



**Parliamentary Briefing
11th September 2007**

Save the Land Reform Act and Restore the Will of Parliament:

Briefing for Scottish Parliament Debate, Wed 12th September, 2007

1. Ramblers' Association Scotland welcomes the decision of the Parliament to hold a debate on the motion (1) submitted to the Parliament by Sarah Boyack, MSP, on issues arising from the judgement (2) in the Kinfauns court case. This judgement was made in Perth Sheriff Court on 12th June 2007 by Sheriff Michael Fletcher in the case of Mrs Ann Gloag v Perth & Kinross Council and the Ramblers' Association. This was the first case brought under the Land Reform (Scotland) Act 2003 in which a landowner sought a declarator from a sheriff court to determine whether access rights, as defined by the Act, applied to a specific area of ground. Mrs Gloag sought exemption from access rights to 12 acres of her estate. The Council and Ramblers contested this claim on the basis that 4 acres of this land was woodland, over which access rights applied, while accepting that the remainder was either garden ground or buildings where such rights did not apply. Sheriff Fletcher found in favour of Mrs Gloag and awarded costs against the Council and Ramblers. Both the Council and Ramblers decided not to appeal the judgement.

The Ramblers' position

2. A statement (3) issued on 4th July, by Alison Mitchell, Convener of Ramblers' Association Scotland, explained the reasons for not appealing the Kinfauns judgement. This statement emphasised that the establishment of access rights under this Act has been a success, with high levels of cooperation and understanding between land management, outdoor recreation and public bodies in its implementation. Already there are clear indications that this "right to roam" legislation is bringing substantial benefits to Scotland in the development of outdoor recreation, with all its social, economic and environmental gains. For example, at the UCI World Mountain Bike Championships, held in Fort William last week, the three main reasons stated for Scotland's outstanding reputation for mountain biking was the "fantastic scenery, lots of natural trails and enlightened land access laws". This was the message going to competitors and visitors from around 50 countries. It was potentially a factor in assisting several British competitors to win medals and provided, in Ruaridh Cunningham, Scotland's first world champion in mountain biking. So it is very important that members of the parliament emphasise that, overall, the access legislation is working very well and largely as Parliament intended.

3. Nevertheless the Kinfauns case has demonstrated that, in a number of respects, the Act is rather fragile and open to interpretation in a way not intended by Parliament. These issues have been clearly established by the Kinfauns case and do not require further court judgements. Corrective action is required and we hope this will be treated as a priority by the Scottish Government in the next few months. The corrective action required is quite straightforward in our view and does not require extensive public consultation or detailed evidence being given to Parliamentary Committees. It is simply a matter of ensuring that the present government build on the success of the Parliament that passed the land reform legislation in 2003.

Kingfisher House, Auld Mart Business Park, Milnathort, Kinross KY13 9DA
Tel: 01577 861222 Fax: 01577 861333 E-mail: Scotland@ramblers.org.uk
President: Dennis Canavan **Convener:** Alison Mitchell **Director:** Dave Morris

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4. As a separate issue we recognise that it would be appropriate in due course for the Parliament, through its various committees, to examine overall progress in the implementation of the Act. Such an examination should not only include an analysis of the outcome of various court cases but also wider matters involving individual and organisational actions which may have facilitated or hindered the implementation of the legislation. We anticipate that the most appropriate time for such a review is probably in 12 -18 months' time. New planning guidance

5. The Kinfauns case arose from the erection of a 6 ft high "security" fence, approximately 1 mile long, around 12 acres of Kinfauns Castle and surrounding garden and woodland in 2005. This was carried out without seeking the necessary planning approval. Mrs Gloag was required to apply for this, retrospectively, by Perth and Kinross Council. Approval was granted in January 2006, despite representations from the Council's access officers to indicate that statutory access rights, in their opinion, applied to land inside the fence. We consider that the granting of this approval, without first resolving the extent of access rights within the fence, was a major factor which led to the subsequent court case. Public concern about this decision, expressed both by access interests, including the Perth and Kinross Access Forum and architectural interests, including Historic Scotland, was followed by Mrs Gloag initiating the process of court action in March 2006, without apparently any further consultation. Public notice of Mrs Gloag's intention to seek a declarator over all the land inside the fence was issued in June 2006.

6. We are aware of other situations in Councils where insufficient attention appears to be paid to safeguarding access rights when planning approvals are granted. Policies and practice do not appear to have been changed sufficiently to take account of the land reform legislation.

Recommendation: that the Scottish Government examines the existing official government advice issued to Councils on the operation of development control procedures. More account needs to be taken of statutory access rights when planning decisions are taken, along with the need for greater consistency between Councils in the way that they implement the land reform legislation.

