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NEW LEGISLATION FOR OUTDOOR ACCESS: A REVIEW OF PART 1 OF THE LAND REFORM (SCOTLAND) ACT 2003

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INTRODUCTION

The manifesto for the incoming new Labour government of 1997 had a commitment to create greater freedoms for the public to enjoy open countryside, a rather old Labour inheritance. This led to legislation to create new rights of public access to land, enacted for Scotland through Part 1 of the Land Reform Act 2003 and, for England and Wales, in Part 1 of the Countryside & Rights of Way Act 2000. Scottish rights of access came into force on 9 February 2005 while, for England, a region-by-region programme of implementation was completed by the end of October 2005. Implementation in Wales took place on 25 May 2005.

Some sectors of the open-air recreation community have long been committed to securing a right of access to open country, but the matter had not attracted sufficient political action over decades of debate, until the 1997 manifesto commitment. There are pragmatic arguments in support of better access for open-air recreation, such as its role in the rural economy through tourism – an issue well exposed through the foot and mouth crisis of 2000-2001. There are the health benefits arising from physical activity in the outdoors: if the public health message is to 'walk about more', then ample welcoming provision for this is needed. The public was often uncertain about where they might go on

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land, and a lack of clarity in the law tended to benefit those who manage land; there were continued impediments to access imposed by some owners; and there has been debate about widening the public benefits that land managers provide in return for state support to agriculture and forestry. Perhaps the most telling practical argument for modernising the law on access to land is the popularity of enjoying the outdoors: surveys indicate that around 130 million visits to countryside or coast are made annually by Scottish adults (Greene 2002). However, the political stimulus to the new legislation proposed by new Labour in 1997 came mainly from the older arguments about securing rights for the public over private property and, in Scotland, it was enacted as part of the Executive's land reform agenda.

Part 1 of the Scottish Act can be said to introduce to the UK a Scandinavian *allemannsrett*, the closest analogue being the arrangements prevailing in Norway, where the pre-existing common law rights of access in that country were affirmed in statute – the Open-air Recreation Act 1957 – under which access rights have to be exercised 'considerately and with due care'. This article reviews the evolution of and the prospects for this new Scottish approach. It can be said to be distinctive, indeed radical in its construction and dependence on civic responsibility, but it also shifts significantly the balance between the public and private interests in land.

TWO CONTRASTING APPROACHES

The new statutes north and south of the border are quite different in scope and construction. For England and Wales, the approach in the 2000 Act is more regulatory, in that land over which new access rights apply (defined in general as mountain, moor, heath or down) is specified on maps prepared under complex consultative procedures. This is backed by a range of statutory procedures for the closure of access land by owners and public bodies, and by a more formal approach to permitted behaviour. In Scotland, the new approach is almost the inverse to that in England and Wales. A regulatory approach has been avoided and, rather than specify on maps where rights exist, the new legislation provides for access to all of Scotland's land, subject only to limited exemptions specified in the Act, and to an obligation on those exercising their new rights to act responsibly. Access rights in Scotland have also a much wider set of purposes than the 2000 Act's limitation to access on foot for open-air recreation.

Responsibility lies at the heart of the new Scottish approach: the principles are set out in general in the Act, and the practice is specified in a new Scottish Outdoor Access Code, approved by the Scottish Parliament. The exercise of access rights by the public has to be responsible, and reciprocal responsibilities fall on those who own land on which access rights can be exercised, so that each has to respect the rights and interests of the other. The core provisions of Part 1 of the Act are as follows.

- Section 1 assigns rights of access to everyone for four purposes, these being to cross land (for the purpose of getting from one place to another); to be on land for recreational purposes; for relevant educational purposes; and for commercial purposes where these could be carried out under the right in a non-commercial way. Access rights apply to all land in Scotland (including inland water, and above and below the land) apart from exclusions specified in sections 6 and 7.
- Section 2 establishes that rights can only be enjoyed if they are exercised responsibly: this is defined in general as acting lawfully and reasonably, by not causing unreasonable interference with the rights of any other person, and by taking proper account of their interests and of the features of the land, all of which is guided by the content of the new code.
- Section 3 places a reciprocal responsibility on the owners of land over which access rights are exercisable, to use or manage and conduct ownership of it responsibly in respect of these rights: this is also defined in general as acting in ways which are lawful and reasonable, and which take proper account of the interests of those exercising or seeking to exercise access rights. Again, the code is the guide to what is responsible.
- Section 10 charges Scottish Natural Heritage to draft, consult on, submit to Ministers and keep under review the Scottish Outdoor Access Code, as the main reference point for responsibility in access. Ministers have to seek the approval of Parliament before the code can be issued by SNH. Both SNH and the local authorities have a duty to publicise the code, and SNH has the further duty to promote its understanding.

All other sections in Part 1 of the Act qualify, amplify or give support to the implementation of these basic provisions, notably the sections 6 and 7 exclusions, mentioned above, and section 9, which specifies a short list of excluded conduct. So, the construction of this part of the Act can be said to be a framework for a social contract between those exercising rights and those who manage land.

A LONG DEBATE

There has been civic debate since the mid-19th Century about access to land for its enjoyment by the public. More people – mainly the emerging middle classes – then began to have sufficient free time and resources for leisure in the outdoors, and conflict arose with those acquiring or using land for private enjoyment, especially for field sports. In Scotland, rights of way cases in the mid-19th Century marked this debate first, followed by pressure to confirm freedoms of access to open country, especially through the efforts to secure legislation for this purpose, led by James Bryce MP over a decade from the early 1890s. Further attempts to create statutory rights of access to open country continued between the wars, leading to the failed Access to the Mountains Act of 1939 – failed in the sense that its provisions (for England and Wales only) were heavily circumscribed and a disappointment for those seeking better access. While brought into force just before the war, it was overtaken by the wartime emergency and repealed in the Act described below.

