

Research Briefing: Common Land



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Research Briefing: Common Land

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1. What is common land?

Common land is generally defined as land owned by one party over which another party has certain rights, such as the right to graze cattle. Contrary to widespread misconception, common land is not owned by the public. However, it may have a right of public access or the public may be allowed to use it.

Rights of common

Most commons are based on **ancient rights** that pre-date the established law. The exact rights that apply to individual commons may be documented but more often are based on long-held traditions.

Rights of commons can include:

- Grazing sheep or cattle (pasture);
- Taking peat or turf (turbary);
- Taking wood, gorse or furze (estovers);
- Taking of fish (piscary); and
- Eating of acorns or beechmast by pigs (pannage).

The people who are entitled to exercise these rights are called 'commoners'. Most rights of common are attached to the ownership or occupation of nearby land or dwellings, but these rights can also be in gross (held personally and not attached to land).

Rights of landowners

Owners of common land generally have the same rights as other landowners as long as they do not interfere with or impair someone's ability to exercise their rights of common. For example, if a commoner has grazing rights to someone's land, the landowner cannot erect a building on that land because it would reduce the amount of grazing land.

2. Common land in Wales

The **area of common land in Wales** amounts to about 175,000 ha, which equals 8.5% of the total land area. **Most common land (PDF 0.99MB)** is located in upland areas in mid and west Wales, in particular in the Brecon & Radnor constituency. Besides playing a vital role in agriculture, common land is valued for its contribution to the natural and cultural heritage of Wales, especially nature and habitat conservation. **About 40% (79,000 ha)** of Welsh commons are designated as Sites of Special Scientific Interest (SSSI) and 50% fall within the protected landscape of Wales. Most common land in Wales **is privately owned**. Other owners include traditional estates, the Crown Estate Commissioners, and the National Trust. Common land in Wales is normally registered under the **Commons Registration Act 1965**.

3. Changes to legislation on common land

Until the 1960s, the extent of common land was a matter of local knowledge and speculation. The **Commons Registration Act 1965** (partly still in force) required common land, town or village greens, and rights of common over such land, to be registered by commons registration authorities. Due to numerous inconsistencies and irregularities, a new Act was introduced in 2006, the **Commons Act 2006** (2006 Act). The 2006 Act is designed to remedy deficiencies of earlier legislation, to improve the protection of common land and to allow more sustainable management.

The 2006 Act has five parts:

- **Part 1 Registration:** Requires commons registration authorities (local authorities in Wales) to bring Commons registers up-to-date by recording past changes and correcting errors. It also allows for registers to be established in electronic format and provides a new process for registering town and village greens (greens);
- **Part 2 Management:** Makes provisions for the establishment of Commons Councils where commoners can form a council to make collective majority decisions on the management of common land. Commons councils could regulate and manage agricultural activities, vegetation, and the rights of common on that common land;
- **Part 3 Works:** Prohibits certain works from being carried out on certain types of common land without consent of the Welsh Ministers and sets out provisions for how consent can be obtained;

- **Part 4 Miscellaneous:** Provides local authorities with powers over unclaimed land, as well as powers to protect common land or greens subject to commons rights from unlawful interference. In addition, it provides the Welsh Government with powers to prevent unlawful agricultural activity on common land and abolishes certain archaic legislation; and
- **Part 5 Supplementary and General:** Contains powers to amend how other Acts apply to common land and greens, and to amend how other Acts which confer functions on the Welsh Ministers apply to common land and greens.

Implementation of the *Commons Act 2006* in Wales

The 2006 Act is an England and Wales Act but it delegates powers to the Welsh Ministers to introduce commencement orders to bring into effect the provisions of the Act. Wales implements the 2006 Act through a rolling programme. Substantial sections, such as those concerning restricted works on common land and the de-registration and exchange of common land, have already been brought into force. However, large sections concerning the management of common land and the registration of rights of common (except for severance of rights) have not been brought into effect yet. The Welsh Government **provides a detailed list of sections currently in force**. Some sections are in force only for the purpose of making regulations or providing guidance, and still await full commencement.

4. Registration of common land

The Welsh Government has **introduced provisions** for the amendment of registers and provides an **application procedure for correcting errors**.

At present, registers of common land including records of individual grazing rights and land ownership are kept in paper form by local authorities. The 2006 Act enables the Welsh Government to transfer paper registers into electronic registers. In a **Written Statement from February 2018**, the Cabinet Secretary for Energy, Planning and Rural Affairs announced that the transition is underway and should be completed by 2021.