Sections 6 and 7 – privacy and enjoyment issues

7. The Sheriff in the Kinfauns case interpreted these sections of the Act to imply that considerable account should be taken of the personal status, wealth and interests of the individual occupying or likely to occupy Kinfauns Castle, suggesting that it could be anticipated that only people like Mrs Gloag were likely to reside in a large house like Kinfauns. In reaching this conclusion he appeared to take no account of evidence led in court that Kinfauns was in recent times owned by the Countrywide Holidays Association and was used as a venue for annual meetings of Ramblers' Association Scotland. He appeared to discount the possibility that Kinfauns might in future be owned by an individual or organisation that had a different view of their privacy and enjoyment needs than Mrs Gloag. We believe that Parliament did not intend such personal circumstances of the individual who occupied a house to carry so much weight when deciding the extent of ground required around that house to meet their privacy and enjoyment needs. Instead Parliament highlighted in the Act (section 7 (5)) the "location and other characteristics of the house" as the issue of greatest significance.

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Recommendation: that the Scottish Government proposes amendment of sections 6 and possibly section 7 of the Act to ensure that, when consideration is being given to privacy and enjoyment issues, it should be the characteristics of the house or place that is given the greatest weight, rather than the personal circumstances of the individual who might occupy the house or place at any particular time.

Section 10 – Scottish Outdoor Access Code

8. When deciding on the extent of access rights, the Sheriff in the Kinfauns case took very little account of the wording of the Scottish Outdoor Access Code. We believe the Code, which was approved by the Parliament, is a fundamental component of the legislation and an essential tool for identifying where access rights do or do not apply. This applies not only to individuals participating in outdoor recreation and other activities, but also to land managers and public bodies, such as local access authorities. Already, since the Kinfauns judgement, we find that Perth and Kinross Council is suggesting that their officers will have difficulty in providing advice to both landowners and members of the public as to where access rights apply because they feel that the judgement indicates that the Code is of very limited assistance in this process. We think the Parliament should correct this impression, emphasising that the Kinfauns judgement only applies to the particular circumstances at Kinfauns and is not binding on any other locations. Equally important, we hope the Parliament will indicate a need to modify section 10 so that the Code is recognised as a key consideration in determining where access rights apply.

Recommendation: that the Scottish Government proposes amendment of section 10 to ensure that the Code is used in the determination of where access rights apply and indicates to local authorities and other public bodies that they should continue to apply this principle in carrying out their responsibilities under the Act. The Scottish Government may also wish to consider advising the Convention of Scottish Local Authorities of the need for consistency of application in the use of the Act and Code across different local access authority areas

Section 28 - Judicial determination

9. In the Kinfauns case arguments were made, which the Sheriff appeared to accept, that the Code was of very little relevance to determining where access rights did or did not apply. On the other hand, as with section 10, we believe it was the clear expectation of the Parliament that, while the Code's primary purpose was in determining whether access takers were acting responsibly when exercising access rights or, in the case of land managers, were acting responsibly in relation to land management and access, the Code also had an important function in identifying what types of land fell within or out with access rights. This is why, for example, section 3.16 of the Code explains how privacy etc issues in the Act (section 6 (1)(b)(iv)) are dealt with in relation to large houses and gardens, usually referred to as the "policies" of the house. It states that "the wider, less intensively managed parts of the policies, such as grassland and woodlands, whether enclosed or not, would not be classed as a garden and so access rights can be exercised." This was the basis on which Perth and Kinross Council and the Ramblers opposed the declarator sought for the woodland area at Kinfauns.

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Recommendation: that the Scottish Government propose amendment of section 28 to ensure that the Code is used as a main source of evidence in the determination of whether access rights apply to land or water in any declarators sought in a sheriff court under section 28 of the Act.

Costs of court action

10. All three parties in the Kinfauns court action employed Counsel in presenting their cases. John Campbell QC acted for the Ramblers. The costs of this court action so far, to both the Ramblers and Perth and Kinross Council, is approximately £20,000 to each party. Costs have been awarded against the Council and ourselves, and Mrs Gloag has claimed £144,941 to cover the five days of court appearance. The majority of these costs result from the employment of two Counsel, Mike Jones QC and James Wolffe Junior Counsel to act for Mrs Gloag. The final costs to be awarded to Mrs Gloag have yet to be determined by the court Auditor but these will have to be split between Perth and Kinross Council and the Ramblers. We feel sure that the Parliament, when passing the land reform legislation, had no expectation that the costs that would be claimed by a landowning party to a summary action for declarator in a sheriff court would be so high. Such high levels of cost are almost certain to deter any local authority, community group, outdoor recreation body or private individual from challenging any landowner from seeking a declarator. The risk that such a challenge could result in expenses of £100,000 or more being awarded against the responding parties would be too great. Press reports indicated that Mrs Gloag intended to take this case all the way to the European Court if the judgement was appealed, exposing the responding parties to costs way beyond £100,000. Such exposure to legal costs appears to us to be quite extraordinary when bodies acting in the wider public interest were simply trying to clarify whether access rights applied to just 4 acres of woodland near Perth.

