

EXPLANATORY MEMORANDUM TO
THE COMMONS REGISTRATION (ENGLAND) REGULATIONS 2008
2008 No. 1961

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Regulations make provision about the registration of common land and town or village greens under Part 1 of the Commons Act 2006 ('Part 1' of 'the 2006 Act'). They come into force on 1 October 2008 and apply to the areas of seven commons registration authorities in England, specified in Schedule 1, which are participating in a pilot implementation.

2.2 Part 1 provides for commons registration authorities to continue to keep registers of common land and town or village greens ('the commons registers'), and to permit amendments to be made to the registers in accordance with the provisions in that Part. This replaces and improves the registration system under the Commons Registration Act 1965 ('the 1965 Act'), but using the same registers prepared under that Act.

2.3 The Regulations provide for the form and content of the commons registers. They set out a procedure for applications and proposals¹ for amendment of the registers, and enable the Secretary of State to appoint the Planning Inspectorate to determine certain classes of application or proposal. They provide for an initial transitional period, so that during the first year of the pilot implementation, applications and proposals may be made to bring the commons registers up-to-date to reflect events which have taken place since 1970 but which have not been registered to date.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The law of common land, rights of common, and town or village greens is rooted in English common law and customary law, and dates back to mediaeval times. During the nineteenth century, increasing awareness of the importance of such land to communities as places for recreation gave rise to increasing statutory protection (such as in the Metropolitan Commons Acts 1866 to 1898, and the Commons Acts 1876 and 1899). But there was no statutory initiative to ascertain the extent of such land and rights until the 1965 Act.

4.2 The 1965 Act was intended to establish definitive registers of common land and town and village greens in England and Wales and to record details of rights of common. The form of the commons registers was prescribed in regulations made under the 1965

¹ Proposals are made by registration authorities themselves, and similar to applications.

Act². Commons registration authorities (generally county councils) were appointed to draw up the commons registers. Applications were invited between 2 January 1967 and 2 January 1970 for the provisional registration of common land, greens, and rights of common, and registration authorities were also able to register land on their own initiative. Disputed provisional registrations were referred to a Commons Commissioner (appointed under the 1965 Act) for determination, but unopposed provisional registrations became final automatically.

4.3 The 1965 Act was intended to be a transitional measure, and further legislation was promised, but no comprehensive provisions were enacted until the 2006 Act. Part 1 continues the commons registers established under the 1965 Act, but makes provision for bringing and keeping the registers up-to-date. In particular, Part 1 includes provisions for:

- the amendment of the commons registers upon the occurrence of registrable events, such as the creation or variation of rights of common, statutory dispositions of common land (e.g. under compulsory purchase legislation) and the creation of new town or village greens, and provides (in general) that such events are only to have effect in law when the register is amended so as to record them;
- the prohibition of the severance of a registered right of common from any land to which it is attached, subject to certain exceptions;
- the correction of errors in the commons registers;
- transitional powers to rectify mistakes made in the commons registers under the 1965 Act, and to register events which occurred while the 1965 Act was in force; and
- ensuring that only registered rights of common may be exercised over land to which Part 1 applies.

4.4 Certain provisions of Part 1 are already in force in England: section 9 and Schedule 1 were deemed to come into force on 28 June 2005 in relation to the prohibition (with exceptions) of severance of rights of common³; sections 4, 5, 15 and 24 of the 2006 Act were brought into force on 6 April 2007⁴, to enable the registration of new town or village greens under section 15 of the Act; and sections 16 and 17 of the Act were brought into force on 1 October 2007⁵ to enable the Secretary of State to determine applications for the deregistration and exchange of common land and town or village greens.

4.5 These Regulations are made for the purposes of a pilot implementation of Part 1, in seven pilot registration authority areas, which are identified in Schedule 1 to the Regulations⁶. And, also on 1 October 2008, the Commons Act 2006 (Commencement No. 4 and Savings) (England) Order 2008⁷ will bring into force various provisions of

² Principally, the Commons Registration (General) Regulations 1966 (SI 1966/1471), the Commons Registration (Objections and Maps) Regulations 1968 (SI 1968/989), and the Commons Registration (New Land) Regulations 1969 (SI 1969/1843).

³ See section 9(7).

⁴ The Commons Act 2006 (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007 (SI 2007/456): www.opsi.gov.uk/si/si2007/uksi_20070456_en_1.

⁵ The Commons Act 2006 (Commencement No. 3, Transitional Provisions and Savings) (England) Order 2007 (SI 2007/2584): www.opsi.gov.uk/si/si2007/uksi_20072584_en_1.

⁶ Section 59(1)(b) of the 2006 Act enables an order or regulations under the Act to “make...different provision for different purposes or areas.”

⁷ SI 2008/1960 (C.94).

Part 1 (not already in force) only in relation to the pilot registration authority areas. The Regulations are necessary to enable the practical and understandable operation of Part 1 in the pilot areas, providing for such matters as the content of an application for amendment of the commons registers, and the form in which the registers must be kept.

4.6 The Regulations fulfil commitments given in Parliament during debate on the Commons Bill (2005–06) in several respects:

- to enable declarations of entitlement to rights of common (see regulation 44) — *Lords Hansard*, 25 October 2005 cols. GC315–316; *Commons Hansard*, Standing Committee D, 25 April 2006 col. 19; *Commons Hansard*, 29 June 2006 cols. 442–443;
- fees for applications to be determined by registration authorities (regulation 17 and Schedule 5) — *Lords Hansard*, 2 November 2005, col. GC72;
- noting of additional information in the commons registers (regulation 47: no provision has been made for new information about private rights to be noted in the register, following consultation on this option) — *Commons Hansard*, Standing Committee D, 25 April 2006 col. 6.

4.7 Provision is made separately in the Dartmoor Commons (Authorised Severance) Order 2008⁸ for the Dartmoor Commoners' Council to be regarded as a commons council for the purposes of paragraph 1 (severance by transfer to public bodies) of Schedule 1 to the 2006 Act.

5. Extent

5.1 This instrument applies in England, in relation to the registration areas of the seven pilot authorities.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The task of establishing registers under the 1965 Act proved to be complex, lengthy and costly, and the 1965 Act was flawed. For example, some land provisionally registered under the Act was wrongly struck out, and other common land was overlooked and never registered. Many greens became registered as common land. Some grazing rights were registered far in excess of the carrying capacity of the common. The scope for correcting errors was limited. Furthermore, regulations made under the Act did not provide for sufficient notification of applications made for provisional registration of common land and rights of common, so that many provisional registrations became final without any objections and thus without independent appraisal of the claim made in the application. Even where land had clearly been wrongly registered as common land, the Act provided no mechanism to enable such land to be removed from the register once the registration had become final. Moreover, although the 1965 Act made provision for amendments to be made to the

⁸ SI 2008/1962.

commons registers consequent upon events which occurred after 1970, there was no obligation on persons interested in any entry in the register to seek such an amendment. Many events which in principle affected entries in the commons registers have not been registered, and the registers have become significantly out-of-date since 1970.

- 7.2 Part 1 is intended to replace and improve the registration system under the 1965 Act, but using the same commons registers prepared under that Act. Part 1 provides for registration authorities to continue to keep the commons registers, and permits amendments to be made to the registers in accordance with the provisions in that Part. But Part 1 also requires that the commons registers are kept up-to-date, by providing that an event which would affect the validity of information contained in the registers is only to have legal effect if the event is registered in accordance with Part 1. That will help ensure that the commons registers become and remain a true record of the extent of common land and greens, and of the rights of common exercisable over such land. Part 1 will also contribute much greater certainty in future about how such land and rights can be managed and protected. For example, Part 3 of the 2006 Act provides for the protection of registered common land from unlawful works which might disfigure a common and impede access to it. If the status of land as registered common land is in question — because it is claimed to be wrongly registered, or because the boundary is alleged to have been drawn in the wrong place — then such uncertainties undermine the protection conferred by the legislation. The implementation of Part 1 will help to eradicate such uncertainty.
- 7.3 Part 2 of the Regulations adopts as a basis the regulations regarding the form and content of the commons registers established under the 1965 Act (see paragraph 4.2 above), with modifications (primarily to reflect the fact that the registers are already in existence). Part 3 of the Regulations regulates the process of making and managing applications and proposals under sections 6 to 15 and 19 of, and Schedules 1 to 3 to, the 2006 Act. It also includes provision for registration authorities to set a fee for the purposes of most classes of application, having regard to their own costs in dealing with such applications; no fee may be charged for applications to register new land, or to correct an error previously made by the registration authority. Provision is made for a hearing, public inquiry or site visit to take place where appropriate, in connection with applications and proposals. Provision is also made for referral to the Planning Inspectorate for determination, where an application or proposal is made under paragraphs 4 to 9 of Schedule 2 to the 2006 Act, in relation to the registration or deregistration of any land or the amendment of the quantification of any right under section 19 of the Act, or where the registration authority has an interest in the application or proposal such that it would call into question its ability to determine the matter impartially.
- 7.4 Part 4 of the Regulations deals with the transitional period, and includes the steps which a registration authority must take to publicise the period and to review the information contained in its commons registers. Part 5 of the Regulations makes provision for miscellaneous purposes, including enabling persons entitled to rights of common attached to land to record in the commons registers a declaration of that entitlement. It also provides that a statutory disposition in relation to a registration (such as a compulsory purchase order) is not to have effect insofar as it purports to affect the registration, until the register is amended in accordance with the disposition. Part 6 of the Regulations makes supplemental provision, including enabling electronic communications (other than for the purposes of an application), for inspection and

official copies of the commons registers, and to revoke certain regulations (in their application to the pilot areas) which make interim arrangements for the registration of certain functions under Part 1 which have already been introduced.

- 7.5 Defra consulted on detailed proposals for the implementation of Part 1 in July 2007⁹, and published a summary of responses in January 2008¹⁰, including a statement of its policy conclusions following the consultation. A total of 38 responses were received, including 14 from local authorities and 10 from commons bodies. The proposals were generally supported, but there was a diversity of views on the timetable for implementation (including the proposal for a pilot implementation), with many seeking earlier implementation. Nevertheless, Defra concluded that implementation nationally without a pilot would pose high risks and potentially very high or uncertain costs. There were also differing views over: the merits of fees for applications (some respondents thought that no fees should be payable, but Defra has concluded that a fee should be paid for applications which fulfil a private interest in the register); the voluntary registration of apportionment (which is now permitted under paragraph 3 of Schedule 4 to the Regulations), and the notice to be given of applications under Schedule 2 to the 2006 Act. Defra has further developed the Regulations and guidance with support from meetings of a focus group of key stakeholders, through discussion with commons registration officers from the pilot registration authorities, and at workshops during the National Common Land Seminar at the University of Gloucestershire during September 2007.

