

COMMONS ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Management

Commons councils

Section 26 Establishment

153. *Section 26* provides a power for the appropriate national authority, by order, to establish commons councils in relation to land registered as common land. The power can also be exercised in relation to land registered as a town or village green where the land is subject to rights of common, although it is expected that the power is likely to be exercised where such land is contiguous with neighbouring registered common land. A commons council is a body corporate: that is, the council has its own corporate status apart from its members and officers.

Section 27 Procedure for establishment

154. *Section 27* sets out the procedural requirements to be followed by the appropriate national authority when seeking to establish a commons council. *Subsection (2)* provides that the appropriate national authority must publish a draft of the proposed order under section 26 and invite representations on it, which must be taken into consideration in deciding whether to establish the council and, if so, whether to amend the draft order. The appropriate national authority may not make an order establishing a commons council unless it is satisfied, after having regard to any representations made to it, that there is substantial support for the making of the order.
155. *Subsection (3)* enables a local inquiry to be held if, for example, there is particular controversy over whether a council should be established and what form it should take.
156. *Subsection (5)* requires the appropriate national authority to have particular regard to representations made by those persons described in the subsection. When taking account of representations made by commoners, paragraph (b) requires the appropriate national authority to pay particular attention to those exercising their rights of common.

Status and constitution of commons councils

Section 28 Status

157. *Section 28* contains provision about the status of commons councils. *Subsection (3)* provides that a commons council is not to be regarded as an authority to which section 28G of the Wildlife and Countryside Act 1981 applies. Section 28G bodies have a duty to further the conservation and enhancement of particular features of land by reason of which the land is designated as a Site of Special Scientific Interest (SSSI). Imposing such a duty on a commons council could discourage their establishment. However, *subsections (6) and (7)* of section 31 require commons councils to have regard to the public interest, including nature conservation, in discharging their functions. In

addition, paragraph 3 of Schedule 5 amends the Wildlife and Countryside Act 1981 so that for the purposes of that Act a commons council falls within the definition of an occupier of land which is designated a SSSI.

158. As the functions of a commons council will include functions of a public nature, it is the opinion of Defra that a commons council will be a public authority within the meaning of section 6 of the Human Rights Act 1998, and will therefore be subject to the duty in section 6(1) of that Act not to act in a way which is incompatible with the rights conferred under the European Convention on Human Rights.

Section 29 Constitution

159. **Section 29** requires the appropriate national authority to prescribe by regulations standard terms for use in the constitution of a commons council. The standard terms will apply to all commons councils (subject to subsections (3) and (4)). It is intended the terms will include provision about, for example, the terms for which council members are appointed, and financial reporting requirements.
160. Under *subsections (3) and (4)* the appropriate national authority may, in an order made under section 26, specify additional constitutional terms for a council and, if necessary, disapply any terms of the standard constitution, or replace them with alternatives more suited to local circumstances. This ensures that an order made under section 26 has the flexibility to take account of differences in local circumstances. It is expected that certain elements contained in the standard terms will vary between individual commons councils, for example, those relating to whose interests will be represented on the council and the frequency of meetings.

Section 30 Constitution: supplementary

161. **Section 30** provides an illustrative list of matters which may appear in either the standard constitution or the order under section 26 establishing the council. *Subsections (2) to (6)* identify some of the terms which may be included in the constitution of a commons council, such as the procedures for the appointment of members and voting, and requirements for meetings and financial accounting.
162. Under *subsection (2)*, terms can determine both membership of the council and participation in the council by persons who are not members. A commons council will appoint or elect persons to be members of the council. The members will represent the different interests in the common or group of commons for which the council is established. The size and form of the membership will vary depending on the number or size of the commons covered by the council and the number and range of different interests represented. A small council for just one or two commons may have fewer than ten members to represent the different interests. A larger council comprising several commons with active and inactive graziers, landowners and sporting interests may require a membership body of twenty to thirty elected or appointed persons in order to represent all the interests in a fair and equitable manner. The appropriate national authority will consider what representation and voting arrangements would be appropriate for each commons council on a case-by-case basis, following representations from the commoners and other interested parties.
163. In many cases it is likely that the majority of persons with interests in a common will not be members of the council but will be eligible to participate to some degree in the council. In particular, they will appoint or elect persons to membership of the council to represent their interests, and be eligible to vote at general meetings of the council. The form and nature of participation will vary depending on local circumstances. The order establishing the council will identify which persons are entitled to appoint or elect members, and who is entitled to attend meetings of the council.
164. *Subsection (7)* ensures that a commons council may regulate its own proceedings, subject to anything in the standard constitution or the order establishing the council.