The post-war Labour Government returned to access legislation in the National Parks and Access to the Countryside Act 1949. The access provisions of the 1949 Act did not apply to Scotland, and mainly depended on access agreements with landowners (with provisions for rarely-used access orders), along with better care of rights of way. This negotiation-based approach can be seen as a feeble response to the need expressed in vigorous pre-war access campaigning, and as a muted provision from a Government that was taking much bolder action on other social fronts. Little emerged for Scotland, apart for some minor provisions to augment local authority powers for practical matters like footpaths, until the Countryside (Scotland) Act 1967, which became the main Scottish legislation for open-air recreation over the second half of the 20th century. This Act followed on from the 'Countryside in 1970' conferences, which were a stimulus in the mid 1960s to public debate about the rapid pace of social, and other development-led, change, affecting rural areas at that time. The recommendations of Study Group 9 on Countryside Planning

and Development in Scotland to the second of these conferences became the starting point for the 1967 Act, which proved to be functional but uninspired legislation. It provided a range of new powers for public bodies, especially the local authorities, to help them manage and provide better for the rapid growth at that time of recreational trips to the countryside, as car-ownership expanded.

While the 1967 Act had some contemporary novelties such as country parks and ranger services, at its heart lay an uncritical importation to Scotland of a number of the main access provisions of the 1949 Act – say, the powers for agreements and orders, both for area-wide access and public paths. The stated aim was to provide Scottish authorities with the tools that their counterparts in England and Wales already had, but without sufficient critical inspection as to whether these were the right tools for Scottish needs. The basic approach was still to seek agreement over the public use of private land, and to foster more management and mediation, all backed by some more resources from central government. Strong suspicion existed within the recreation community (and amongst local authorities) over any statutory powers of agreement over access, lest they enable landowners to limit or deny what those using the outdoors for active pursuits regarded as existing, legitimate freedoms. The outcome was that the 1967 Act access agreement powers were a bigger failure in Scotland than their equivalents had been south of the Border. Of the limited number of area-agreements signed, virtually all were for small areas of land, mostly in use by the public, and over which the involved local authorities sought a stronger legal footing to deliver better management. Most of the public-path creation agreements were used in the establishment of statutory long-distance routes, another borrowing from the 1949 Act. So, an opportunity was missed to create a forward-looking approach relevant to Scottish circumstances: however, it has to be said there was no clamant call at the time for more radical change.

The 1967 Act also created the former Countryside Commission for Scotland (CCS) as Government's statutory advisor on open-air recreation and on the conservation of Scotland's natural beauty. Over most of its near 24-year life, the CCS pursued the pragmatic approach in its founding statute of assisting local authorities and landowners to make improvements to access through more management and better facilities, all supported by grant. But in its final years, the Commission did initiate (in 1990) a wide-ranging review of access arrangements. This review eventually ran forward into the merger between CCS and the Nature Conservancy Council in Scotland to create Scottish Natural Heritage (SNH). Before its extinction, and in passing the uncompleted access review onwards to its successor body, the Commission came to the view

that there should be a change in the law, but this opinion was set aside by SNH when it revived the process of review. However, the Commission's efforts to look at the fundamentals of access to land did start a process of consultation, and the commissioning of background research studies and reviews. It also started collective debate between the main parties, and it fostered expectation of change ahead on a matter that had lain dormant for too long, all of which provided a helpful platform for what was to follow.

THE EARLY DEVELOPMENT OF THE NEW LEGISLATION

It was inevitable that action on the 1997 manifesto commitment would need different approaches north and south of the border, because access to land in Scotland had separate historical and cultural resonances. Any legal changes would need to be set in the context of Scots law on land, and it was also expected to be a matter for the then oncoming Scottish Parliament. Following the election of a Labour government in May 1997, Lord Sewel, then Minister of State at the former Scottish Office, wrote to Scottish Natural Heritage in late July 1997 to invite it to 'take the lead in convening a Working Group to consider the law on access to open country and to advise by the end of 1998 on the need for any changes'. In response, SNH (and others) sought that the scope of review be expanded to cover all land (which was conceded), as the prime access issues in Scotland lay not in the use of the high hills, but more in lowland countryside. Here, recreational access had become inadequate for a range of reasons, not least from significant losses to the rights of way system in the post-war period. Here, also, were to be found more impediments to access created by land managers (SNH 2002).

SNH addressed the Minister's request for a working group by involving an already existing national Access Forum, which had representation from the main landowning, recreational and relevant public body interests. This Forum had been one of the main outcomes of the SNH's own review of access needs (1994). SNH had concluded that the law on access was unsatisfactory, but that further attempts to improve access through consensus and more management was still the way forward – perhaps the only realistic outcome, as the then Conservative administration would have not supported any major changes to the law. The role of the Forum was to help promote collaborative working, and some success was achieved through a concordat on access to open country, agreed between the main interest groups (SNH 1995). Some useful work was also started to improve access close to where most people live, under an

initiative called the Paths for All Partnership, also one of the outcomes of SNH's review. But before much else could be done, the Forum was diverted to become the main vehicle of debate about the best way to meet the needs of the new administration. The critical decisions on whether and how to proceed fell, of course, to Scottish Office Ministers and, later, to the Parliament.

The Forum debated the options for change to the law through most of 1998, and it came to the unexpected and bold recommendation for a general right of access to land and inland water for informal recreation and passage, subject to access being taken responsibly according to a code of behaviour, and to there being safeguards for land management, privacy, and conservation needs. This outcome was achieved through the landowning and managing bodies on the Forum offering to go in this direction. The representative of the then Scottish Landowners' Federation (SLF – now the Scottish Rural Property and Business Association) made this proposal at the August 1998 meeting of the Forum. It can be taken as an accepted position by the other land managing bodies on the Forum at that time, as none demurred on the day or objected during subsequent discussions: nor did they detach from the Forum's final advice, which was endorsed by SNH, then submitted to the Scottish Office and published (1999).

The Forum addressed its task as a pragmatic review of administrative law on a matter normally given low political attention, and it did so at a distance from the parallel review of land reform issues, led by the Scottish Office in preparation for action by the new Parliament. The links between public access and land reform are quite evident; indeed, they are implicit in any radical political action on ownership, although the land reform campaigners had not made a great deal of these connections, being more concerned with the structures of ownership than the uses of land. The Scottish Office's Land Use Policy Group, which led the debate on the legislative changes needed for land reform, mentioned access lightly in its initial consultation paper (February 1998) and in its subsequent publications as a matter being dealt with elsewhere, until the Group's final recommendations for legislation (July 1999), which presented the proposals from SNH and the Forum.