8. Impact

- 8.1 An Impact Assessment is attached to this memorandum.
- 8.2 The impact on the public sector is focused on the commons registration authorities participating in the pilot implementation, and this is described in the Impact Assessment. Some costs will also fall on public sector bodies in complying with the requirements of Part 1 (*e.g.* in registering the effect of statutory dispositions), but these costs are unlikely to exceed the cost of best practice compliance with the previous legislation.

9. Contact

- 9.1 Hugh Craddock at the Department for Environment, Food and Rural Affairs, Tel: 020 7238 5663 or e-mail: commons.villagegreens@defra.gsi.gov.uk can answer any queries regarding the instrument. Further information about the Commons Act 2006 generally, is also available on the Defra website, at: www.defra.gov.uk/wildlife-countryside/issues/common/index.htm .

18 July 2008

⁹ *Consultation on updating the commons registers: Implementation of part 1 of the Commons Act 2006.*

¹⁰ *Summary of responses to the consultation on updating the commons registers:* both the summary and the consultation paper are available on the Defra website, at: www.defra.gov.uk/wildlife-countryside/issues/common/registration/index.htm.

Summary: Intervention & Options

Department /Agency: Defra	Title: Impact Assessment of Pilot Implementation of Part 1 of the Commons Act 2006	
Stage: Pilot implementation	Version: P1.4	Date: 19 June 2008
Related Publications: Commons Act 2006, Explanatory Notes To Act, Guidance to commons registration authorities/to applicants, the Regulations		

Available to view or download at:

www.defra.gov.uk/wildlife-countryside/issues/common/index.htm

Contact for enquiries: Grant McPhee

Telephone: 020 7238 6326

What is the problem under consideration? Why is government intervention necessary?

Common land and greens are precious reserves for biodiversity and recreation, are a vital agricultural resource, and a strong feature of the English landscape. Registers of common land and town or village greens, held by 149 local authorities in England, are the only legal record of the extent of such land and the rights exercisable over it. But they have not been effectively updated since the 1970s, and are an unreliable indicator of present status. Part 1 of the Commons Act 2006 enables the registers to be improved and updated, securing greater reliability for the registers and thereby conferring improved protection for common land and greens. Failure to implement reforms will further weaken protection, with erosion of the qualities which make such land special.

What are the policy objectives and the intended effects?

To achieve a comprehensive current record of common land and greens so that they are protected and fulfil their potential, by:

- maintaining the reliability of commons registers and confidence in the registers, and
- ensuring the capability of commons registration authorities to fulfil their functions.

This pilot implementation will test the efficacy of procedures, guidance, costs and benefits of Part 1 of the Commons Act 2006 in selected pilot local authority areas to achieve this outcome, with a view to national implementation in England from 2010 onwards..

What policy options have been considered? Please justify any preferred option.

Early national implementation was considered, but posed an excessive risk in terms of implementing untried complex new legislation imposing uncertain costs. The pilot implementation will test procedures etc. in advance of national roll-out, and is in accordance with the principles of better regulation

Fully regulated implementation was tested against minimal regulation: only fully regulated procedures can deliver the full range of benefits in terms of certainty, reliability and cost-effectiveness, while minimal regulation would also deprive stakeholders of significant benefits from converting to electronic registers. We have therefore selected a fully regulated implementation within pilot areas.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Following implementation in the pilot areas, a review will be conducted in 2009–10 to help inform decisions on national implementation from 2010 onwards. National implementation will be accompanied by a further impact assessment, with cost/benefit data derived from the pilot scheme.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:

JONATHAN SHAW

.....Date: 14 July 2008

Summary: Analysis & Evidence

Policy Option: Fully regulated pilot	Description: Implementation of Part 1 of the Commons Act 2006 in pilot areas, with full use made of regulation making powers
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Primarily to Government and pilot local authorities: costs incurred by authorities in year 1 transitional period (£216k) and by the Planning Inspectorate (£100k). Of these costs, £100k are expected to recur annually, while further costs of £50k annually will be funded through fees paid by service users.
	One-off (Transition)	Yrs	
	£ 316k	1	
	Average Annual Cost (excluding one-off)		
	£ 150k	Total Cost (PV) £ 1440k	
Other key non-monetised costs by 'main affected groups' An est. 600 applications will be made in year 1. Of these, 200 are expected to recur annually. Applicants will be required to pay a fee if there is no public interest. Typically, drafting an application will take 1 hour, but publicising notices will add costs of £10–20. Controversial applications may (as now) take and cost much more.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Benefits are almost entirely non-monetised: see below
	One-off	Yrs	
	£ N/A		
	Average Annual Benefit (excluding one-off)		
	£ N/A	Total Benefit (PV) £ N/A	
Other key non-monetised benefits by 'main affected groups' Registers achieve a comprehensive current record of commons and greens so that they are protected and fulfil their potential, enabling better management to promote public goods including biodiversity, nature conservation and recreational benefits, and safeguarding valuable rights of common.			

Key Assumptions/Sensitivities/Risks Data on costs and activity levels are scarce, and the pilot will improve accuracy of data for national implementation. Outturn may vary significantly from estimates, leading to adjustment to pilot and subsequent national implementation timetable. The pilot covers 1/5th of the common land in England, so problems within pilot will nevertheless have very real impact.

Price Base Year 2008	Time Period Years 9	Net Benefit Range (NPV) £ N/A	NET BENEFIT (NPV Best estimate) £ N/A
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What is the geographic coverage of the policy/option?	Pilot areas in England			
On what date will the policy be implemented?	1 October 2008			
Which organisation(s) will enforce the policy?	LAs/Planning Inspectorate			
What is the total annual cost of enforcement for these organisations?	£ 100k			
Does enforcement comply with Hampton principles?	N/A			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	£ N/A			
What is the value of changes in greenhouse gas emissions?	£ N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro nil	Small nil	Medium nil	Large nil
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)	
Increase of	£ negligible	Decrease of	£ negligible	Net Impact £ negligible

Summary: Analysis & Evidence

Policy Option: Pilot with min. regulation	Description: Implementation of Part 1 of the Commons Act 2006 in pilot areas, with minimal regulation
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Primarily to Government and pilot local authorities: costs incurred by authorities in year 1 transitional period would be significantly greater than the £216k figure estimated for the preferred option, as the lack of regulation would increase uncertainty and the time taken to process applications. Similarly, the annual cost (including those paid by service users) would be significantly greater than £100k.
	One-off (Transition)	Yrs	
	Significantly greater than £216k	1	
	Average Annual Cost (excluding one-off)		
	Significantly greater than £100k		
Total Cost (PV)			Significantly greater than £1,000k
Other key non-monetised costs by 'main affected groups' An est. 600 applications will be made in year 1. Of these, 200 are expected to recur annually. Applicants will be required to pay a fee if there is no public interest. Drafting an application could take a substantial length of time, with the possibility of a need for professional advice, due to the lack of a clear regulatory framework.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Any benefits would be almost entirely non-monetised: see below
	One-off	Yrs	
	£ N/A		
	Average Annual Benefit (excluding one-off)		
	£ N/A		
Total Benefit (PV)			£ N/A
Other key non-monetised benefits by 'main affected groups' Some benefits should be achieved through updating the registers, but benefits may suppressed due to the difficulty of making applications in the absence of a clear regulatory framework.			

Key Assumptions/Sensitivities/Risks Data on costs and activity levels are scarce, and the pilot will improve accuracy of data for national implementation. In the absence of full regulation, application numbers might be much lower. Little is known about costs in the absence of regulation, due to the obvious uncertainties involved, but they could be substantially higher than those presented here.

Price Base Year 2008	Time Period Years 9	Net Benefit Range (NPV) £ N/A	NET BENEFIT (NPV Best estimate)
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What is the geographic coverage of the policy/option?		Pilot areas in England		
On what date will the policy be implemented?		1 October 2008		
Which organisation(s) will enforce the policy?		N/A		
What is the total annual cost of enforcement for these organisations?		N/A		
Does enforcement comply with Hampton principles?		N/A		
Will implementation go beyond minimum EU requirements?		N/A		
What is the value of the proposed offsetting measure per year?		£ N/A		
What is the value of changes in greenhouse gas emissions?		£ N/A		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-	Micro nil	Small	Medium nil	Large nil
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)		
Increase of	Greater than £46k	Decrease of	£ 0k	Net Impact
				Greater than £46k

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

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1 Introduction

1.1 The 2006 Act was introduced into Parliament as a Bill on 28 June 2005, and received Royal Assent on 19 July 2006. A copy of the 2006 Act, and of the

explanatory notes written to aid understanding of the Act, can be seen on the internet¹¹.

1.2 Part 1 of the 2006 Act provides for commons registration authorities ('registration authorities') to continue to keep registers of common land and town or village greens ('the commons registers'), and to enable amendments to be made to the registers. These measures replace and improve the registration system introduced under the Commons Registration Act 1965 ('the 1965 Act'), but rolling forward the same registers prepared under that Act.

1.3 This impact assessment estimates the costs and benefits of the regulatory proposals and options for commencing Part 1 of the 2006 Act in a limited number of pilot areas in England. Parts 2 and 3 (together with sections 16 and 17 of Part 1) of the 2006 Act have been implemented separately and are not covered in this assessment¹².

2 Context: Part 1 of the 2006 Act

Background: the 1965 Act

2.1 The 1965 Act was intended to establish definitive registers of common land and town or village greens in England and Wales and to record details of rights of common. Registration authorities were appointed to draw up the registers. (At the time, registration authorities were county councils and London borough councils, but now include metropolitan district councils and other unitary authorities — collectively referred to in this consultation paper as 'registration authorities'.)

2.2 But the 1965 Act was not intended to be a long-term tool for management of the registers and of common land generally. Second-stage legislation was promised, but not delivered for 40 years. The 1965 Act had numerous shortcomings to which there were no immediate solutions, and comprehensive legislation was not available until the 2006 Act was passed by Parliament some forty years later. Further information about why the 1965 Act was not fit for purpose is available in the annexe to this impact assessment.

2.3 The registers are the key to delivering better management and protection. All registered common land is protected under Part 3 of the 2006 Act, so that works on such land (which might disfigure a common or impede access to it) require the consent of the Secretary of State, while town or village greens are protected under statute, so that interference with their use for recreation is a criminal offence. Local authorities have powers to protect unclaimed registered land¹³, and the Secretary of State has powers to enforce against agricultural abuses on common land¹⁴. Such powers and functions are undermined if there is uncertainty about the registration of land, or the rights exercisable over such land (e.g. because it is claimed to be wrongly registered, or because the boundary is alleged to have been drawn in the wrong place). The implementation of Part 1 will help to eradicate such uncertainty,

¹¹ www.opsi.gov.uk/acts/acts2006a.htm.