Functions of commons councils

Section 31 Functions

165. **Section 31** sets out the functions that may be conferred on a commons council in an order made under section 26. *Subsection (1)* limits the functions to those which relate to the management of agricultural activities, the management of vegetation and the management of rights of common. *Subsection (2)* requires the appropriate national authority to confer only those functions which it considers appropriate for each council.
166. *Subsection (3)* contains an illustrative list of the sort of functions which may be conferred. It is envisaged that the principal function of a commons council will be to make rules relating to the agricultural use of the land, the management of the vegetation, and the management of rights of common. A council might make rules, for example, regarding the numbers of animals and the times when animals may be turned out on a common, the marking of animals grazing on the common, letting of rights of common, and requirements for managing animals while they are on the common (e.g. hefting requirements).
167. There is no requirement for a commons council to be given functions relating to all the matters referred to in *subsection (1)* or all the functions set out in *subsection (3)*. Equally, the list of functions in *subsection (3)* is not exhaustive and other functions may be conferred where appropriate. For example, on an upland common where agricultural activity is taking place, it may be appropriate to confer functions on the council relating to management of grazing which are wider in scope than the specific matters referred to in *subsection (3)*.
168. It is envisaged that an order establishing a commons council will normally either permit or, where appropriate, require it to prepare and maintain a register to record which commoners are exercising their rights of common. Similar registers of the exercise of grazing rights already operate on some commons and have been found to be useful in managing the numbers and movements of animals. For example, the Dartmoor Commons Act 1985 requires the maintenance of such a register by the Dartmoor Commoners' Council, with requirements for commoners to provide up-to-date information on a continuing basis.
169. A council might be given the function of making rules relating to the leasing and licensing of rights of common. This would permit the council to control the use of rights of common by persons other than the commoner entitled to the rights. For example, controls might be imposed where holders of common rights wish to lease out their rights to others on the common, or, if they are active graziers, to take on more rights for significant periods of time. Any local rules made by a council would take precedence over any regulations made under paragraph 2 of Schedule 1 to regulate the leasing or licensing of rights of common generally (see paragraph 7070), but could not apply to any arrangements made by the owner of a common to lease or licence any part of the surplus grazing to a third party, since the owner's right to use the surplus grazing is not a right of common.
170. *Subsection (4)* enables a commons council to make rules which have the effect of limiting or imposing conditions on the exercise of rights of common or on the exercise of the rights of an owner to use the surplus of a common. The intention is that all those exercising rights, whether through rights of common or to the surplus, should be subject to the same rules. For example, a commons council might enter into an agri-environment agreement that might require a period where no grazing takes place on the common. In such a case all those grazing animals on the common would be required to remove them for the specified period.
171. *Subsection (6)* requires a commons council in discharging its functions to have regard to the public interest (as defined in *subsection (7)*), as well as to any guidance issued by the appropriate national authority.

Section 32 Ancillary powers

172. **Section 32** gives a commons council ancillary powers to enable it to carry out its functions. **Subsection (2)** provides a non-exhaustive list of such powers, which include powers to enter into agreements and to raise money. The power to enter into agreements will enable commons councils to enter into funding arrangements such as agri-environment agreements which would be binding on all those using the common for agricultural purposes. A council will also be able to raise money by applying for funds from any other source, for example, Heritage Lottery funding or European Union funding programmes. Funding schemes and programmes change over time and these ancillary powers will allow a council to apply for funding from a wide range of sources to assist it in carrying out its functions.
173. **Subsection (3)** makes it clear that the power to raise money includes the power for a commons council to require the payment of fees in connection with participation in the council, for example, through payment of an annual subscription, and for the exercise of rights of common or rights to use the surplus of a common. It is expected that such fees will relate in most cases to the exercise of grazing rights.

