

CORRECTED MINUTES OF ORAL EVIDENCE

taken before the

MALVERN HILLS BILL COMMITTEE

PETITIONS AGAINST THE BILL

Wednesday, 11 March 2026 (Afternoon)

In Committee Room 2

PRESENT:

Lord Hope of Craighead (Chair)
Baroness Bakewell of Hardington Mandeville
Lord Evans of Guisborough
Lord Inglewood

FOR THE PROMOTER:

Jacqueline Lean, Counsel, Malvern Hills Conservators
Alastair Lewis, Roll A Parliamentary Agent

FOR THE PETITIONERS:

Barbara Wilkes

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(At 2.00 p.m.)

1. THE CHAIR: Good afternoon. This is the afternoon sitting of the select committee on the Malvern Hills Bill. We are looking this afternoon at a petition by Barbara Wilkes, who is here to present her case to us. We look forward to hearing from you.

Ms Barbara Wilkes

Evidence of Ms Wilkes

2. MS WILKES: Thank you, my Lord. I have taken advice a few days ago, after which I have added in an introduction and a conclusion. I have added these pages to the binder, so if the pages do not turn very well, I am sorry. It is because the binder was already bound.

3. I am grateful to your Lordships for the opportunity to present my petition to you today. I have identified specific areas of the proposed new Bill that add to the difficulties of being a practising commoner. I am, however, deeply concerned that, while I have made several objections to the Bill, I have not in any sense expressed properly my heartfelt feelings about the Bill or the fact I feel the conservators, as a body, have a deeply embedded lack of proper understanding of the true value of the commons under their jurisdiction. I would like to identify some of these.

4. The Malvern Hills and the appended commons represent a lasting and vitally important part of the living history of Worcestershire and neighbouring counties of Herefordshire and Gloucestershire, the area concerned being a tangible and living monument to the ancient systems of rural life, which has been part of rural England for centuries, a matter that is well understood by commoners and the residents who live there. At a time when so much effort is made to conserve important parts of our living history, I take a strong view that the common land and the way it is regulated and farmed occupy a special place that should not be tampered with, and the working commons should be allowed to continue to play their part in the retention of a proper understanding of our history.

5. In all of this, it is the commoners who should have control of the rights that they own and that they or their predecessors have bought and paid for. I would like to add that, while these rights remain in place, any question or action that allows their erosion or that

reduces their usefulness to commoners has the result of losing a valuable part of our history.

6. I live at Upper Orchard Cottage on Hollybed Common with one of my adult sons and his young family. My daughter and her family also live very close by. They both help with the sheep I graze on the common, fitting it in with their full-time jobs and families. It is intended that my property should eventually be inherited by my children, as they wish to continue this traditional way of life.

7. I have worked as a nurse for 49 years. I have recently retired. Having lived in Castlemorton for the last 47 years, I have always taken an interest in the local area, especially the commons, and have served as a parish councillor for 12 years. I currently sit on various committees which are involved with the commons—the CCA, the 4Cs, along with being part of the Castlemorton grazing scheme. I am not from a farming background, but common rights have played a large part in my life for many years, and I would like to think these rights will be protected, so in the future my own children and grandchildren, along with the future generations of other commoners, can continue to use the commons in the traditional way.

8. I have grazing rights, along with the rights of estovers, piscary and pannage, and currently graze a flock of Herdwick sheep all year round on the common. They move freely to other parts of CL9, including Coombe Green Common, which is not owned by the conservators. I hope to try to give your Lordships a picture of how our grazing rights are used now, and how the clauses I have petitioned against could affect these rights in the future.

9. The Malvern Hills Bill seems to have been rushed through. A lot of the concerns that have been raised by myself and others have been ignored or dismissed, or it has been suggested that we did not fully understand the proposals. The conservators have frequently said that the commoners are their first choice as graziers, but if not, they would license the grazing. It does not feel as if we are the first choice, as the clauses in this Bill do not seem to value the commoners in any way. Some of the clauses will make it easier for the conservators to go down the path of licensing the grazing, resulting in them having full control over how the commons are grazed rather than leaving it to the commoners who have been successfully looking after the commons for many years.