¹² For more information, see the Defra website: www.defra.gov.uk/wildlife-countryside/issues/common/.

¹³ Section 45 of the 2006 Act.

¹⁴ Section 46 of the 2006 Act will be brought into force on 1 October 2008.

by achieving a comprehensive current record of commons and greens so that they are protected and fulfil their potential.

Why Government needs to intervene

2.4 The commons registers are the creation of statute. Before the 1965 Act, common land was largely governed by the common law (that is, decisions made by the courts rather than rules made by Parliament). The 1965 Act sought to require such matters to be entered into statutory registers, and provided a statutory mechanism for the resolution of disputes. Section 10 of the 1965 Act provided that the registers were to be conclusive of certain information contained within the registers, and section 1(2) deemed unregistered land, and unregistered rights of common, not to be common land, green, or rights of common, at all.

2.5 But the 1965 Act was a snapshot — a first phase (acknowledged as such in Parliament and on the face of the Act) to record the extent of what was registered. It explicitly failed to provide to keep the registers as a living record, and indeed, further legislation was anticipated within a few years for just such a purpose. So, forty-three years on, the registers continue to be maintained under legislation that was intended to be a temporary expedient.

2.6 The 1965 Act, although imperfect, was an irrevocable step on the path from a purely common law system to a fully regulated statutory system. Once the registers had been drawn up, disputes resolved¹⁵, and unregistered lands and rights set aside, it was and remains impossible to revert to the original common law arrangements: progress can only be achieved by refining the present system. Moreover, the registration system is founded in the registers held by registration authorities. Although the registers could be held by another public body¹⁶, it is inevitable that they should be held by an impartial body accountable to the public, and the 2006 Act confirms that local authorities should retain the present role. Registration authorities can only undertake the functions conferred on them by Parliament, and it is inevitable that reform requires intervention by Government in the form of new primary legislation.

The 1965 Act to the present day

2.7 Several initiatives were promoted in the period following implementation of the 1965 Act, in support of further legislation. An inter-Departmental working party reported in 1977¹⁷ with recommendations for reform to commons legislation. The (then) Countryside Commission set up the Common Land Forum which reported in 1986¹⁸, reflecting a broad consensus between landowning, farming, nature conservation and recreational interests as the basis for legislation.

2.8 In 1989, a Private Member's Bill to enable limited deregistration of wrongly registered common land was supported by the Government, and became the Common Land (Rectification of Registers) Act 1989¹⁹. The Act, although very limited

¹⁵ The Commons Commissioners issued over 13,000 decisions in relation to England and Wales, many of them after local hearings.

¹⁶ The *Common Land Policy Statement 2002* considered whether the commons registers should be held by the Land Registry.

¹⁷ Unpublished.

¹⁸ *Report of the Common Land Forum*, Countryside Commission (now the Countryside Agency), 1986, CCP215: www.countryside.gov.uk/LAR/Access/open_access/clf.asp.

¹⁹ www.opsi.gov.uk/acts/acts1989/ukpga_19890018_en_1.

in scope and duration, temporarily relieved some of the mounting pressure for new legislation. Comprehensive legislation was later ruled out by the 1995 White Paper *Rural England*, and instead research was commissioned to publish guidance in 1998 on the management of common land²⁰. However, the *Rural White Paper* in 2000²¹ included a commitment to legislate on common land as soon as parliamentary time allowed. Meanwhile, Part I of the Countryside and Rights of Way Act 2000 provided for a public right of access (on foot) to nearly all registered common land, which was fully implemented across England and Wales by October 2005.

2.9 The Government published a consultation paper in February 2000, to coincide with the introduction into Parliament of the Countryside and Rights of Way Bill, on proposed reforms to legislation relating to common land and town and village greens. Two years later, building on responses to the consultation, the *Common Land Policy Statement 2002*²² set out in broad terms the Government's intentions for future legislation relating to common land and town and village greens. A Government Bill was subsequently introduced into Parliament in June 2005, and received Royal Assent in July 2006.

2.10 The 2006 Act gives effect to the recommendations set out in the *Common Land Policy Statement 2002* with respect to the registration of common land and town or village greens, works and fencing on common land, and the agricultural use and management of common land (sections 2, 3 and 5 of the *Policy Statement*). It also makes more limited changes to the law with regard to town or village greens (section 4), principally in relation to the registration of greens, and the criteria for registering new greens.

About Part 1 of the 2006 Act

2.11 Part 1 of the 2006 Act ('Part 1') is intended to replace and improve the registration system under the 1965 Act, but using the same registers prepared under that Act. Part 1 provides for registration authorities to continue to keep the commons registers, much as they were required to under the 1965 Act, and permits amendments to be made to the registers. But Part 1 will also require that the commons registers are brought up-to-date and kept up-to-date, by providing that an event which would affect the validity of information contained in the commons registers is only to have legal effect if the event is registered in accordance with Part 1 (e.g., a right of common would only be considered extinguished in law if an application were made to the registration authority to delete the right from the register). That will help ensure that the registers become and remain a true record of the extent of common land and greens, and of the rights of common exercisable over such land. It will also contribute much greater certainty in future about how such land and rights can be managed and protected.

2.12 Part 1 includes provisions for:

- the amendment of the registers upon the occurrence of registrable events, such as the creation, variation, extinguishment or transfer of rights of common, statutory dispositions of common land (e.g. under compulsory purchase legislation) and the creation of new town or village greens;

²⁰ *Good practice guide on managing the use of Common land*, Defra, 1998: www.defra.gov.uk/wildlife-countryside/issues/common/manage/guides.htm.

²¹ *Rural White Paper*, Defra, November 2000: www.defra.gov.uk/rural/ruralwp/.

²² Defra, July 2002: www.defra.gov.uk/wildlife-countryside/issues/common/policy.htm.

- the prohibition of the severance of a registered right of common from any land to which it is attached, subject to certain exceptions;
- the correction of errors in the registers by registration authorities;
- the establishment of electronic registers; and
- transitional powers to rectify mistakes made in registers under the 1965 Act, and to register events which occurred while the 1965 Act was in force.

2.13 Part 1 also includes provisions, in sections 16 and 17, for the deregistration and exchange of common land and town or village greens. However, applications under section 16 lie to the Secretary of State, and these provisions were brought into force in England at the same time as Part 3, on 1 October 2007²³. Accordingly, when we refer in this impact assessment to ‘Part 1’, we therefore do not mean to include sections 16 and 17.

Implementing the 2006 Act

2.14 Part 1 has the purpose of improving the commons registers to achieve a comprehensive current record of commons and greens so that they are protected and fulfil their potential.

2.15 If no steps are taken to address the present defective registers then the accuracy of the registers will decline further, and some stakeholders would be denied a legitimate and much-needed opportunity to correct past mistakes. There is a widely held view, established in previous consultation exercises, that the 1965 Act needs to be overhauled. Under the 2006 Act, revalidated and more accurate registers will preserve and protect the extent of common land and town or village greens in England and Wales and aid efforts to improve the agricultural management of common land.

2.16 The provisions of Part 1 do not come into force until one or more commencement orders are made for that purpose by the Secretary of State. In theory, therefore, it is possible to defer (possibly indefinitely) the implementation of Part 1. However, we do not consider a ‘do nothing’ approach is viable because:

- Parliament has debated and approved the 2006 Act, and expects it to be implemented without unnecessary delay;
- three commencement orders have already been made, bringing into force (in particular) section 15 on an interim basis, so it is no longer possible to ‘do nothing’;
- the commons registers are significantly out of date and the existing legislation would permit further deterioration — so ‘do nothing’ would perpetuate the present decline in the quality of information available.

2.17 Moreover, the purpose of this impact assessment is to measure the marginal impact of making regulations to implement Part 1 in the form in which they are adopted for the purposes of the pilot implementation. Measurement of the impact of those regulations against a baseline position of ‘do nothing’ would bundle together the impact of both the regulations, and the effect of the underlying legislation in Part 1 of the 2006 Act. An assessment of the impact of the legislation itself is available in

²³ The Commons Act 2006 (Commencement No. 3, Transitional Provisions and Savings) (England) Order 2007 (SI 2007/2584): www.opsi.gov.uk/si/si2007/20072584.htm.

the regulatory impact assessment prepared to accompany the Commons Bill on introduction to Parliament²⁴.

2.18 Accordingly, this impact assessment does not adopt a baseline position of 'do nothing'. Instead, the assessment sets out two options for implementation, a baseline position of minimal regulation and a preferred option of full regulatory implementation:

- **baseline:** implementation of Part 1 with no or minimal regulation (where Part 1 does not enable a provision to be implemented without regulations, then the baseline assumes that the minimum necessary regulations are adopted);
- **preferred:** implementation of Part 1 with regulations to enable the efficient management of processes introduced under that Part (e.g. such regulations ensure that there is reasonable certainty about making applications under Part 1, and that such applications, when received, are disposed of fairly and promptly).

2.19 The impact of the preferred option is measured against the baseline position. So, for example, we look at the impact of prescribing procedures for an application under Part 1, compared with no prescribed requirements of procedure. However, it has not been practicable to measure the monetised costs of the preferred option against the baseline position, and the costs in this impact assessment relate to the costs of the pilot implementation of Part 1 measured against a 'do nothing' alternative (i.e. retaining the existing arrangements under the 1965 Act).

Pilot implementation

2.20 Our preferred approach to implementation is to bring Part 1 into force on a pilot basis in seven commons registration authority areas, in order to test and evaluate the implementation of the legislation, before proceeding to national implementation over a staged, three-year period, at a later date. This approach forms the basis of the pilot implementation described in this impact assessment.

2.21 The pilot scheme will begin in October 2008, generally concluding in September 2009, except in areas where achievement within the timescale proves impracticable, where the transitional period may continue for up to a further year. The pilot area registration authorities comprise:

- Devon County Council
- Cornwall County Council
- Lancashire County Council
- Hertfordshire County Council
- County of Herefordshire District Council
- Kent County Council
- Blackburn with Darwen Borough Council

2.22 Review of the pilot will be used to inform implementation in the rest of the country. Our present plans, which are subject to adjustment in the light of the pilot review, are to implement part 1 in three stages across England, on a region-by-region basis, as follows:

²⁴ *Commons Bill: Final Regulatory Impact Assessment*, Defra, 2006: www.defra.gov.uk/wildlife-countryside/issues/common/commonbill/index.htm.

- October 2010–September 2011: Area 1 — South East, South West, East Of England, London (comprising 101,948 ha registered common land, 2,265 town or village greens)
- October 2011–September 2012: Area 2 — West Midlands, North West (comprising 141,353 ha registered common land, 752 town or village greens)
- October 2012–September 2013: Area 3 — East Midlands, Yorkshire and the Humber, North East (comprising 130,193 ha registered common land, 1,353 town or village greens)

2.23 In general, the transitional period in each stage would last one year, but, as in the pilot, it is possible that further time may be required in registration authority areas with many commons or greens (the pilot will also help inform to what extent further time may be necessary).