THE EXISTING LEGAL POSITION

Contention about what the pre-existing law said on access, and whether there were existing general rights, became an important point of debate as the new legislation evolved, both in setting its tone and in influencing its detail. There has long been a popular view that there was no law of trespass in Scotland,

although the extent to which this view was held had been brought into question by a market research survey (System 3 Scotland 1991a). This evidence showed that opinion amongst the Scottish population on whether there was a law of trespass or not fell into three broad groups: rather more people (41%) thought that there was a law of trespass than those who believed the opposite (33%), leaving a sizable group of 'don't knows' (26%). So public opinion was a bit confused about access law. Strictly, the asking of a market research question on the law of trespass is a bit unfair, because of the opaque nature of the law at the time for the public, so these survey data can only illuminate general perceptions. However, perceptions have long been part of the access debate, with attitudes on the matter being influenced by the cultural and historical context of ownership, or by the need for modern access arrangements fit for the present-day needs of society. Such views came more from the experience of access to open country than on low ground, as freedom to enjoy the hills has always been a potent force in this debate, to the disadvantage of access elsewhere.

The practical outcome of this lack of clarity for the public was that most people were uncertain or cautious about where they might go on land, without there being some form of invitation – direct or implied – or the comfort of existing visits being normal practice. The public has long felt free to use certain popularly-visited locations or categories of land such as the coast or open hill (System 3 Scotland 1991b), but their understanding of whether they had any rights was weak – say, the longstanding common law right of access to the foreshore, which will not be known to most beach visitors. This confusion in the law for the public was to the advantage of the land manager.

Where one starts from in debate about change to the law was critical to perceptions of the extent of legal change required – was this to be a new and radical measure or just a confirmation of what people could already enjoy under assumed and existing common law rights, evolved through custom and practice? This led to two rather polarised camps. The claim to existing rights of access was argued on the precedent and historic rightness of long-standing customary entry onto land (especially to hill land); on existing access to land and inland water being exercised as of right, and thereby an assertion by the public of the legitimacy of their actions; and on re-examination of past case law. Also used in the argument were past statements by politicians and others about the lack of a law of trespass, or on the ineffectiveness of the landowners' position in taking action to exclude people from their land. The case for existing rights was supported by most (but not all) of the recreation non-

governmental organisations active in influencing the parliamentary debate; the Scottish Rights of Way and Access Society demurred. The existing-rights case drew from the arguments of Alan Blackshaw (see Blackshaw 1997 and his evidence to Justice 2 Committee (2002)) as promoted by Ramblers Scotland, which had funded his researches into the traditions and history of Scottish access law and past case law.

Supporters of the conventional legal position held that there was no general right of access. This position was taken by the Executive; by the legal profession, as represented by the Law Society of Scotland; by the landowning bodies; and by SNH (see the Stage 1 written and oral evidence of all these bodies to Justice 2 Committee (2002)). It is also the accepted approach in the main land law texts (say, Gordon 1999 and Reid 1993). While there are longstanding trespass offences in relation to poaching, the carrying of firearms and camping (the last of which has been amended in the Act), the conventional approach of the law relating to trespass is based on landowners' rights to exclusive use of their property. However, it has always been very difficult for owners to assert or enforce such rights at law. From this stance, customary access was implied consent, which had no security in law. As the National Farmers' Union of Scotland put it in its evidence to Justice 2 Committee, the public have a liberty to enter onto land, a liberal sounding formula, but without this liberty being conceded as a right, and with the land manager having more than a liberty to try to restrain entry.

The claim to existing rights became an important basis for the non-governmental organisations to challenge the inadequacies of Part 1 of the consultative draft of the Bill (2000), and it also emerged as a main issue in evidence to Justice 2 Committee on the revised Bill, at Stage 1. Indeed, this Committee held an extra session of oral evidence on 19 February 2002 to test again the views of the main bodies representing the two opposing stances. In its Stage 1 report, the Justice 2 Committee's main conclusion on existing rights is equivocal. Thus, at para. 26, its conclusion states 'On the question of the common law position, the Committee remained unpersuaded by the evidence and arguments that there is either a clear prohibition or a clear permission in relation to harmless access to land. However, we note the principle of Scots law that what is not expressly prohibited is permitted'. However, para. 44 accepts that 'no new rights of access are being created by the Bill'. Thereafter, the case for existing rights played a strong role in the Stage 2 committee debates, with most members of the Justice 2 Committee being aligned with

these arguments. There was also support for existing rights from other MSPs, during the Stage 1 and Stage 3 parliamentary debates.

For the supporters of existing rights, the significance of their arguments was threefold.

- First, the strong claim of existing rights asserted the political context of the parliamentary debate, especially in reinforcing the historic and social rightness of this measure.
- Treating the new legislation as only confirming existing rights was a powerful argument against any undesirable limitations or restraining provisions to access, which could be said to diminish what people could enjoy already and, perhaps, even be a step backwards.
- Third, it was contended that existing rights would be important in challenging any attempts to limit unreasonably (or to take narrow interpretations of) the new statutory provisions, once implemented.

These were strong arguments for those who were believers in existing rights, and they were well deployed in the political debate, certainly the first two. The third seems less certain: it does not seem practicable that individuals might draw from their hip pocket a claim to a pre-existing right of access should they meet a challenge on the ground to their exercise of the new statutory right. However, it might be argued, in line with the approach of the legislation, that what was pre-existing practice (and still within responsibility) was intended to be within the new access regime.

Leaping ahead for the moment in the sequence of events, the issue of existing rights led to contention following amendments laid at Stage 2 (numbers 19 and 40, by Scott Barrie), to confirm that certain key words in the Bill (as introduced) did not deny existing rights. Thus, the relevant part of the long title to the Bill used the words ‘to confer and regulate public rights of access’. By amendment, these words (and equivalent words in the first line of section 1) were changed to read ‘to secure public rights of access’. SNH raised a concern that this was a hazardous change, in that any future legal challenge, which exposed that there was nothing of substance ‘to secure’, could undermine the whole basis of the legislation. Part of the problem here was not just the amended words, but also their justification by an assertion of existing rights.