10. The Malvern Hills Bill contains new specific powers that diminish and regulate commoners' rights, and general powers that could be used for the same purpose. I object to these. I also object to the clauses that would give the conservators the power to fence the common, as this will greatly impact on the openness of this area and prevent the commoners from using their grazing rights. There is nothing in this Bill that even acknowledges the right of the commoners' livestock to graze freely, and there is nothing in any of the clauses to protect this traditional right of grazing.

11. I hope to be able to present my petition to your Lordships from a commoner's perspective, and so will concentrate on the fencing clauses, which I believe will greatly affect our grazing rights. In the filled Bill—this is Clause 48, fencing and other means of securing common land—the inclusion of “onto land which is not common land” does imply that the conservators wish to fence the perimeter of the common, which was what was inferred at the consultation meetings and in consultation documents.

12. However, the conservators have never given any explanation as to what they intend to do where their land borders other common land that they do not own. Coombe Green Common, which is owned by Birtsmorton Court, adjoins the conservators' land in two places. Back on page 1—it should really read “figure 1”—is a map, and it shows Coombe Green Common clearly. It is in the green at the bottom of the page. It is adjoining the conservators' land. On figure 2, it is the front page of the registry of common rights for CL9, and, although it is handwritten, it says “Castlemorton, Shady Bank, Hollybed and Coombe Green Common”. They are all part of CL9.

13. At one of the consultation meetings in 2024, I did ask if we could see a plan of where the perimeter fencing is likely to be. I was told that, as they did not know themselves, they were not in a position to produce a plan. Our common rights are for the whole of CL9, and our livestock should be allowed to continue to roam freely over the whole unit. My own flock of sheep do not just graze in one part of CL9, but come back each evening to their home area, which is Hollybed Common. They move off again in the morning, staying more or less together but grazing across the different commons. They seem to have set routes at different times of the year.

14. I chose Herdwicks as I thought they would do well on the common and be ideal for conservation grazing. My current flock are all descendants of the ewes I purchased 15

years ago, so apart from the rams, which I buy in, they will all have been born on the common and so they know their way around. They know where the ponds and streams are to access water and they know which hillocks or mounds to get behind to shelter from wind and rain, or where to go for shade in extreme heat. If the common were to be fenced, either permanently or temporarily, it will make it impossible for this way of grazing. This is why I am so concerned about the clauses that are seeking powers to fence the common, and I am concerned that they could limit and eventually extinguish our common rights.

15. I am also unhappy at the way the conservators have sometimes marketed this Bill by implying that a lot of these clauses have been put in place for the benefit of the commons. There is nothing in this Bill that protects our common rights.

16. THE CHAIR: Could I ask you to pause there and look back again at your quotation from Clause 48(1)? Is there some change in the wording there that would meet your point? It does say “fence common land” without any explanation as to what that means.

17. MS WILKES: Sorry, my Lord, which part?

18. THE CHAIR: You quote on the previous page Clause 48(1).

19. MS WILKES: This is from the actual Bill. It is from the filled Bill. The part I said that had been included, my Lord, was “onto land which is not common land”. That has been included in the filled Bill, which does imply that they do intend to fence the perimeter, but I am still concerned about fencing the perimeter—how that will affect Coombe Green Common and our rights to graze on the whole of CL9.

20. THE CHAIR: I may be rather simple-minded, but so long as it is confined to the perimeter, it does not interfere with the grazing within the area enclosed by the fence. Is your point that they need to be able to move beyond Hollybed Common to other areas?

21. MS WILKES: The conservators do not own Coombe Green Common, so they cannot fence the perimeter of Coombe Green Common. The sheep can freely move into Coombe Green Common, so, my Lord, basically they could just go off from Coombe Green down to the A roads and the B roads and the various roads that we were shown on the slides the other day.

22. THE CHAIR: Yes, which is undesirable, obviously.

23. MS WILKES: Yes. What my point was, my Lord, was the fact that we have not really had an explanation of how this will be averted.

24. THE CHAIR: Thank you.

25. LORD INGLEWOOD: Could I just ask a question arising from that? Given that they have said that they are not going to enclose the edge of a common where it abuts another common over which the same sheep can graze, what is your objection to fencing against enclosed land outside the common?