2.24 But the pilot authorities' roles do not come to an end at the end of the transitional period (expected to be September 2009). At that date, pilot authorities will continue to manage their commons registers under Part 1 of the 2006 Act, and will remain open to applications to amend the register to reflect contemporary changes (and will remain open until at least 2017 to applications to deregister wrongly registered land, and to register mistakenly excluded land). Registration authorities will continue to receive funding, where necessary, to the extent that these continuing duties bring with them new burdens, the cost of which is not defrayed by fees or existing funding.

2.25 An alternative approach to implementation would bring the whole of Part 1 into force throughout England on a uniform date. If this approach were adopted, there would be no pilot implementation: instead, all of Part 1 would come into force throughout England on the same date. This would mean that the benefits of a pilot, in terms of testing the procedures and guidance on a small scale, and modifying them before proceeding with staged national implementation, would be lost. Registration authorities, and others, would be unable to learn from the experience of pilot participants. Any difficulties or problems identified in arrangements for implementation would be felt throughout the country, rather than confined to a small number of pilots. Regulations and guidance would need to work 'out of the box'. A uniform implementation would also give rise to very high transitional costs during the first year or two, during the transitional period, particularly affecting registration authorities (these costs would need to be defrayed by Government).

2.26 But a uniform national implementation would ensure that the benefits of Part 1 were made available equally throughout the country at the same time, ensuring (for example) that owners of wrongly registered common land in certain parts of the country do not feel disadvantaged by any delay in their ability to apply for rectification of the register. Nevertheless, we rejected this approach, as being too high risk and potentially too costly without the supporting cost data which the pilot implementation is designed to deliver. In order to enable early application to deregister certain wrongly registered common land, we are minded to enable applications to be made throughout England under paragraphs 6 and 8 of Schedule 2 to the 2006 Act from October 2009: a final decision will be made in spring 2009, in the light of experience of the first few months' implementation of the pilot.

Consultation

2.27 We consulted in June 2007 on options for implementation of Part 1, with a closing deadline of 28 September 2007 for responses. We received around 40 responses to the consultation, and published an analysis of responses, together with a commentary on the main issues arising, in January 2008²⁵, showing how consultees' responses had helped shaped emerging policy.

3 Options

3.1 This section of the impact assessment considers the impact of options for implementation of Part 1, grouped by the same themes as were used in the Part 1 consultation in 2007 (see paragraph 2.27 above). These themes comprise:

- A. Content of the registers
- B. Applications to amend the register under sections 6 to 15
- C. Severance
- D. Corrections to and rectification of the registers
- E. Electronic registers
- F. Transitional period
- G. The panel of inspectors

A. Content of the registers

3.2 Section 3 of the 2006 Act enables regulations to be made for the purpose of prescribing the content of the commons registers (e.g. the form in which information is to be held). The 2006 Act provides that the commons registers are to comprise the registers established under the 1965 Act, with any modifications subsequently made. And the 1965 Act registers were drafted on the basis of requirements set out in regulations made under that Act²⁶. Together, these regulations prescribe the form of the registers, the form of entries to be made in the registers, the notation to be used on register maps, and provision for notes to be made on the registers.

Baseline

3.3 It is not realistic to undo the regulatory regime established under the 1965 Act. So our baseline position is the retention (or re-enactment) of the 1965 Act regime, without significant amendment.

Preferred option

3.4 Our preferred option is to modify the arrangements under the 1965 Act, so as to provide for better labelling of the commons registers, and to incorporate provision for declarations of entitlement to rights of common. New regulations would also allow for constraints to be imposed on the right of access to see the registers and ancillary documents in section 20, and to seek copies of the register and ancillary documents in section 21.

²⁵ www.defra.gov.uk/wildlife-countryside/issues/common/registration/index.htm.

²⁶ The Commons Registration (General) Regulations 1966, the Commons Registration (Objections and Maps) Regulations 1968, and the Commons Registration (New Land) Regulations 1969 (SIs 1966/1471, 1968/989, 1969/1843 respectively). These regulations are no longer in print.

Impact

3.5 The baseline would retain the existing form of registers established under the 1965 Act. The preferred option would mean that the registers depart from the present familiar, well-understood format (but the present registers have various recognised defects).

3.6 The preferred option would enable modifications to enable declarations to be made of entitlements to rights of common. This would encourage commoners to identify, in the register, their 'ownership' of rights of common, avoiding the need for third parties interested in the register to make a separate reference to the Land Registry's register of title. Amending the format of the registers would allow for unnecessary or misleading elements in the registers to be removed or corrected.

3.7 The preferred option would, in relation to sections 20 and 21, help protect people's privacy, since regulations will allow for constraints on the release of personal information. It will also empower registration authorities to charge reasonable fees for the disclosure of official copies, so reducing the burden on registration authorities, and reducing the likelihood of abuse of an otherwise free service.

Impact summary (preferred option v. baseline)	
Benefits	Costs
<ul style="list-style-type: none">• declarations of entitlement ensure management agreements with commoners can be procured and administered more easily and more quickly, because there is greater certainty about entitlement to rights of common, leading to earlier and cheaper procurement of nature conservation benefits	<ul style="list-style-type: none">• commoners must complete application, supply evidence and pay fee to make declarations

A. Content of the registers — Example

Consider the following **illustrative example** (not a real one), of Blackacre common, which has 20 registered rights. Natural England wishes to conclude a management agreement with the active commoners.

Under our **baseline option**, there is considerable uncertainty about entitlement to exercise rights of common, because the register is out-of-date and there is no commoners' association. Natural England finds, of the 20 registered rights shown in the registers, 15 were registered by persons no longer farming in the area. In order to establish the precise entitlements to rights, Natural England maps the dominant tenements which the register shows the rights are attached to, and proceeds to identify the owners of the dominant tenements, by carrying out searches of the Land Registry (in relation to land whose ownership is registered), and by local inquiries (in relation to land whose ownership is not registered).

Under our **preferred option**, Natural England can refer to declarations of entitlement made in relation to registered rights. It finds that eight of the rights are accounted for by declarations.

Although, in both scenarios, Natural England must trace and establish entitlement in relation to at least some of the rights, the extent of research under the preferred option is significantly reduced, and the agreement can be concluded sooner.

B. Applications to amend the register under sections 6 to 15

3.8 The accuracy of the information contained in the registers is declining. This can be attributed partly to the fact that at present registration authorities are informed of events affecting the register after the event has taken place, if at all (e.g. a right held in gross has been sold and the authority only learns about the transaction afterwards). But that situation will change when Part 1 is commenced because changes affecting the register will be lawful only when shown in an amendment to the register.

3.9 Sections 6 to 15 make provision for different types of applications to be made to the registration authority, which can amend the commons registers where an application is granted. Under some provisions the registration authority can bring forward proposals to amend the register itself (effectively applying to itself). There are ten different types of application regime. For example under section 6 new rights of common can be registered; under section 10 a right held in gross may be attached to land; new town or village greens may be registered under section 15.

Baseline

3.10 The baseline for the application provisions is commencement without regulations. However, as section 15 has already been implemented on an interim basis, the existing regulatory framework for the registration of new town or village greens would be retained.

Preferred option

3.11 Our preferred option is to introduce regulated procedures for the purposes of applications and proposals under sections 6 to 15, to ensure that applicants, registration authorities and objectors follow a clear, logical and fair process towards a determination.

Impact

3.12 The preferred option will help avoid the confusion and inconsistency which would follow from an undefined application process. It will ensure that registration authorities receive applications which contain the information which they require: this will reduce the resources required by the applicant to complete the application (application less likely to be rejected), and required by the registration authority to determine the application (application likely to be complete and in good order).

3.13 The preferred option will also confer other benefits:

- a prescribed period of time for the submission of objections to applications will mean that objectors receive a fair opportunity to comment, but applications are not unnecessarily delayed;

- the registration authority will be able to charge fees for applications, ensuring that taxpayers do not fund applications which are generally for private benefit (fees will not generally be imposed for applications made in the public interest);
- provision will be made for determination by the Planning Inspectorate, and the holding hearings or inquiries, where an application ought not to be determined by the registration authority, because of a conflict of interest, or the complexity of the evidence;
- supplementary criteria will be prescribed to limit the right of application in certain cases, so that vexatious applications are not brought forward by third parties, which would otherwise need to be formally considered.

Impact summary (preferred option v. baseline)	
Benefits	Costs
<ul style="list-style-type: none"> • reduces cost to applicants and registration authorities in preparing application 	<ul style="list-style-type: none"> • legitimate applications deterred by perceived 'red tape' so potentially beneficial proposals are abandoned
<ul style="list-style-type: none"> • fairness in decision making process encourages people to make applications, so keeping transactions 'on-register', and ensuring registers become and remain effective tool for management of registered land 	<ul style="list-style-type: none"> • fees discourage applications, so that transactions continue to be made 'off-register' (but these will be of no legal effect)

B. Applications to amend the register under sections 6 to 15 — Example

Consider the following **illustrative example** (not a real one), of the owner of a common, Mrs G, who wishes to extinguish a right of common belonging to a commoner, Mr F. (Mrs G might want to do that in order to acquire greater control over the management of the common.)

Under our **baseline option**, Mrs G cannot obtain a form to complete, and must write to the registration authority. She does not know what information will be required, and employs a solicitor to deal with the registration. The solicitor is unfamiliar with the procedures, and fails to seek and include the consent of Mr F to the application. The registration authority has to write for further information. Mrs G and the registration authority incur additional costs, and the application takes four weeks to complete. There is no fee, so taxpayers must underwrite the cost of processing Mrs G's application.

Under our **preferred option**, Mrs G must complete a standard form which requires her to include in the form the information required to register the extinguishment (e.g. it includes Mr F's consent, the identification of the dominant tenement to which the right is attached, and a copy of the rights entry in the commons register). The form instructs her to check the council's website for the fee payable for the registration, which she does. Mrs G does not need a solicitor, as the form is reasonably straightforward. She sends off the form. The registration

authority receives it, and finds all the information it needs on the form. It considers the application, grants it and amends the register within seven days of receiving the application.

C. Severance

3.14 Schedule 1 to the 2006 Act enables regulations to be made:

- amplifying the requirements on Natural England or a commons council in giving notice of intention to acquire rights of common by severance (paragraph 1(3));
- to nominate commons management bodies as commons councils for certain purposes related to severed rights (paragraph 1(5));
- to regulate the registration of rights acquired by severance (paragraph 1(6));
- to enable the temporary letting of rights of common (paragraph 2); and
- to enable the permanent severance of rights of common (paragraph 3).