The outcome was an Executive-led compromise on the amended words at Stage 3 to replace them with a new formulation: ‘to establish statutory rights of public access to land’. This leaves open the prospect that non-statutory rights may exist, notwithstanding that the word statutory is tautological, in that rights created in an Act are de facto statutory. The new legislation also interacts with pre-existing access law by virtue of Section 5(3), which states that ‘the existence or exercise of access rights does not diminish or displace any other rights (whether public or private) of entry, way, passage or access’. This is a proper provision because of the need to avoid overtaking other existing rights, such as public rights of way or of navigation, private servitudes, and the long-standing public right of recreational access over the foreshore: but it also leaves open the prospect that wider rights exist under the common law.

These differing positions have not been resolved; indeed they could not be concluded without a determination in the courts, although expert legal commentators would assert that the law has long been settled and not in need of determination. Indeed, they would argue that the sparsity of case law on the matter is a measure of acceptance of this position, with most access case law arising from secondary issues linked to the taking of access, such as liability, rather than challenge to the principles of the law. A key factor in this debate was that the conventional approach of the law had been too detached for too long from practice in open-air recreation, and from the expectations and needs of modern society. So, debate about existing rights may not have led to more clarity, but it was significant in the process of developing the legislation as it passed through Parliament. In short, the outcome of this debate was that the existing-rights approach found political favour, but it is not conceded by legal opinion.

THE LEGISLATIVE PROCESS

The evolution of Part 1 of the Land Reform Act ran a long course from the original manifesto commitment in 1997 on to enactment in early 2003, and commencement on 9 February 2005. In large part, this delay arose from the time needed to evolve the new approach through the Access Forum, from the need to await the creation of Scotland’s Parliament, and from the considerable time taken up in the evolution and passage of a complex three-part Bill. Following Royal Assent on 25 February 2003, there was an extended consultative debate on and Parliamentary approval of a revised final version of the Scottish Outdoor Access Code. Guidance to local authorities on their

powers and duties post-legislation had to be developed, consulted on and approved by Parliament, and some time before commencement was provided to allow local authorities to begin preparation for the implementation of their new powers and duties.

During the period when the Executive was preparing for the draft Bill, a breach of the original consensus at the Forum emerged. This arose from concerns raised by the representative landowning bodies, some of which came from the extended discussions over the draft Scottish Outdoor Access Code. But by that time, some of the wider membership of the landowning bodies would have judged that the new approach went too far, or that the safeguards they had envisaged were not likely to be forthcoming in the Code or the Bill. And there was the reality that this part of the Bill was now swept up into the sharper politics of land reform. During the Forum's debate on the creation of the Code, concerns had arisen from landowning interests about commerce, about access by groups, about enforcement, and about closures for land management. Subsequently, there was some influence from debate on the equivalent legislation for England and Wales. This led to stronger concerns being expressed by property interests about dogs, liability, and night-time access, and there was also lobbying against Scottish access rights extending to inland water.

By the time the consultative draft of the Bill was launched (by Jim Wallace and Sam Galbraith) at Aberfoyle on 22 February 1999, the National Farmers Union of Scotland withdrew from the Forum. Evidently not much committed to the consensus, NFUS had moved to a position that new rights should be limited to open country and that, on low ground, access should only be on paths. The views of the SLF were also shifting, in suggestions that the claimed need for legislative change was not robust, and that the measures were disproportionate. Other land managing interests outwith the Forum were also in opposition. This lobbying may have influenced the approach taken by the Executive in the draft Bill, which greatly disappointed access campaigners as a backward step. Other influencing factors appear to have included uncertainty over the viability of the advice from SNH and the Forum for an open structure to the legislation, and some uncertainty about how to convert this into workable statute. There was a concern to strike a balance between access needs and land management (a theme stressed by Ministers at the Aberfoyle launch) and the influence of human rights provisions will have intruded here.

So, by the time of the Executive's consultation on the draft Bill, public debate was becoming more contentious. This consultation, which was extended

because of the foot and mouth disease crisis, drew a large number of submissions (around 3600), mostly on Part 1 and mainly from the recreation sector – bodies and individuals. The main issues that drew most criticism and active lobbying were:

- concern that the status of people leading commercial outdoor-recreation groups had not been explicitly covered in statute;
- a long list of activities (s.5 of the draft) deemed to put a person outwith access rights, many of which were more suited to the code;
- powers taken by the Executive (s.6) to amend key parts of the Act by order;
- powers (s.8) for the emergency suspension of access rights by local authorities;
- provision (s.9) of a means for owners to suspend access rights, for reasons of interference with the owner's lawful activities or hazard to those exercising access rights;
- powers (s.10) for local authorities to exempt specified land and to exclude certain activities from access rights, or to restrict the scope of rights, and (s28) a role for them in certifying land where access rights did not apply;
- a power (s.15) to enable a police constable (or an authorised officer of a local authority) to exclude or remove people from land in circumstances of persistent contravention of the access code, or where a person had or intends to act in ways that exceed their rights, with an offence arising on that person's refusal to leave at the request of a constable; and
- an order power (s.16) to local authorities to exclude individuals from land who have persistently contravened the access code or have acted in ways outwith their rights.

There were other significant omissions, such as the failure to specify clearly the role of a code as the reference point for responsibility; and the powers of practical action given to local authorities were weak, with only a power (not a duty) to uphold access rights – which was a big step back from SNH/Forum advice, as set out also in the Land Reform Policy Group's recommendations for legislation. There was a lack of responsibilities assigned to landowners in

relation to access; and no provision for wild camping. And (for the landowning interest) there was concern that there was no mention of liability. So this was a draft which disappointed, which did not meet the aspirations of the advice from SNH and the Forum, which was regulatory in tone (although not to the same degree as implemented south of the border), and which departed from the advice for a simple framework to handle access through responsibility, as guided by a code. The main weight of complaint came from the recreation interests, but local authorities did not like the regulatory powers assigned to them.