26. MS WILKES: Because they do not own Coombe Green Common, my Lord, they would not have the right to fence that in, so that is presumably going to be left open.

27. LORD INGLEWOOD: If they do not own it, they cannot fence on it without the owner's consent, can they?

28. MS WILKES: I presume not. I was concerned that they would actually fence their own common in, my Lord, and exclude Coombe Green.

29. LORD INGLEWOOD: Against Coombe Green Common, yes. I think they have said they are not going to do that.

30. MS WILKES: I watched yesterday's, my Lord, and I think it has been clarified, but I still was a little concerned.

31. THE CHAIR: Sorry I interrupted you, but it was helpful just to get this clarified.

32. MS WILKES: No, that is fine, my Lord. Clause 45 is "Regulation and prohibition of access to Malvern Hills". The conservators have said they do not want to take away our rights, but Clause 45 gives a number of situations when areas could be fenced, making it difficult or in some cases impossible to use our grazing rights. I think this was covered yesterday, but 45(3)—"as long as appears necessary"—could be interpreted to allow permanent fencing. 45(2)(b)—"for the protection or restoration of the natural beauty of the Malvern Hills or their suitability for grazing or recreation"—our animals should be allowed to graze freely without restriction. 45(2)(d)—"for the protection or preservation of flora and fauna or any site of special scientific interest"—most of Castlemorton Common is an SSSI, so potentially this could all be fenced off. Again, the map shows the

large, pinkish-coloured area at the top, which is all SSSI.

33. THE CHAIR: Yes.

34. MS WILKES: I am aware that Ms Lean said that Clause 45 gives a power to prevent access to the public, but not a power to prevent livestock. My only confusion here is, if the public are fenced out, I would imagine the animals will also be fenced out of an area. That was my concern about 45. I would like this clause to state, “The free movement of grazing animals across a common land unit cannot be limited or interfered with in any way”. This is to protect our rights for our animals to graze all of the common land unit. The promoter has said these sorts of powers already exist or find their footing in previous Acts, such as in Section 15 of the 1995 Act. This may be true, but unfortunately now the likelihood for impact on our common rights is far greater with this new Bill, as the conservators seem more intent on finding ways to be able to put up fencing on the Hills and commons.

35. I received a response to my petition at the end of December 2025 from the parliamentary agent, in which they referred to some petitioners’ concerns that powers in the Bill could potentially enable commercial or licensed grazing by MHT to interfere with the commoners’ rights. They also gave their response, which did not deny this.

36. The letter also stated, “There is a considerable area of common across the Malvern Hills where the commoners’ grazing rights have not been exercised for a considerable period”. Common rights should not be timed out just because they have not been used for a few years. Circumstances may change. Ownership of property may change. There could be numerous reasons why someone might not use their grazing rights for a few years.

37. The grazing licences currently granted by the conservators are for 10-year periods and can cover an entire common land unit. Therefore, they would interfere with the commoners’ rights. After a few years of the Malvern Hills Act 1995 coming into force, the free-grazing animals belonging to the commoners on the hills seem to have been replaced by licensed graziers who keep their livestock within fences. The common rights in this area appear to no longer exist because they cannot be used. If someone wanted to turn some livestock out into this part of the hills, they would not be able to graze that area due to the fencing.

38. In his presentation, the conservation manager commented that, should commoners with grazing rights want to turn their stock out, they could “shoo their animals into our electric compartments”. This shows how little the conservators understand the benefits of allowing the livestock to graze freely in open land with enough space for the different flocks or herds to keep apart.

39. The conservators have said they would only license out the grazing if there were no commoners grazing it, but there is nothing in the Bill to suggest that that is their true intention or that they wish to protect the commoners’ rights of grazing. I would like to see a clause written into this Bill to confirm that all active commoners of a CLU are included in any decisions to license out grazing for that unit.

40. There are also concerns that, when the conservators grant grazing licences to people living further away, there could be welfare issues, with either the grazier not being on hand to tend to the stock or the possible spread of disease by animals being brought in from other areas. These sorts of situations could also lead to problems with the commoners’ own livestock.

41. I am concerned that some of the proposed fencing clauses will provide more powers for the conservators to use commercial and licensed grazing to the interference with our rights.

