

# COMMONS ACT 2006

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 1: Registration

##### Introductory

##### *Section 1 Registers of common land and greens*

41. *Section 1* requires commons registration authorities to continue to keep the commons registers first established under the 1965 Act.

##### *Section 2 Purpose of registers*

42. *Subsection (1)* explains that the purpose of the register of common land is to register land as common land and rights of common exercisable over such land. Similarly, *subsection (2)* applies the same principles in relation to the register of town or village greens. In practice, the form of the register of common land and the form of the register of town or village greens prepared under the 1965 Act were identical in all material respects.

##### *Section 3 Content of registers*

43. *Subsection (1)* provides that the land registered under section 2(1) is to be the same land as was registered as common land under the 1965 Act, together with any other land registered under Part 1 of the Act. In other words, the register of common land will contain all the entries that were previously registered in it under the 1965 Act, together with further entries that may be registered in the future in accordance with the new provisions in the Act. Similar principles are applied to land registered under section 2(2) in the register of town or village greens (*subsection (2)*).
44. *Subsection (3)* provides that the rights of common registered are to be the same rights as were registered under the 1965 Act, together with any other rights registered under Part 1. *Subsection (4)* identifies the information about a right of common which must appear in the commons registers, and *subsection (5)* enables regulations to be made requiring or permitting other information to be included in the registers, including matters to be noted in the registers. For example, regulations made under the 1965 Act enabled applications to be made to the commons registration authority to note in the register a claim to certain private rights and interests in respect of registered land (such as easements and mineral rights), and enabled the commons registration authority itself to note the existence of certain matters affecting the public interest in common land (such as limitations on a right of public access imposed under section 193(1)(b) of the Law of Property Act 1925).
45. *Subsection (6)* states that neither land, nor any right of common, that has been registered is to be removed from the commons registers, except as provided by or under Part 1 of the Act or any other enactment. There is provision for land to be removed from the registers in section 16 (deregistration and exchange) and Schedule 2 (Non-registration

or mistaken registration of land under the 1965 Act), for corrections to the registers under section 19 which may in certain circumstances result in land being removed from the registers, and power to make provision for land to be removed from the registers in consequence of some other statutory instrument by means of regulations under section 14 (statutory dispositions).

46. Under *subsection (7)*, rights of common registered or eligible for registration under Part 1 are not to be registered in the register of title to land kept by the Land Registry. The register of title is maintained under the Land Registration Act 2002, and the rules made under that Act. This provision does not affect the small number of rights of common which are believed to have been registered in the register of title before the commencement of the 1965 Act.

#### **Section 4 Commons registration authorities**

47. **Section 4** provides for the continued appointment of certain local authorities as commons registration authorities for the purposes of Part 1. In England, commons registration authorities are county councils, district councils (in areas without a county council) and London borough councils. In Wales, the commons registration authority is the county or county borough council. There is no common land and there are no greens in the Isles of Scilly or in the City of London, and so the councils for these areas are not appointed as commons registration authorities.
48. *Subsection (3)* provides that commons registration authorities may agree between themselves for one to exercise the registration functions of the other in relation to land straddling their common boundary. It is intended that agreements already in existence for this purpose under section 2(2) of the 1965 Act will continue to have effect.

#### **Section 5 Land to which Part 1 applies**

49. **Section 5** applies Part 1 to land in England and Wales, other than the land specified in *subsections (2) and (3)*. Those subsections reproduce the effect of exemptions set out in section 11 of the 1965 Act, with the exception of land exempted by orders made under that section. Consequently, none of the provisions in Part 1 apply to the New Forest, Epping Forest or the Forest of Dean, and these notes must be read in that light.
50. The New Forest was excluded from registration under the 1965 Act because it has its own registers of rights of common drawn up under the New Forest Acts 1877–1970. Similar arrangements apply in relation to Epping Forest. Open land in the Forest of Dean is owned by the Crown, which asserts that the land is not subject to rights of common — *subsection (3)*, which repeats a similarly-worded provision in the 1965 Act, is therefore for the avoidance of doubt.
51. Certain other urban commons were exempted from registration by order under section 11 of the 1965 Act because they were already regulated under local Acts or schemes, rights of common were no longer being exercised, and the extent of the common land was already well-defined. Those commons are not excluded from the operation of Part 1, and may qualify for registration under paragraph 2 of Schedule 2. A list of such commons is set out in annex B.

#### **Registration of rights of common**

52. **Sections 6 to 13** and Schedule 1 make provision about dispositions such as the creation, variation or surrender of rights of common. Sections 6, 7, 12 and 13 and paragraphs 1 and 3 of Schedule 1 include provisions that a registrable disposition of rights of common (*i.e.* a disposition requiring an entry in a commons register to be made or amended) shall operate at law only where the disposition complies with such requirements as to form and content as regulations may prescribe, and where the disposition is registered. It is intended under these provisions to make regulations requiring each type of registrable disposition of a right of common to be made in a prescribed form. There

are further powers in section 24 to make regulations about applications to a commons registration authority under these sections, the determination of such applications, and the consequential amendments required to the register.

### **Section 6 Creation**

53. It was not possible under the 1965 Act to register the creation of new rights of common over registered land. Section 6 makes it impossible, apart from by statute, to create a new right other than by express grant and then only if the newly created right is attached to land (*i.e.* there must be a dominant tenement in relation to such a right). It will not be possible to create new rights of common over an existing registered town or village green. The section therefore makes it impossible to create a right by reservation or prescription, or to create a new right in gross. The effect of creating a right of common over unregistered land will be to cause the land to become registrable as common land.
54. *Subsection (6)* provides that the creation of a new right of common consisting of a right to graze animals is not to be registered if in the opinion of the commons registration authority the land over which the right is exercisable would be unable to sustain the exercise of that right taken with any other rights exercisable over that land.

### **Section 7 Variation**

55. *Subsection (1)* provides that a right of common is to be regarded as varied if it is altered as specified in paragraphs (a) to (c). A variation includes an alteration in the quantification of the right (for example, the number of animals that may be grazed by virtue of a right), as well as an alteration in respect of the land over which the right is exercisable so as to introduce new land in addition to or in substitution for all or part of the land over which it was formerly exercisable. But *subsection (2)* provides that the right may be varied so as to become exercisable over new land only if that land is not already registered as a town or village green. *Subsection (5)* places a restriction on the power to vary a right of common consisting of the right to graze animals, similar to the restriction contained in section 6(6). A variation does not include a reduction in the land over which a right is exercisable (other than in the circumstances described in *subsection (1)(a)*) — it may be possible to effect such an alteration by means of surrender under section 13.