Section 33 Consent

174. **Subsection (1)** makes it clear that where the consent of a person with an interest in the land is required for the commons council to do anything on the land for which it is established, nothing in Part 2 authorises a commons council to do anything on the land without that consent. For example, if commoners acting collectively would require the consent of the landowner to undertake works to improve the drainage on a common, then a commons council would also require the landowner's consent to undertake the same activity. However, by virtue of **subsections (2) and (3)**, a council does not need the consent of a person with a right of common before doing anything on the land, and it does not need consent for any activity which commoners could themselves undertake without consent.
175. **Subsections (4) to (6)** make provision about how a commons council can obtain consent, and includes provision that a failure on the part of the owner to respond in a timely manner to a notice served on him by the council, may be taken as the giving of his consent.
176. Where a person whose consent is required cannot be identified, **subsection (7)** enables a council to serve notice by posting a notice on the land, and again, where the owner fails to respond to such a notice in a timely manner, the council may take it that his consent has been given.

Section 34 Enforcement of rules

177. **Section 34** sets out the consequences of not complying with rules made by a commons council. Rules made by a council will be similar in effect to bye-laws made by a local authority. Breach of a rule can constitute a criminal offence if the appropriate national authority has approved the rule and if the rule itself specifies that breach of the rule is to constitute an offence. A commons council has a discretion to decide whether breach of a particular rule will constitute a criminal offence. Breach of the rule renders the offender liable on summary conviction to a fine (or daily fine) as specified in **subsection (3)**.
178. Under **subsection (5)**, a commons council may apply to a county court for an order requiring any person to comply with any of its rules. This provides an alternative approach to enforcement of rules where it is likely that imposition of a fine is unlikely to have the desired effect. Under **subsection (6)**, a council may only apply to the county court to ensure compliance with a rule the breach of which constitutes a criminal offence if, in its opinion, proceedings against the person in the criminal court would not provide an effective remedy.

Section 35 Rules: supplementary

179. **Section 35** makes further provision in relation to the making of rules by a commons council. *Subsection (2)* enables an order under section 26 establishing a commons council to make provision for the procedure to be adopted in the exercise of the power to make rules. It is expected that orders under section 26 which confer a power to make rules will require draft rules to be approved by the appropriate national authority before coming into force, and will also include requirements about the publication by commons councils of draft rules for consultation, publicising rules which have been made, and ensuring they are available for inspection.
180. The power given to the appropriate national authority in *subsection (3)* to revoke any rule made by a commons council is subject to *subsections (4) and (5)*, which require the appropriate national authority to give reasons for revoking a rule, and to consult with the commons council (and other persons as appropriate) before doing so.

Commons councils: supplementary

Section 36 Consequential provision

181. **Section 36** addresses potential problems where the functions given to a council might overlap with those of some other body. One example might be a manorial court (*e.g.* a court leet) which still exists in relation to some commons. For example, if a council were to be established encompassing several commons and one of those commons was governed by a manorial court, the section enables the appropriate national authority to alter or abolish that court's jurisdiction in order to remove any conflict of functions. Similarly, an order might make provision for the abolition or curtailment of the functions of a board of conservators in relation to common land.
182. The power enables the appropriate national body to vary or revoke specific legislation, including any scheme or arrangement in or under a local or personal Act, which relates to the management or maintenance of common land or the exercise of rights over common land.
183. The fact that provision under this section is by order under section 26 means that the procedures in section 27 will apply (and so the appropriate national authority must be satisfied that there is substantial support for the making of the order).
184. *Subsection (3)* ensures that the powers in *subsection (2) (c) to (e)* may not be exercised where their exercise would have the effect of prohibiting or restricting any public right of access. For example, schemes of management under Part 1 of the Commons Act 1899 (see *subsection (2)(c)*) generally confer rights of access in accordance with the prescribed scheme, but an order in pursuance of section 36 could not revoke that part of the scheme relating to such rights.

Section 37 Variation and revocation of establishment orders

185. **Section 37** describes the procedure to be followed where the appropriate national authority wishes to wind up a commons council because it is no longer operating effectively. *Subsection (1)* identifies three different situations which could lead to a commons council being wound up. *Subsection (2)* clarifies that a council may only be wound up through making an order under section 26. This requires the same procedure to be followed by the appropriate national authority as applies to establishing a council, to ensure that there is consultation with local interests and substantial support for the order to wind up a council. Such an order must also make provision for dealing with any liabilities and assets of the council, and provision for amending enactments that may have been amended previously as a result of the establishment of the council.