3.15 An order has already been made under paragraph 2 enabling the temporary letting of rights of common for (renewable) terms of up to two years²⁷.

Baseline

3.16 The baseline position is that no instrument is made under Schedule 1, except in relation to the temporary letting of rights of common, where the baseline would enable the current exemption for the temporary letting of rights of common to endure.

Preferred option

3.17 The preferred option is to employ the regulation making powers in Schedule 1 for the purposes described in paragraph 3.14 above.

Impact

3.18 The preferred option would enable reasonable exceptions to the prohibition on severance contained in section 9 of the 2006 Act, and temper the severity of an absolute prohibition. It would, in particular, enable certain statutory commons management body to be granted new powers to regulate severance, it would enable the existing exemption for the letting of rights of common to be tailored to local needs (e.g. where longer lets were desirable in the interests of long-term stock management, or conversely, where no letting is to be permitted in accordance with local traditional practice), and it would recognise the possibility of enabling permanent severance in localities where a good case could be made (such as the circumstances outlined in the consultation paper, proposal 30).

Impact summary (preferred option v. baseline)	
Benefits	Costs
<ul style="list-style-type: none"> • derogations to secure longer leases of rights enables continued investment in hefted flocks and consequential better management of upland commons for nature conservation and access 	<ul style="list-style-type: none"> • derogations to prohibit all leasing of rights causes economic loss to some commoners unable to let rights

²⁷ See The Commons (Severance of Rights) (England) Order 2006 (SI 2006/2145): www.opsi.gov.uk/si/si2006/20062145.htm.

- provision for permanent severance of rights enables commoners to secure economic return from separate disposal of rights

C. Severance — Example

Consider the following **illustrative example** (not a real one), of Blackacre common, in the North Pennines, which has long been grazed by traditionally hefted hill flocks. However, many commoners have withdrawn their flocks, and no longer wish to graze the common.

Under our **baseline option**, rights cannot be let for a period of more than two years at a time, and no farmer wishes to invest in hefting a flock given the uncertainty of whether the let will be renewed after two years. Continuing under-grazing of Blackacre common causes a further decline in nature conservation condition.

Under our **preferred option**, the commoners' associations for Blackacre common and neighbouring commons apply to the Secretary of State for a dispensation under paragraph 2 of Schedule 1 to enable the letting of rights of common for periods of up to ten years, renewably, so that rights can be let to third party farmers for sufficiently long periods to justify investment in re-hefting flocks on the common. Natural England agrees that Blackacre common is under-grazed, giving rise to failing nature conservation condition. An order is made for the purpose sought, and rights are duly let to two local farmers, not themselves entitled to rights of common, who introduce their own flocks to the common, and initially intensively manage the flocks to promote hefting patterns. The increased grazing helps restore Blackacre common to favourable condition.

D. Corrections to and rectification of the registers

3.19 Schedule 2 to the 2006 Act enables applications and proposals for rectification of the register to enable the deregistration of wrongly registered land, and the registration of land mistakenly omitted from registration under the 1965 Act. The criteria for registration and deregistration are set out in some detail, but regulations may be made (under section 24) regarding the process of application and determination, and in relation to paragraphs 2 and 3, regarding the specification of supplementary criteria for registration of land previously recognised as common land or green by statute.

Baseline

3.20 The baseline position is that no regulations are made regarding the process of application, or (where appropriate), the criteria to be adopted in determining an application.

Preferred option

3.21 Our preferred option is to introduce regulated procedures for the purposes of applications and proposals under Schedule 2, to ensure that applicants, registration authorities and objectors follow a clear, logical and fair process towards a

determination, and to prescribe appropriate additional criteria for applications under paragraphs 2 and 3 of that Schedule.

Impact

3.22 The impact would be similar to the position in relation to Applications to amend the register under sections 6 to 15. The specification of supplementary criteria in relation to paragraphs 2 and 3 will help to ensure that inappropriate land (such as land developed with homes) is not eligible for addition to the register, which would otherwise place the determining authority in a difficult position in being unable to refuse such applications notwithstanding the unfairness of the consequences.

Impact summary (preferred option v. baseline)	
Benefits	Costs
<ul style="list-style-type: none"> reduces cost to applicants and registration authorities in preparing application 	<ul style="list-style-type: none"> legitimate applications deterred by perceived 'red tape'
<ul style="list-style-type: none"> fairness in decision making process encourages people to make applications, so ensuring registers become and remain accurate and effective tool for management of registered land 	<ul style="list-style-type: none"> fees discourage applications, so that some landowners of wrongly registered land suffer continuing economic loss and blight (but in most cases, economic gain from application will exceed fees)
<ul style="list-style-type: none"> adoption of additional registration criteria under paragraphs 2 and 3 reduces economic loss to landowners caused by applications for registration of developed land 	<ul style="list-style-type: none"> adoption of additional registration criteria under paragraphs 2 and 3 discourages registration of otherwise eligible sites and fails to secure environmental protection of such sites

D. Corrections to and rectification of the registers — Example

Consider the following **illustrative example** (not a real one), of common land which was enrolled in a scheme of management (made under the Commons Act 1899) in 1902. Part of a small, isolated area of the common was used for a military encampment during the Second World War, and developed for commercial use subsequently. None of the isolated area of land was registered as common land under the 1965 Act.

Under our **baseline option**, an application is made under paragraph 2 to register the isolated area of land comprised in the scheme of management. The application must be granted for the whole of the area comprised in the application, and the commercial premises are registered as common land. The owners of the premises find it difficult to find a buyer when they wish to sell, because of the status of the land, and uncertainty about the impact of the scheme of management on the use of the land, and they are compelled to sell at a substantial discount to the previous value.

Under our **preferred option**, the same application is made. This causes concern to the owners of the developed land, because of the likely loss in value of the premises if the land is registered. However, regulations

made under paragraph 2(2)(d) provide that land is ineligible for registration if it is covered by a building or the curtilage of a building, and the application is granted with the exclusion of the land which is commercially developed.

E. Electronic registers

3.23 Section 25 of the 2006 Act provides for the creation of electronic registers of common land and town or village greens. Most public services and functions are now computerised and many are available through the internet to increase efficiency and make them more accessible.

Baseline

3.24 The baseline for section 25 is not to commence this provision, and not to make regulations amplifying the requirements for electronic registers. That would mean that commons registration authorities would be unable to adopt electronic registers as the statutory register.

Preferred option

3.25 Our preferred option is to commence section 25, and make regulations to enable registration authorities to adopt (at their discretion) the requirements of electronic registers. However, detailed regulations setting out the requirements of electronic registers, and permitting the conversion of registers from paper to electronic form, will not be made in time for the commencement of the pilot project, but will be made at a later date, pending the outcome of research into the form and content of electronic registers.

Impact

3.26 Enabling statutory electronic registers of common land will confer benefits for both registration authorities and their customers. For example, if the registers and register maps are available on the internet, it will largely remove the need for people who wish to inspect or enquire about the register to either visit the offices of the registration authority or to contact the registration officer.

3.27 Other benefits include reduction in the number of searches requiring the assistance of a registration officer, including the time it takes to conduct a search; easier preservation of data as no longer reliant on the condition of paper copy; easier and quicker data logging and retrieval; quicker to produce copies of the textual register and supplemental maps; improved accuracy and easier interpretation of information such as boundaries.

3.28 Additionally, digital versions of commons register maps may be viewed within a geographical information system (GIS) against a wide range of other data sets, including planning, nature conservation, land management. This greatly increases the value of the data to both the registration authority and others.

Impact summary (preferred option v. baseline)	
Benefits	Costs
<ul style="list-style-type: none"> more accessible registers enable wider dissemination of information contained in the registers, and so consequential greater likelihood of 	<ul style="list-style-type: none"> adoption of statutory electronic registers will impose additional transitional costs on registration authorities and stakeholders

land being protected from encroachment, development <i>etc.</i>	
<ul style="list-style-type: none"> • all-electronic searches enable quicker and cheaper responses, leading to more efficient property market (or less time wasted waiting for adverse response) 	
<ul style="list-style-type: none"> • greater accuracy of registers confers on public and local authorities greater confidence in asserting protected status of land, such as resisting encroachment, development <i>etc.</i> 	

E. Electronic registers — Example

Consider the following **illustrative example** (not a real one), of Borsetshire County Council's registers of common land and town or village greens. A firm of solicitors submit a search for Blackacre Leigh, enquiring on behalf of their clients whether the land is registered.

Under our **baseline option**, the search must be handled manually within the council, and an inspection made of the relevant register. The register itself is in a poor condition, owing to repeated handling, and there is a risk of the register map disintegrating. There is a three day delay in providing a response.

Under our **preferred option**, the council prepares a draft electronic register, consults on the draft, and confirms the draft register with amendments. Using the National Land Information Service (NLIS), the solicitors submit the search on-line, and a response is produced automatically by direct interaction between NLIS and the council's electronic register ('level 3'), and returned within a matter of hours.

F. Transitional period

3.29 Schedule 3 makes provision for updating the registers during a transitional period to capture events since 1970 which have not yet been registered. Regulations may be made setting out the duration of the transitional period, the procedure for applications to the registration authority and proposals by the authority, reviews and publicity by the registration authority, and the registration of out-of-time events.

Baseline

3.30 Were no regulations to be made under the Schedule, it would not be possible to capture in the registers events which had occurred since 1970, and one of the fundamental reforms intended by the 2006 Act could not be achieved. This would be contrary to the purposes of the new legislation, and therefore the baseline position must reflect an implied requirement to give effect to Schedule 3 in some form.

3.31 The baseline for Schedule 3 is to make 'minimalist' provision for regulations regarding the transitional period.

3.32 'Minimalist' provision would comprise:

- specification of beginning and end dates for the transitional period,
- authorisation for registration authorities to make the necessary amendments to their registers in consequence of any application or proposal;

but, no provision would be made for:

- the steps to be taken by a registration authority to carry out a review of information held, to publicise the review, and to invite the supply of further information;
- what is or is not to be regarded as severance (for the purposes of amending the register during the transitional period); or
- the amendment of registers after the close of the transitional period.

Preferred option

3.33 Our preferred option is to fully prescribe arrangements for the transitional period, for the purposes described in paragraph 3.29 above.

Impact

3.34 The preferred option ensures that the opportunities presented by the transitional period to update the commons registers are fully employed, so that there is maximum engagement with stakeholders. This will help to ensure the capture of the greatest possible number of unregistered events, and so ensure that the registers become accurate and reliable records, which can aid improved management of common land and greens.

3.35 The preferred option will also enable regulations to be made to reduce the likelihood of spurious registrations of severances of rights of common: this will ensure that most rights remain attached to land (the 2006 Act places strict controls on severance of rights, because this can cause management difficulties for common land where some right holders have no close contact with the common and those who manage it).