### **Section 8 Apportionment**

56. **Section 8** enables regulations to be made regarding the amendment of the commons registers where rights of common are to be apportioned. Apportionment occurs where land to which rights of common are attached (the dominant tenement) is divided into two or more parcels in separate ownership (*e.g.* where the owner sells only part of the land and retains the remainder). Generally, it is not intended that the apportionment of rights of common should be registered. Instead, rights will be shown as attached to the dominant tenement with which they were associated when an entry in respect of those rights was last made in the register. Subsequent changes to the dominant tenement will not be recorded (but see *subsection (5)* of section 9 for provision with regard to *pro rata* apportionment).
57. This is best illustrated by an example. Assume a common subject to rights to graze 100 sheep, where the register shows that the rights are divided equally between farms A and B, each dominant tenement having the right to graze 50 sheep attached to it. The owner of Farm A dies and the farm is divided equally between that owner's two children. Two new dominant tenements A1 and A2 come into being and the operation of Part 1 of the Act will ensure that to each is attached the right to graze 25 sheep. Farm B is sold to a developer who in turn sells it off in 50 plots of equal size, each with a house built on it. Each of those plots will have the right to graze one sheep. The register will show a common subject to two separate rights to graze sheep attached to the two 'historic' dominant tenements, A and B. The register would in each case identify the rights and

identify the land to which they were attached. At the conclusion of the events described above, the owners of the new dominant tenements formerly comprised in farms A and B will be able to trace their entitlement to exercise their rights of common by reference to the historic dominant tenements subsisting in the register. For example, each owner of a house built on farm B will be able to show that they occupy 1/50<sup>th</sup> part of the area of the historic dominant tenement B, and (applying the rules of *pro rata* apportionment) therefore each has attached to it 1/50<sup>th</sup> of the rights recorded as attached to historic dominant tenement B. It will be possible to show that each owner is entitled to exercise the rights by virtue of the attachment of the rights to their house (the attachment will be shown in the commons register), and ownership of the house (which may be registered in the register of title to land kept by the Land Registry). The common law principle is that a right of common attached to land belongs to the owner for the time being of that land.

58. Any principle by which a right of common may be extinguished owing to the development of the dominant tenement so that it is incapable of benefiting from the right is abolished by section 13(3). In Defra's view, any fractional right which may arise in consequence of the rules of *pro rata* apportionment would be unexercisable, but (by virtue of section 13(3)) would not cease to exist.
59. However, where the rights attached to land which forms part of a historic dominant tenement are to be surrendered, varied or severed in accordance with the provisions in Part 1, it will be necessary to amend the register to record the previous apportionment of the rights. *Subsection (2)* enables regulations under *subsection (1)* to require the register to be amended in these circumstances.
60. *Subsection (3)* provides that, where the commons register has not been amended to reflect an apportionment of rights, the rights which arise as a result of that apportionment are to be treated as if they were separately registered. This provision is intended to ensure that each of the rights arising as a result of the apportionment is treated for the purposes of Part 1 of the Act as if it were registered, so that, for example, application may be made under section 12 to surrender and extinguish the right notwithstanding that the right is not itself reflected in an individual entry in the register at the time of the application.

### ***Section 9 and Schedule 1: Severance***

61. *Section 9* effects a prohibition on the severance of rights of common. Before the passing of the 1965 Act, most rights of common were attached to the land farmed by the commoner (the dominant tenement). The reason was that, at common law, the numbers of animals which could be grazed on the common by the commoner was determined by the capacity of the dominant tenement to accommodate animals over the winter (known as rules of 'levancy and couchancy'). Typically the common was not grazed in winter and dates were established when animals were allowed on to the common and when they had to be removed. Livestock usually had to be over-wintered on commoners' own farms which imposed a natural ceiling on their grazing rights. Such rights, while not explicitly quantified, were thus subject to a theoretically measurable constraint. It was therefore not possible to trade in a right of common separately from the land owned by the commoner, as the right could not exist independently of the dominant tenement because it was defined by reference to the dominant tenement. The courts adopted a rule that any purported severance of unquantified rights from the holding to which they were attached would extinguish the rights.
62. Section 15 of the 1965 Act required that, for the purposes of registration, all commoners register the actual number of animals in respect of which they claimed rights of grazing. This meant that, once rights of grazing had been quantified and registered, the capacity of the commoner's own holding to over-winter stock ceased to be relevant. In *Bettison*

*v. Langton*<sup>3</sup>, the House of Lords determined that a consequence of the quantification of grazing rights as required by section 15 of the 1965 Act was to enable a commoner to dispose of rights of common independently from the land to which they were traditionally attached (or, alternatively, to sell the land and retain the rights). This is known as 'severance'. Rights which have been severed become 'rights held in gross' and may be freely bought and sold as an incorporeal asset.

63. The problem with grazing rights which have been severed is that the local link between the commoners and the land over which the grazing rights are exercised may be lost since the owner of the rights can sell them to anyone, including farmers who live far away from the common. This can cause management difficulties for common land where some right holders have no close contact with the common and those who manage it.
64. **Section 9** prohibits further severance of rights of common, subject to the exceptions specified in Schedule 1 or in any other Act<sup>4</sup>. Section 9, and therefore the exceptions in Schedule 1, apply only to registered rights of common which would otherwise (apart from section 9) be capable of being severed. They do not, therefore, apply to rights of common which remain unquantified (such as a right to gather firewood or to dig peat for the hearth), nor are they likely to apply to 'appendant rights' (which the courts have held not to be severable, regardless of whether the right is quantified).
65. *Subsections (3) and (4)* make provision about any disposition of rights of common attached to land or any disposition of land to which rights of common are attached by which rights are purported to be severed, so that the severance is of no effect. Subsections (3) and (4) only apply to dispositions made after the commencement of section 9. *Subsection (3)* provides that an instrument (such as a conveyance) which purports to effect the severance of a right of common from the dominant tenement, is to be void to the extent that it would effect severance. So where a conveyance provides that the rights attached to a dominant tenement are to be conveyed from X to Y (but X remains the owner of the dominant tenement), the conveyance will be void to the extent to which it conveys the rights, and the rights will remain attached to X's dominant tenement. *Subsection (4)* also provides that a disposition of the dominant tenement by which the rights are purported to be reserved to the vendor has effect so that the rights are conveyed with the land, notwithstanding the terms of the conveyance.
66. *Subsection (5)* provides that the apportionment of rights of common must be *pro rata*. To the extent that any instrument purports to apportion otherwise than *pro rata*, it will be void. This means that, where a dominant tenement is divided into two or more parcels in separate ownership (for example, on a sale of a farm in two separate lots), the rights attached to the original dominant tenement are assigned proportionately to the separate parcels according to the area of each parcel relative to the area of the original dominant tenement. The reason for this is that non-*pro rata* apportionment is a form of severance. For example, a commoner might own land to which 100 rights to graze cattle are attached. That commoner sells half that land to X and half the land to Y, but purports to assign 75 of the rights as attached to X's land and 25 as attached to Y's land. In that case the instrument of sale will be void to the extent that it purports to convey more (or for that matter less) than half the rights of common with each of the two parcels of land.
67. *Subsection (6)* provides that this section does not affect rights of common which were permanently severed by an instrument made before, or pursuant to a contract in writing made before, 28 June 2005, the day following the date of introduction of the Commons Bill into Parliament, and *subsection (7)* specifies that the section is deemed to have come into force on that date. The purpose of this is to prevent commoners from severing rights of common after the date of introduction but before the Bill received Royal Assent. *Subsection (7)* also enables orders under paragraph 2 of Schedule 1 (which permits

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<sup>3</sup> *Bettison and another v. Langton and others* [2001] 1 AC 27.

<sup>4</sup> The only enactment known to permit severance in certain circumstances is contained in section 33 of the Greenham and Crookham Commons Act 2002.



temporary severance by way of the letting or licensing of rights of common) to have effect from the same date. Such an order cannot be made until after Royal Assent, but a draft statutory instrument intended to have retrospective effect was published in draft soon after the date of introduction.