The consultation led to a substantially improved Part 1 of the Bill, as introduced by the Executive to Parliament, which resolved many of the above failings. The Act, as eventually passed, was now clearly recognisable in this major revision. The debate then moved to a more evolved set of concerns, exposed in the substantial volume of written response to Justice 2 Committee's call for Stage 1 evidence. Again, the majority of the responses came from the recreation sector, although many of the issues raised at this point were about detail rather than principle. The issues of a more substantive nature, and on which oral evidence was taken, were:

- the lack still of any way of handling the commercial needs of outdoor activity businesses, and other existing commercial uses (such as photographers), emerged for resolution;
- the existing rights argument (as described earlier);
- the open nature of the powers that the Executive was claiming at sections 4 and 8 (of the Bill as introduced) to amend the Act by order still raised concern;
- continued complaint about the now restricted local authority powers to exempt land from access rights (section 11); the recent experience of some Councils acting quickly to close rights of way during the foot and mouth crisis, and also of being slow to open them up, had raised fears in the recreation community about how they might use this new power;
- while the regulatory powers assigned to Councils in the draft Bill were now greatly diminished, and they now had a duty rather than a power to uphold access rights, their powers for implementation were still less robust than was desirable; and

- access through farmyards also emerged as an issue that would run through into Stages 2 and 3.

Four Committees, apart from the lead Justice 2 Committee, commented on or took evidence on Part 1 of the Bill, but only the Rural Development Committee did so to any great extent. In holding five sessions of oral evidence, the lead Committee did place some emphasis (as described earlier) on what the existing law said, and the concerns of outdoor-activity businesses were well aired. These two issues emerged strongly in the Committee's Stage 1 report, along with the other themes listed above. Also given attention by the Committee in its report was the basis of judgement over what guidance would be appropriate for statute or for the Code, and the need for a simple adjudication procedure for any problems arising; and the Committee strongly supported the non-regulatory approach in recommending against any new criminal offences. Landowner-led evidence bidding for a paths-only approach on low ground, or asserting that the need for change had not been demonstrated, was set aside, although the Committee was more helpful to landowners in raising the issue of liability and in pressing for adequate financial resources for local authorities.

The Parliamentary debate on the Stage 1 report had relatively narrow focus – many of those who spoke raised the matter of commerce and the existing rights issue had much exposure. By now the debate had become much more politicised: the party lines were also now clear with the Executive having the support of the SNP, leaving the Conservative representation (one out of seven members on Justice 2) in an isolated position throughout the remainder of the parliamentary process in promoting amendments for the landowning interest.

At Stage 2, debate on the details of Part 1 again dominated, occupying eight of the eleven sessions of committee debate on the Bill, and attracting some 256 of the nearly 500 amendments – the largest number for any Bill at that time. The broad thrust of the Part 1 amendments was to push the Bill further towards the recreational interest by extending the basis of access rights, and by excising powers that had any regulatory content. The outcome was that Part 1 of the Bill emerged rather battered from Stage 2, with three sections removed and other significant changes made, much of this change being influenced by effective lobbying from the Ramblers and other recreation non-governmental organisations.

The main changes and areas of contentious debate at Stage 2 were as follows. First, there was change to the long title and section 1 to clarify that the intention was to secure existing rights (as described above); sections 4, 8 and

11 were excised, the first two being the Executive's powers to amend the Act by order, the third being the local authority power to withdraw rights from land. The need to accommodate commercial outdoor activities was addressed, but with the outcome that the Committee adopted two parallel amendments, one from the Executive directed at the issue of activity-group leaders, the other a broader solution sponsored by non-governmental organisations. Clearly this would need resolution at Stage 3. Debate and amendments also covered much wider ground including a good number of useful detailed improvements introduced by the Executive.

A key theme throughout the Stage 2 debates was pressure to extend the basis on which new access rights might be exercised. Thus, there was extended discussion about what might be termed the tramlines issue: would rights extend to taking passage across crops where some kind of track (the tramlines) or other space was available beside or within the crop? This was a debate about the fine-grain interpretation of section 6(1)j (of the Act), which limits the exercise of access rights over land 'in which crops have been sown or are growing' (but subject to the exemption at section 7(10)b, allowing access to field margins). Does this limitation extend to the whole area sown (etc) or just to the land on which the crop is actually present? The Minister did concede (Cols 1742 and 1745-7, Justice 2 Committee Official Report for 18 Sept 2002) a liberal interpretation that it would be possible to cross crops using tramlines or the ground between rows of crop plants, if done without causing damage, but the details of responsible action for access and land management were deferred to the code. Some crops do have space where crossing the field would not cause any physical damage; in other cases the passage of one person might be damage free, but the cumulative effects of more than one person would soon be unacceptable. For these more marginal cases, there remains the question as to whether it would at all be reasonable and responsible for people to take access in this way. The advice in the code is necessarily general and puts emphasis on actions to avoid damage to crops, also commending that ample margins be provided.

One theme where the Executive held the line firmly was that of access rights extending through farmyards. Passage through the farmyard has long been possible where a right of way exists, or where access has always been possible. In some regards this is a more pragmatic need than access through crops, in that the steading is often the hub for existing farm roads or tracks, and it would often be convenient that existing tracks be a main basis for the exercise of rights. However, Ministers held fast to arguments of health and safety, and of

privacy for the farmhouse (this on Human Rights grounds), although there was encouragement for farmers to permit access through farmyards where possible, or to provide alternative options around the steading.

There was a gap from the end October 2002 to early January 2003, before Parliament returned at Stage 3 to Part 1 of the Bill as amended. Again the access provisions led the debate, and the number of Part 1 amendments ran to 130. This large volume of proposed change was handled by guillotining the debate, even though this was the first Bill to have a two-day consideration at Stage 3. The outcome of this congestion was that some new amendments were adopted with light or no discussion over their purpose or wording. A good number of the amendments went over old ground and the main changes were as follows:

- argument about the long title and its awkward wording was resolved through an Executive amendment;
- the matter of commerce was resolved by Ministers adopting the more widely constructed of the two options agreed by Justice 2 Committee, which allows that activities that can be pursued under rights can also be undertaken commercially or for profit;
- the scope of access rights was widened by the addition of a new purpose for 'relevant educational activities';
- sections 4 and 8 (the Executive's powers of amendment by order) and 11 (the local authority power to exempt land from rights), which had been lost at Stage 2, were successfully brought back, but with significant compromise by the Executive on consultation and on the scope of the powers sought; and
- some advance was made on the powers of implementation for local authorities – and more might have been achieved here had the emphasis of debate throughout the process not lain with the earlier parts of Part 1.

