

Briefing Paper & Questionnaire for Members of Link and the Heritage Alliance
Law Commission Project on Conservation Covenants
2 July 2012

Introduction

The Law Commission (LC) approached Wildlife and Countryside Link (Link) in May to initiate a discussion around its current project on Conservation Covenants. On 22 May, Matt Shardlow (Chair of Link's Legal Strategy Working Group) and Julie Middleton (Secretariat, Legal Strategy Working Group) met with the Law Commission staff working on this project, with a view to finding out more about the project and about how Link can best provide input into it.

The outcome of the meeting was an offer from Link, to the Law Commission, to provide a briefing on the project for its members and to circulate a simple questionnaire to gather the views of Members as to whether they would apply such a legal instrument, if so under what circumstances, and what value it would bring to their conservation work. This paper/questionnaire will also be circulated to members of the Heritage Alliance (HA), given the potential use of Conservation Covenants for heritage conservation purposes. A joint gathering of information will reduce duplication of effort and will give the Law Commission input from across the conservation and heritage sectors in one process.

Part 1 of this paper provides a brief overview of the Law Commission's Conservation Covenants project and then provides a summary of the purposes and possible form of a conservation covenant and how it might be used for conservation purposes.

Part 2 then sets out eight general questions for Link and HA members on the possible uses and benefits of conservation covenants. Responses to these will be collated by Link and then presented to the Law Commission.

Part 1: Law Commission Conservation Covenant Project

The purpose of this LC Project is to investigate the case for a new statutory interest in land – a Conservation Covenant. This project has been instigated following a recent Law Commission review of the general law of easements and covenants.

Under current common law it is possible to use a **restrictive covenant** to convey a benefit to a piece of land, by burdening neighbouring land with negative obligations (for example, not to build on the land or use it for business purposes).

The LC review, published in June 2011, concluded that this type of covenant should be retained and formalised in primary legislation, and also extended so that it could impose positive obligations (for example to maintain a fence). The review did not recommend any change to the need for neighbouring land which benefits from the covenant. However, during the review it was suggested that it may be appropriate to use a covenant where the benefit is not specifically linked to neighbouring land – and that one such circumstance would be where a conservation objective would be met by an obligation to use, or not to use, land in a particular way. The LC therefore commenced a new project specifically on Conservation Covenants in January 2012.

So, how might a Conservation Covenant work and what benefits would it bring?

- A list of ‘bodies’ could be given the ability to enforce Conservation Covenants created by landowners. The list might include government and public bodies, local authorities and conservation charities.
- Such a body would be able to enter, with the landowner, into a Conservation Covenant relating to a specific piece of land. Such a covenant would ‘bind’ to the land (i.e. would remain in place if the land was sold/rented/etc). The covenant could stipulate terms of use or management which would further conservation objectives. These terms could be restrictive (i.e. preventing a certain use/management practice) and/or positive (requiring a certain use/management practice). For example, a Conservation Covenant might be established which would require the renovation and maintenance of a monument, conservation of a wildlife habitat, or provision of public access to a historic site/building or an area of the countryside.
- The body enforcing the covenant would not have to own land or show that the covenant would benefit existing land (as is the case with current restrictive covenants).
- The legislation may set limits on the terms that the covenant could contain. Generally, however, it would be up to the enforcing body and the landowner to enter into an agreement, the terms of which both are happy with.
- The Conservation Covenant could be accompanied by a one-off or regular payment to the landowner in consideration of the obligations of the covenant. It could also be a way for the landowner to donate land without giving up the freehold. The donation could be accompanied by a gift of money, for example as an endowment to fund conservation activities on the land.

The LC sees certain benefits in such an approach:

- Those able to enforce Conservation Covenants could take advantage of a more efficient and flexible system than is available under existing law. The law already contains limited provisions enabling certain covenants to be enforced by specified bodies rather than by the owner of neighbouring land. Those bodies are nearly all governmental organisations; the only private body with such powers is The National Trust. However, the provisions have been implemented on a piecemeal basis and often without a framework establishing precisely how the interest should function, be enforced or be brought to an end.

- Conservation Covenants would bring benefits to the public and society at large, by enabling the protection of and facilitation of access to land of cultural, ecological and environmental importance.
- Conservation Covenants might underpin biodiversity offsetting/habitat banking initiatives.
- As noted above, landowners who agree to a covenant binding their land would also benefit, for example through payment in consideration, or simply from the knowledge that their own conservation objectives would remain enforceable after they have parted possession with the land.

In summary, this investigation by the Law Commission will:

- Investigate whether there is a case for a new statutory interest in land – a Conservation Covenant – that would enable conservation interests to be enforced by a particular body (or class of bodies) rather than a neighbour.
- Consider which bodies should be able to enforce Conservation Covenants in the event that they were introduced. The initial suggestion is that this would include: government and public bodies; local authorities; and conservation charities.
- Investigate what conservation objectives would be of sufficient importance to bind land in this way.
- Consider the procedures and tests that would govern how Conservation Covenants are varied and brought to an end.

The Law Commission's June 2011 general review of easements and covenants recommended draft primary legislation that would implement its recommendations. The Government has not yet indicated whether it will carry forward those proposals. Should it become apparent from the current review that there is a useful purpose to be served by creating Conservation Covenants then additional primary legislation will be prepared.

For more background to the project see www.justice.gov.uk/lawcommission/areas/conservation-covenants.htm

For your information, examples of some of the issues and questions which have already arisen in our thinking and through discussions with the LC are listed below. The LC is not looking for fully formed answers to them at this stage, but it may help to bear them in mind when formulating your responses to the questions in Part 2.