68. [Schedule 1](#) sets out the exceptions to the prohibition on severance contained in section 9. Paragraph 1 contains a limited exception to the prohibition in relation to rights acquired by a commons council (established under Part 2), Natural England and the Countryside Council for Wales, provided that the transfer of the severed rights to any such body is duly registered in accordance with sub-paragraph (6) (see also the transitional provision in section 57). This exception will enable the continued acquisition of rights of common in furtherance of nature conservation. (Natural England is a new integrated agency created under the Natural Environment and Rural Communities Act 2006 which is expected to assume the functions of English Nature, part of the Countryside Agency and the Rural Development Service of Defra.)
69. Where rights are to be acquired by either Natural England or the Countryside Council for Wales, sub-paragraph (2) provides that notice must be given of its intention to the owner of the land and (where there is no commons council established under Part 2 of the Act) any voluntary commoners' association or other body representing the commoners in accordance with sub-paragraph (3). Sub-paragraph (4) provides that if a commons council has been established under Part 2, that council must consent to the acquisition of the rights.
70. The exception to the prohibition on severance in paragraph 2 permits the temporary severance of rights in accordance with an order made by the appropriate national authority or, where a commons council has been established in relation to a common, any rules which may have been made by the council. An order (or rules) may, for example, enable a commoner to lease or license rights of common for a maximum period specified in the order, so that the rights are severed from the land only for so long as the lease or licence endures. Sub-paragraph (2) explains that such an order (or rules) may relate to particular commons or particular classes of persons, and sub-paragraph (4) enables an order to prescribe the form or content of any instrument of letting or licensing. Rules made by a commons council about the leasing or licensing of attached rights of common are to take precedence over provision in an order (sub-paragraph (3)).
71. [Paragraph 3](#) permits the permanent severance of rights in accordance with an order made by the appropriate national authority. Sub-paragraph (2) provides that an order may be made only in relation to particular land or descriptions of land (such as all commons within a defined locality), and may restrict the transfer of rights to particular persons or descriptions of persons (such as persons who are already entitled to exercise rights of common over the same common).
72. Sub-paragraph (3) provides that the appropriate national authority, before making an order under paragraph 3, must consult bodies representing owners and commoners affected by the order. For example, the appropriate national authority would need to consult any (voluntary) commoners' association, any statutory commons council, and any common owners' association.
73. Sub-paragraph (4) enables an order under paragraph 3 to provide that, in any particular case, a right is not to be severed unless the owner of the common (over which the right is exercisable) has been notified, and has given his consent. However, sub-paragraph (5) enables the order to provide for notice and consent to be deemed to have been given in certain circumstances: for example, the order may provide that notice may be posted on the land if the owner cannot be identified, or that the consent of the owner may be deemed if he does not object to the proposed severance within a specified period. Sub-paragraph (6) enables the order to also provide that the consent of the owner may be deemed if consent is unreasonably withheld, and that the order may provide in what

circumstances consent is to be regarded as unreasonably withheld and for the resolution of any dispute arising.

74. Where the right is transferred to a person who is already entitled to rights of common over the same land (or substantially the same land) as the right to be severed, by virtue of his ownership of a dominant tenement to which those rights of common are attached, the order may by virtue of sub-paragraph (8) require the transferee to apply for the severed right to be registered as attached to the same dominant tenement in order for the severance to be effective.
75. [Section 9](#) and Schedule 1 must be read with section 57 which makes transitional provision in relation to the early commencement of section 9 and Schedule 1.
76. [Part 1](#) of Schedule 6 repeals two provisions contained in local enactments which prohibit the severance of rights of common (section 8 of the Dartmoor Commons Act 1985 and section 33(1) of the Greenham and Crookham Commons Act 2002), and section 9 replaces those local provisions with a nationally consistent measure.

### ***Section 10 Attachment***

77. The existence of rights in gross can render the management of a common more difficult. At common law, it is impossible to convert a right in gross into an attached right. Section 10 enables rights of common held in gross to be attached to land. It is immaterial whether a right has previously been severed from a dominant tenement, or has always existed in gross. The right may be attached to a new dominant tenement on an application to the commons registration authority. An application for the attachment of a right of common to land must be made by the owner of the right, and the person entitled to occupy the land, if different, must consent to the application (*subsection (2)*).

### ***Section 11 Re-allocation of attached rights***

78. [Section 11](#) enables a right of common attached to a dominant tenement to be concentrated on part of the dominant tenement where another part is to be developed for non-agricultural use. For example, suppose a commoner owns land (the dominant tenement) to which a right to graze 100 sheep is attached. If one tenth of the land is developed for a new road, the effect of the *pro rata* rules of apportionment (see paragraph 6666 above) would be that a right to graze 10 sheep would attach to the owner of the road. The effect of a successful application under section 11 will be that the developed land will cease to have any rights attached to it, and the land which remains undeveloped will enjoy all of the rights which formerly attached to the whole of the dominant tenement.
79. The section provides that the owner of the dominant tenement to which rights are attached may apply to the commons registration authority to exclude part of the dominant tenement from the register. An application may be made where the relevant part is not used for agricultural purposes, or has planning permission for non-agricultural use. An application may also be made where the land is subject to a compulsory purchase order which has been confirmed, but before the land is vested in the acquiring authority.
80. It will be possible for the appropriate national authority to make regulations under *subsection (5)* which provide what is and is not to be regarded as use of the land for agricultural purposes. It is expected, for example, that regulations will provide that land maintained in Good Agricultural and Environmental Condition in accordance with the cross-compliance conditions of the Single Payment Scheme<sup>5</sup> is to be regarded as in agricultural use, regardless of whether the land is actually in productive use.

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<sup>5</sup> The Single Payment Scheme is a simplified Common Agricultural Policy subsidy system which provides payments generally in proportion to the area of eligible land farmed by the claimant, who must undertake to maintain that land in accordance with the standards of Good Agricultural and Environmental Condition: see Council Regulation (EC) No. 1782/2003.

81. It is intended that applications should be made under this section while the commoner remains in control of the entire dominant tenement. So, for example, he may apply after the grant of planning permission for development of part of the dominant tenement, but before he disposes of that land to a developer. However, regulations made under section 24(2)(n) could enable an amendment to be made to the register in consequence of an application under the new section even where the application land has ceased to be owned by the applicant since the date of the application.

### ***Section 12 Transfer of rights in gross***

82. **Section 12** requires the transfer of any right of common held in gross (that is, a change in the ownership of a right which is not attached to any land) to comply with such requirements as to form and content as regulations may provide, and the transfer shall not operate at law until it has been registered.