3.36 The option will also ensure that late applications may be made to amend the registers after the close of the transitional period, where the need for such an amendment has been overlooked, providing that the registration authority is satisfied that it would be fair to all parties to make the amendment 'out-of-time'.

Impact summary (preferred option v. baseline)	
Benefits	Costs
<ul style="list-style-type: none"> • stakeholders are able to register transitional events because of widespread prescribed publicity, so delivering accurate and reliable registers which promote improved management 	<ul style="list-style-type: none"> • transitional period review will impose higher cost on registration authorities because of higher standards
<ul style="list-style-type: none"> • new recreational opportunities following registration of exchange land by registration authorities as a result of following prescribed review procedures 	
<ul style="list-style-type: none"> • stakeholders are able to register out- 	

of-time events and so secure economic benefits which would otherwise be irretrievably lost	
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F. Transitional period — Example

Consider the following **illustrative example** (not a real one), of commons registration authority Borsetshire County Council, which begins its transitional period on 6 April 2008.

Two events are eligible for registration during the transitional period. First, Mr C owns Blackacre common, and agreed with commoner Miss S in 1989 that she should surrender her right of common in return for payment of £500.

Secondly, a portion of Blackacre common was acquired by the (then) Department of Transport in 1978 for a new road scheme.

Under our **baseline option**, there are few specific requirements on the council in relation to the transitional period, and it is not well publicised. Borsetshire council fails to undertake a thorough review of its registers, and the two events are not registered during the transitional period. Mr C finds that the right of common which he acquired in 1989 is revived, and that Miss S now seeks £2,000 to renew consent to the extinguishment of the right. And the public is unaware of the existence of the exchange land generated by the new road scheme on Blackacre Common, and so is unaware of the availability of that land for public recreation.

Under our **preferred option**, and in accordance with regulatory requirements, the council conducts widespread publicity for the transitional period, advertising in local newspapers, via parish councils, working with stakeholder representative organisations and amenity bodies, using the internet, etc. As a result, Mr C is well-informed about his opportunity to register the eligible events, and makes an application for that purpose before the cut-off date one year later. His application is granted, and the register is amended to show that the right is extinguished.

Borsetshire Council undertakes a review of its registers in accordance with regulations, and turns up the records relating to the new road scheme on Blackacre common. It also discovers that the land given in exchange for the taken common land was not registered at the time. It now makes a proposal to register the exchange land, which is granted. Consequently, new land is added to the register, which (on a later review of Natural England's access maps) is depicted on Ordnance Survey maps as access land, creating new recreational opportunities.

G. The panel of inspectors

3.37 Section 24(8) enables regulations to be made regarding the discharge of all or part of the functions of a commons registration authority in relation to any application under Part 1.

Baseline

3.38 The baseline position is to make no provision for applications to be inquired into or determined by an independent person appointed from a panel established at Defra's request.

Preferred option

3.39 The preferred option is for Defra to establish a panel of inspectors, as part of the Planning Inspectorate, to determine certain complex applications, and those in which the registration authority has an interest in the outcome which would call into question the authority's role in determining the matter.

Impact

3.40 The preferred option will ensure that certain applications under Part 1, particularly those which raise complex issues of law, or where the registration authority has an interest in the outcome, can be referred to an experienced person for inquiry and determination. This will help ensure that the applicant and objectors receive a fair and open hearing, and that a decision is taken by an impartial tribunal.

3.41 But there is no provision in legislation for charging a fee for the costs of an application incurred by the Planning Inspectorate, so these costs will fall entirely on Government, even though, in some cases, the application will lack any element of public interest (i.e. it will be made solely in the interests of the applicant).

Impact summary (preferred option v. baseline)	
Benefits	Costs
<ul style="list-style-type: none">stakeholders have confidence in decisions made on complex or controversial applications (social benefit)	<ul style="list-style-type: none">cost of determining applications falls on Government instead of applicant, even where no public interest in application
	<ul style="list-style-type: none">local authority role ousted in controversial cases, so diminishing authority's control over local circumstances

G. The panel of inspectors — Example

Consider the following **illustrative example** (not a real one), of an application to register a new village green in Borset-sub-chateau. The registration authority, Borsetshire County Council, receives 40 letters of support for the application, together with letter of objection from the landowner. The authority is part of a partnership committed to development of the site for affordable housing.

Under our **baseline option**, the authority decides to commission an independent barrister to inquire into the application. The inquiry costs the council £12,000, and the inspector's recommendation to refuse the application are accepted by the authority. However, because the authority is not seen as impartial, the applicant seeks a judicial review of the authority's decision. Although the judicial review fails, both parties face substantial legal costs.

Under our **preferred option**, the application is referred to the Planning Inspectorate, because the registration authority has an interest in the land. The Inspectorate hold a public inquiry before an experienced inspector, but the cost is £5,000 because the fee rate is lower. The inspector's determination to refuse the application is accepted by the applicant, because the inspector is recognised as impartial.

4 Administrative burdens and Impact Assessment

4.1 As we explain above, the pilot is specifically intended to generate improved cost data to help inform national implementation at a later date. Therefore, at this stage, data on cost impacts on Government and stakeholder organisations are limited, and must be treated with caution.

Impact on service users

4.2 Part 1 is intended to reduce the burden on service users. Previously, a person intending to vary, extinguish, create or otherwise amend a right of common needed to seek legal advice, so that a document (generally a deed) could be drawn up by a solicitor to achieve the intended effect. Good practice suggested that the effect of the deed should be reflected in an amendment to the commons registers on application to the registration authority, but this was often not done. Part 1 sweeps away this approach, introducing instead a one-stage application process to the registration authority, without the need for legal intervention. This will remove the need for the applicant to employ a solicitor in making an application, because there is no longer a requirement to draw up a legally binding document in advance of the application.

4.3 Some applicants may continue to use a solicitor, particular if their requirements are complex, or their applications are likely to be challenged by objectors. But the use of a solicitor will not be essential to the success of their application.

4.4 We have not attempted to quantify the saving accruing from a reduced reliance on legal support for applicants. This saving more properly accrues from the construction of Part 1, rather than the regulatory approach adopted in the pilot implementation.

4.5 The pilot implementation prescribes the steps to be taken by applicants. Regulations will not prescribe the form which must be used, but will require applicants to use a form which is supplied by the registration authority. This approach will reduce the burden on an applicant by specifying the information which he must disclose, so reducing uncertainty, and ensuring that the correct information is available to the registration authority when it receives the application. We expect to gather information about the time taken by applicants to complete applications as part of the pilot implementation, but initial exercises in completing application forms suggest this approach may impose a very small administrative burden on applicants: completing a typical application form may take less than one hour, provided all the relevant supporting documents are to hand (additional time will be taken if it is necessary, for example, to obtain copies of the relevant part of the register).

4.6 The applicant may also have to pay a fee for his application to the registration authority. A fee will not be charged in relation to applications which are

likely to be made in the public interest, nor for applications which relate to the registration during the transitional period of qualifying historic events which took place before commencement of Part 1. In particular, fees will not be charged for applications under:

- section 10 (attachment to land of rights held in gross);
- section 15 (registration of new town or village green);
- section 19(2)(a) (correction of register to include new land);
- Schedule 2, paragraphs 2–5 (registration of statutory land, waste land of the manor or transfer of land from commons register to greens register).

4.7 In other cases, where applications are presumed to be made in furtherance of the interests of the applicant, the registration authority will be able to charge the applicant a fee commensurate with the costs incurred by the registration authority in dealing with all applications of the same class. If the registration authority does not specify a fee for any particular class of applications, the default fee specified in Schedule 6 to the regulations will apply. The default fee is based on our estimate of the cost to registration authorities generally of processing applications of the same class, and is towards the lower end of the expected range of costs. In a typical case, we expect an application to cost between £50 and £200, but applications requiring the registration authority to advertise public notice in a local newspaper will cost substantially more, typically rising to £600 to £800. We expect the total value of fees raised by registration authorities to total about £50,000 per annum.

4.8 The requirement on applicants to pay a fee in respect of most classes of application will cause the cost of providing the service to fall on applicants. However, this is justified where (as will generally be the case), such applications generate a benefit to the applicant, or a person closely connected with him. For example, if the owner of a common agrees with a commoner to buy out the commoner's rights, the commoner may apply to the registration authority to have the rights removed from the register, and the owner of the common may agree to underwrite the costs of the application. In such a case, the benefit of the transaction accrues to the common owner, and it is fair that the applicant is required to pay the authority's average cost in registering the application (the applicant in turn recovers the fee from the common owner).

4.9 Applicants will also be required to send notice of their application to others with an interest in the application prescribed in regulations. These costs will generally be low, in the range £10 to £20, but the authority may, in certain cases, direct additional steps to be taken, such as advertising in a local newspaper (at the applicant's expense), or erecting the notice on site. Although we expect these powers to be exercised with discretion, where additional publicity is justified, the additional costs may be substantial, perhaps as high as £1,000.

Impact on local authorities

4.10 The most significant impact arising from the pilot implementation will be on the participating pilot registration authorities. Registration authorities are currently funded for their responsibilities under the 1965 Act, which includes the registration of new town or village greens, and to a very limited extent (particularly in upland areas) the registration of other amendments to the commons registers (such as the variation or extinguishment of rights) permitted under the 1965 Act.

4.11 Under Part 1, many applications will be supported by fees, which should be set at a level which will recover the authorities' costs in considering and determining the applications. registration authorities' responsibilities in dealing with such applications will therefore attract no new funding from Government.

4.12 However, some registration authorities' functions under Part 1 will not be supported by fees because:

- some applications are expected to be made in the public interest (e.g. an application to register waste land of the manor under paragraph 4 of Schedule 2), and so no fee is chargeable;
- some applications relate to events which took place prior to the transitional period, and it would be unfair to impose charges to register events which have already taken place;
- authorities need to train and prepare for their new functions;
- special duties are imposed on authorities during the transitional period to research the need for amendments to the registers, leading to proposals which the authority must fund itself.