Following royal assent on 25 February 2003, SNH began the process of finalising the Scottish Outdoor Access Code. The earliest draft of the code had been developed in discussion at the Forum during 1999, in parallel to the initial drafting of the legislation. While the primary function of the code is to give guidance on responsibility in access, its creation became a second round of debate at the Forum about the details of access, and about the safeguards to be

provided through the approach based on responsibility. Not all the detail of this draft was agreed by all of the parties, and SNH edited the first public version, which was issued as part of the consultation on the draft Bill. Subsequently, SNH provided a further version of the code (the Forum by then being in abeyance) to stand alongside and to accord with the revised version of the Bill, as introduced to Parliament. After royal assent, the Forum reconvened for further debate on the code, in advance of it being the subject of a wide-ranging public consultation (SNH 2003) under section 10 of the Act.

The SNH consultation was the first occasion when there had been any extensive public engagement with the draft code. There had been only limited comments on the first public version, consulted on by the Executive alongside the draft Bill, some of which focused on inconsistencies between these two draft documents (an outcome of their separate origins). However, at that time, the code was secondary to the content of the draft Bill, which commanded most attention. The second version, which stood alongside the Bill during its progress through Parliament was primarily a supporting paper. The final version of the code is a long document and has been criticised as such. This length is in large part an (inevitable) outcome of how it was created, with the members of the Access Forum bidding, for their interest, to get as much detail into the text as was needed to secure a solid footing for the operation of new access arrangements based on the principles of responsibility. Further and condensed practical advice is expected to come in more specific promotions to those engaged in open-air recreation, and to those managing land for access.

SNH's 2003 consultation attracted a strong response (over 1300 submissions) but it was difficult for SNH and the Forum to respond positively to all of them. Some were challenges to the legislation or how it might be implemented and, for some of the other comments, the code was the linear successor to that earlier negotiation between representative groups, much of which could not be readily set aside (SNH 2004). Inevitably, there are some compromises in the final version (SNH 2005), most of which touch on the main areas of political debate, but much more was agreed in the original negotiation than disagreed.

There has been some recent minor legislative change to Part 1. First, the Executive has used section 8 of the Act to correct a confusion arising from a Stage 3 amendment that might have been interpreted as excluding forests and woodlands from access land (Scottish SI 65 of 2005). A further provision, through a Westminster Order (SI 2250 of 2003 under section 104 of the Scotland Act 1998), enables the Secretary of State for Scotland to exempt specified areas of land from access rights for reasons of defence or national

security, these being reserved matters. A similar, but much less satisfactory provision, was introduced at Westminster, at sections 129 to 131 of the Serious Organised Crime and Police Act 2005. This introduced a power to the Home Secretary and Scottish Ministers to designate land for reasons of national security (withdrawing any statutory access rights thereby, although this provision covers all land, not just that where access rights apply) and creating a criminal offence of trespass for entry onto such land. If used only for prime security needs this can be acceptable, but it has to be said that the creation of an offence for just being on the wrong piece of land does cut across the bows of the approach taken in the Land Reform Act.

REVIEW

The construction of the new access legislation can be said to found on five main precepts:

- first, and at centre to the new approach, the exercise of new rights is contingent on responsibility;
- reciprocal responsibilities fall on both those exercising rights and the owners of access land, each having to have regard to the rights and interests of the other;
- access rights apply to all of the land of Scotland (including inland water) subject only to limited exemptions, as set out in sections 6 and 7;
- regulatory provisions are minimised in favour of the approach of responsibility and the resolution of problems through discussion (say, through local access forums) or formal adjudication at the sheriff court; and
- much of the detail on how rights and responsibilities should be exercised lies in a separate code, which is not statutory but has the endorsement of the Scottish Parliament.

For the visitor to the countryside this is a liberal and forward-looking clarification of fragmented and poorly understood access law, which now allows the public to feel confident about where they may go on land and inland water. A pragmatic solution has been found, which conforms in general to the pre-existing practice on open country, and which also cuts through the previously confused and unsatisfactory position on low ground access. The

degree of practical change may in reality not be huge, given that people have assumed a freedom to be on those categories of land most frequented by the public, and given also that they are likely to be prudent in how they exercise their new rights. But, for the landowner, there is a clear shift in the legal presumption on access from the private to the public interest. It can be said that the new approach is a socially forward-looking basis for access, balancing rights and responsibilities, and thereby a contribution to the Executive's aim of promoting civic responsibility. More political commitment now exists for better funding and action for access management through the existence of the legislation, its new roles for local authorities, and new resources released for this by Government. And there is better accord now with other public policies that assume that good access will be available – say for tourism, or the contribution that outdoor activities make to public health.

Yet, many land managers will feel that the process of debate became one-sided. Apart from the diminution in property rights, they continue to have practical concerns, such as their liability for people on their land; reduced privacy; the fear of people being on their land under the guise of the new law, but there with criminal intent; or of there being more disturbance to their management. There are concerns that land managers will not get sufficient support from public bodies, and that public behaviour will not match the best aspirations for responsibility. For example, some land managers at the margins of cities and large towns face real difficulties of damage and unruly use of land, but the Act should not make matters worse here: those who act irresponsibly have no rights, and the commitment to more active management for open-air recreation should begin to help.

It has yet to be shown that these fears have substance. For liability, the law aims to clarify that the existence of new rights or their exercise does not increase the degree of an owner's liability burden (section 5(2) of the Act). However, the extent of owners' liability may be now wider, in that an owner may have to address hazards on land where the public would not previously have been expected to enter, although past case law on liability in access has not operated against the landowning interest (McKenzie et al 1996). For the prospect of criminality, those on land for malign purposes have never paid attention to the legal basis on which they have entered; and, for concerns about interference to land management, there are the requirements of responsibility on the public and a clearer basis for addressing practical problems than in the past.

Two years on from commencement, it appears that Councils are making progress with their core path planning and other duties and, so far, no general trend has emerged of poor compliance with responsibility in the exercise of new rights. A small number of contentious cases have been brought recently to the sheriff court, either by Councils acting (under section 14) to defend rights of access, or where an owner is seeking adjudication (under section 28) about the extent of access rights. Some of these cases would have caused debate regardless of the change in the law, the difference now being that of a changed context for their resolution.