### ***Section 13 Surrender and extinguishment***

83. At common law, a right of common could cease to exist by being surrendered by its owner (usually by a deed of release) or by being extinguished by operation of law. Section 13 requires the surrender of any right of common to be effected in a prescribed form, and delays the effect of the surrender until the right has been deleted from the commons registers. *Subsection (3)* provides that any other common law mechanism by which registered rights of common may cease to exist is abolished. These mechanisms are believed to comprise:

- Unity of ownership (or unity of seisin): where the common land and the right come into the same ownership (typically, where the dominant tenement to which a right is attached is acquired by the owner of the common), then the right is extinguished. The effect of *subsection (3)* is that rights acquired by the owner of the common will be exercisable by that person in the same way as the rights were exercisable by their former owner.
- Abandonment: where the owner of the rights can be shown to have irrevocably turned away from the use of the rights.
- Implied release: where a collective release of rights can be inferred over part of the common, typically where that part is inclosed by encroachment and the commoners acquiesce in the loss.
- Alteration to the common, comprising destruction of the common land (such as where the land is reclaimed by the sea) or exhaustion of the product (such as peat which is subject to rights of turbary).
- Alteration to the dominant tenement, comprising the demolition (without replacement) of a building to which rights (particularly rights of turbary) are attached, or the conversion of land to which rights (such as grazing) are attached to a use incapable of benefiting from the right (such as a reservoir).

84. These mechanisms are considered to be either redundant or of doubtful relevance where the existence of common land, and rights of common, is recorded in statutory registers. The powers in section 13 will provide a mechanism to extinguish rights of common.

## **Registration, deregistration and exchange of land**

### ***Section 14 Statutory dispositions***

85. **Section 14** enables the appropriate national authority to make regulations to provide for amendment of the commons registers consequent on a disposition arising under statute. There are a number of statutes under which common land or greens may be acquired (generally compulsorily) and removed from the commons register, sometimes in exchange for other land being added to the register. Similarly, rights of common



may be acquired and extinguished, sometimes becoming exercisable over land given in exchange. *Subsection (3)* sets out those instruments which are ‘relevant instruments’ for the purposes of *subsection (1)*, such as orders by which common land is acquired compulsorily, and (usually) other land is given in exchange, on a compulsory purchase under the Acquisition of Land Act 1981.

86. It is expected that regulations made under the powers conferred by *subsection (1)* will place a duty on the persons making or confirming a relevant instrument to notify the appropriate commons registration authority of, or direct it to make, amendments to the commons registers consequent on the disposition made by the relevant instrument. Regulations may also provide, under *subsection (2)*, that on an exchange of land, any land given in exchange is to be registered, and under *subsection (5)*, that the disposition is not to have effect until its effect is registered. For example, where common land is acquired under section 13 of the New Parishes Measure 1943<sup>6</sup> for building a church or similar purposes, regulations may provide that the land is not to cease to be common land until the land and any rights of common are removed from the commons register in accordance with notice given by the Church Commissioners, notwithstanding the effect of section 15(1) of the Measure.

### **Section 15 Registration of greens**

87. *Section 15* sets out the circumstances in which land may be newly registered as a town or village green. It is derived from, but varies in certain respects from, the definition of a town or village green in section 22(1), (1A) and (1B) of the 1965 Act. (There is no substantive distinction in law between a ‘town’ and a ‘village’ green: these terms merely reflect the physical setting of a green.) *Subsection (1)* provides that in qualifying circumstances, any person may apply to the commons registration authority to register land as a green. *Subsections (2), (3) and (4)* set out the three alternative qualifying circumstances.
88. The first case (*subsection (2)*) is where a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years, and continue to do so at the time of the application. ‘As of right’ has been defined in case law as meaning openly, without force, and without permission<sup>7</sup>. The reference to “a locality” does not necessarily connote a defined area for administrative purposes, such as a parish, and the phrase “any neighbourhood within a locality” means in effect ‘any neighbourhood within one or more administrative areas’, in line with the judgment of the House of Lords in the *Trap Grounds* case<sup>8</sup>.
89. The second case (*subsection (3)*) is where a significant number of such inhabitants indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years which ceased after commencement of section 15, and the application is made within two years of this cessation.
90. The third case (*subsection (4)*) is where a significant number of such inhabitants indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years which ceased before commencement of section 15, and the application is made within five years of this cessation. Land is not covered by this third case (because of *subsection (5)*) if three conditions are all met:
- planning permission was granted in respect of the land before 23 June 2006;
  - before that date, construction works were commenced in accordance with the permission on that land, or on any other land covered by the permission; and

<sup>6</sup> Under section 15 of the Measure, common land may be acquired free of rights of common, subject to the consent of the Secretary of State. The provision applies only to the Church of England.

<sup>7</sup> See the judgment of the House of Lords in *R v. Oxfordshire County Council and others, ex parte Sunningwell Parish Council* [2000] AC 335 per Lord Hoffman at paragraph 27.

<sup>8</sup> <sup>26</sup> *Oxfordshire County Council v. Oxford City Council and another* [2006] UKHL 25.

- the land either has become, or will become, permanently unusable by the public for lawful sports and pastimes as a result of works carried out in accordance with that planning permission.
91. *Subsections (6) and (7)* amplify how *subsections (2) to (4)* are to work. *Subsection (6)* provides that any period during which access to the land was prohibited by reason of any enactment is to be disregarded in the calculation of the 20 year period. *Subsection (7)* makes provision about when use is to be regarded as continuing for the purpose of subsection (2)(b).
92. *Subsection (8)* enables the owner of any land to apply voluntarily for its registration as a green, without having to show that there has first been 20 years' qualifying use of it by local inhabitants. *Subsection (9)* requires the consent to such an application of any 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land, thereby protecting these parties' interests in the land. Both of these terms are defined in *subsection (10)*.

### ***Section 16 Deregistration and exchange: applications***

93. Section 147 of the Inclosure Act 1845 provides for the 'exchange' of land. In recent years, the only use which has been made of this power has been to exchange common land or a town or village green for other land, so that the land given in exchange is substituted for the former common land or green. The Secretary of State (in Wales, the National Assembly) is required to confirm orders of exchange. In deciding whether to confirm the order, the Secretary of State must take account of the interests of the parties to the exchange. Sections 16 and 17 provide a replacement mechanism for the exchange of land which is registered under Part 1. Section 147 of the Inclosure Act 1845, and certain ancillary provisions in the Inclosure Acts 1847 and 1857, are repealed by Part 3 of Schedule 6.
94. *Subsection (1)* enables the owner of land registered as common land or a town or village green to apply to the appropriate national authority for the land or part of the land to be released from registration. If the 'release land' is more than 200 square metres in area, an application must be made at the same time to register 'replacement land' as common land or a green in its stead (*subsections (2) and (3)*). If the release land is smaller than 200 square metres, a proposal for replacement land may (but need not) be included (*subsection (4)*) — but the appropriate national authority must pay particular regard to the extent to which the omission of any proposal for replacement land is prejudicial to the interests specified in subsection (6)(a)–(c) (*subsection (7)*). Any replacement land may not be land already registered as common land or a green, and must be land to which Part 1 applies (see paragraph 4949). Its owner must join in the application, if not also the owner of the release land (*subsection (5)*).
95. *Subsections (6) to (8)* set out the matters that the appropriate national authority must consider in deciding whether or not to consent to an application.
96. *Subsection (9)* ensures that an application under this section may be made only with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the release land and any replacement land.

### ***Section 17 Deregistration and exchange: orders***

97. *Subsection (1)* requires the appropriate national authority, if it grants an application under section 16, to make a 'release order' to direct the commons registration authority to remove the release land from the register. *Subsection (2)* requires, where appropriate, the registration of the replacement land and of any rights of common previously registered as exercisable over the release land, which are now exercisable over the replacement land.