42. THE CHAIR: Is it the case that the Trust do need to bring graziers in because not everybody is grazing the entirety of land that needs to be protected and enhanced? I am thinking of the problem that grass grows ungrazed and it blankets out flowers that otherwise appear in the course of a season and so on, so grazing itself is a good idea to keep the environment in its proper shape. Is it the case that there is a shortage of people grazing the land in the Malvern Hills just now?

43. MS WILKES: My Lord, my point was that if outside graziers are to be brought in, those with common rights and who are actively using them should be consulted and included in those sorts of decisions rather than just outside graziers brought in without our knowledge even. Thank you, my Lord.

44. Clause 7 gives the conservators the power to fence anywhere without notice, and so could prevent us from using our grazing rights. It is not that these clauses directly take

our common rights away; it is that they will make it difficult for us to use them, so that for commoners to graze animals in the traditional way might become impossible. I would like this clause to state that the free movement of grazing animals across a common land unit cannot be limited or interfered with in any way.

45. Then I have gone on to “Fencing: further powers”; that is, Clause 49. The conservators often speak of temporary fencing as a way of keeping livestock in, when any fencing is keeping commoners’ livestock out. The time limit does not need to be increased from the existing 28 days, and I would like to see the wording at 49(1)(b) changed. I would like to see it changed to, “That is common land, for a period not exceeding 28 days, if the Trust”, and then added, “and all active graziers with common rights registered for the common land unit in which the area for the proposed temporary fencing is situated”.

46. I know that sounds rather clumsily phrased. What I am suggesting is for all active commoners to be involved with all decisions regarding temporary fencing, but only in the common land unit that they have rights on. For example, CL12, which I think is one of the hills—if there was a discussion about fencing up there, I do not have rights for CL12 and, whether I agree with it or not, I do not think I have rights to be involved with decisions, whereas if there were discussions about fencing on CL9, I do think myself and other active graziers should be invited to be involved in those sorts of decisions. I am sorry; that sounds a bit muddled, my Lord, but that is what I was trying to get across.

47. THE CHAIR: This is your point on consultation, really, is it not?

48. MS WILKES: Yes, but only for the units we have rights on. I would not expect to have consultation on units where we do not have rights, my Lord.

49. THE CHAIR: Yes.

50. MS WILKES: The active commoners need to be consulted and included in any decisions to fence any part of the common, not only to ensure the powers are not used to limit or interfere with their rights, but because they are aware of the conditions of the specific grazing areas. There does not appear to be any limit on the area that could be fenced, which could result in the commoners’ livestock being fenced out of their natural grazing areas. If this was genuinely being undertaken for regulated grazing or target grazing, a maximum limit of one hectare is still an extremely large area.

51. In the consultation document, there was a proposal to include a clause for fencing areas of common land for up to 12 months for the purposes of animal health management. The conservators stated, “This has been requested by the graziers of Castlemorton Common”, which was incorrect. A lot of concerns were raised about this, and after various meetings, the conservators agreed to have this proposed clause removed. It was agreed that areas needing to be fenced for animal health reasons would be covered under existing Animal Health Acts or Defra rules.

52. At the conservators’ board meeting on 19 September 2024, it was resolved that the proposal to fence for animal health reasons be removed. There were 15 in favour, one against and one abstention. At the same meeting, one of the trustees stated that, in his opinion, the Trust would not propose a scheme that did not have the backing of the commoners. It now looks as if the added text is seeking the power to fence indefinitely in matters relating to animal health, so it seems the conservators have altered what had been agreed. I think that any circumstances regarding animal health would be covered by existing Animal Health Acts or Defra rules. I have put, “So I believe this clause should be removed”; I meant that I believe the subclauses (3)(a) and (b) should be removed.

53. Then I was just going to briefly mention Clause 83 and 65(1). Clause 83 sets out a general power to do any lawful thing to further its objects. This clause is just so open to being interpreted in ways that were never intended. I would like to see it removed.

