



Malvern Hills Trust

Special Meeting of the Board

Thursday 19 September 2024 at 7 pm

**The Council Chamber,
Avenue Road,
Malvern, WR14 3AF**



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Agenda

Introduction

1. Apologies for absence
2. Chair's Announcements
3. Declarations of Interest
4. Public comments

Items for Decision

5. To consider the Consultation Responses and whether the Trust wishes to amend any of its proposals for a Private Bill as set out in paper A. Paper A
6. Urgent Business
7. **Date of Next Meeting**
10 October 2024

Malvern Hills Trust Special Meeting of the Board

Consultation outcomes and whether any changes should be made to the Trust's proposals for a Private Bill in response.

19 September 2024

Background

Trustees are aware of the reasons why the Trust needs to update its governing Acts and the work which has been put into shaping its proposals over the last 10 years.

The Trust consulted on proposals in 2019 but because of changes in response to that first consultation and lapse of time, it was felt better to consult again this year on all the main proposals which are intended for inclusion in its Private Bill.

The public consultation was carried out over a period of over 8 weeks by 56 Degree Insight, an experienced Market Research Company. There were 483 validated responses which was in excess of those from 2019. A full explanation of the consultation process is set out in main the report.

The consultation closed on 22 July and responses were circulated to trustees between 29 July and 5 August. This included 9 organisations who responded direct to the Trust.

A working group was set up at the Board meeting on 8 August and to date they have reviewed 4 of the 5 key topic areas (land management, licences and leases, administrative provisions and the objects – with the Trust's constitution still to consider) which had been identified by the Board as having attracted the most significant comments. The working group considered the background to the current proposals, sought additional input where needed and prepared reports setting out their recommendations which were discussed in 2 workshops on 4th and 10th September, giving trustees the opportunity to consider the recommendations and request any additional information in advance of this meeting.

Consultation responses

The Trust thanks everyone who took the time and trouble to respond to the consultation. Trustees have read the quantitative outcomes and 100 A4 pages of text comments, some setting out thoughtful arguments and passionately held views. All responses have been considered most carefully.

Whilst not detracting from the value placed on each opinion shared, misinformation was being circulated before and during the consultation. Just one example is a website stating "The Malvern Hills Trust Private Bill will mean loss of our green spaces, more building and loss of control by local people. Preserving Natures Beauty for future generations will no longer be paramount". In addition, that website set out how to respond to the Trust's consultation questionnaire in 4 minutes, on order to submit an entirely negative response without reading the Trust's consultation document. 56 Degree Insight confirmed that 12 % of the validated responses conformed to this template.

It was also asserted in a number of places that the Trust was a public body. The Trust has always made it clear that it is a charity governed by statute. This has been a long running issue on which the Trust has taken legal advice to ensure trustees are clear about the position. There is no definition of “public body” for all purposes and trustees will now have seen that Lord Attlee asked a Parliamentary question about this topic and the response from Baroness Haycock, Parliamentary Undersecretary at the DEFRA was that the Trust was not considered to be a public body.

It is acknowledged that the Trust is an unusually constituted organisation and it is not surprising that there is a degree of confusion about its status. However it appears that some respondents were not clear that the Trust’s duties are to act in accordance with the Malvern Hills Acts to care for the Malvern Hills and preserve the land under its jurisdiction as an open space for the enjoyment of everyone, and not conduct its affairs for the benefit of any particular section of the public.

Analysis of the results

That having been said, the working group has very carefully considered all responses and made recommendations on the topics agreed by the Board at the meeting held on 8 August together with a few additional issues they consider merit further thought.

General points

Trustees should be mindful that the Charity Commission have asked to be informed of any changes to the proposals which the Trust set out in its s74 application. These were the proposals that formed the basis of the Trust’s public consultation.

The budgeted legal costs for the Bill were based on the proposals in the s74 application. Any significant changes in response to the consultation will incur additional costs.

It *may* be advisable to run a further short consultation if there are any significant changes to the proposals in the consultation document – the Parliamentary Agent will advise.

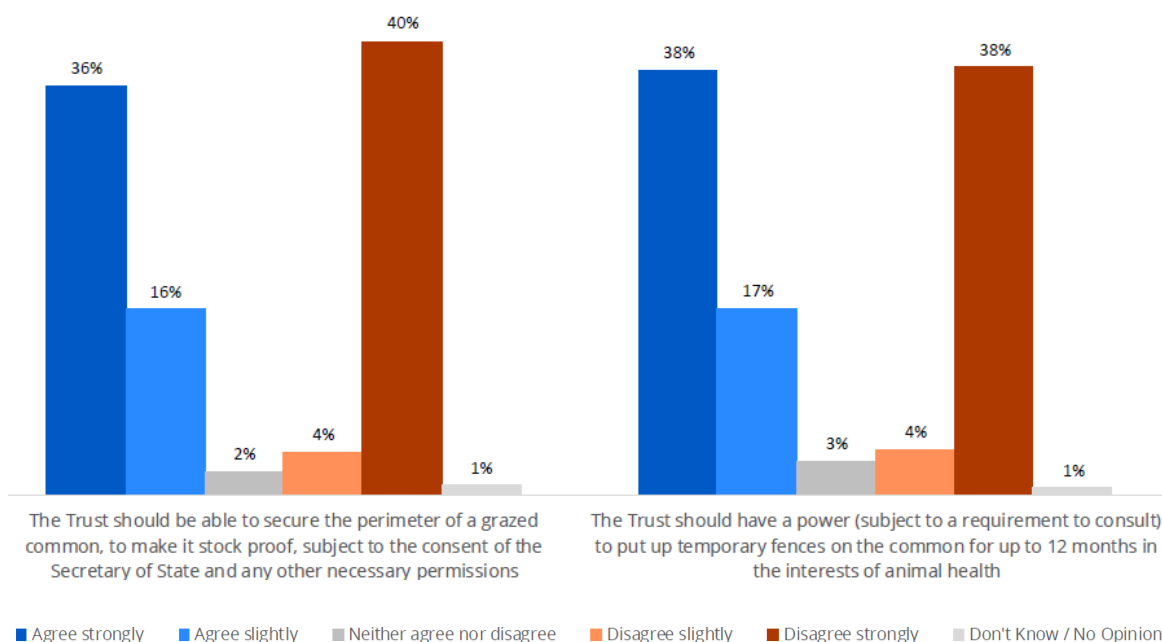
Significant numbers of people made the point that they could not comment definitively until they had seen the draft Bill. Unfortunately, this is not currently possible as drafting is still a work in progress but these comments are noted and understood.