98. *Subsection (3)* provides for a power to require a commons registration authority to take such other steps on receiving a release order as may be prescribed in regulations.
99. *Subsections (4) and (5)* provide for the extinguishment over the release land of rights of common and any rights exercisable by virtue of the land being a town or village green on its removal from the register. Such rights will generally transfer to the replacement land. Unlike an order under section 147 of the 1845 Act, an order under section 17 has no effect on the title (*i.e.* the ownership) of the release land or of any replacement land, nor on any easement or proprietary rights in the land (other than rights of common).
100. *Subsection (6)* provides that if any relevant provision applied to release land before the relevant date (defined in *subsection (9)* as the date on which the register is amended), it ceases to apply to the release land and applies instead to the replacement land. *Subsection (8)* lists the various enactments and measures which are relevant provisions for the purposes of *subsection (6)*. For example, where the release land is subject to a right of access under section 193 of the Law of Property Act 1925, and limitations (similar to byelaws) have been imposed on the right under that section, both the right and the limitations will cease to apply to the release land, and will normally transfer to the replacement land.
101. There may however be specific circumstances where it would not make sense for recreational rights that apply over an existing green, or specific statutory provisions that apply on an existing common, automatically to transfer to any replacement land. For this reason, *subsection (7)* enables an order to make special provision disapplying or varying these rights or provisions in relation to the replacement land.
102. An order may also vary the effect of any local or personal Act in relation to the release land, the replacement land, or both. For example, where the release land is subject to a local Act regulating the management of the release land and adjoining common land, and the replacement land would not otherwise be subject to that Act, the order may provide that the replacement land is to be deemed to be subject to the Act.

## **Conclusiveness and Correction of the Registers**

### ***Section 18 Conclusiveness***

103. Section 10 of the 1965 Act provides that “the registration ... of any land as common land or as a town or village green, or of any rights of common over any such land, shall be conclusive evidence of the matters registered, as at the date of registration”. Section 18 makes similar provision as to the extent to which information in the registers can be relied on. It is immaterial for the purposes of this section whether an entry in the register was made after commencement of the Act or under the 1965 Act — see *subsection (6)*.
104. Under *subsection (2)*, where land is registered as subject to a right, it is deemed to have become subject to the right on its registration if it would not otherwise have been so subject. It can therefore be assumed that, in law, the land is subject to the right. *Subsection (2)* does not in itself guarantee that the land continues to be subject to the right. But, given the preceding provisions of the Act, it is in most cases impossible for the situation to have changed, since the right cannot be extinguished by common law, and cannot be surrendered or varied without the surrender or variation being registered. One possible exception is an extinguishment or variation of the right by virtue of another enactment which may have effect before the necessary amendment is made to the register (for example, by a compulsory purchase order made under the Acquisition of Land Act 1981). But section 14(5) enables regulations to be made which cause the effect of such an enactment to be delayed until the register is amended.
105. *Subsection (3)* provides that, where the register shows that a right of common is attached to land, the right is deemed to be attached to that land upon registration. *Subsection (3)* does not in itself guarantee that the right continues to be attached to that land. But again, given the provisions of the Act, it is in most cases impossible for the situation to have

changed, since the effect of *subsection (6)*, and the prohibition on severance contained in section 9, is generally that any right of common registered as attached to land<sup>9</sup> will continue to be attached to land. The exceptions are either that an application is made under paragraphs 1 or 3 of Schedule 1 to sever the right, or that an application is made during the transitional period (see Schedule 3 and the notes to that Schedule) for an amendment to the register to show that the right had been severed after the register entry was made but before the commencement of Schedule 3<sup>10</sup>, and the commons registration authority is satisfied that the register should be amended to give effect to the severance. In either case, the severance of the right will then be registered.

106. *Subsection (4)* provides that, where the register shows that a person is the owner of a right of common in gross, that person is to be taken as the owner upon registration, even if he or she would not otherwise be the owner. Section 12 provides that a transfer of a right held in gross cannot be effective in law unless the transfer is registered under that section, thereby ensuring that the register remains an accurate record of ownership of such rights.
107. *Subsection (5)* preserves what is believed to be the present position under the 1965 Act, which is that, where a right of common is subject to any customary constraint not mentioned in the register (for example, that the rights may be exercised only at certain times of the year, that stock should be hefted in accordance with local custom, or that the times at which stock may be turned out are to be determined by a manorial or other ancient court<sup>11</sup>), those constraints are preserved notwithstanding that they are not mentioned in the commons registers.

### **Section 19 Correction**

108. **Section 19** enables commons registration authorities to correct certain errors in the commons registers. *Subsection (4)* provides that a correction may be made on the authority's own initiative or on an application by any person. *Subsection (2)* sets out the purposes for which a correction may be made. These comprise:
- In paragraph (a), a mistake in making or amending an entry in the register (including, by virtue of *subsection (3)*, an ambiguous description of, for example, rights of common), but only where the mistake was made by the authority. Such a mistake may arise, for example, where an error was made by the authority in transposing onto the register map a map supplied by an applicant for provisional registration of common land, or where in amending an entry in the register (for example, on an apportionment under the 1965 Act), the authority erroneously added a zero to (or deleted a zero from) the number of rights registered. An error made in a map supplied by an applicant defining the area of common land, which was faithfully reproduced in the register entry, could not be corrected under this provision (but it may be possible to correct such an error under the provisions in Schedule 2).
  - In paragraph (b), any other mistake, whether made by the authority or another person, provided that the amendment would not affect the extent of land registered as common land or as a town or village green, nor the quantification of any right of common. For example, a mistake may have been made by an applicant for registration of a right of common attached to land by which the dominant tenement was wrongly defined. The authority would be able to correct such a mistake.
  - In paragraph (c), removing a duplicate entry in the register (whether caused by the error of the authority or another person). Duplicate entries typically arose where

<sup>9</sup> The rights section of the commons registers prepared under the 1965 Act is prescribed in Form 3 of Schedule 1 to the [Commons Registration \(General\) Regulations 1966 \(SI 1966/1471\)](#). Column 5 of the prescribed form provides for entries describing "Particulars of the land (if any) to which the right is attached".

<sup>10</sup> Subject to regulations made under paragraph 5 of Schedule 3.

<sup>11</sup> The jurisdiction of certain ancient courts to transact customary business was preserved by section 23 of the Administration of Justice Act 1977.

application was made for provisional registration of a right of common under the 1965 Act, both by the tenant of a farm entitled to exercise the right, and the landlord of the farm<sup>12</sup>, and no objection was made to either registration, so that they both became final.