The manifesto commitment to legislate on access was a delivery on an old Labour commitment. The Ramblers' Association must take credit here for sustaining its long-standing parliamentary campaign to secure rights of access over open country. Recently, this has included draft Private Member's Bills on right to roam, introduced at Westminster in 1994, 1996 and 1999, only the first of which extended to Scotland. Interestingly, the most recent of these Right to Roam Bills (Bill 16 of the 1998-99 session) contained the idea of mapping open-country access land that emerged in the 2000 Act. Clearly there was a different cultural and political context in Scotland for legislation of this kind, and a number of doors opened (or did not close) which helped the new Scottish access legislation to take a different course from its counterpart in England and Wales.

- First, it was important and appropriate that the Scottish Office agreed in 1997 to widen the review of legislative change to all land; likewise, its invitation to SNH to promote collective debate helped in seeking solutions, even if consensus crumbled in the later stages.
- The oncoming of the Scottish Parliament with its unicameral structure was critical, in that this legislation would not have had such an open hearing at Westminster, even if Parliamentary time had been available.
- The Executive's first-session legislative theme of land reform provided the opportunity for early action on access law, although space for Scottish legislation on access would have been found, given the manifesto commitment, parallel action at Westminster and existing demand for such change.

- At the parliamentary stages, the Justice 2 Committee was strongly supportive of and engaged by the legislation. Briefing from the recreational bodies helped here, especially the strong campaigning of Dave Morris, Director of Ramblers Scotland.

A critical contribution was made to the Access Forum's debates by the landowning side making the initial proposal for a general right of access for recreation and passage. This was a bold contribution for which credit is due, and which opened the door to the Forum's collective advice. There is no stated reason why this offer was made. As a best speculation, the Forum's earlier access concordat had conceded the principle of general access (if only to open country) and the landowning interests, given their weakness in the pre-existing legal position, will have seen the unavoidability of legal change ahead as providing a basis for a better practical bargain on access, with more management commitment. It might also be seen as a concession made in the face of the *realpolitik* of land reform, on a theme which could be said to have least impact on most owners (compared to their fears about other parts of the land reform agenda) and whose day might be said to have arrived.

The debate at the Forum began in the spirit of developing practical measures to modernise Scotland's access laws, but it was inevitable that the outcome became more politicised. With the full commitment of both the coalition government and the SNP to secure this measure, the minority Conservative voice was left in an isolated position in arguing for the landowning interest. As noted earlier, the main landowning bodies also retreated from their earlier commitments, no doubt as their membership increasingly raised concerns that too much had been conceded without the counterbalance of sufficient safeguards. So, a breach in the initial consensus was almost inevitable as the matter became more politicised, and as landowning expectations were not met.

It has been said that the initial debate on the content of the advice to government was a rather closed event, such complaint coming from interests (say, from outdoor education) who were not at the Forum's table to influence the way forward; but the practical response is that the Forum delivered the goods. SNH did, at the outset of the process, invite views widely on the options for change, but this call for evidence drew only a modest response, probably because any wide-ranging consultation could only be effective once there was a product to consult on, which had to be a matter for the Executive's pre-legislative action. SNH has subsequently reviewed and revised the Forum's

structure to assist it in its new duty to maintain oversight of the role of the code in the implementation of the Act.

The new access law is not without some uncertainties. In large part these relate to its open nature: the Act sets a framework but does not prescribe all the detail, and the code is not (and could not be) comprehensive of, or anticipate, all the different circumstances under which people take access or manage land. This is legislation based on open wording, such as responsible, reasonable, and taking proper account of, and some issues of interpretation will arise. The process of the passing of the Act also led to some legislative uncertainties. These have various causes – some come from decisions in the original drafting, some from the politicised nature of the debate in committee and Parliament. Three themes on which there is not yet full clarity (and where adjudication in the courts may arise) are as follows.

- There is no definition of the words 'recreational purposes', the main basis under which rights will be exercised. While the code offers some guidance as to what is reasonable, this is not mandatory in that the code is not an absolute set of rules but a reference point. In policy terms, this part of the legislation is intended to create greater opportunities for the public to enjoy the countryside and this could be interpreted widely (the original advice had been for informal recreation).
- The extent of access close to buildings and other exempt structures will be a sensitive matter. The relevant words in sections 6 and 7 of the Act effectively prescribe a zone of privacy for residential property, and they were designed to accord with the right to 'respect for … private and family life' set out in Article 8 (backed by Article 1 of Protocol 1) of the European Convention on Human Rights. Limitation of access rights close to non-residential properties or structures uses the more conventional term of curtilage, and should be more readily defined on the ground. While the code does offer some guidance on what is responsible when close to property, the range of settings and circumstance involved is likely to be wider than the code can allow for. The courts have already been asked to adjudicate on the extent of rights around houses in different settings and, through this, guidance for other cases may arise.

- There is also uncertainty about the scope of the right to undertake commercially or for profit those activities which can be undertaken by right on a non-commercial basis. Commercial activities under the Act have to be recreational or educational, but the interaction between these different rights is a bit unclear, because the recreational and educational purposes are not tightly defined, and the commercial right is broad in its construction.

Some further practical uncertainties include the future of rights of way. Many of these ways will be incorporated into the new core path networks, and existing rights are safeguarded under the Act: but the gathering of evidence under the common law rules of prescription to create new ways, or to defend those that exist, may become more difficult. The right of passage has had little debate, and the limitation on access rights over golf courses to passage (section 9(g)) does not accord with the longstanding practice of recreational walking on many courses. Levels of awareness of the extent of new rights and of the content of the code will take time to develop, and the range of different recreational activities now having rights may lead to some irritability. But none of these uncertainties is a fatal flaw: rather, they reflect the openness and novelty of the new approach; indeed some of these perceived problems might not emerge.

Evidently, Part 1 of the Land Reform (Scotland) Act has some considerable novelty in how it is constructed and implemented. Local authorities have the main practical burdens arising from implementation, but much of the day-to-day working of this part of the Act will depend on the good sense and goodwill of those who exercise their new rights, and of those who manage land and water used by the public. That is how things should be for the daily interactions between people: more law to govern behaviour is not the best approach. Where serious transgressions arise, there are ample, existing provisions in other criminal law, without creating new statutory sanctions.