Trustees will recall that in addition to some proposals needing to be revisited by trustees following the consultation, there were numerous other comments that need (a) to be referred for possible drafting amendments, (b) further public communications to help increase understanding of the Trust’s proposals, or (c) to be considered for possible operational action. The communications and management points will be dealt with separately.

Although this may mean some hard choices, when considering and responding to the consultation trustees must act solely and exclusively in the best interests of achieving the Trust’s objects.

Land management.

Working group report



Background

Land Management is what the Trust is about. The changes and the conflicts which now exist would be unrecognisable to someone living in 1884. The cars, the level of public access, cycling on the Hills and the lack of people exercising rights of common all create very different management challenges today and in the future. The Trust needs a different set of “tools” to keep the Hills open for public access and to cope with the pressures on their important features and special qualities.

The critical importance of using grazing livestock to manage the Hills was fully explained in the consultation document.

Public and organisation comments

Some of the comments indicate that not everyone had read the consultation document and there was some level of confusion about the proposals. For example, the Trust’s proposals would not result in fencing along the B4208 across Castlemorton Common or the Gullet Road, or on any of the ungrazed commons.

There was general support for the proposal to secure the commons. Some respondents did not want to see the perimeter of the common fenced, saying that it would restrict access but these comments were countered by those agreeing that it was a good idea. Others were concerns about losing the open character of the common.

The County Council noted that if fencing crosses a public right of way, the Trust would need to consult them (as it always does) and there were a number of other comments about gates needing to be to an appropriate standard to facilitate public access.

There were a small number of comments from people opposed to livestock grazing more generally on moral or environmental grounds and from people who did not like the Trust's use of temporary fencing to target grazing.

Castlemorton Common Association (CCA) did not support the proposal for fencing for animal health reasons, although the Open Spaces Society (OSS) did.

The OSS proposed that there should be a 6 month break period following fencing to regulate grazing but in discussions accepted there should be a *de minimis* exception to provide that the Trust can re-fence an area of up to 1ha to enable hard grazing for the control of unwanted vegetation/species (eg Yorkshire Fog, a coarse and dominating grass).

Officer input

It should be noted that 92 % of Castlemorton Common is already fenced by adjoining landowners.

Since the consultation document was prepared, the Conservation Manager has raised the issue of "hard cases" where it would make no sense to fence along the perimeter of the common (for example where fencing could be hidden by vegetation or topography not far from the perimeter or where another feature could be used as part of the fencing – for example the churchyard wall at Hollybush). There is also the instance of Old Hills where the common is divided by a busy road with poor sightlines and one side of the road is suitable for grazing but the other is mature woodland which is not. The Conservation Manager also referenced other similar sites which have secured their open commons, such as Epping Forest. Some of the fencing/infrastructure has had to be sited away from the exact perimeter of the common to deliver a successful, safe scheme. Landowners (with the exception of those with a statutory power) always need approval of the Secretary of State under s38 Commons Act 2006 to put up fencing.

The current draft makes it quite clear that the Trust would have to secure Secretary of State consent to undertake works on common land to prevent stock straying from the common. The Conservation Manager has suggested that rather than the Bill trying to define exactly where the Trust could fence, the provision for securing the commons should be amended to say that the Trust could put up fences, or make other arrangements to keep stock on the common provided the Secretary of State's consent was obtained under s38 Commons Act. The Trust's Parliamentary Agent advises that he can draft the provision in such a way that the power can only be exercised to prevent stock from straying off the common whilst also meeting the Conservation Manager's concerns. Therefore, the decision whether fencing (or other methods) is appropriate or not would be made on a case by case basis with full public input. S38 applications are made to the Planning Inspectorate on behalf of the Secretary of State and the process includes public consultation so that all views can be considered. Complex cases are determined by way of a hearing or public enquiry. This amendment was supported by Open Spaces Society and by representatives of CCA. S39 Commons Act outlines the factors which may be taken into account and this includes public access:

<https://www.legislation.gov.uk/ukpga/2006/26/section/39>

The Trust's Parliamentary Agent has pointed out that keeping the requirement to obtain s38 consent means that fencing which the Trust request will not necessarily be permitted but this seems to be a compromise which enables a full public debate where everyone's issues and concerns can be addressed on a case by case basis.

Working Group recommendations

Securing the grazed commons

If grazing is to continue in the long term, the Trust has to have the power to secure stock on the commons. Access would be maintained and the public would not be excluded as a result of any of the new proposals to fence. Very few other grazed commons have no infrastructure to prevent the stock leaving the common.

Only the grazed commons would need to be secured.

The points raised about using gates of an appropriate standard to enable everyone to exercise their right of access are noted, agreed in principle and have been referred to the Parliamentary Agent to be reflected in the drafting. The working group understands that the Trust's Parliamentary Agent is proposing to re-word the provision to meet the Conservation Manager's concerns. **The working group proposes that the Board agrees that the provision be amended as set out above but that it remains subject to it obtaining the consent of Secretary of State under s 38 Commons Act.**

Regulating grazing

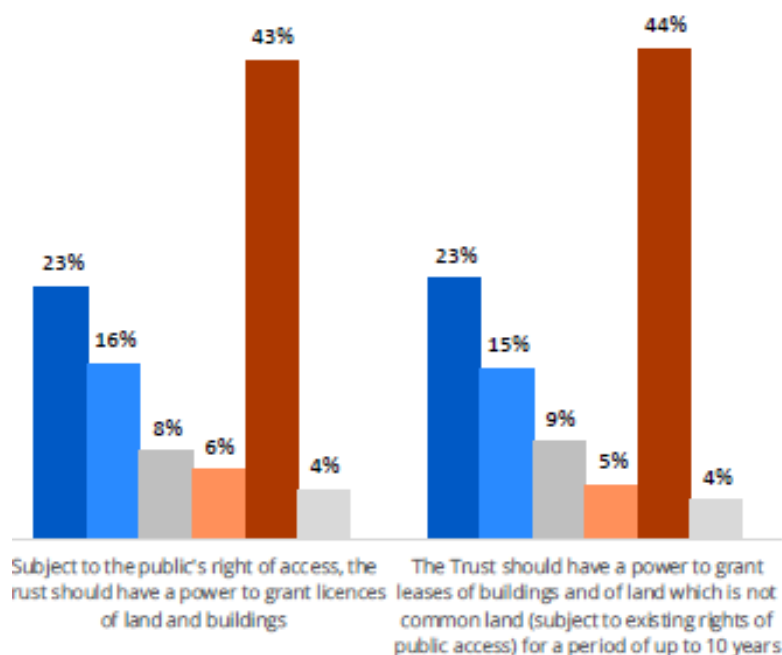
The working group recommend to the Board that a provision for a 6 month break following fencing to regulate grazing before the same area can be fenced again should be included in the Bill, with a *de minimis* exception to enable up to 1ha to be fenced again for the control of unwanted vegetation.