- Conservation credits: There are a number of issues being considered in relation to Conservation Credits, some may be resolvable in the text of individual covenants; it is likely to be hard to clarify some of these issues by primary legislation, but the legislation could be developed to form an accommodating framework.
- Penalties: In current covenants penalties for breaching a covenant can be determined by the courts on the basis of the financial disbenefits produced, how would this work for biodiversity or other less economically tangible assets?
- Remediation – With positive measures comes a question of what happens if positive measures are not undertaken, should the body (or nominated third party) have the ability to enter the land and undertake the management and have the option of charging the costs of the work to the landowner?
- Reversibility – Currently it is hard to change a covenant, it's done by application to the Lands Chamber (formerly the Lands Tribunal). Conservation covenants containing positive provisions are inherently more complex, and conservation priorities change over time, does this mean that changes to covenants will be in greater demand? Can this issue be better managed or avoided?

- Objectives – At the most relaxed level the objectives for which a Conservation Covenant might be established would be defined by the objectives of the organisations allowed to enter into a covenant, alternatively clear objectives could be established in the legislation that the covenant would need to be shown to contribute to. What would these objectives include?
- Oversight: would a public organisation such as Natural England need to play a supervisory role? For example, the parties to a Conservation Covenant could be required to seek Natural England’s advice/approval before entering into and/or varying/terminating it. There may also be a need for public organisations to act as ‘backups’ in case a conservation charity folds or becomes unwilling/unable to enforce a Conservation Covenant.

Part 2: Collation of the views of Link and Heritage Alliance members on possible uses and benefits of conservation covenants.

The Law Commission would appreciate the views of the members of Link and Heritage Alliance on the concept of conservation covenants, how and when they would be used and what benefits they would bring.

To assist the Law Commission, we have prepared a simple questionnaire (below). We would appreciate it if you could take the time to consult with the relevant colleagues within your organisation, complete the questionnaire below on behalf of your organisation and return it to us by email. This information will inform the early scoping stages of the Law Commission's investigation. The LC aims to produce a formal consultation paper in late 2012 or early 2013, when each member of Link and the Heritage Alliance will be able to respond in their own right, or collectively if desired.

1. Name and core purpose of your organisation

The Institute of Historic Building Conservation (IHBC) is the professional body of the United Kingdom representing conservation specialists and historic environment practitioners in the public and private sectors. The Institute exists to establish the highest standards of conservation practice, to support the effective protection and enhancement of the historic environment, and to promote heritage-led regeneration and access to the historic environment for all.

2. How does your organisation currently seek to deliver conservation benefits from land not in your ownership? What mechanisms and approaches do you use? How effective are these mechanisms and what problems arise in practice when you use them?

The IHBC delivers conservation through the professional work of its members and does not itself engage in such mechanisms. However many of our members client groups would be likely to find the proposed arrangements useful either as a tool for conservation work or as a management mechanism.

3. Would your organisation be interested in using 'Conservation Covenants' to further conservation objectives? If so, describe instances or circumstances in which this would be considered and how this might link to the core purposes of your organisation. How would such an approach work with those approaches you already employ to secure conservation objectives from land (No. 2 above).

Probably not – but we would be well placed to promote their use through land ownership and planning mechanisms.

4. For a conservation covenant approach to be effective/useful – what characteristics should it have (i.e. what should it do)?

We think that the Law Commission proposals already contain a reasonably sound prospectus for the measure but are willing to accept that there may be matters of fine detail that need attention as a result of consultation and close analysis.

5. Are there any problems you anticipate with a conservation covenant approach? In your experience, are there any potential obstacles/difficulties with this approach that the Law Commission should bear in mind when considering how to 'design' the mechanism and how it would work in practice?

We are aware of circumstances in which covenants of this sort have failed seemingly because the covenant had no beneficiary (other than the property) with an interest and thus the covenant was lifted because the interests of the new owner outweighed the conservation interest. It seems most important to us, therefore, that the proposal has a firmly-rooted structure of enforceable benefit which is not vulnerable to legal challenge.

A second issue is going to be resources. Covenants will require monitoring and enforcement. Considering the financial benefits that can follow the lifting of covenants, it must be expected that litigation occur and contesting cases in the courts can be expensive. This indicates at least an endowment system for covenants (say from the original covenantor) and possibly an umbrella body with resources to fund cases.

6. In your experience, are there examples of specific government conservation policy which could be implemented / supported through the use of conservation covenants? If so, how would the use of the covenant approach help in practice?

- **Passing on property purchased by local authorities through Compulsory purchase of Listed Buildings (section 47 of the Planning (Listed Buildings and Conservation Areas) Act 1990) following a Repairs Notice (Section 48 of the Planning (Listed Buildings and Conservation Areas) Act 1990) or other action. The covenant could be used to ensure the repairing owner carries out suitable works.**
- **Protecting the setting of important sites and structures (Section 16(2) & 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990).**
- **Requiring public access to sites which have received public funding.**
- **Protecting parts of historic areas or estates not in the predominant estate ownership.**
- **Ensuring appropriate continued care for historic buildings with ownership transferred to community bodies.**

7. Can you give an indication of the financial benefits that the introduction of conservation covenants might provide to your organisation and to the wider public?

- **We don't think there will be any specific financial benefits of this to the Institute, but there could be benefits to organisations that equip themselves to enforce and manage covenants under endowment or other funds.**

8. Please provide any other thoughts or comments you might have that you have on Conservation Covenants at this time.

- **We have no further points at present.**

Please forward your responses to Julie Middleton (Julie@wcl.org.uk) at Link by 27 July 2012. All responses will be collated and forwarded to the Law Commission in August 2012.

You can provide answers to the questions in the form above – or within the body of a separate email. Please use the format you find most convenient.

Contact Julie if you have any queries or would like more information on this project.

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