- In paragraph (d), updating any details of name or address, such as those which relate to the registered owner of a right held in gross.
  - In paragraph (e), updating an entry in the register to take account of the common law principles of accretion and diluvion. The principles apply to all land where the boundary of ownership follows a body of water — whether river, lake or sea shore. They provide that, if by gradual and imperceptible accretions in the ordinary course of nature, land is added on one side, it falls into the ownership of the person owning the rest of the land on the same side, and the boundary line correspondingly advances, and (in the case of diluvion) *vice versa*. If one side of the body of water is also subject to rights of common, then the rights of the commoners will adjust along with the rights of the owners.
109. Corrections may be made to the registers for the purposes set out above, whether the error originates from a registration made under this Act or under the 1965 Act (*subsection (3)*). In some cases, an error may meet the criteria for correction both under this section and under Schedule 2.
110. *Subsection (5)* provides that the commons registration authority may not correct mistakes in the register if it would be unfair to do so. For example, if land had been acquired by a person reliant on an inspection of the register which showed it not to be registered common land, but the commons registration authority had mistakenly excluded that land from the register, it would not be able to correct the mistake if it would, in all the circumstances, be unfair to do so (having regard, for example, to the interests of the person acquiring the land, as well as the interests of others interested in correcting the error).
111. *Subsection (7)* provides a limited power, derived from section 14(a) of the 1965 Act, for the High Court to order the register to be amended where an entry, or any information in an entry, has been secured by fraud and it would be just to amend it. The High Court will also be able to judicially review the actions of a commons registration authority, but it is not necessary to include provision in the Act for this purpose.

## **Information etc**

### ***Section 20 Inspection***

112. *Section 20* provides for a right of public access to the commons registers, and to records held in connection with applications for registration under Part 1 or under the 1965 Act. Regulations may be made under *subsection (2)* which provide for exceptions to the right, or which place conditions on the exercise of the right, including, as under *subsection (3)*, the payment of fees.

### ***Section 21 Official copies***

113. *Section 21* provides for the admissibility in evidence, and the issue, of official copies. There is no provision in section 21 or elsewhere in Part 1 for official searches of the register (for which purpose regulations were made under the 1965 Act): it is expected that instead, non-statutory provision will be made for searches in an amendment to form CON29 Part II published by the Law Society.

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12 See regulation 7(1) of the [Commons Registration \(General\) Regulations 1966 \(SI 1966/1471\)](#).



## **Transitory and transitional provision**

### ***Section 22 and Schedule 2 Rectification of mistakes etc under the 1965 Act***

114. [Section 22](#) introduces Schedule 2 to the Act, which makes provision for rectification of mistakes and other matters in the commons registers prepared under the 1965 Act.
115. An amendment may be made to the register for any purpose in Schedule 2 either on an application, or following a proposal brought forward by the registration authority itself. Regulations may prescribe a cut-off date after which applications and proposals under paragraphs 2 to 9 of Schedule 2 may no longer be made.
116. [Paragraphs 2 and 3](#) of Schedule 2 enable the registration of land which was specifically recognised by or under an earlier statute as being common land or a town or village green, but which was not registered under the 1965 Act. The criteria for registration as common land under paragraph 2 are set out in sub-paragraph (2), and include the requirement that the land is regulated under the Commons Acts 1876 or 1899, the Metropolitan Commons Act 1866, or a local or personal Act, or is otherwise recognised as common land by or under any other enactment<sup>13</sup>. The criteria for registration as a green under paragraph 3 include the requirement that the land was on 31 July 1970 land allotted by or under any Act for the exercise or recreation of the inhabitants of any locality.
117. For example, a local Act may have defined the extent of a common in a plan deposited with the House authorities during the passage of the corresponding Bill through Parliament, but part (or all) of the lands defined in the plan were overlooked and not registered under the 1965 Act. The amendments will enable the land to be registered, subject to any criteria specified in regulations (which may, for example, restrict application to the owner of the land, or require that the land remains common land at the date of the application). It may be possible for commons exempted from registration under section 11(3) of the 1965 Act (a list of which appears in annex B) to be registered under paragraph 2, and for allotted recreation grounds not registered under the 1965 Act to be registered under paragraph 3.
118. [Paragraph 4](#) enables certain land to be registered as common land. An application or proposal may be made only in respect of land which is not registered as common land or a green, and which is waste land of the manor at the date of the application. Waste land of the manor has been defined as “the open, uncultivated and unoccupied lands parcel of the manor”<sup>14</sup>. Consequently, land which is otherwise eligible for registration under paragraph 4, but which has been developed, improved and brought in hand, or otherwise fails to fulfil the character of waste land of the manor, cannot be registered.
119. The criteria for registration of land under paragraph 4 are set out in sub-paragraphs (2) to (5), to the effect that:
- the land was provisionally registered as common land under section 4 of the 1965 Act,
  - there was an objection to its provisional registration, and
  - one (or more) of the following applies:
    - (i) the registration was dismissed by the Commons Commissioner solely because the land had ceased to be connected with the manor (sub-paragraph (3)),

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<sup>13</sup> For an example, see the reference to land specified as common land in the Second Schedule to the [Broxbourne and Hoddesdon Open Spaces and Recreation Grounds Act 1890](#) (ch. xlvii).

<sup>14</sup> *Attorney General v. Hammer* (1858) 2 LJ Ch 837. The effect of the *Hazeley Heath* case (see footnote 16) is that it is not relevant for these purposes whether the land continues to be held by the lord of the manor — but the land must be of manorial origin.

- (ii) the registration was dismissed by the Commons Commissioner because the land was not subject to rights of common, and the Commissioner did not go on to consider whether the land qualified instead for registration as waste land of the manor (sub-paragraph (4)), or
  - (iii) the registration was withdrawn at the request or with the agreement of the applicant for registration (sub-paragraph (5)).
120. The Court of Appeal decided in 1978 in the *Box Hill* case<sup>15</sup> that ‘waste land of a manor’ — the second limb of the definition of common land for the purposes of registration under section 22(1)(b) of the 1965 Act — must still be in the ownership of the lord of the manor, but the court’s decision was subsequently overruled in 1990 by the House of Lords in the *Hazeley Heath* case<sup>16</sup>. Between 1978 and 1990, many provisional registrations of common land were cancelled by the Commons Commissioner solely on the grounds of the *Box Hill* judgment, or were withdrawn by the applicant for registration in anticipation of cancellation, and were out of time or ineligible for appeal following the decision in *Hazeley Heath*. Sub-paragraphs (3) and (5) enable such cases meeting the criteria specified to be the subject of a fresh application for registration.
121. Cases where an application for provisional registration was withdrawn after an objection will also be eligible for consideration under sub-paragraph (5) whether or not the reason for withdrawal was the decision in the *Box Hill* case. This is intended to enable fresh consideration to be made in respect of cases where applications for registration of a common were withdrawn by agreement between the several applicants, often in advance of a hearing before the Commons Commissioner. Such agreements generally led to the Commissioner cancelling the registration by consent<sup>17</sup>, without the opportunity for the wider public interest to be considered in relation to the application.
122. Sub-paragraph (4) enables cases to be reviewed where the Commons Commissioner concluded, on an objection to the registration of land as common land, that the land was not subject to rights of common, but did not consider whether the land might qualify for registration as waste land of the manor. Where none of the parties appearing before the Commissioner argued that the land might also qualify as waste land, the Commissioner often concluded that the registration should fail without further consideration. However, there is some authority to support the view that the Commissioner ought to have examined the evidence before coming to a decision in such cases, since there is a public interest aspect to the registration of common land and whether land should or should not be registered should not be treated solely as a matter of dispute between the parties to the application.<sup>18</sup>
123. In determining the circumstances of a decision by the Commons Commissioner, reference may be had to copies of the Commissioner’s decision letters which are held by Defra (in relation to both England and Wales) in both bound and electronic form.
124. Where land is registered under paragraph 4, it will not be possible to claim or register any rights of common which were formerly exercisable over that land. Such rights were extinguished for want of registration, under section 1(2)(b) of the 1965 Act (see footnote 1).