Temporary fencing for animal health reasons

Given the lack of support from the commoners for fencing for animal health purposes, and notwithstanding the support of the OSS, the working group recommends that the Board consider abandoning this proposal.

Leases and Licences of Land

Working group report



Background

The Trust needs to be able to grant leases and licences for the proper management of the land under its jurisdiction and has been doing so for years on the basis that this is an implicit of the Trust as a landowner. The new Act would be an opportunity for these powers to be made clear. Like everything the Trust does, the making of such arrangements has to be in the best interests of fulfilling the Trust's charitable objectives.

Licences for land management

The landscape of the Malvern Hills and commons has been shaped by human activities for thousands of years. This including coppicing, making hay, collecting bracken, and livestock grazing.

In order to conserve its important features and special qualities, the Trust's land needs active management as detailed in the Trust's adopted Land Management Plan. With an area of around 3000 acres, this active management is beyond what the Trust's resources can deliver and so licencing provides a means to gain extra effort and expertise.

Presently, licences are issued to deliver woodland coppicing, hay-making, and conservation grazing with livestock.

Grazing the commons is no longer an attractive proposition for livestock owners. Without the support of Countryside Stewardship grants, grazing would be unviable in most places on the Hills. Graziers are faced with unenclosed commons, high levels of

public access, worrying of livestock by dogs and busy roads bisecting the commons on which there are a number of stock fatalities every year.

Much of the Trust's land is SSSI and grazing is the method of management recommended by Natural England and in some instances is the only practical method. Grazing is therefore essential and whilst those with rights of common are legally entitled to graze, the Trust as landowner is entitled to graze any surplus. In order to ensure grazing continues, the Trust operates a system of tendering for licences to graze the land in a sensitive and appropriate fashion, supported by the Countryside Stewardship grants. It is a condition of the licences that grazing by licensees is subservient to those with rights of common.

Licences – buildings

The Trust has a small number of buildings which it licences to individuals and grants a licence to the Malvern Hills National Landscape team to share the use of Manor House.

Leases

The Trust has a small number of fields on the lower slopes of the Hills, which enhance the setting of the Hills and are part of the Trust's public access land. There is a second purpose, in most instances, which is providing in-bye land to support the grazing of stock on the Hills. The Trust has to arrange for this land to be cared for and managed and this is done in some instances by way of a farm business tenancy, containing conditions that the land to be managed in a nature friendly way and ensuring that the obligation to allow public access is fulfilled. This gives both the Trust and the tenant the security to enable proper medium term planning for the use of the land.

St Ann's Well

The power to lease this building is governed by separate provisions in the existing Acts which will be re-enacted.

Public comments

These proposals were not supported by a majority of respondents but there were no comments explaining the opposition to the granting of leases or licences for Trust's current land management purposes. However, some respondents expressed concern that this power would cause MHT's ethos to shift from conservation towards commercialism.

There were suggestions on Social Media that the new proposals would enable the Hills to be used for developing solar farms and wind turbines and whilst clearly not something the Trust could do because of its charitable objectives and the legal designations which apply to much of the land, this misinformation was picked up by respondents' comments.

Working Group recommendations

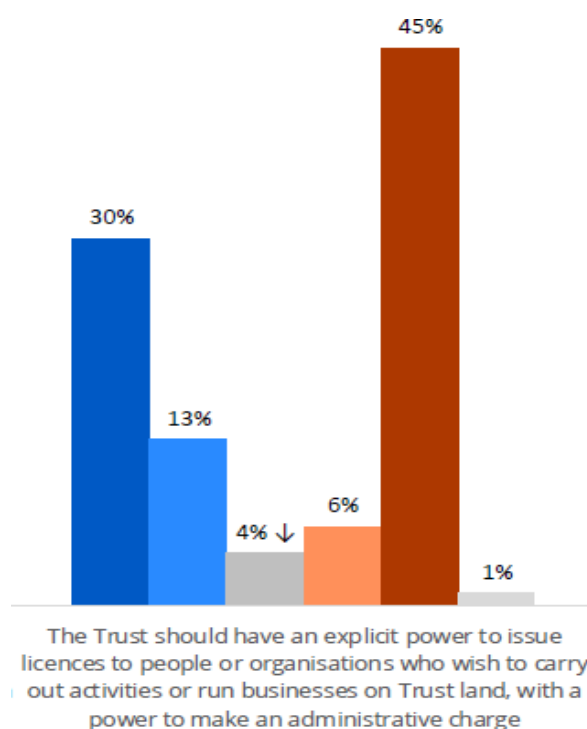
These provisions seek to bring clarity to the way licenses and leases are already used by the Trust. It is difficult to understand what reasoned objection there could be to the continuation of the current arrangements, which are a way of

managing the Trust's land and not a revenue raising exercise. The Trust does not have the resources to undertake these activities using Trust staff.

Looking more broadly at the provisions, the Trust could only exercise them in furtherance of its objects and cannot operate for commercial gain.

The Working Group concluded that the percentage against the proposal was as a result of the Trust failing to get its points across and suggest the Board considers making no change to the Trust's current proposals, but that further communication and engagement is undertaken to explain the Trust's intentions and reassure the public

Licencing activities



Background

See paper on the members section of the website.

<https://www.malvern hills.org.uk/media/3581/20171012paperfsponsoredwalks.pdf>

This paper sets out the multiple reasons why the Trust needs to know what events are being organised on its land and to make sure events do not clash or impact on sensitive and important habitat. It also sets out (as at 2017) the charging regime of other similar bodies.

Public comments

Comments were many and various. The main concern expressed was that issuing licences might lead to the commercialisation of the Hills, greater footfall and consequent adverse impacts on their tranquillity and the natural environment.