54. I would like to see the general power in Clause 83 removed, and I would like Clause 65(1) to include wording that will prevent the conservators from having anything similar to a general power under a by-law. If the conservators were granted these powers, they could be used in ways to dilute, erode or even eradicate commoners’ rights. This could eventually lead to commoners like me being unable to use our existing rights, allowing the conservators to license the grazing to outside graziers under its power to do anything that is calculated to facilitate or is conducive or incidental to the furtherance of its objects. In very little time, Castlemorton Common could become a mat of grazing compartments in the same way that grazing is controlled on the hills, with animals behind the fences and tourists walking their set paths to look at them.

55. I have included a photo that was from the promoter’s slides, on page 3, of a recent scene on the hills. All the rest of the photos are various ones I have found that I have taken

over the years to try to show you the openness, and how grazing in the traditional way happens on Castlemorton Common. The common rights in these areas in the hills appear to no longer exist. If a commoner wanted to turn their animals out, they would not be able to graze that area due to the fencing. All the previous Acts seem to have a spirit running through them of wanting to protect the public's right of access and commoners' rights, but this proposed Bill appears to just want to control commoners' rights and access for the public.

56. In the wish to keep this petition as concise as possible, my objections to Clauses 44, 65 and 65(7) are summarised as a written document. I thank your Lordships for hearing my petition, and I hope you have found these views from a commoner's perspective useful.

57. THE CHAIR: Is the written document the pages that just follow?

58. MS WILKES: Yes. A lot of it was covered, I believe, yesterday by Mr Smallwood, my Lord, so I just thought to keep it concise.

59. THE CHAIR: That is very helpful. We can study that in due course and read it at our leisure. Thank you very much indeed.

60. MS WILKES: Thank you.

61. THE CHAIR: Ms Lean?

Response by Ms Lean

62. MS LEAN: Thank you, my Lord. If I can start with a general point about fencing, just to set the context for when I come on to the individual clauses, first, these are powers. It is not saying that this is what is going to happen tomorrow or that the Trust is seeking it because it has a tangible proposal to go out and do X the day after the Bill was enacted if it gets Royal Assent. In terms of concern about where fencing might go, there has not been a plan produced about fencing on Coombe Green Common. It is not like a planning application that the Trust wants to put a particular fence somewhere and now it needs to go and get the power to do it. This is about having the power to make sure that, if it becomes necessary, desirable or appropriate to do so at some point in the future, it has the authority to do it.

63. The second is that, of course, as you have heard, the Malvern Hills comprises a vast area and there are differing terrains, differing landscapes, and different ways that different land needs to be managed. These powers have had to be drafted in terms that enable them to be used across the whole of the hills in a way that it may be appropriate to do so in any particular location. Whilst a lot of the concerns that have been raised have been in the context of Castlemorton Common, which continues to be used by commoners exercising their rights of common, these powers also, of course, apply to the hills, where you have heard that those rights have not, in practice, been exercised for some time. That is also by way of context. I suppose this is a word of caution about trying to amend these clauses that are meant to apply to the whole of the Malvern Hills by reference to very particular concerns raised, perhaps about a particular area of common land.

64. My Lord, first, on Coombe Green Common and Clause 48, I think this point has been picked up, but it is made explicit now with the amendment to the filled Bill that the power to fence cannot be used other than to prevent animals going from common land on to non-common land. Clause 48(1) would not allow for fencing to prevent animals going from the Trust-owned part of CL9 on to the non-Trust-owned part of CL9. Clearly, it may be desirable at some point in the future for there to be fencing of that end of Coombe Green Common that goes on to the roads. It may be that that comes forward in conjunction with a scheme with the landowner, or the Trust may acquire Coombe Green Common perhaps at some point in the future and it could fence it then, but again, it is about having the power to make sure that, if the Trust is in a position to fence in the future and it is appropriate to do so, it can.

65. Moving on to Clause 45, as I mentioned yesterday, Clause 45(1) is directed at excluding the access by the public. Obviously, I take on board the point that that might be the purpose but the concern here is the effect, if the effect is also to preclude animals or to make it more difficult for grazing. I would start by saying that, on Clause 45(1), 45(1) is a power as it thinks fit to regulate or prohibit access by the public. Fencing is just one of the means by which that might be done, so no doubt when it came to looking at exercising a power under Clause 45, the Trust is going to have to look very carefully at what the right way is of dealing with the situation we are dealing with. What is the right way of prohibiting or regulating access by the public if it is an area that is, for example, at that time being actively grazed, and there are those matters that have to be considered?