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<sup>15</sup> *Box Parish Council v. Lacey* [1979] 1 All ER 113.

<sup>16</sup> *Hampshire County Council and others v. Milburn* [1990] 2 All ER 257.

<sup>17</sup> See the provision for decisions by consent in regulation 31 of the [Commons Commissioners Regulations 1971 \(SI 1971/1727\)](#).

<sup>18</sup> See the judgement of Lord Denning MR in the *Corpus Christi* case (footnote 2): “I cannot think it correct for the commons commissioners to treat these cases as if they were pieces of civil litigation, such as a *lis inter partes*, in which the applicants have to prove their case. ... The hearing by the commissioner should be regarded more as an administrative matter, to get the register right, rather than as a legal contest. The commons commissioner should inquire carefully whether any land is common land, and, if it is, register it in the land section accordingly.”

<sup>1</sup> Section 1(2)(b) of the 1965 Act states that such rights are rendered not ‘exercisable’. In *Central Electricity Generating Board v. Clwyd County Council* [1976] 1 WLR 151, Goff J. concluded that the fact that rights of common were no longer exercisable meant that they were extinguished, and this finding is now generally accepted.

125. [Paragraph 5](#) enables certain land registered as common land to be transferred to the register of town or village greens. Some greens were mistakenly registered under section 4 of the 1965 Act as common land, typically because the land was subject to rights of common, and the applicants believed that such land was required to be, or wished to have it, registered as common land. It appears that the effect of section 1(2) (a) of the 1965 Act was to cause such land to cease to be a green, and it is unlikely that the protection afforded to greens by nineteenth century legislation (notably section 12 of the Inclosure Act 1857<sup>19</sup> and section 29 of the Commons Act 1876<sup>20</sup>) extends to such land<sup>21</sup>. Paragraph 5 therefore affords a fresh opportunity to ensure that such land is entered in the correct register. An application or proposal will need to show that, immediately before its provisional registration under section 4, the land was in fact a town or village green within the meaning of the 1965 Act as originally enacted (for example, evidence may be adduced that the land was allotted as a town or village green under an inclosure award). Any transfer will not affect rights of common registered over the land.
126. [Paragraphs 6 to 9](#) make provision for the deregistration of certain land wrongly registered as common land or town or village green. The registration of land under the 1965 Act gave rise to a number of regrettable errors. People, including landowners, who disagreed with a provisional registration under the 1965 Act were able to make formal objections within a certain time, which were heard by the Commons Commissioner. But once a provisional registration became final, no allowance was made for substantive corrections to be made, whatever the circumstances. In order to publicise provisional registrations, local authorities were required to give notice of them in local newspapers, and to make the provisional registers available for inspection. There was no requirement to serve notice on the affected landowners (because identifying the ownership of such land was often impossible and one of the purposes of the legislation was to clarify ownership). However, it is clear that some landowners did not see the notices or had no reason to look out for them, and as a consequence a number of mistaken or misguided provisional registrations became final without their being aware.
127. The Common Land (Rectification of Registers) Act 1989 made provision for the rectification of certain errors in the registers in relation to dwelling-houses. But the opportunity to make an application under the Act expired on 21 July 1992. Further provision similar to (but not the same as) the 1989 Act is made in paragraphs 6 and 8.
128. [Paragraph 6](#) deals with the removal of certain buildings from the register of common land. Some common land may have been registered so as to mistakenly include (typically) cottages or gardens on or abutting the common. The error may have gone unnoticed, or that the Commons Commissioner felt unable to correct the error if no timely objection had been made. The paragraph enables the deregistration of common land registered under section 4 of the 1965 Act, which is covered by buildings or within the curtilage of buildings. The land must have been covered by buildings or have been within the curtilage of buildings at the time of the original provisional registration, and continuously up to the date of determination of the application or proposal. It is immaterial for the purposes of paragraph 6 whether the building was lawfully present on the land at the date of registration<sup>22</sup>.
129. [Paragraph 7](#) also enables the deregistration of land which was wrongly registered as common land under section 4 of the 1965 Act, but is not restricted to buildings and curtilage (as under paragraph 6). Land will be eligible for deregistration under this paragraph if it was provisionally registered as common land under section 4 of the 1965 Act, and its provisional registration was not referred to a Commons Commissioner.

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<sup>19</sup> Prevents damage and interruption to enjoyment of the green.

<sup>20</sup> Prevents encroachment or disturbance other than to improve enjoyment of the green.

<sup>21</sup> In the *Trap Grounds* case (see footnote 8), the House of Lords ruled that land registered as a town or village green under the 1965 Act is subject to the protection afforded by the nineteenth century legislation. By implication, the same protection does not extend to former greens registered as common land.

<sup>22</sup> So this paragraph will not enable the deregistration of land where, for example, a garden has been extended onto, and encroached upon, a common after the date on which the common was provisionally registered.

130. It follows that an application or proposal cannot be made where a hearing was originally held into the registration of the land by the Commons Commissioner. However, an application or proposal under paragraph 7 will not be precluded merely because a hearing was held which considered only the registration of rights over the land, or because a hearing into the ownership of the land was held under section 8 of the 1965 Act.
131. An application or proposal under this paragraph will succeed only if it can be shown that, before its registration, the land was not common land (whether subject to rights of common or waste land of the manor), nor a town or village green within the meaning of the 1965 Act as originally enacted, nor within the definition of land subject to be inclosed under section 11 of the Inclosure Act 1845 (see annex C). The exclusion for the purposes of paragraph 7 of land subject to inclosure under the 1845 Act ensures that land cannot be removed from the registers under this provision if, at the time of its registration, it was (among other things) a regulated pasture. Regulated pastures are lands which are owned in common by several persons, who also use the land in common at certain or all times of the year (for example, the land may be used to graze in common the stock of all the owners). A number of regulated pastures were incorrectly registered under the 1965 Act, but the continuing registration of such land is not thought to give rise to any difficulties, and confers some benefits in terms of security of status, and public rights of access.
132. Provision similar to paragraph 6 is found in paragraph 8 for the deregistration of town or village green registered under section 4 of the 1965 Act, which is covered by buildings or within the curtilage of buildings. The land must have been covered by buildings or have been within the curtilage of buildings at the time of the original provisional registration, and continuously up to the date of determination of the application or proposal. It is immaterial for the purposes of paragraph 8 whether the building was lawfully present on the land at the date of registration.
133. Provision similar to paragraph 7 is found in paragraph 9 for the deregistration of certain registered town or village greens. However, the criteria for deregistration of greens are slightly different. Sub-paragraph (2) provides that an application or proposal will succeed only if it can be shown that, before its original provisional registration, the land was not common land nor a town or village green. Sub-paragraph (3) provides that the latter condition is satisfied if:
- owing to its physical nature, the land could not have been used by members of the public for lawful sports and pastimes throughout the 20 years before its registration under the 1965 Act (for example, if buildings on the land precluded such use), and
  - the land was not (and still is not) allotted under any enactment as a green, or for the purposes of a green.
- This provision seeks to avoid an application under paragraph 9 seeking to adduce witness testimony as to the actual use made of the green prior to the date of provisional registration, which may be unhelpful so long after the period of use.
134. [Paragraph 10](#) enables regulations to be made to provide for the award of costs arising in determining an application under Schedule 2. Section 24 enables regulations to make provision about applications under paragraphs 2 to 9.