4.13 Defra is providing approximately £0.216 million of additional funding to the seven pilot registration authorities to meet new burdens during the first year of the transitional period (October 2008–September 2009), with a commitment to continuation funding in subsequent years to reflect the costs of determining applications which will not attract fees. This funding has been agreed with the registration authorities. It is based on an estimate of the cost (including overheads) of the pilot to a large template registration authority: to apply the template costs to other registration authorities participating in the pilot, multipliers have been agreed to reduce the cost to a level commensurate with expectations of the level of activity in generating applications and proposals consistent with the authorities' extent of registered common land and town or village greens. The cost to the large template registration authority during the first year of the transitional period is estimated to be £48k. Activity levels for the purposes of applications have also been estimated, again in relation to a large template registration authority. The estimated costs and activity levels are as follows:

Table of estimated costs and activity not funded by fees in large template registration authority, in year one (the transitional period)		
Activity	Est. cost	Est. no. of applications and proposals
Training	£5k	
Publicity for transitional period	£4k	
Applications and proposals under Schedule 3	£11k	61
Review and research	£3k	
Rectification (paragraphs 2–5 of Schedule 2)	£16k	13
Section 19	£7k	14
Applications under sections 10 and 15(8) (no fee)	£1k	4
Total	£48k	

4.14 Costs to registration authorities of dealing with individual applications are based on an analysis of time spent by officers at relevant grades: for example, the calculation of the cost of registering an extinguishment of rights of common was derived as follows:

Specimen costs for registration of extinguishment of rights under paragraph 2(2)(b) of Schedule 3			
Activity	Hourly rate/cost	Hours	Total
Publish notices website etc.	£25.00		£25
Admin. – registration officer	£20.25	3	£61
Admin. – registration manager	£35.00	1	£35
Legal officer	£67.00	0.5	£34
Total			£155

Although the cost to registration authorities will vary, depending on the type of application, the above example is considered to be representative of straightforward applications where there is limited scope for objection and the application may be determined without the need for a hearing or inquiry.

4.15 We estimate that the cost of applications under sections 6 to 14 (for which purposes, a registration authority may charge the applicant a fee) will range from around £50 to £200, based on cost calculations similar to those shown in paragraph 4.14 above. Some applications will be more costly where notice of application must

be published in a newspaper, where objections are likely to be received, or where a hearing or inquiry must be held into the application. However, most such applications will be of a kind which the registration authority must refer to the Planning Inspectorate for determination, and the costs subsequent to referral will fall on the Government and not on the registration authority. For example, we estimate that the costs to a registration authority of an application under paragraph 4 of Schedule 2 (registration of waste land of the manor) will be around £800, which includes the cost of placing a notice in a local newspaper, but does not include the cost to the Planning Inspectorate of inquiring into the application and reaching a determination.

4.16 The volume of applications expected to be made under sections 6 to 14 has been based on the activity in relation to a large template registration authority. The estimated costs and activity levels are as follows:

Specimen costs and activity levels per annum for applications funded by fees in large template registration authority		
Activity	Est. cost	Est. no. of applications and proposals
Section 6 (creation)	£137	1
Section 8 (apportionment)	£157	15
Section 12 (transfer of rights in gross)	£63	10
Section 13 (surrender)	£117	6

4.17 The high uncertainty associated with these cost estimates means that there is a significant risk that the actual costs imposed on the participating pilot authorities will vary from the estimated costs which (insofar as they represent new burdens) are being funded by Government. As explained in paragraph 5.2 below, there is some flexibility to accommodate such variance. Moreover, we believe that the risk is greater on the downside than the upside — i.e. that the likelihood is that costs will prove lower than the estimates.

4.18 The fee charged by a registration authority for an application under Part 1 will depend on its calculation of its own costs in relation to processing applications of that class, and may differ from the amounts shown above. Moreover, the fees specified in regulations as the default fee for any particular purpose (see paragraph 4.7 above) are less than those set out above, in order to ensure that the default fees do not exceed the costs likely to be incurred by the majority of registration authorities.

Impact on Government

4.19 Defra will fund the new burdens on registration authorities arising from the implementation of Part 1 in the pilot implementation areas. Defra will also fund the Planning Inspectorate to deal with applications referred to it by registration authorities. Initial costs to the Inspectorate are expected to be around £100,000 in the transitional year of the pilot, declining to £50,000 per annum thereafter.

Impact on Admin Burdens Baseline

4.20 The total estimated increase in ongoing administrative burdens as a result of this pilot is £100,000 per annum, made up of £50,000 to local authorities and £50,000 to the Planning Inspectorate. For the purposes of comparison with the administrative burdens baseline set in 2005, these costs should be deflated to 2005 prices using the Treasury GDP deflator. Using this these costs are equivalent to a £92,000 annual increase in admin burdens in 2005 prices.

5 Risk, uncertainty and unintended consequences

Risk

5.1 Implementing Part 1 on a pilot basis generally reduces the risk associated with implementation, because the provisions will be tested in a confined and more benign environment, before being rolled out nationally at a later date. Insofar as anything may not go as planned, the impact should be limited by virtue of the scale of the pilot, and adjustments to the implementation arrangements may be made before subsequent national implementation.

5.2 But there are risks associated with this approach: particularly that—

- Costs of the pilot exceed expectations: full appraisal and review of costs during the pilot may bring with it the conclusion that the costs of implementation, projected forward on a national scale, are too high to be sustainable. We assess the risk of this outcome as low, because the cost estimates outlined in this impact assessment make generous provision for the expected level of activity. However, contingency arrangements could allow a longer timetable for national implementation, so reducing the annual cost. Alternatively, costs may be lower than forecast, but registration authorities will be able to employ slack resources in other areas (e.g. improving mapping of dominant tenements in preparation for conversion of registers to electronic form).
- We lose stakeholder engagement because of the drawn out timetable for implementation. To help stop this happening, we will seek to keep stakeholders at a national level engaged in the pilot scheme, and give particular attention to the needs of pilot registration authorities. We assess the risk of this outcome as low, having regard to the adopted timetable for implementation.
- There is confusion among stakeholders, because pilot authorities are operating under different legislation to other registration authorities. We assess the likelihood of this outcome as medium, but the impact as low. We will continue to offer advice to stakeholders to resolve any difficulties arising.
- Pilot authorities pull out owing to insufficient certainty about their role, guidance, legislation, funding, etc. However, we will work closely with pilot authorities, and other stakeholders, to minimise the risk and impact. We assess the risk of this outcome as medium, having regard to the adopted timetable for implementation. Two registration authorities, initially proposed as pilot authorities, decided not to participate in the pilot, but their withdrawal was not reported as attributable to insufficient certainty about their role. If further authorities withdraw, the pilot will continue with fewer participants, but

the quality of the data on costs and activity levels will diminish in consequence.

5.3 Moreover, although the pilot implementation is on a smaller scale than an immediate national implementation, it extends to eight registration authorities' areas covering 67,000 hectares of registered common land and over 500 registered town or village greens. So while the effect of any difficulties encountered during the pilot implementation will be limited in extent, they may nevertheless cause real problems. We will be prepared to issue revised guidance or, if necessary, make amending regulations, where appropriate.

Uncertainty

5.4 The pilot project is also subject to considerable uncertainties, including:

- the cost to registration authorities of managing the transitional period;
- the level of application activity (both during transitional period and subsequently);
- the cost of processing applications (many applications are intended to be self-funding, but Defra cannot recover the costs of hearings and public inquiries held by the Planning Inspectorate from local authorities, applicants or others);
- the cost of converting to electronic registers (conversion is not essential to implementation, but even if conversion is optional, authorities will only be able to convert if appropriate funding is available); and
- the relationship between the character of each authority and likely costs (*e.g.* it is very unlikely that costs will be directly related to the area of registered land in an authority's area, and we need to identify better proxies in order to use cost data from the pilot to project the costs for national implementation).

However, it is the role of the pilot to provide answers to many of these questions, and in Defra's views, such questions are better raised and resolved in a pilot scheme, than on the much larger stage of national implementation.

Unintended consequences

5.5 Any project involving complex reforms and engaging with a wide range of stakeholders is likely to generate unintended consequences. Again, the adoption of a pilot should assist in minimising those which do arise.

5.6 Some unintended consequences can be foreseen, and mitigated where possible. For example:

- imposition of fees in relation to applications may deter commoners and others from registering events affecting the registers (but because such events can no longer have legal effect without registration, the deterrence is likely to be limited in effect);
- conversion to electronic registers will facilitate inspection of registers by end users, and reduce registration authorities' income from search fees (but greater awareness may actually increase the number of searches sought);
- restrictive rules on temporary letting of rights of common may discourage continuing grazing of commons (but prescribed exceptions will help promote flexibility).

6 Implementation

6.1 Pilot implementation is consistent with the principles of better regulation²⁸. For example, the National Audit (NAO) reported on the (then) Countryside Agency's work in implementing the statutory right of access to the countryside under Part I of the Countryside and Rights of Way Act 2000²⁹, a project which, in terms of complexities involving the digitising of maps of registered common land, and consulting on such maps, has some similarities with the implementation of Part 1 of the 2006 Act. The NAO was critical of: "The absence of pilot testing, ... [which], contributed to an underestimate of the work involved."

6.2 Our intention is to build our cost/benefit and quantification of activity data through experience of the pilot implementation, and to present a full impact assessment in anticipation of national roll-out at a later date. Review of the pilot will be used to inform implementation in the rest of the country.

6.3 There will be a spread of pilot authorities, differing in size, amount of common land and number of town or village greens and experience of commons registration work.

6.4 Defra's intention is that the pilot implementation of Part 1 during 2008–09 will greatly improve our and stakeholders' understanding of the costs and benefits of implementation, and will enable subsequently a more accurately targeted and funded national implementation of the provisions. Defra intends to review the pilot implementation and prepare a thorough impact assessment before proceeding to national implementation in 2010–11 onwards.

6.5 However, the corollary is that objective cost data in relation to the pilot implementation are scarce, because it is the purpose of the pilot itself to deliver reliable cost data. Consequently, this impact assessment lacks some of the clear data on costs and benefits which we expect to be able to publish following the review of the pilot implementation, as part of the impact assessment for full national roll-out from 2010 onwards.

7 Enforcement, sanctions and monitoring

7.1 There are no specific enforcement powers provided in Part 1 as it confers administrative functions. Moreover, because Part 1 causes events affecting the registers to be of no legal effect unless duly registered, the provisions are in part self-enforcing. For example, if a commoner agrees with the owner of a common to extinguish his right of common (perhaps in return for payment), but the extinguishment is left unrecorded in the commons register, the commoner will be free to continue to exercise the right, until one of the parties applies to amend the register — so the owner will be greatly encouraged to secure prompt registration.

7.2 Where parties overlook, or seek to evade, the need for registration, an event affecting the commons registers may go unrecorded for some years. However, the event will not be effective in law, and it is likely that the position will need to be rectified at a later date when the omission comes to light — for example, on the sale of land — and it is possible that the registration authority may at that stage refuse to

²⁸ See the report of the Better Regulation Task Force, "Regulation — less is more", annex F, paragraphs 13 & 14: www.brc.gov.uk/upload/assets/www.brc.gov.uk/lessismore.pdf.

²⁹ "The right of access to open countryside", NAO, June 2006: www.nao.org.uk/pn/05-06/05061046.htm.

make the amendment sought, or make a different amendment, to different effect from that sought.