66. THE CHAIR: Could there be a provision here for consultation before that power is exercised?

67. MS LEAN: My Lord, that is the power that sits with Clause 46, which says that there is a requirement to consult if the power is going to be used for more than 42 days, but where the consultation can happen after you have put the fence up if it needs to go up quickly.

68. My Lord, what I was going to say is, of course, if there is a situation where it is necessary to exclude or prohibit access to a particular area, for example to protect a very particular habitat—I think a rare visiting bird was the example that was used last week—it may be that the Trust might have to look at both 45 for precluding access by the public and, if it was also necessary to perhaps prevent animals going in there, that might be a situation where it is necessary to look as well at, say, Clause 49, the power to regulate grazing in furtherance of the Trust's objects. It may be a situation of having to look at the two in parallel.

69. I just say that to raise the fact that 45 is not only a fencing power. It is about prohibiting access by the public, and the Trust will have to think very carefully in any particular case what the right way of doing that is in the situation that arises.

70. LORD INGLEWOOD: Might I just quickly ask a point? Do you have commons councils here on these—

71. MS LEAN: No, my Lord.

72. LORD INGLEWOOD: No, so that mechanism for engaging with commoners is not present on this common.

73. MS LEAN: Forgive me; I am just going to get the exact name. My Lord, there is the Castlemorton Common Association, which is not the same as a commons council, but there is a body there that is particularly concerned with the Castlemorton Common, which is the actively grazed common at the moment. I am told also that there are stewardship schemes that have involved people having to sign up to that. There are mechanisms or fora, as it were, by which there can be engagement and liaison with those exercising rights of common, but no, there is not a commons council in the same way that there is set up

under the Commons Act 2006 or under the Dartmoor Commons Act, for example.

74. LORD INGLEWOOD: There is a mechanism in place for ongoing communications between parties.

75. MS LEAN: Yes. My Lord, I hope that covered briefly the concern about Clause 45. On the next clause, which is Clause 47, fencing dangerous places, I note the concern that is raised that putting the word “permanent” in somehow broadens the power. I believe “permanent” went in because there was a concern that it was too broad without the word “permanent”, so “permanent” was put in to make clear that Clause 47 could only be used for a permanent danger; it could not just be used for any other sort of danger. That was intended to be restrictive or limiting rather than expansive, but again, apart from that, it is almost a direct read-across from the earlier legislation, with the inclusion of that word for clarity.

76. Moving on then to Clause 49 and the further fencing powers, my Lords, you will have heard, of course, from Mr Gardner yesterday about issues of timing and issues of size of parcels. You have the letter from Mr Chance in your bundle 7, explaining the practical realities there would be of having to do this within the smaller areas or being limited to 28 days and suchlike.

77. There are a couple of points to pull out, my Lord. First, on the 28 days, as I alluded to yesterday, it seems that 28 days may have come from something that is in guidance around when Commons Act consent might not be required. There is a suggestion—I think it is in either PINS or Defra guidance; I am afraid I would have to dig out the exact document. It is not in the bundle; we can provide it if that would be of assistance—which talks about situations where consent would not be required because they are not thought to be the sort of works that would restrict or prohibit access so that you need consent. Fencing of up to 28 days for things like lambing or suchlike are in that list of, “This is not something that we think falls within the types of works that need Commons Act consent”.

78. What I would draw attention to, if I may, is that there are also formal exemptions in a statutory instrument. These are works that are formally exempt works that do not need consent under Section 38 of the Commons Act 2006, even though they are works that have the effect of preventing or impeding access, and, in fact, fencing being one of those particularly mentioned. My Lords, you have a copy of that exemption order behind tab 8

of bundle 7. It starts at page 43.

79. LORD EVANS OF GUISBOROUGH: It is tab 9 in my bundle.

80. MS LEAN: Yes, sorry. Forgive me, my Lord. It is tab 9. My Lord, this is the Works on Common Land (Exemptions) (England) Order 2007. If I can draw attention to Article 2, Section 38, the prohibition on works without consent does not apply, subject to complying with Articles 3 and 4 for “the carrying out on land registered as common land of any works of a description specified in the second column of the table in Schedule 1”—my Lord, just to flag, Article 3 is essentially about if somebody has a legal right of access to or across the land, you have to preserve that, and Article 4 is that you have to display a notice saying what is happening, but the schedule starts at page 45.

