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## **LAND REFORM - THE DRAFT BILL**

### **Access Legislation and draft Scottish Outdoor Access Code**

#### **1. Introduction**

Scottish Environment LINK is the liaison body for Scotland's voluntary sector environment organisations. LINK's membership currently stands at 36 organisations, in turn supported by half a million people. LINK represents organisations with direct interests in land ownership and management for conservation, as well as bodies concerned with heritage protection, recreation and amenity across the Country as a whole. We warmly welcome, therefore, the principle in the Bill of establishing a statutory right of responsible access to land and inland water for recreation and passage, subject to appropriate safeguards for health and safety, privacy, land management and conservation.

As drafted, a number of the key technical issues and mechanisms in the Bill lead to an unbalanced approach and depart, significantly, from the consensus proposals worked out through long negotiation by the Access Forum, and substantially endorsed by Scottish Natural Heritage. The Bill, as it stands, with its proposals for ad hoc suspension of the right of access by landowners and for criminal sanctions, may substantially undermine even the established access currently enjoyed by visitors to the countryside. Furthermore, it could reduce future opportunities for enjoying the outdoors rather than enhancing these and extending them to a wider public.

In addition, we have a concern that the duties given to public bodies to secure conservation interest are inadequate.

In our view, therefore, substantial parts of the draft should be significantly amended and, at present, it cannot command the support of LINK members.

## 2. Overview

LINK members welcome many aspects of the draft Bill and believe these should be retained in the version to be introduced to Parliament. These sections should not be altered, otherwise there would be a fundamental diminution of what is good about the draft Bill:

- the decision to legislate to establish a statutory right of responsible access for **all** types of user - including cyclists and horseriders;
- the intention to give a right of access to all land and water for recreation and passage;
- that the Access Forum proposals form the basis for key elements of the Bill;
- the absence of distinction between individual and group access; and
- that the statutory right of access will apply at all times.

However, the legislation will be seriously undermined if it does not more closely reflect the consensus recommendations of the Access Forum by:

- giving a more balanced package of responsibilities between users, owners and public bodies;
- giving a clear right of responsible access that is easily understood without expensive mapping and recording exercises to establish where it may or may not be exercised;
- including some legislative recognition of the conservation safeguard and reducing the excessive land management safeguards;
- leaving the detail of implementation for the Code, rather than the Bill; and
- relying on co-operation, education and understanding, rather than compliance and compulsion (except where this can be achieved by cross-referencing to existing legislation, eg., health and safety).

## 3. Key concerns

The following points all flow on from the fundamental concern outlined above.

### **The suspension of access rights by landowners**

**Section 9 must be removed.** This power is unnecessary and open to widespread abuse from those landowners who are unsympathetic to access and/or nature conservation. As recommended by the Access Forum, reliance on the Code, a more co-operative approach, and a cross-reference to existing legislation is all that is needed. Moreover, any statutory powers to suspend access rights should obviously rest with public authorities, accountable to Parliament and or the Courts, and not with private individuals.

## **Additional local authority and police powers**

The proposed additional powers are not necessary - existing powers are sufficient.

**Section 8 - emergency suspension of access rights - should be removed.** The need for an additional power such as this has not been demonstrated. The possibility of emergencies, eg., fire risk, exists today and has not led to demands for this type of legislation. If this section is incorporated into the legislation, it will expose local authorities to lobbying by land managers for help in dealing with so-called 'emergencies'. Moreover, the public's response to the 2001 Foot & Mouth Disease outbreak has demonstrated people's willingness to obey advisory signs when an emergency is clearly apparent.

**Section 10 - local authority power to exempt particular land and particular conduct - should be reconsidered.** Again, the need for this power has, in our view, not been demonstrated, and the Access Forum was of the view that byelaws and management rules should be used in this type of circumstance. It is probably unnecessary, and will expose local authorities to tremendous lobbying by land managers wishing to restrict access. It could also be a huge drain on local authority resources. We would welcome discussion with the Executive on this issue, but would suggest that it remains to be demonstrated that existing statutes are inadequate to address genuine reasons for limiting access rights. Meanwhile, elsewhere in the Bill, there may be a need to empower local authorities to implement management schemes in special areas such as nature reserves, country parks or other sensitive areas, after appropriate public consultation.

**Section 15 - creating a new criminal offence - must be removed.** It is unnecessary, against the tradition of access in Scotland and against the spirit of the legislation. Landowners can already call out the police to deal with any "incidents" on their land and the police have to respond. Serious cases of irresponsible access would, in any case, be criminal under other existing statutes (eg. health and safety).

**Section 16 - giving local authorities exclusion order powers - should be reconsidered.** Classically, these have been used in parallel with new criminal offences, and are too extreme a measure for public access. We would welcome discussion with the Executive on this issue, but would suggest that it remains to be demonstrated that existing statutes are inadequate to address genuine reasons for limiting access rights.

**Section 27 - the register of excluded land - should be removed.** It is unworkable and an unnecessary burden to give local authorities.

## **Other Local Authority powers (Sections 17 - 28) must be strengthened.**

Recommendations include:

- a 'duty' to identify, protect, and manage Core Path Networks;

- a power to remove obstructions from all paths whether or not they form part of the core path network and a duty to remove obstructions from the core path network. Local authorities must be able to apply this power and duty for other reasons additional to safety.
- an ability to develop Core Path Networks by means other than path agreements and orders;
- the incorporation of planning for access into the formal development planning system;
- ring-fenced funding for improving local access provision.
- strengthening of the role of the Local Access Fora (Section 26).