Several factors point to an optimistic outcome. First, virtually all people who visit the countryside for open-air recreation do behave with good sense and, where lapses occur, these normally arise from lack of understanding or carelessness. The evidence of a responsible approach by the public through their restraint in going to the outdoors during the Foot and Mouth disease epidemic of 2000-2001 was helpful in giving confidence to those involved in the creation of the legislation that it could work. Nor is there any evidence that the new legislation on its own will lead to any rapid increase in the numbers of

people taking open-air recreation, as growth in participation depends mainly on social and economic factors. People can now feel freer to be on land where they were uncertain about going before, or where barriers to access existed, and, in due course, we can expect a wider distribution in where people go on land, as their confidence in the exercise of new rights grows. New core path networks will also promote use of the outdoors, especially close to where most people live.

Is the new legislative approach of mutual responsibilities just a pragmatic and innovative solution to a longstanding need? Or does it have wider significance, in signalling a new relationship with landowners (public as well as private), through bringing the people of Scotland closer to the land, for which they now have rights and responsibilities? It can be surmised that many access-takers are unlikely to hold strong views on this kind of socio-political issue or on its land-reform context. Nor would many in the landowning community agree with this proposition, especially as other commentators will view the access legislation as part of a political and cultural process of re-balancing property rights in favour of the public interest.

However, if the content of this legislation has strong Norwegian parallels, as claimed earlier in the introduction, then analogues for its social context from across the North Sea are worth noting. In Norway, traditional rights of access and the free use of natural resources evolved from being an earlier functional need for rural people living in harsh and often remote settings, to the modern social construct of ‘friluftsliv’ – or the open-air life. This happened in tandem with changing social and political changes in Norway spanning the turn of the last century – the role of individuals like the explorer Fridtjof Nansen was important in fostering this cultural shift (Breivik 1989). There is no single English word to capture the full cultural meaning of *friluftsliv*, which embodies the physical and emotional engagement that people enjoy in their use of the outdoors – both its natural and cultural elements – as part of their quality of life and sense of national pride. This is a cultural context to outdoor access, which draws from a more egalitarian approach to land and its use, as well as from stronger values in society for the natural environment, and for outdoor activities as part of the wellbeing of the individual.

We cannot readily import to Scotland a strong cultural approach that has its roots in the values of a different society, but there is something to learn from here, and admire, even though the status of these Norwegian cultural values is now less robust, as stronger urban influences emerge in Norway’s present-day society. Indeed, the Norwegian Government (2001) has recently reviewed

friluftsliv in response to social change. The significance of this approach for Scotland is the emphasis placed on the qualities and values inherent in the outdoor environment and their role in the quality of life of the nation. There is a strong endorsement here of the links between the enjoyment of the outdoors and the benefits to the individual; the benefits thereby to society at large; and also the need for care of that which people most enjoy. The emphasis on responsibility in the Act lies, very properly, on respecting the needs of others and their interests. However, there is a parallel responsibility on the public at section 2 for care of the features of the land, as a small foothold for this theme. This is not a new idea, of course, for those in Scotland who have long had a strong commitment to their open-air recreation but here, as elsewhere, values shift as society changes. If Part 1 of the Act has a role beyond the functional and political, this may lie in a forward-looking commitment to promote more care of that enjoyed, both the qualities of the land itself and the recreational values that people find there.

Finally in review, the gap between Scottish law and that for England and Wales may have some implications. It is unlikely that there will be any significant problems at the border itself – the law will change as it does on a number of land-related issues, and much of the Border is riverine or upland – and for the latter, two different approaches to open access will abut each other. However, the breadth of the Scottish approach has already caught the interest of some recreational bodies in the south. Those involved in the Scottish legislative process noted that some of the cross-border public bodies involved in open-air recreation were feeling a bit uncomfortable about the prospect of having to adjust to two different policy approaches, as well as the prospect of the northern one becoming infectious. And there are some recreation interests which did not gain from the 2000 Act, such as water-based recreation, riding or cycling: indeed, following on from that Act, canoeists in the south launched a rivers access campaign seeking a general right of access. The new agency, Natural England, which inherits the access remit of the former Countryside Agency, has recently[1] announced its recommendations to Ministers to meet their request to extend public access around the coast of England (Natural England 2007). The mechanism for doing this has to be resolved, but new legislation is an option. There are separate proposals for improved coastal access in Wales.

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[1] *February 2007*

CONCLUSION

It can be argued that Part 1 is the most significant part of the Land Reform Act Act, with more certain outcomes than Parts 2 and 3. The provisions of Part 1 will touch on the interests of very many people – those who recreate in the outdoors and all who manage land where rights can be exercised. It also provides a clear public benefit from land, in recognition that much land management has been subsidised from the public purse. Importantly, clarification of the law sets aside debate about matters legal, and puts the focus on the practicalities of providing for and enjoying new rights.

Part 1 of the Act can also be said to be a success for the Parliament's aim to have more engagement with the public in the development of new legislation. The basic policy approach was created through collective debate amongst the key interests before it entered the formal political process. Consultation on the draft Bill led to significant changes; and external lobbying advice led to further change to the Bill at Stages 2 and 3. But the consensus fell apart, and many in the landowning community now perceive the outcome to lack balance, given the earlier concession to accept an open access approach, and because it lacks the safeguards that they might have been expected on the basis of this concession. However, in the closing speeches at Stage 3, the Conservative spokesman, Bill Aitken, did concede that 'the damage that Part 1 of the Bill will do is fairly minimal.' The second and third parts of the Bill attracted most of his ire.

There may yet be some obstacles ahead to implementation: some owners may find it difficult to come to terms with the new arrangements; unresolved expectations of or local interpretations of what is responsible may test goodwill between the interests; and public behaviour locally may not match the intention, or some parties may seek to push out the limits of what is reasonable – and responsible. Some cause célèbre cases seem likely to arise, and the processes for consensus forming may fall short of expectations at times. But these are shadowy threats, and a positive welcome to this forward-looking legislation is well justified.

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