There were also comments from people worried that the issuing of licences would affect free access to the Hills, eg were people going to be charged for meeting up with families or friends for a walk or picnic.

A number of respondents felt that charity/not-for-profit/community events should not attract an administrative charge.

Other comments included:

- Admin charges should be reasonable
- Business activities should be compatible with the purpose of the Trust and not interfere with public access
- Too many licences should not be granted
- There were comments for and against having a licencing system for professional dog walkers (licencing was supported by some professional dog walkers)
- Concerns about litter from temporary food stalls
- How would licences be policed?
- Possible impact of events on other users of the Hills

Working Group recommendations

The Trust's proposal is that the Bill will confirm the power to licence activities on its land, something the Trust already does and needs to do. Underlying that power will be a policy or policies which will set out the requirements for those using Trust land for organised activities and business purposes, for example which types of event are compatible with the Trust's purposes, where a charge will be made and what the level of charge will be.

The Trust as a charity cannot operate for commercial gain.

Any regime to licence organised events or business activities will not affect individuals or family groups accessing Trust land pursuant to the Trust's objects. The composite question did not differentiate between events run by schools/charities and other non-profit organisations (some but not all of which might attract an administration fee), and commercial activities which would attract a charge (eg filming/fashion shoots etc). With the existing exception of Link Common, activities which excluded public access would not be compatible with the Trust's objects.

There is no change proposed to the existing power to licence up to 6 temporary food stalls, or the provisions which cover events on Link Common.

The Working Group recommend that the Board considers leaving the proposal unaltered but to see whether some of the concerns expressed can be addressed in the detailed drafting.

Licences to run services

There was a small majority in favour of the proposal to change the consultee in any instance where the Trust grants a licence to run overground service. This is an existing power although the working group is not aware whether it has ever been exercised. The current consultee is the local planning authority. This makes little sense if planning permission is not required and Malvern Hills District Council have indicated they are happy no longer to be consulted if the power is exercised (with Malvern Hills National Landscape as a consultee in its place).

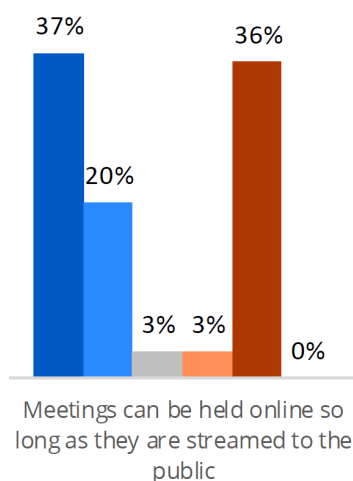
Working Group recommendations

That the Board makes no change to the proposal.

Modernisation of the Trust's Administration

Working group report

What constitutes a meeting?



Public comments

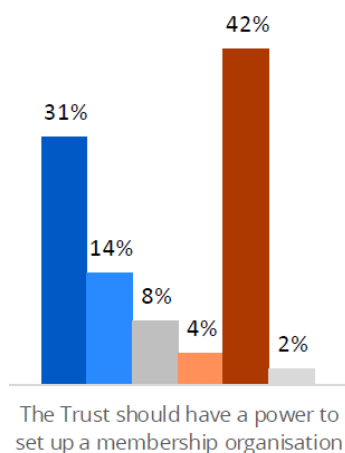
Comments on this topic were limited. Some favoured having the option of holding meetings online, some commented that this should be the exception rather than the default position and also that not everyone has online access

Working Group recommendations

The proposal to be able to hold online or hybrid meetings was included in the Trust's 2019 consultation. The technology to hold such meetings has now become commonplace. Covid 19 brought home the importance of being able to meet virtually. This power has to be included in the Trust's governance in order for such meetings to take place. Having this option for meetings provides a degree of additional flexibility for example if a trustee is on holiday but still wished to attend. It was noted that more members of the public logged into the Trust's online meetings during Covid that attended the meetings when they were face-to-face. The group felt face to face meetings remained the most satisfactory option and did not envisage that online meetings would become "the norm". Meetings which are open to the public and which are held online must be streamed. The group noted that not everyone has access to the internet but felt the Trust could ensure that there was a facility at its office for those without internet access to view online meeting.

The working group recommends the Board retain the proposal to be able to hold virtual or hybrid meetings.

Power to set up a membership organisation



Public comments

This provoked a number of comments. Some were supportive, seeing it as a way for those not already contributing through the levy to provide a degree of financial support but others expressed concerns:

- Would the membership organisation be part of the Trust's system of governance, and enable pressure groups to influence decision making?
- Would people from outside the Malvern area be able to drive changes to the management of the Hills and Commons, to the detriment of local people?
- Would it create a 2-tier system where members got privileged access to the Hills and Commons?
- Would a membership organisation be costly and burdensome to administer?

A number of comments sought greater clarity on what a membership organisation would mean in practice.

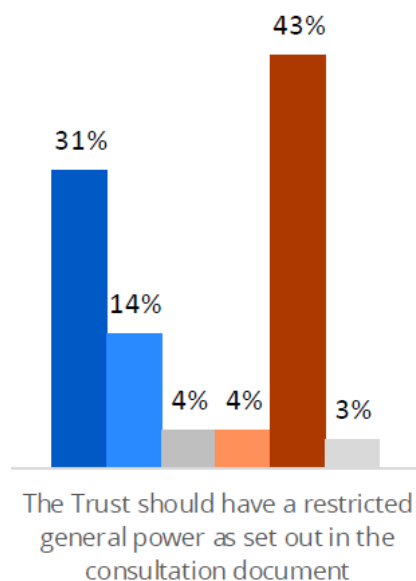
Working Group recommendations

The choice of the term “membership” was unfortunate as seems to have carried implications which were not intended.

Any supporters' group would not be part of the Trust's governance structure, nor have a direct influence on the Trust's decision making. The intention would be to provide people who have an interest in the Hills, wherever they might live, with the opportunity to learn more about them and to get involved with their care. A supporters' group might also be a fundraising source and facilitate more volunteering. The Trust would like to have the option to create a supporters' group but as yet no details have been worked up.

The Working Group suggests the Board adopt the word “supporters” instead of members.

General power



Public comments

The proposal to include a general power has prompted a significant number of comments about potential misuse. These centre around concerns that it provides the opportunity for the Trust to do anything it wished without constraint. Regrettably, this is an area where there has been misinformation circulating on social media during the consultation period, suggesting the power could be used to facilitate solar farms, shops, business or residential development on the Hills, or that it would allow the Trust to sell off land.