7.3 Registration is a function undertaken by local authorities, and insofar as a local authority fails or is ineffective, a complaint of maladministration may be addressed to the local government ombudsman. In exceptional cases, the failure of a registration authority to carry out its functions may be challenged by judicial review (a number of such cases have been brought before the courts in relation to the registration — or failure to register — land as a new town or village green), and the court may impose appropriate remedies (for example, to quash a decision made by a registration authority, and require the registration authority to determine the matter afresh).

7.4 During the pilot implementation, registration authorities will be required to implement and record data relevant to each provision in Part 1. The data will be analysed, alongside discussions with pilot authorities, to determine both the effectiveness and cost of implementing the Part 1 provisions. The data from the pilots will help us understand and quantify the benefits arising from Part 1 implementation, whether we need to amend the provisions employed in the pilot, and how much it will cost to roll-out Part 1 nationally. These data from the pilots will be used as the basis for the impact assessment accompanying the national implementation of Part 1 at a later date.

7.5 The additional data mentioned in the preceding paragraph are likely to include the following:

- Monitoring data from pilot authorities including number of each type of application (new rights, variation, transfer *etc.*); number of successful/unsuccessful applications; number of hours spent dealing with applications. Each of the above will give a breakdown of the time spent by each person, including their grade, to give an accurate cost.
- Data from randomly selected applicants, including how long it took to prepare their application; whether legal (or other) advice was sought and how much it cost; satisfaction with the service provided by the registration authority.
- Analysis of a survey conducted with registration authorities on the level of activity concerning the registration of greens following the interim commencement of section 15 of the 2006 Act.
- Face to face meetings with commoners' associations to gauge impact of Part 1 provisions on agricultural activity.
- Discussion with local and national bodies to determine impact of implementation of Part 1 on management and enjoyment of registered land (for example, does the availability of improved information about entitlement to rights of common confer greater confidence in proposing new management measures, or safeguarding the value commons into the future?).
- Any relevant data supplied by respondents to consultation.
- Data collected in respect of applications referred to the Planning Inspectorate.

8 Specific Impact Test Outcomes

Legal Aid

8.1 The pilot implementation does not create new criminal sanctions or civil penalties, and therefore does not give rise to a potential call on legal aid: Part 1 is intended to be self-enforcing. Occasionally, applications under Part 1 (whether granted or refused) may, as now, give rise to challenge in the courts through judicial review, which may attract legal aid, but the likelihood of challenge is unlikely to be predicated on the content of the regulations, and the frequency of challenge is expected to be unchanged compared to the present level of activity. The provision for applications in which the registration authority has an interest to be referred to the Planning Inspectorate should reduce the likelihood of challenge to decisions previously taken by the authority itself.

Carbon Impact Assessment

8.2 The pilot implementation will have no significant effect on carbon emissions, as the functions under Part 1 are generally administrative in nature. There may be some small effects at the margins (for example, in terms of making commons registers more accessible on-line), but the overall impact is unlikely to change significantly. Better quality registers will help promote improved management of commons, which may in turn help preserve upland commons as important media for carbon sequestration: however, the cause and effect are insufficiently connected to be quantifiable.

Other Environmental Issues

8.3 The pilot implementation has no direct implications in relation to climate change, waste management, landscapes, water and floods, habitat and wildlife or noise pollution. However, updated and accessible registers will underpin measures to improve the management of common land to help achieve the Governments intermediate outcome to render 95% of designated sites of special scientific interest (SSSIs) in favourable condition by 2010, by creating greater certainty in relation to the management of SSSIs which are registered as common land and green.

Health Impact Assessment

8.4 The pilot implementation will not directly impact on health or well being and will not result in health inequalities.

Race/Disability/Gender

8.5 There are no limitations on meeting the requirements of the pilot implementation on the grounds of race, disability or gender. The pilot implementation does not impose any restriction or involve any requirement which a person of a particular racial background, disability or gender would find difficult to comply with. Conditions apply equally to all individuals and businesses involved in the activities covered by the pilot implementation.

Human Rights

8.6 The pilot implementation has been developed so as to conform with the Human Rights Act 1998.

Rural Proofing

8.7 The majority of common land and town or village greens, and therefore the rights exercisable over such land, are located in rural areas, and that pattern is equally apparent in the pilot areas. The effect of implementation is therefore skewed so as to have a disproportionate impact in rural areas, but the impact is expected to be positive and beneficial.

Competition

8.8 To determine whether a proposal will have a significant impact on competition, the following four questions must be addressed in the competition assessment. The retention of a commons registration system does, in effect, maintain a requirement for registration 'procurement' from a single supplier, the registration authority, but this is not a consequence of the preferred option for implementation of Part 1, and the retention of local authorities' role in this context is not within the scope of the competition assessment.

A. Directly limit the number or range of suppliers?

This is likely to be the case if the proposal involves:

- the award of exclusive rights to supply, or
- procurement from a single supplier or restricted group of suppliers, or
- the creation of a form of licensing scheme, or
- a fixed limit (quota) on the number of suppliers.

8.9 Conclusion: no effect as impact not relevant.

B. Indirectly limit the number or range of suppliers?

This is likely to be the case if the proposal significantly raises the costs:

- of new suppliers relative to existing suppliers,
- of some existing suppliers relative to others, or
- of entering or exiting an affected market.

8.10 Conclusion: no effect as impact not relevant.

C. Limit the ability of suppliers to compete?

This is likely to be the case if the proposal:

- controls or substantially influences
 - the price(s) a supplier may charge
 - the characteristics of the product(s) supplied, for example by setting minimum quality standards
- limits the scope for innovation to introduce new products or supply existing products in new ways,
- limits the sales channels a supplier can use, or the geographic area in which a supplier can operate,
- substantially restricts the ability of suppliers to advertise their products, or
- limits the suppliers' freedoms to organise their own production processes or their choice of organisational form.

8.11 Conclusion: no effect as impact not relevant.

D. Reduce suppliers' incentives to compete vigorously?

This may be the case where a proposal:

- exempts suppliers from general competition law,
- introduces or amends intellectual property regime,
- requires or encourages the exchange between suppliers, or publication, of information on prices, costs, sales or outputs, or
- increases the costs to customers of switching between suppliers.

8.12 Conclusion: no effect as impact not relevant.

8.13 Overall impact: none.

9 Average annual cost per organisation by size

9.1 The nature of the commons registers is such that few people or bodies (other than registration authorities) will have any contact with the registers in a given year. Even in relation to those owning common land, or entitled to rights of common, few will need to apply to amend the registers, even within a lifetime. The incidence will be slightly higher in relation to rights of common held in gross, because Part 1 requires every transfer of the rights to be registered: even so, the burden of registration will only fall on the owner at the time of his purchase of the rights, and the registration will remain valid while he remains the owner (unless he changes his address).

9.2 So the impact of implementation of Part 1 will be negligible in relation to most stakeholders (and zero in relation to the public as a whole), except on the rare occasions that a need for an application arises. In such cases, the applicant will face the following possible costs:

- the cost of completing the application and obtaining any necessary evidence (e.g. a copy of the relevant part of the commons registers);
- the cost of any professional advice (a solicitor will rarely be essential to an application, but applicants may sometimes seek legal or technical advice (e.g. in relation to an application under paragraph 6 of Schedule 2 to deregister land which is asserted to be part of the curtilage of a dwelling, the applicant may seek evidence from a surveyor that the land was at the relevant times curtilage);
- the cost of any fee;
- the cost of sending notices to prescribed persons (and in certain cases, otherwise publishing notices as directed by the registration authority).

Further information about these costs may be found at paragraph 4.2 above.

9.3 But as these costs will seldom fall on any individual on a regular basis, no average annual cost can be given for an organisation (whatever its size), because the value will be negligible. Therefore, a nil entry has been included in the Summary on page 2 in relation to the "Annual cost (£–£) per organisation".

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Why didn't the Commons Registration Act 1965 work?

1. The 1965 Act was intended to establish definitive registers of common land and town or village greens in England and Wales and to record details of rights of common. Commons registration authorities were appointed to draw up the registers.
2. Disputed registrations were referred to a legally-qualified Commons Commissioner (appointed under the 1965 Act) for determination, but unopposed provisional registrations became final automatically. The 1965 Act provided that, where land was eligible for registration under the Act (whether as common land or a town or village green), a failure to register it by 31 July 1970 resulted in the land being deemed not to be common land or a green after that date. Similarly, a failure to register rights of common which were eligible for registration caused the rights to be effectively extinguished after the same date.
3. In practice the task of establishing registers was complex and the 1965 Act proved to have deficiencies. For example, the provisional registration of some land was wrongly cancelled, and other common land was overlooked and never registered. Many greens became registered as common land. Some grazing rights were registered far in excess of the carrying capacity of the common. The scope for correcting errors was limited. Furthermore, many provisional registrations became final without any objections (because interested parties were not personally notified) and thus without independent appraisal of the claim made in the application. The Court of Appeal held that even where land had clearly been wrongly registered as common land, the Act was conclusive as to the registration of the land, and it was not possible to remove it from the register³⁰.
4. Moreover, although the 1965 Act made limited provision for amendments to be made to the registers consequent on events which occurred after 1970, there was no obligation on anybody to seek such amendments. Many events which in principle affected entries in the registers have not been registered, and the registers have become significantly out-of-date since 1970.
5. Yet the registers are widely relied upon as records of both the extent of registered common land and town or village greens, and the extent of rights exercisable over them. The registers are vital, because registered common land and greens are an important part of our national heritage, valued for their role in agriculture, recreation, landscape, nature conservation and archaeology. Owing to the problems which became apparent in the wake of implementation of the 1965 Act, described above, the registers are also unreliable. So, for example:
 - the registers do not show the effect of some legal changes which have not been registered (e.g. some motorways are still registered as common land);
 - the registers contain numerous mistakes or inconsistencies as to the precise boundary of registered land (this can have a profound effect on the affected

³⁰ *Corpus Christi College, Oxford v. Gloucestershire County Council* [1982] 3 All ER 995.

land, e.g. on the value of a dwelling which is partially registered as common land);

- the registers are uncertain as to who is entitled to exercise registered rights of common, and do not assist in identifying such persons;
 - the registers must be held in paper form, and cannot take advantage of GIS and database technology to deliver modern, accurate and accessible information.
6. These and other problems inhibit effective management of common land and, to a lesser extent, greens, to maximise public benefits. For example, uncertainty about the registration of a common (was it correctly registered? is part of the registration likely to be challenged? who is entitled to exercise the rights of common?) discourages investment of resources in improving management, if there is a fear of deregistration at a later date.
 7. The 1965 Act failed to provide answers to any of these problems. It was intended to fulfil a short-term objective of registering land and rights, and was not intended to provide a longer term solution. The 1965 Act explicitly refers to the likelihood of second-stage legislation. Unfortunately, such legislation was not brought forward until forty years later, in the Commons Act 2006.