As of May 2018, Wales is the only UK country setting up an electronic register of common land. England has not implemented the relevant section of the 2006 Act, and has not announced plans to do so.

5. Management of common land

According to a **report by the UK Government Department for Agriculture, Food and Rural Affairs (Defra)**, most common land in Wales is under agricultural management and grazed by livestock. Since there are typically several farmers entitled to graze the same common, management systems that coordinate land use have been in place for many centuries.

The way commons are managed today varies across commons. Part 2 of the 2006 Act includes provisions for the establishment of statutory commons councils where there is stakeholder support to do so, but the Welsh Government has yet to bring this part of the Act into force.

However, under the **Glastir Commons Scheme**, the Welsh Government has employed Commons Development Officers to support the establishment of commons/ grazing associations. These associations allow commoners to apply collectively for agri-environment funding. They have to consist of a minimum of 80% of the active graziers on the common and must have management responsibility for all areas entered into a Glastir common land contract. Under the contract, associations must commit to adopting one of two land management options. They have to either limit stocking levels, or agree to a closed winter period where no stock is allowed to graze on the common. Associations are also required to abide by a common land code.

As of May 2013, **147 common land element contracts** had been signed under Glastir. This equates to 48% of common land in Wales and is significantly higher than the 2% of common land covered under the predecessor scheme Tir Gofal.

6. Public access to common land

The Countryside and Rights of Way Act 2000 (CROW Act) extends public rights of access to all registered common land in England and Wales. This includes the 'right to roam' and allows for activities like walking, sightseeing, bird-watching and climbing. It does not allow for riding bicycles or horses, driving vehicles, camping, and a number of other activities that may damage the common land and its vegetation or disturb livestock or wildlife. In some circumstances, people who have to drive across a common to access their property may have a right to do so. The Welsh Government advises that landowners check which public access rights apply to their common.

7. Works on common land

Consent is required for any restricted works on common land. Restricted works are works that prevent or impede access to, or over, the land. This includes developments such as erecting fencing, constructing buildings and digging ditches, but also the resurfacing of land with tarmac and similar materials. Consent is required independently of who proposes the work (the owner, commoners, or another party). Further consents such as planning permission or building regulations approval may also be required.

Planning Inspectorate Wales is responsible for deciding on applications made on common land and greens. The Welsh Ministers generally have to consider any restricted works on registered common land. The 2006 Act states that in making their decision, the Welsh Ministers should take account of the interests of persons who have rights in relation to the land (e.g. commoners), neighbours of the land, as well as public interests. Public interests include nature conservation, conservation of landscape, protection of public rights of access and protection of archaeological interests.

The **Welsh Ministers have introduced regulations** specifying the procedures for applying for consent. The Welsh Government has published **guidance on making and assessing such applications**, and on **enforcement against unlawful works** on common land.

The 2006 Act provides for the Welsh Ministers to exempt certain works by Order from the prohibition. Although Wales has not made such an Order, the **Works on Common Land (Exemptions) (England) Order 2007** is in force in England.

Consent for the exchange and deregistration of registered common land

Under section 16 of the 2006 Act, owners of registered common land or greens can apply to have the land released from registration. If the 'release land' is more than 200 m², they must register 'replacement land' as common land or green at the same time. If the release land is smaller than 200 m², replacement land need not be provided.

8. Assembly business

Over the last few years, the topic of common land has featured in Assembly Business on a number of occasions.

In **Plenary on 8 May 2013**, the issue of stakeholder communication about the benefits of Glastir to commons was raised. The **Welsh Commons Forum** had previously expressed concerns that Glastir could lead to the destocking and under grazing of common land. It was stated that these concerns suggested that the Welsh Government needs to improve communication with key stakeholders.

The then Minister for Natural Resources and Food, Alun Davies, responded that the success of the Glastir Commons Scheme demonstrates that many people already understand the benefits of the programme, but admitted that further work on stakeholder communication is needed.

The potential risk of under grazing common land under Glastir was raised again in **Plenary on 5 February 2014**. Alun Davies responded that the issue had already been addressed in a Glastir consultation document published two weeks before the debate. In the **final consultation document**, the Welsh Government announced that a new Glastir scheme would be made available to support sustainable grazing on the affected common land. The document also announced the re-introduction of minimum grazing levels and more flexibility regarding upper stocking rates.