Some comments supported the power but advocated constraints such as linking the power to the objects (it fact it could only be used in furtherance of the objects), not being able to carry out activities prohibited by the Acts, supervision of the use of the power by the levy payers or a requirement that the exercise of the power require a special majority.

Comments from organisations

The Open Spaces Society gave a very detailed and considered response to the Trust's proposals. They supported a general power but raised some questions about its interrelationship with other specific powers. These comments were welcomed and further drafting work should overcome the points they raised.

Who else has a general power?

Many other bodies have a general power – parish councils have the general power of competence, the National Trust has a general power and the Charity Commission's own model trust deed contains a general power - "to do any other lawful thing that is necessary or desirable for the achievement of the objects". These clauses are far wider than the one proposed by the Trust.

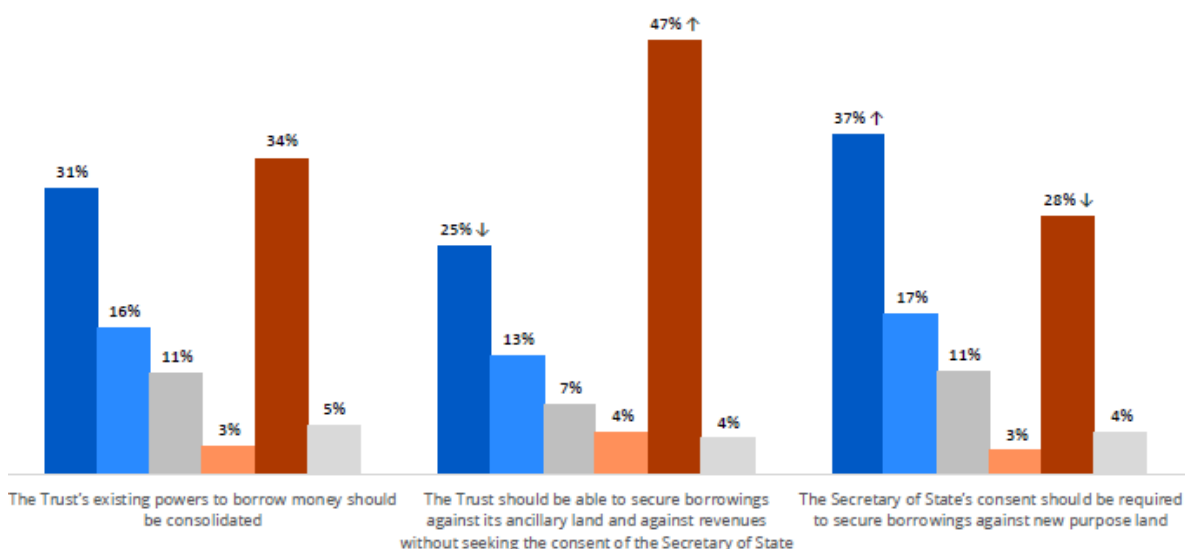
Working Group recommendations

As a charity governed by statute, MHT only has the powers that are set out in its Acts. Frequently, it is not clear whether the Acts cover a particular situation or not and the Trust has to seek costly legal advice (which does not always provide a solution). If the Trust needs to do something outside the scope of the Acts, as a one off, it can apply for a s105 Charities Act 2011 Order in certain circumstances. This is time consuming and expensive but otherwise the only option is to amend the Trust's governing legislation. Everyone is aware that this is a massive drain on the charity's resources. It is impossible to cover every eventuality in the Bill because it is impossible to predict what challenge the future may bring, and how they will affect the Trust. A general power would enable the Trust to be as responsive and flexible as possible in meeting such challenges and dealing with unexpected circumstances. The power is already drafted to exclude its use where there are specific powers available and amendments are proposed to address the points raised by the OSS.

The power can only be used in furtherance of the Trust objects so there is no possibility of engaging in some of the sorts of activities which have been suggested, such as putting up solar panels on the Hills, which would directly contradict the requirement to keep the Hills as an open space for public access and be contrary to the designations (eg SSSI) to which the landscape is subject.

The working group recommends retaining this provision.

Power to borrow



Background

The Trust has 3 different powers to borrow. All can be secured against revenues or land but since 1995 if borrowings are secured against purpose land, the agreement cannot contain a power of sale or a right to sell timber.

The powers are:

- Without consent to borrow for the purposes of the 1884 and 1909 Acts (1909 Act)
- With Secretary of State consent for the purposes of 1884, 1909 and 1924 Acts.
- With Secretary of State consent for the purposes of 1930 and 1995 Acts.

Current proposals

We are taking advice to see what constraints (if any) are imposed on other charities. At the very least, the present position in relation to borrowing should be preserved. The Trust can secure borrowings against land and revenue streams. In rationalizing the current provisions it might be appropriate to adopt the requirements in the 1995 and 1924 Acts to obtain Secretary of State consent (subject to the views of the relevant department) if the loan was to be secured against purpose land (with no power of sale nor power to take timber from the land as now).

In relation to ancillary land, the Trust should be allowed to secure borrowings against it without a requirement for external consent and there could be a power of sale in the event of default.

The new proposal is that the Trust should be able to offer up land which it is in the process of buying as security, with a power of sale. The reason for this, as per the consultation document, is that should the opportunity arise to purchase one of the sizeable land holdings on the Hills which the Trust does not own, it would be unable to offer sufficient security for any loan. The Trust will seek the views of the Secretary of State and the Charity Commission as to whether this should require Secretary of State consent.

Public comments

Some comments evidence an anxiety about borrowing by the Trust although they did not seem reflect the existing position, which is admittedly complex. A number felt there was a need to ensure some controls to make sure the Trust did not borrow too much and some objected in principle to the Trust being able to secure borrowings against land.

Organisations

The Open Spaces Society ask whether the Secretary of State will wish to continue in the current role of having to give consenting to borrow.

Working Group recommendations

The Trust is taking advice on the position of other charities, in relation to securing borrowings and Trust's Parliamentary Agent will enquire whether the Secretary of State wishes to continue to consent to some borrowing and also seek the view of the Charity Commission. These provisions cannot be finalised until then.