81. There, the first exemption is “the erection of temporary fencing (which may include electric fencing) for a period not exceeding six months, to enclose land for the purpose of restricting the movement of grazing animals which are on the land in the exercise of a right of common to graze animals or in the interests of nature conservation”. Then there are some size restrictions that follow. You can only do it if the area to be enclosed does not “exceed the lesser of 10 hectares or 10% of the area” of the registered area of common land, and that no part of the land you are going to enclose has been previously enclosed without consent in the period six months previously. The people who can do those works are the owner of the land, any person entitled to exercise rights of common, and any other person acting with the written consent of the owner of the land.

82. My Lords and my Lady, I hope from that that you will see a parallel with what appears in Clause 49 of the Bill, in that what Clause 49 of the Bill is essentially doing is taking almost a bespoke version of what is in that general exemptions order and applying it to Malvern Hills. It says that the Trust can enclose land “that is common land, for a period not exceeding 60 days”—so well under the six-month period that you see in the exemption order—if it is “necessary or desirable for the purpose of regulating grazing, and is in furtherance of the Trust’s objects”. What you do not have is that restriction on, “It has to be less than 10 hectares or it has to be less than 10% of a registered common unit”. This concept of being able to enclose areas of common land for more than 28 days is not something that is wholly new and novel that we are trying to put in the Bill. You can see a recognition of it within the exemptions, certainly in the requirement for consent

in that exemption order.

83. My Lord, I hope that explains on Clause 49. Just by way of a bit of further context, what the background is for why we say 28 days is not the right approach and why it should not be restricted to 28 days, and that in terms of the hectarage, you have heard—

84. LORD INGLEWOOD: This is a rather technical point. In her evidence, we have heard that the impact of the fencing appears to be cutting across some of the usability to heft. Is that an experience you have had in respect of the way you actually carry out the temporary fencing, given the size of the paddocks you are enclosing and so on?

85. MS LEAN: I think I am going to have to look to Mr Bills on that, because that is probably factual evidence rather than legal submission, if I may. My Lord, what I am hearing from Mr Bills is that, of course, where these grazing compartments are being used at the moment is on the hills, where people are not exercising rights of common, so it is not getting in the way of any hefting because no hefting is happening, if I can put it in those terms.

86. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: That is not what Ms Wilkes has told us.

87. MS LEAN: I understand that Ms Wilkes was talking about Castlemorton Common, and there are not any grazing compartments of this sort that are currently being used on Castlemorton Common.

88. LORD INGLEWOOD: She was concerned about her ewes not being able to get home in the evening. Is that not right?

89. MS LEAN: I had understood that was primarily about the fencing between Coombe Green Common and the rest of CL9. That was where I had understood the point to come in about that, but no, certainly my understanding from what I am seeing behind is that there are not sheep hefting at the moment on the areas where the grazing compartments are happening, so the two are—

90. LORD INGLEWOOD: Not mutually exclusive.

91. MS LEAN: —not mutually exclusive.

92. LORD INGLEWOOD: Thank you.

93. MS LEAN: My Lord, that was on the time-limited 49 and the hectarage, if I could put it in those terms. The other point to pick up on Clause 49 was subclause (3) and the concern about animal health. That had gone out and come back in, but what I can clarify is that subclause (3) of Clause 49 is essentially by way of an exemption or a carve-out.

94. What Clause 49 says in the beginning of subclause (3) is that you can enclose certain areas for up to 60 days, but if you enclose an area for more than 42 days, then you have to leave it at least six months before you enclose that area again, unless—the animal health exemption is in the “unless”. The starting point would be if somebody enclosed part of the north hills for 50 days, say, they could not then come back and enclose that same area until at least six months had passed, but if there was essentially a situation where they went, “I really need to because there is an animal health emergency”, that would allow them to do it despite that general position of, “No, you have to wait six months”.

95. This is not trying to reintroduce an ability to enclose land for up to 12 months for animal health purposes; it is quite a discrete carve-out of the, “You have to wait six months before you enclose this bit of land again”. My Lord, our submission would be that there is no need or no basis for removing the subclauses in Clause 49 that have been requested by this petitioner in her presentation today.