### ***Section 23 and Schedule 3 Transitional***

135. [Section 23](#) enables the appropriate national authority to make transitional provisions and savings in connection with the coming into force of Part 1, and introduces Schedule 3, which makes transitional provision for updating the commons registers.
136. The 1965 Act did not require the commons registers prepared under that Act to be kept up-to-date. Provision was made (in section 13) to register certain events, but compliance was optional. Many instruments, and other events affecting entries in the registers

(or calling for new entries in the registers), have had effect since the registers were compiled under section 4 of the 1965 Act, but many of these have not been captured in consequential amendments to the registers.

137. [Schedule 3](#) makes provision for updating the registers during a transitional period to capture these events. Section 59(1) enables the transitional period to be commenced in relation to different commons registration authorities at different times.
138. [Paragraph 2](#) enables the appropriate national authority to make regulations regarding the updating of registers by commons registration authorities during the transitional period in consequence of ‘qualifying events’. ‘Qualifying events’ are defined in sub-paragraph (2).
139. Sub-paragraph (2) provides that qualifying events comprise:
- the creation by any means of rights of common after 2 January 1970 (the latest date on which rights of common eligible for registration under section 4 of the 1965 Act could be registered, failing which they were extinguished under section 1(2)(b) of that Act<sup>23</sup>) but before the commencement of paragraph 2;
  - any relevant disposition (as defined in sub-paragraph (3)) of a right of common occurring after the date of registration of the right but before the commencement of paragraph 2;
  - an extinguishment of a right of common occurring after the date of registration of the right but before the commencement of paragraph 2;
  - the deregistration of registered land under a relevant instrument (as defined in sub-paragraph (4)), and the giving of other land in exchange.
140. Regulations may provide for the amendment of the register both on application and on the initiative of the commons registration authority (sub-paragraph (5)). Sub-paragraph (6) states that regulations may require commons registration authorities to take steps to discover information concerning qualifying events. This may include undertaking and publicising a formal review of their registers.
141. [Paragraph 3](#) provides for the extinguishment of rights of common which remain unregistered at the conclusion of the transitional period.
142. [Paragraph 4](#) provides that regulations may enable a commons registration authority to entertain applications for amendment of the registers in consequence of a qualifying event, even though the application is made after the end of the transitional period. Where such an amendment is made, any extinguishment of rights by virtue of paragraph 3 is deemed not to have occurred. It is expected that such regulations will require registration authorities to consider whether confirming such an amendment would be fair having regard to the extent to which other persons may have placed reliance on the registers without the amendment having been made.
143. [Paragraph 5](#) enables regulations under paragraph 2 or 4 to include provision as to what is or is not to be regarded as severance for the purposes of registering qualifying events during the transitional period. It is expected that regulations will, for example, provide that a right is not to be treated as having been severed unless it can be shown that the parties to the severance expressed a clear intention in writing that the right should be severed, or the right has subsequently been treated as severed.
144. [Paragraphs 6 to 9](#) make certain transitional provision as a consequence of the repeal of the 1965 Act.

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23 See footnote 1.



145. [Paragraph 6](#) preserves the effect of section 1(2)(b) of the 1965 Act, which extinguished rights of common which could have been, but were not, registered at the conclusion of the initial registration period<sup>24</sup>.
146. [Paragraph 7](#) preserves the effect of section 21(1) of the 1965 Act, which in turn preserves the right of access under section 193 of the Law of Property Act 1925. Section 193 of the 1925 Act confers a right of access to certain ‘urban’ commons, particularly those formerly in urban districts or boroughs prior to local government reform, and to commons in respect of which a deed of dedication applying the provisions of section 193 had been executed by the owner. The right of access to ‘urban’ commons ceased to apply under section 193(1)(d)(i) where the rights of common over such commons were extinguished under any statutory provision. Where such a common was registered under section 4 of the 1965 Act, but any rights remained unregistered and may have been extinguished by section 1(2)(b) of that Act, section 21(1) provided (and paragraph 7 ensures the continuing effect) that the right of access was not to be treated as ceasing to apply by virtue of section 193(1)(d)(i) of the 1925 Act.
147. [Paragraph 8](#) retains the ownership section of the commons registers prepared under the 1965 Act until such time as regulations may provide for their removal and archiving (sub-paragraph (3)). This provision takes account of the gradual migration of ownership information from the ownership section of the commons registers to the register of title held by the Land Registry. Sub-paragraph (2), which reproduces the effect of section 12(b) of the 1965 Act, requires a commons registration authority which receives notice from the Land Registry that the ownership of common land or a town or village green has been registered in the register of title, to delete any entry as to ownership of the land in the ownership section of the commons register.
148. [Paragraph 9](#) preserves the effect of any vesting of unclaimed registered land in a local authority under section 8 of the 1965 Act, and sub-paragraph (2) preserves, where appropriate, the application of sections 10 and 15 of the Open Spaces Act 1906 to such land. These sections place certain obligations on the local authority to maintain the land, and confer powers to make byelaws for the better regulation of the land.

## **Supplementary**

### **[Section 24 Applications etc](#)**

149. [Section 24](#) enables the appropriate national authority to make regulations regarding the making and determination of applications for the amendment of the registers under Part 1. Regulations may, among other things, make provision as to any of the matters set out in *subsections (2) to (3) and (5) to (8)*. In particular, subsection (2)(d) permits regulations to require a fee to be paid in connection with any application, and enables regulations to provide (if required) that the fee is to be determined by the person to whom the application is made. *Subsection (4)* makes clear that an application made under sections 6, 7, 10, 11, 12, 13 and 15, and paragraphs 1 and 3 of Schedule 1 (but not Schedule 2, for which separate provision is made in that Schedule) must be granted if properly made, subject to the relevant provisions. *Subsection (5)* enables regulations to provide for a person to be appointed to discharge any or all of the functions of the appropriate national authority in relation to an application under section 16.
150. *Subsection (8)* enables regulations to provide for the appropriate national authority to make appointments to a panel of persons who will be eligible to discharge the functions of a commons registration authority, and for a person to be selected from the panel in relation to any particular application or proposal. Such a person may be appointed to inquire into an application or proposal and make recommendations to the commons registration authority, leaving the authority to make the determination, or they may be appointed to determine the matter instead of the authority.

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24 See footnote 1.

151. *Subsection (9)* permits regulations to enable the Church Commissioners to act with respect to land or rights vested in an ecclesiastical benefice of the Church of England (*i.e.* generally, parsonage land or rights belonging to the parsonage): this is because, where there is no incumbent appointed to a benefice, no person would be able to act on behalf of that benefice without special provision.

***Section 25 Electronic registers***

152. **Section 25** enables the appropriate national authority to make regulations permitting or requiring commons registration authorities to maintain commons registers in an electronic form. *Subsection (1)* provides that the regulations may relate to part of a register: for example, regulations may provide only for maps contained in a register to be kept in an electronic form. *Subsection (3)* enables regulations to make provision as to the process of conversion of a register to an electronic form: regulations may require authorities to consult on a provisional version of the register, which will enable persons to comment in particular on the accuracy of the authority's digitisation of maps contained in the registers.