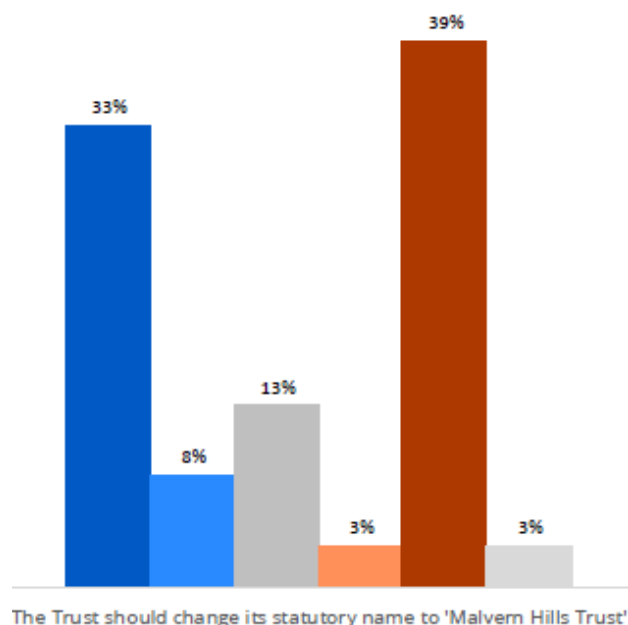
Because the Trust has been in the fortunate provision of having sufficient reserves available to purchase land, the powers to borrow have not been used for at least the last 30 years. (Until the recent requirement to make provision for an internal loan to spread the cost of the Private Bill) However, the Trust needs to be in a position to borrow if funds are required in pursuance of fulfilling its Objects. If the Trust needs to borrow to purchase an important piece of the Hills it may need to be able to proceed quickly, for example if land is for sale by auction. The new Bill should not place the Trust in a significantly less favourable position than it is currently in.

The Trustees are under an obligation to act responsibly, in the best interest of the Trust and within their powers. This would include ensuring that any repayments could be serviced by the Trust.

The existing powers (see page 32 of the consultation document for details) need to be restated in a provision which covers all requirements.

The Working Group recommends that the Board maintain the status quo including the power to secure borrowings against ancillary land without the need for Secretary of State consent.

Change of name



Public comments

Whilst the percentages for and against the name change were more or less the same, a number of comments made reflect the views of those not in favour of the change. Some comments did not flow from the facts – for example that the name change was a tax dodge or that it would be a waste of money – in fact it would incur no additional cost.

Organisation comments

The Open Spaces Society supported the name change.

Working Group recommendations

The Trust adopted the working name Malvern Hills Trust in 2017. Please see the papers on the members section of the website which set out the process and the rationale for the rebrand.

The name change flowed from work on the Trust “brand” as it had become clear the Trust was struggling to get its key messages across including an understanding of its charitable status and the work which it carried out. This was evident from research carried out both with residents and visitors.

The rebrand and the name change was driven by the need to secure a number of operational benefits:

- to reduce confusion in the minds of the public about the Trusts status and that it was not linked with local government
- the need to give a strong professional first impression when making grant applications
- to increase opportunities for partnership working
- securing an increase in donation and legacies which were felt to suffer as result of a lack of awareness of the Trusts charitable status.

The change would reflect the Trust’s well established brand and the name most people now use.

The Working Group recommends the Board proceeds with the proposal to change the statutory name to Malvern Hills Trust.

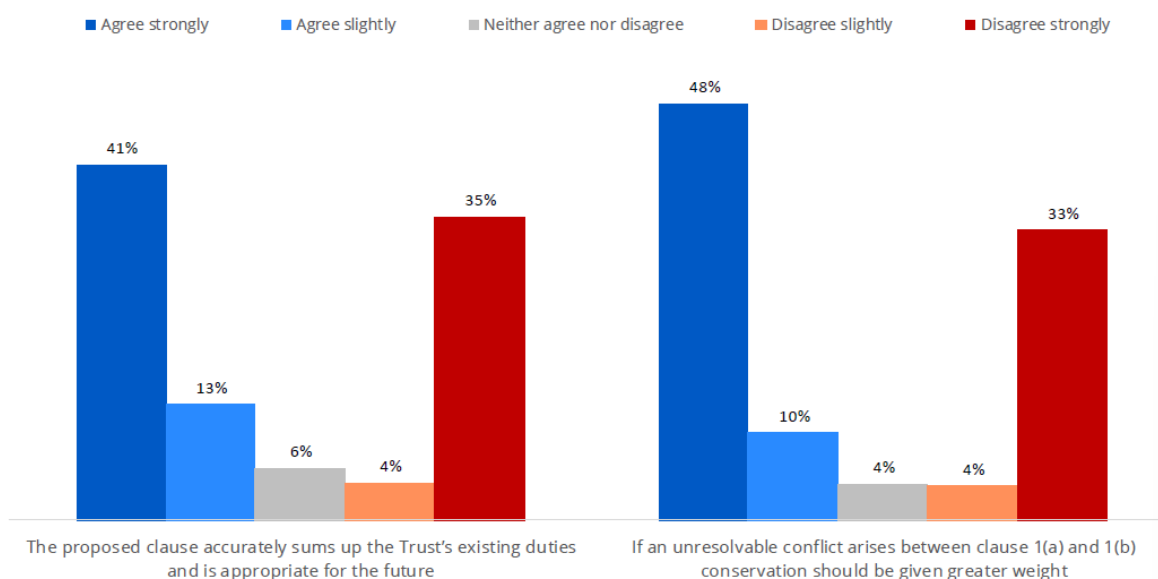
Objects

Working group report

The objects were revised slightly following the s74 application and were referred back to the Charity Commission who confirmed the revised draft was acceptable. The Charity Commission will have to be consulted on any further changes to the objects as they have a regulatory interest and this was also a specific matter set out in the s74 consent.

Current draft cause

- (1) The objects of the Trust are, for the benefit of the public—
 - (a) to protect, conserve and maintain the landscape, natural appearance, habitats, flora and fauna, geology and archaeology of the Malvern Hills; and
 - (b) to keep the Malvern Hills unbuilt on as open space for recreation and enjoyment of the public.
- (2) If in exercising its functions, it appears to the Trust that there is a conflict between the object specified in subsection (1)(a) and the object specified in subsection (1)(b), and the conflict cannot be resolved by the Trust, the Trust must attach greater weight to the object specified in subsection (1)(a).
- (3) Subsection (2) is subject to consideration by the Trust of the health and safety of persons.
- (4) In subsection (1), “unbuilt on” means unbuilt on except for any buildings that existed at the date on which this Act was passed and any buildings which replace them.



