partnerships Service – National Advisory Group

We are also the largest member association of the European Council of Rural Law.



Our Response

This response is submitted on behalf of the ALA and its members who advise their clients in a rural context on all land and property related matters.

Our members' clients have diversified land and property interests and we look forward to working with DEFRA on any proposals to bring forward legislation in respect of Conservation Covenants following the completion of this Consultation.



Consultation Introduction

Whilst we have focussed our response on the specific questions asked in the consultation document, with additional reference to our response to the Law Commission consultation in 2012, the concept of conservation covenants must pay regard to an inevitable measure of commerce on the part of the covenantor. Whilst there may be some landowners who wish to enter into such arrangements out of a sense of public well-being or even duty, they are very much in the minority.

The majority will seek a commercial outcome from entering into such covenants, but which recognises the public benefits of conservation and offers an incentive to enter into a longer-term covenant.

As the Law Commission consultation and this Consultation set out, there are shortcomings of positive and restrictive covenants as currently known to the law, and to the sometimes complex and expensive workarounds which are necessary in the broad context of conservation to overcome them.

Insofar as conservation covenants may provide another tool more easily and conveniently used to engineer the result the parties desire, they are to be welcomed. But underlying the process it must remain that the agreements on which they bear are to be privately and freely negotiated between the covenantors and the relevant responsible body(ies).

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

Yes. However, we question whether the term 'conservation covenant' is too narrow. An alternative might be to consider the term 'environmental and heritage conservation covenants'.

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

Uptake by private landowners may be limited where a cautious approach would be taken by the present generation to 'tying the hands' of future generations despite what might be altruistic views held by the incumbent.



However, a private, freely negotiated agreement offers significant flexibility to those who are frustrated by limited options that produce both a commercial return and fulfilment of environmental aims and objectives.

With reference to Government's proposed agriculture policy and the introduction of an Environmental Land Management Scheme ('ELMS'), conservation covenants may offer an alternative to entry into the Scheme, although this will clearly turn on a case by case basis but would, in our view, only be an option for a minority.

Uptake will also depend in part on the adoption of the use of conservation covenants by Local Planning Authorities through the planning system. Further, there is work to be done to ensure that management plans/long term obligations directed through the planning system and using conservation covenants as the 'mechanism' dovetails with other initiatives for example Sustainable Alternative Natural Green Spaces ('SANGS') in the context of the Thames Basin Heaths Special Protection Area.

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

With reference to our general comments under the Introduction, at a policy level, a more sophisticated and commercial approach to the management and conversation of environmental and heritage assets offers continuity for landowners and the 'responsible body'; to ensure longer term management and enhancement where existing complex work-arounds and Agri-Environment Scheme offerings either prevent such initiatives from being taken forward or result in overly prescriptive, inflexible management agreements.

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

With reference to our answer to Question 2, the use which may achieve the widest uptake of conservation covenants could be that gained through the planning system assuming widespread adoption by Local Planning Authorities.

It might also be an opportunity to consider how ELMS and Conversation Covenants could be used in parallel, perhaps with some match-funding from Government funds to achieve complimentary outcomes but where ELMS criteria is limited in its scope (a concept that will be



subject to the outcome of the development of the ELMS and the pilot programme being brought forward by DEFRA over the next few years).

It may also be the case that a landowner wishing to carry out capital restoration of a specific targeted area of land (within an owner's wider land ownership) for example a significant restoration of historic and undermanaged features, where the capital cost is prohibitive (even if the cost of maintaining such features thereafter is manageable), and where there are sufficient outcomes delivered, could use a conservation covenant for such a purpose.

Question 5: What, if any, unintended consequences might there be? What is the basis for your view?

As a general point, there should be a guard against land under conservation covenants falling under a statutory designation as a consequence, for example, as a SSSI. The voluntary nature and intention of the covenant objective must be preserved throughout its term.

In a planning obligation context, so long as the provisions of environmental obligations for long term management of land are properly employed under the single most appropriate mechanism i.e. Section 106 or Conservation Covenant, we do not see any unintended consequences other than our overriding view above.

Use of Conservation Covenants in this instance may provide for greater flexibility than is possible under a Section 106 Agreement.

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

We agree with the comments made under paragraph 42 that there may be some landowners who would prefer to enter into a covenant with a body outside the public or charitable sector.

We therefore consider that limiting the class of organisations would act as a barrier to wider uptake. It may be that two (or multiple) private landowners could use a conservation covenant agreement between them to achieve a common objective.

It may also be the case that corporate bodies seeking to achieve conservation outputs to compliment/offset their core activities would see conservation covenants as an attractive option. However, they may not wish to establish a separate charitable entity to achieve this.



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

Yes

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

Yes, subject to the express provision under Question 8a below that they must obtain written consent from the freeholder before entering into a covenant.

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

n/a

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

Yes. This is a fundamental point.

As an additional benefit, the fact that a tenant may wish to enter into such an agreement should promote discussion with the freeholder on the most appropriate long-term management of the subject land and therefore the obligation to obtain freeholder consent has the additional potential benefit of seeking to encourage greater Landlord and Tenant co-operation.

Question 8b: If not, what is the basis for your view?

n/a



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

Yes, where the tenant has a registrable interest in the land as a consequence of their tenancy agreement i.e. the freeholder should not be obliged to seek the consent of, for example, short term or year to year tenants.

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

Yes

Question 9b: If not, what would you propose and what is the basis of your proposed alternative?

n/a

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

Yes. The obvious example is the potential use of conservation covenants by water companies to fulfil the delivery of environmental goods (which may not be strictly regarded as simply conservation).

Furthermore, and as referenced elsewhere in this response, opportunities for private landowner to private landowner or developer agreements will exist and therefore such individuals/companies should not be precluded.

Lastly, given the extent of environmental and flood mitigation works which are incorporated into larger infrastructure schemes, there may be opportunities to use conservation covenants between acquiring authorities and private landowners.



Question 10b: Should there be additional mechanisms introduced for for-profit bodies which provide assurances that the covenants they hold are delivering conservation outcomes for the public good? If so, what mechanisms would you suggest?

No

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

Yes

Question 11b: If not, what changes would you make?

n/a

Question 12a: Do you consider the Law Commission proposals, with the proposed amendments set out above, as simple, practical and capable of delivering lasting conservation outcomes?

Yes

Question 12b: If not, what changes would you make to them?

n/a

Question 13a: Do you consider the Law Commission proposals, with the proposed amendments set out above, contain sufficient safeguards to ensure they are not used to block development, or otherwise abused?

Yes



Question 13b: If not, would you support additional safeguards? Please give details.

n/a

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

Recognising the intention that conservation covenants are to be voluntary and freely negotiated, it would in our opinion be appropriate for the private contract between the parties to provide for procedures for the parties to seek remedy under the terms of the contract for breach; which would precede litigation and proceedings through the courts.

We have welcomed the opportunity to contribute our views to this Consultation and we would be happy to assist DEFRA in further work on this topic.

Specifically, and with reference to the Law Commission's Report to Parliament dated 23 June 2014 and the draft Conservation Covenant Bill annexed to that Report (Annex A), we would request further stakeholder engagement on the provisions of the draft Bill following the conclusion of this Consultation.

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