Local authorities have stressed the importance both of a right of access to *all* land, and the need for much stronger powers to facilitate further access. The draft Bill seems to simply restate the powers available to a local authority under the 1967 Countryside Act, amongst other things, which themselves have proved to be somewhat ineffective. Local authorities are given few absolute duties to facilitate access and rather more discretionary powers which will be constrained by resources and political will. Without active participation by the local authorities the Bill will fail to produce significant improvements to access provision for the general public.

## **Code vs Bill**

Inconsistencies between the Bill and Code must be resolved.

Much of Section 4, land over which access rights are not exercisable, should be re-drafted to avoid confusion. In addition, LINK bodies believe that to have so many exempt areas would go against the consensus developed in the Access Forum and would favour a situation where the detail was presented in the Code rather than the Bill.

Section 5 should be redrafted so that conduct excluded from the right is defined in the Code. Details of such conduct should be moved to the Code and may need much rewording.

## **Conservation**

A new section<sup>1</sup> should provide, where Scottish Natural Heritage (SNH) or Historic Scotland (HS) consider it is appropriate, for the conservation of the natural or cultural heritage, for local authorities, SNH or HS to have a duty to take action, under the provisions of this, and other, legislation, to prevent disturbance or damage to the natural or cultural heritage.

This section should also include a power for local authorities, SNH or HS to enter land to erect signs to take other management measures to protect the natural or cultural heritage. As a check against local authorities, SNH or HS being pressed into unnecessary action for 'spurious' conservation reasons, there should be a legal process to object to/appeal such measures (akin to S.29 nature Conservation Orders).

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<sup>1</sup> See Annex 1 for possible drafting.

This suggestion is based on the following principles:

1. It provides a flexible 'hook' - ie., a framework to ensure conservation action where necessary and uses a variety of (existing or proposed) mechanisms\* to achieve this;
2. The duty/power rests with statutory agencies, rather than with individual landowners;
3. It is therefore subject to public scrutiny (and, of course, legal challenge);
4. It should remove the risk of 'spurious' conservation claims by irresponsible owners; and
5. It provides legal surety as required by European law.

\* Examples of such mechanisms include bye-laws, Nature Conservation Orders, Special Nature Conservation Orders, Areas of Special Protection, management schemes agreed with local authorities, etc.

Local access forums should include voluntary conservation representatives.

#### **4. Additional Points**

##### Rangers

The important role of Countryside Rangers in facilitating access (Section 25) should focus on mediation and education rather than policing and 'ensuring compliance'.

##### Camping

The legal situation should be clarified so that the existing right to camp wild is properly enshrined in law. The 1865 Act was referring in essence to squatting, or the setting up of a substantial camp for an extended period, rather than the pitching of a small backpack tent for one or two nights for purely recreational purposes. The legislation should be amended to permit, clearly, recreational camping.

##### Liability

A statement on liability should be included in the Bill. As proposed by the Access Forum and as suggested by the draft Code, access should be taken at the individual's risk.

#### **5. Conclusion**

Although the enacting of a statutory right of access is most welcome, LINK members are concerned that this would be significantly undermined by the proposed additional powers, exclusions and exemptions which go beyond the proposals of the Access Forum. We believe that the effect of this would be a net reduction of the rights of access traditionally enjoyed by the public in Scotland, running entirely counter to the stated objectives of Government policy.

Recent events have demonstrated that public bodies already have, or can obtain, the necessary powers to restrict access when this is absolutely necessary. It has also been shown that the public at large do

behave with exemplary care and responsibility where there is a real need to restrain access. Public enjoyment of the countryside, with its widespread economic benefits to local communities and social and health benefits to participants, depends on an equitable balance of interests in access, based on mutual acceptance of responsibility. Further unjustified restrictive powers or exclusions such as are proposed in the draft Bill are undesirable, and must be reconsidered if the Bill is to succeed.

Neil E Rankin CB CBE  
Chairman

This submission is supported by the following member bodies of Scottish Environment LINK:

*Association for the Protection of Rural Scotland*  
*Association of Regional and Islands Archaeologists*  
*Badenoch & Strathspey Conservation Group*  
*Biological Recording in Scotland*  
*British Trust for Conservation Volunteers Scotland*  
*Butterfly Conservation*  
*Cairngorms Campaign*  
*Council for Scottish Archaeology*  
*John Muir Trust*  
*Mountaineering Council of Scotland*  
*National Trust for Scotland*  
*North East Mountain Trust*  
*Royal Society for the Protection of Birds*  
*Ramblers' Association Scotland*  
*Saltire Society*  
*Scottish Council for National Parks*  
*Scottish Countryside Activities Council*  
*Scottish Countryside Rangers' Association*  
*Scottish Wild Land Group*  
*Scottish Wildlife Trust*  
*Sustrans Scotland*  
*Woodland Trust Scotland*  
*WWF Scotland*

## **Annex 1**

### Suggested wording for new clause relating to conservation

(1) It shall be the duty of SNH and HS to advise local authorities where management action may be necessary for the reason of securing the protection of the natural and cultural heritage.

(2) It shall be the duty of local authorities and SNH and HS, where SNH and HS provide advice under subsection (1), to take action using powers under this and other legislation.

(3) SNH, HS or local authorities shall have power to enter land to erect signs or take other management measures in pursuance of their duty under subsection (2).