Public comments

As illustrated above, a majority of respondents agreed that the redrafted objects reflect the Trust's current objects and the incorporation of s1(2) reflecting the Sandford Principle was supported as guide to decision making in the last resort when objects 1(a) and (b) could not be reconciled by careful management.

A number of points were picked out from the public comments in the online consultation for consideration by the working group.

- the omission of the word "**unenclosed**" and the reasons for that (6 comments on the drafting issue, but a number of related comments expressing concerns about public access and losing the open landscape of the commons)
- changing "maintain" to "**enhance**" (4 comments) -
- using the term "**biodiversity**" instead of flora and fauna. (2 comments)
- Change from the term "**natural aspect**." (3 saying the term should be retained, 7 broader comments)

Organisation comments

Open Spaces Society (OSS).

1. Clause 1(1)(a) should also include the object of protecting, conserving, and maintaining the **cultural heritage** of the Malvern Hills. This would include its traditions, as well as commoning
2. Clause 1(1)(b) should refer also to the objects including to **promote public understanding** of the Malvern Hills, as well as public access.
3. Clause 1(2)
We propose that [the] **objects should be of equal standing**, and the trustees should continue to rely on specific powers to manage or restrict public access where this is necessary for defined purposes, and subject to existing controls. In effect, the trustees will continue to act to fulfil all of these objects, and to reconcile any conflicts in accordance with their existing statutory powers. The new subsection is pretentious and unnecessary.

Commentary on points raised by OSS

Legal advice

Please see comments in the confidential legal advices from VWV and Sharpe Pritchard, circulated 3 September and 1 September.

Officers' response

Points raised in discussions with OSS

1. Cultural heritage
 - We were not planning to change the objects, just re-state them in modern language.
 - One of CC's conditions of going ahead was that we consulted them if there was to be any change to the objects.

- We included “cultural landscape” in a previous draft and CC said that was not acceptable to them.
 - Cultural heritage (of the common) was not readily capable of definition and could potentially include outdated or damaging practices. If you are talking about preserving the cultural heritage, at what point in time? People once wanted to drain the commons?
 - Cultural heritage is mentioned in National Parks legislation but Trust isn’t a National Park or a public body.
 - Looking after the private rights of commoners isn’t a charitable object.
 - The Trust does in practice support commoning where it aligns with the Trust objects. The OSS cited well dressing as an example of cultural heritage (although they were not aware that it was currently practiced. Well dressing in the area had lapsed and was reintroduced in the 1990s). The Trust facilitates well dressing on its land. It is not strictly relevant to preservation of the landscape or access by the public.
2. Education work is undertaken pursuant to the existing legislation and it is intended to continue this. Educating the public about the Hills and their special features is one way the Trust works to deliver its objects and is ancillary to them. Landscape scale education falls to Malvern Hills National Landscape not to the Trust.
3. The objects are a mission statement –the detail of how they can be implemented is set out in the Bill. The Trust needs to be able, where necessary, to prioritise the things which need preserving for the future public’s enjoyment.

The Trust needs to try to mitigate public access pressures. Subclause 2 does not mean that whenever access causes a problem we should defer to conservation but is a guide to trustees when as a last resort the conflict between 1(a) and (b) cannot be resolved by skilful management. OSS referred to the Sandford Committee report where it states [the National Landscape body] should “develop capacity in suitable areas to absorb greater numbers”. The Trust manages a very small part of the National Landscape. It will not always be possible for the Trust to develop capacity elsewhere in a landscape on this scale where most people want to go to the same areas, normally on the ridge. It is accepted that full expression of the Sandford principle goes beyond what is set out in clause 1(2) but this nevertheless provides a guide to trustee decision making. All decisions of this sort would be in a meeting open to the public.

Working Group recommendations

The working group is very grateful to the Open Spaces Society for their detailed and expert input to the Trust’s consultation.

Additional objects

The working group was mindful of the advice that the inclusion of the suggested objects would go beyond the Trust's current purposes. The Trust carries out a number of activities aimed at educating the public about the special features of the Malvern Hills, because this is a very important way of fulfilling the Trust's objects by ensuring that visitors understand, respect and care for the landscape. The Trust considered the introduction of an educational object at an earlier stage, and was advised by Bates Wells that this was unnecessary as the activities it carries can be done as part of fulfilling its existing objects.

Subclause (2)

The working group do not believe that the inclusion of subclause (2) means that conservation will always take priority. One of the key roles of the Conservation Department is to manage the land to avoid the Trust's dual purposes conflicting. This subclause will come into play on the rare occasions when this proves impossible. The Trust already makes this judgement to an extent by using the powers in s15(3) 1995 Act to fence off certain areas for the purposes specified. The objects are a mission statement, the methods the Trust can use to implement them are set out in the other parts of the Bill. The underlying principle is that the Trust should not allow the features of the Hills which make them special to be degraded and deprive future generations of the opportunity to experience them. **The working group therefore recommends that the Board to consider making no change in response to the points raised about the Trust's proposed objects by the OSS.**

Points raised in online comments

"Unenclosed"

There were a limited number of comments about the removal of "unenclosed" from the objects (including from Castlemorton Common Association) but a greater number raising concerns about associated issues - loss of the open appearance of the commons (including concerns that the Trust might fence along the sides of the roads crossing the commons) and using fencing to deny public access.

Background

The preamble to the 1884 Act refers to enclosures and encroachments having been made upon the common and one of the purposes of the Act was to prevent such enclosures. In this context the term is used to mean fencing off land for private use.

S10 of the Act declares that "no enclosure shall be made or building erected on the lands subject to the Act" and gives the Conservators a power to keep the said lands as open space free from enclosure.

Unenclosed is a term used in s3(a) of the 1930 Act in a slightly different way.

Except as in the Malvern Hills Acts otherwise provided they shall at all times keep the Malvern Hills unenclosed and unbuilt on as open spaces for the recreation and enjoyment of the public;

The Trust had no powers to fence in the 1884 Act but powers were introduced in the 1909 Act to protect trees and in the 1930 Act to fence dangerous places. It was not until the 1995 Act that wider powers to temporarily fence for specific purposes were introduced.

