

Land Reform (Scotland) Act 2003: Draft Guidance for Local Authorities and National Park Authorities

Submission to the Justice 1 Committee from the Scottish Environment LINK Access Network (LAN)

December 2004

Several individual LINK member bodies submitted comments to the consultation on the draft guidance in May 2004. We now welcome the opportunity to make further comments on the guidance to members of the committee.

The current document is a great improvement on the initial draft, and a number of our suggestions have been included in the guidance, such as the underlying principle to taking access stated on page 36 ("the outdoors is, however, not risk free and can never be made so").

However, there have been substantial additions to the text that we were unable to make any comments on before the guidance came before the committee. Therefore, we now wish to make a number of comments where we are concerned that the Act and the intention behind the legislation have been wrongly or too narrowly interpreted. We feel that these areas could lead to misunderstandings in the implementation of the Act, and would like to draw these to the attention of the committee so that they may be placed on public record. These points should be considered in the case of any future review of the guidance.

1. Introduction p3, omission of the right of access to land and water for educational and certain commercial purposes, or for passage.

The introduction refers to the rights being "for the purpose of open air recreation" and ignores the other purposes stated in the Act. This is also stated on p28 of the guidance. This wording did not appear in the consultative draft. The phrase 'open air recreation' (apparently borrowed from the CRoW Act S2) is narrower than the statutory rights established by the Act. This may be seen as misleading a local authority as to the wider extent of the statutory rights (which also cover education, passage and some commercial activities). This is more than a theoretical point, as the customary rights and freedoms of access to land in Scotland have always been for general purposes and not just recreational ones.

2. S6(1)(a) and S6(1)(b)(iv). p10, reinterpretation of the Act

In both these cases there has been a reinterpretation of the Act, firstly by saying access rights are excluded from the land on which there is a building, rather than just the building itself. The effect of this reinterpretation appears to be that the exclusion from access rights in this subsection refers to the whole of the land, not just to the bit of land immediately associated with the building. In S6(1)(b)(iv),

there is also a reinterpretation in that it suggests that there is protection of the privacy and enjoyment of the person's property as a whole, not of the house alone as is made clear in the Act.

3. S13 Duty of local authority to uphold access rights, p28, not strongly stated enough

The guidance says "The emphasis of the legislation on the local management of access means that dialogue and consensus building is vital." In fact, there should be an emphasis on enforcement of the law by removal of obstructions and this should be stressed in the guidance. Dialogue and consensus building have their place but there is an expectation on the part of the public that access problems will be resolved as a result of the introduction of this legislation. The interpretation of the rights is too narrow in this section – as mentioned above.

4. S15 Consent of owner

The guidance gives too much emphasis on the need to consult landowners. It is still unclear, from reading this section of the guidance, when a local authority has to seek consent. For example, it is our understanding that they do not need to in the case of core paths (see S19).

5. S17 Core paths plan, pp40-43, a number of issues

(i) There is an over-emphasis on the access rights being exercised through the core path network, i.e., "The core paths system should provide the basic framework of routes for the exercise of access rights throughout each local authority area."(S17) The guidance as it is currently drafted may lead to local authorities ignoring the wider path network and the promoting access rights more widely - not only on paths.

(ii) There should be a presumption that long distance paths should be incorporated into the core path network. There are already maintenance programmes in place for such routes, so there is no extra cost to local authorities, and these routes are a good way of ensuring that different local authority path networks link up. The guidance says: "Again, there is no requirement that all major existing paths should become core paths. As with all paths, routes such as designated Long Distance Routes or National Cycle Network routes should be assessed through a consultation process to allow area-based assessment of their appropriateness for inclusion in that authority's core paths network." S17(2)(b).

(iii) There is a misinterpretation of the Act in the stated assumption that core paths will be multi-user. "There should be a general presumption that most core paths will be available for all types of users", S17(2)(d). The network as a whole should be multi-user, but not each path, as this is not practical or desirable.

6. S19 Power to maintain core paths, lack of funding

The guidance does not allow local authorities to take an aspirational approach and designate core paths with a view to securing funding, but rather gives a maximum time period for paths to be in place. The guidance states that other public bodies should fund paths on their properties, but does not mention CAP reform as a source of funding, a crucial omission if paths are to be created through agricultural areas in Scotland.

7. S25 Local access forums, lack of detailed guidance

There should be more detailed guidance for local authorities in standardising the membership and role of local access forums across Scotland. Currently, local authorities seem to be taking a variety of approaches.

The guidance states that the function of the access forum is to provide advice where requested by the local authority. The Act says that any other person or body, not just the local authority, can consult them.

8. Agricultural support

The guidance makes no mention of the role CAP reform and the resulting agricultural support regime. This has the potential to significantly contribute to improving access opportunities in agricultural areas in Scotland. Local authorities should be encouraged to interact with the development of land management contracts and to give advice to land managers where they are developing access measures.

We thank the committee for their consideration of these points. We would be very pleased to provide further information on any of these points if that would be of help.