96. With regards to Clause 83, my Lord, I am conscious that we do keep coming back to this one, which is a power that makes clear that you cannot use it if you have powers to do anything else. Moreover, there is the proviso in subclause (1) that the Trust has the “power to do any lawful thing”. I do just stress that, because the concern, as I understood it, seemed to be that this power could be used to somehow extinguish or prevent somebody exercising rights of common. As I have mentioned before, in Clause 94 of the Bill, which is at page 69 of the filled Bill, there is a specific provision about the protection of the rights of common. “Except where specifically provided, nothing in this Act is to be deemed or construed to take away prejudice or affect any right of common exercisable by any person or persons over or in respect of the Malvern Hills”.

97. In my submission, when you read Clause 83(1), in particular with Clause 94, it is clear that the Trust could not do something that extinguishes or takes away rights of common in reliance on the general power. If there is going to be anything that happens to

affect rights of common, what you would be looking for is one of the specific powers earlier in the Bill, so maybe that is an exercise of a particular by-law power or the fencing power. You would have to look for one of those specific powers that said you could do a particular thing that might have the effect of temporarily interfering with—or suchlike—the exercise of rights of common.

98. My Lord, I am conscious that there has been a point raised in the past about by-laws. Again, in my submission, there is nothing that needs to be written in specifically to do with by-laws, because Clause 65 itself already expressly addresses how the by-law-making power can work in respect of rights of common. At Clause 65(1)(c), page 51 of the filled Bill, there is the power to make by-laws for “preventing any interference with the rights of common or other rights to graze exercisable over the Malvern Hills”. Then at (j), page 52, “regulating the user and enjoyment of any rights of common exercisable over the Malvern Hills”. Then the proviso in Clause 65(7), which you have on page 53, that no by-law made under this section “prejudices or affects (except as provided by subsection (1)(j)) or takes away any rights of common which are exercisable by any person over the Malvern Hills”.

99. My Lords, in my submission, Clause 65 is already very clear about the extent to which by-laws could or could not be used to interfere with or affect the exercise of rights of common. It is not necessary to write anything further into the Bill, either in Clause 65(1) or more generally in that regard.

100. My Lord, I hope I have then broadly covered off everything that was raised orally today. Unless there is anything in particular you would like me to respond or assist you with, that would be my response.

101. THE CHAIR: No, I do not think so. I think you have covered the ground. Thank you very much. Ms Wilkes, is there anything you would like to say by way of reply?

102. MS WILKES: Yes. Could I just clarify the Castlemorton Common Association—that was set up in 1965 and it was called Castlemorton Commoners Association, and it was there to protect commoners’ rights. In the last 30 years or so, we have changed the name to Castlemorton Common Association, and the main things we do are fundraising and social events. It is not there to oversee commoners’ rights. In fact, there are very few people who are actually commoners on the committee now. It has turned into a social

committee now, my Lord.

103. On Clause 49, I did suggest, my Lords, that the commoners were involved in the fencing of areas where they had rights and they were actively using them. My Lord, your example of perhaps stopping my animals from hefting back—it could come about if I was not involved in a decision to fence Castlemorton Common. This is why I did ask if all graziers that are actively commoning in that particular CL unit should be involved with any decisions. On 49, the animal health, I just thought that subsection (c) of 49(3) covered it because, if any area had to be fenced off for animal health reasons, it would automatically be covered by Defra rules or the Animal Health Act.

104. Just coming back on to what Ms Lean said—that these regarding the fencing are just powers and there are no plans—my concerns are to protect common rights in the future as well as in the here and now. Although they are powers, I would like to see some clauses tightened up to make sure they could never be used in any way that could just erode our common rights. Thank you, my Lords.

105. THE CHAIR: Thank you very much indeed. I think there are no further questions, so we just have to thank you for taking the trouble to present your case and presenting it in writing in a very neat way. We will obviously think very carefully about the rights that you have raised.

106. MS WILKES: Thank you, my Lord.

107. THE CHAIR: We will conclude today's hearings at this point and meet tomorrow, 12 March, at 10.30 am. Good afternoon.