Advice from Parliamentary Agent

This has been circulated. A clause had already been prepared and had it been included in the consultation document, might have allayed some of the concerns:

Draft clause: Duty to keep the Malvern Hills unenclosed

Except as otherwise provided in this Act, the Trust must—

- (a) at all times keep the Malvern Hills unenclosed and unbuilt on as open space for the recreation and enjoyment of the public; and
- (b) by all lawful means prevent, resist and abate—
 - (i) all enclosures and encroachments upon and all attempts to enclose or encroach upon the Malvern Hills or any part of the Malvern Hills; and
 - (ii) any attempt to appropriate or use the Malvern Hills or the timber on the Malvern Hills for any purpose inconsistent with this Act.

A meeting for trustees with the Parliamentary Agent has been arranged for next Wednesday to how this issue is best addressed in the drafting.

Working Group recommendations (prepared before the issue of Sharpe Pritchard's advice)

The open aspect of the Malvern Hills and commons is one of the outstanding features of the landscape and it is clear that is treasured by many of those who commented. Although there were limited comments specifically about the omission of the word “unenclosed”, there were a significant number of others in several different sections of the responses, reflecting the importance of maintaining the open landscape and expressing concern about whether access would be in some way restricted. Whilst there was some misinformation circulating suggesting the Bill could result in land being shut off by the Trust and access prevented, there is no doubt about the genuine nature of these concerns. The working group and no doubt all trustees would wish to see the open nature of the landscape maintained and access to it be fully available to all wishing to exercise their rights under the Acts.

Although not itemised for consideration by the working group, they also reflected on the comments about how the term “unbuilt on” was defined and have suggested these are passed back to Sharpe Pritchard to consider whether the concerns can be reflected in the drafting.

The working group recommends to the Board (subject to the advice of Sharp Pritchard) that they consider whether the word “unenclosed” should be

introduced back into the object. Sharpe Pritchard should also be asked to consider whether any other reassurance that the open landscape will be maintained can be offered through the drafting of other provisions in the Bill.

Natural aspect

The Bill is an opportunity to clarify the term Natural Aspect.

Comments reflected the degree of ambiguity in relation to “natural” and “aspect”! Some supported the Trust’s proposal on the basis it incorporated the various elements which were intrinsic to the appearance of the Hills. A number of people put forward their own views on what the terms meant. One commented that it should include the outlook from the Hills (which is beyond the Trust’s control) whilst others pointed out that in fact the landscape of the Malvern Hills and commons has been shaped by humans and is in reality a managed landscape.

Legal advice

Please see comments from VWV and Sharpe Pritchard

There has been a limited consideration in case law of the term, notably **National Trust for Places of Historic Interest or Natural Beauty v Midlands Electricity Board** where there was a discussion about the meaning of the words in relation to their use in a deed of covenant. Vaisey J said, “the omission of any criterion by which these vague and uncertain words can be brought under some control is fatal to the validity of the restriction”. He found the term in that instance to be void for uncertainty.

Working Group recommendations

The working group noted the value that some respondents placed on the term “natural aspect” but there were a variety of views on what it meant. Other commentators felt that a more definitive and readily understandable term was needed.

The working group considered that “natural appearance” captured what was meant by ‘natural aspect’ 140 years ago but was more readily understandable by a modern audience. They therefore suggest the Board should consider making no change, ie that the proposed wording of 1(a) should remain as ‘to protect, conserve and maintain the landscape, natural appearance, habitats, flora and fauna, geology and archaeology of the Malvern Hills;’

Enhance and Biodiversity

Legal advice

Please see comments from VWV and Sharpe Pritchard

Enhance

There were a limited number of reasoned comments expressing the view that the word 'enhance' should be included as this would better allow for changes in management in the future, eg in response to climate change.

Working Group recommendations

Enhance

This is a nuanced point. The working group understands the view that including the word enhance might enable the Trust better to respond to climate change. However, they noted Sharpe Pritchard's comments about the scope for debate provoked by the amendments to s85 of Countryside and Rights of Way Act 2000 to include this word.

The working group recommend that the Board adhere to "conserve and maintain", because implicit in 'maintain' is the requirement to respond to changing pressures in the external environment.

Biodiversity

Although the term biodiversity can be seen as broadly equivalent, it goes beyond flora and fauna as it encompasses the genetic diversity of domesticated animals and plants as well as undomesticated. For MHT's purposes, the term flora and fauna is felt to be more appropriate and is likely to be better understood and the **working group recommend that the Board make no change.**

Recommendations

Land Management

That the Board resolves to:

1. Request the Parliamentary Agent amends the clause relating to securing the grazed commons to take into account Officer concerns that the most appropriate site for fencing will not always be on the exact perimeter of the common
2. Include a requirement that there should be a minimum of 6 month break following fencing to regulate grazing before the same area can be fenced again, but with a *de minimis* exception to enable up to 1ha to be fenced again for the control of unwanted vegetation.
3. The proposal to be able to fence for animal health reasons be removed.

Licences and Leases

That the Board resolves:

4. To make no change to the Trust's proposals in relation to leases and licences of land (including buildings).
5. To make no changes to the proposals outlined in the consultation document in relation to licences for activities on Trust land (but to ask the Parliamentary Agent whether some of the concerns expressed can be addressed in the drafting).
6. To make no change to the Trust's proposal to change the consultee in relation to licences for overground services.

Modernisation of the Trust's Administration

The Board resolves:

7. To make no change to the Trust's proposal to be able to hold hybrid or online meetings
8. To retain the provision to permit the Trust to set up a supporters organisation but adopt the term "supporters" instead of "members".
9. To make no change to the Trust's proposal to include a restricted general power in the Bill.
10. To restate the current power to borrow within the provisions of the Bill
 - powers to borrow in furtherance of its purposes,
 - powers to secure borrowing against land and revenues, but without any power of sale or to cut and sell timber in relation to its current purpose land.
 - powers to secure borrowings against ancillary land without third party consent, and any such loan agreement can include a power of saleTo establish the view of the relevant Government department and the Charity Commission on any requirement for third party consent to secure borrowings against existing purpose land or new purpose land.

11. To proceed with the change of the charity's statutory name to Malvern Hills Trust.

Objects

The advice from Sharpe Pritchard was circulated after the working group report was prepared. The group's recommendation was to make no change to the objects as currently drafted, save for consideration of whether to introduce the word "unenclosed".

David Core, John Michael, Mike Wilkinson, Sheila Wren
Working Group

Susan Satchell
Governance Change Officer
15 September 2024