On 1 December 2015 Plenary discussed the removal of the TB testing exemption for common land. A previous exemption from pre-movement testing for movement to and from common land had been abolished as part of the 2016 Bovine TB eradication programme. It was questioned whether the additional work this imposes on farmers in pre-existing agreements was justified, especially since they might not have been aware of this when they signed the agreements. The then Deputy Minister for Farming and Food, Rebecca Evans, defended removing the exemption, saying that it conforms with requirements of the European Commission, and had already been implemented by Defra in the previous year. There is no exemption for pre-movement testing for common land in the **current TB eradication programme**.

In its **Planning (Wales) Bill Stage 1 Committee Report (PDF 582KB)** (January 2015), the Environment and Sustainability Committee recommended that the Minister should remove Section 50 from the Bill. Section 50 introduces provisions for the Welsh Ministers to set fees for applications to amend registers of common land and town or village greens. **The Bill passed** without the suggested change in May 2015. The power to make provisions about fees became **Section 54 of the Act**.

In its **[Fourth Assembly Legacy Report \(PDF 2.88MB\)](#)**, the Environment and Sustainability Committee stated that the longstanding problem of abandonment of ponies on Welsh common land requires further investigation. The Committee recommended further post-legislative scrutiny of the **[Control of Horses \(Wales\) Act 2014](#)**. In addition, it suggested that a future committee should consider the removal of an exemption from the equine identification and microchipping rules for ponies on some commons. The **[Equiventus Review of the Control of Horses \(Wales\) Act 2014 \(PDF 1.18MB\)](#)** (submitted in July 2017) recommends identifying a sustainable solution to the problem through collaborative working. In a **[written response](#)** in January 2018, the Welsh Government committed to working with local authorities to assess the scale of the problem and to identify solutions by encouraging collaboration between Welsh Government, landowners, welfare organisations, those with an interest in common land and local authorities.

In a **[Plenary debate on 1 February 2017](#)**, a lack of clarity regarding the protection and enforcement of rights of common was raised. The Cabinet Secretary for Energy, Planning and Rural Affairs, Lesley Griffiths, agreed to review the existing guidance and, if appropriate, issue a statement on the available support for protecting rights of common. As of June 2018, no statement has been issued.

In the **[Draft Budget 2018-19](#)**, the Welsh Government allocated £433,000 revenue budget in 2018-19 and £1.1 million capital budget for the next three years (2018-21) for the implementation of an electronic register for common land in Wales. In its **[scrutiny report \(PDF 341KB\)](#)**, the Climate Change, Environment and Rural Affairs Committee noted that the allocated capital budget has been transferred from the budget line for National Parks, removing the latter capital budget altogether. In light of these cuts, the Committee recommended that the Welsh Government should work with National Parks to explore ways for them to raise revenue, and that it should report on progress within six months.

9. Common land in other UK countries

Like Wales, England has implemented most parts of the 2006 Act (England had brought into force almost all sections by 2014). As of May 2018, Wales' and England's legal situation regarding common land is therefore largely identical, with the exception of the registration of rights of common. While England already has procedures in place for the selling and leasing of rights of common, the Welsh Government has announced that it will implement these sections only after the transition to electronic registers.

While almost all common land in England and Wales had to be registered under the 1965 Commons Registration Act and is now covered under the 2006 Act, the situation is less clear in other UK countries.

To date, Scotland has **no modern legislation** that formally identifies the extent of common land or clarifies rights with respect to common land. This is despite the fact that a significant area of Scottish land functions as common land by having multiple graziers or multiple grazing rights attached to it. According to **figures from the Foundation for Common Land**, around 592,000 ha, or 7%, of Scottish land is used in this way. To allow for better protection of common land, in 2016 the Scottish Land Reform Minister **invited the Scottish Land Commission** to review the ancient **Division of Commonties Act 1695**.

In Northern Ireland, common land is estimated to occupy a **relatively small land area** (36,390 ha, about 2.6% of total land area) and information on its legal status is sparse. According to a **2010 report by the Northern Ireland Law Commission (PDF 3.28MB)**, traditional rights for the shared use of common land by neighbouring farmers have largely disappeared, while some rights of shared ownership have survived.

10. Key Sources

- UK Government, [**The Commons Act 2006;**](#)
- UK Government, Defra, [**Agricultural management of common land in England and Wales;**](#)
- Welsh Government, [**Protection of common land;**](#)
- Welsh Government, [**Common land;**](#)
- Welsh Government, [**Glastir Commons;**](#)
- [**Foundation for Common Land;**](#)
- Foundation for Common Land, European Forum on Nature Conservation and Pastoralism & European Commission, [**State of commoning in Wales report \(PDF 7.83\);**](#) and
- Royal Society for the Protection of Birds (RSPB), [**The state of common land in Wales - an indicative study \(PDF 0.99MB\).**](#)