11. We believe this issue is one on which urgent action is required by the Scottish Government. If such costs are to arise simply as a result of a summary application in a sheriff court then there is a real issue of access to justice. We would then arrive at a position where the whole intentions of the land reform legislation could be swept away by landowners wanting to remove access rights from large areas of land, and local authorities and others being inhibited from defending such actions for fear of unknown costs. The second court case involving an application for declarator is at Boquhan Estate near Kippen where Mr Euan Snowie is seeking a declaration that access rights do not apply to 40 acres of his land. Landowners can simply carry on seeking ever large declarators from 4 to 40 to 400 acres or more, and they will be unchallenged simply because local authorities and bodies like the Ramblers cannot afford to take the financial risk of a challenge. At the outset of a case, it is difficult, if not impossible, to accurately predict potential liabilities.

Recommendation: that the Scottish Government recognises that the cost implications of the Kinfauns judgement effectively mean that the land reform legislation has been seriously undermined and this situation needs to be corrected as a matter of urgency. The Scottish Government needs to lay before Parliament new legislation, or an amendment to the Land Reform (Scotland) Act 2003 which enables organisations acting in the public interest in challenging applications for declarator are protected against excessive costs, so that when costs are awarded against them these costs do not exceed £20,000. Otherwise access legislation will in effect become one law for the

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rich and another law for everybody else. It should be noted that orders of this kind have been made in a number of cases in England, called Protective Costs Orders, in recognising the need to protect organisations who act in a wider public interest.

- (1) Text of motion – see below at appendix 1
 - (2) Web link to judgement http://www.scotcourts.gov.uk/opinions/B111_06.html
 - (3) Full text of Ramblers' Association Scotland 4 July statement – see below at appendix 2
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Ramblers Scotland is the representative body for walkers and aims to promote walking for health and pleasure, secure public access to land, develop path networks and protect the outdoor environment.

For more information, contact Dave Morris, Director, on davem@ramblers.org.uk or Helen Todd, Access Campaign Officer, on helent@ramblers.org.uk, telephone 01577 861222.

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Appendix 1

Text of motion for debate

S3M-187# Sarah Boyack (Edinburgh Central) (Lab) : Save the Land Reform Act and Restore the Will of Parliament— That the Parliament is concerned about the decision by Perth Sheriff Court to grant a declarator to Ann Gloag, owner of the Kinfauns Castle estate, which has the effect of denying the statutory right to roam over parts of the estate that was previously allowed under the Land Reform (Scotland) Act 2003; notes that Perth and Kinross Council and the Ramblers Association opposed the declarator and gave evidence to the court that such a declarator would be contrary to the intention of the Act; believes that this decision undermines the clear will of the Parliament which legislated for the widest possible access to the countryside and that the court judgement ignores the significance of the Scottish Outdoor Access Code approved by MSPs to accompany and inform the operation of the Land Reform (Scotland) Act 2003, and considers that the judgement should be examined and appropriate action taken to give proper effect to the land reform legislation and, if necessary, to issue guidance to the courts on the status of the access code.

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Appendix 2

KINFAUNS JUDGEMENT

STATEMENT BY ALISON MITCHELL, CONVENER, RAMBLERS' ASSOCIATION SCOTLAND

4 JULY 2007

1. "We remain disappointed by the judgement of the sheriff, Michael Fletcher, in the Kinfauns case. We believe it is incompatible with the provisions of the land reform legislation and does not reflect the intentions of the Scottish Parliament when it passed this legislation. We are advised that a case could be made to challenge this judgement in a higher court.

2. Nevertheless, following discussion by the Ramblers' Scottish Executive Committee, we have concluded that the best way forward is not to appeal the judgement but to bring issues raised by the Kinfauns case to the attention of the Scottish Parliament and others. To prolong the Kinfauns dispute through appeals, perhaps eventually leading to the House of Lords or European Court of Human Rights, would take several years. We think that, from the point of view of protecting access rights across Scotland as a whole, it is better to raise the relevant issues now, both from the Kinfauns case and other recent disputes, with the Parliament and others. Early action can then be taken to prevent any further undermining of the application of the land reform legislation to Scotland's land and water.

3. Of greatest concern in the Kinfauns judgement is the relatively limited significance which the Sheriff appears to have attached to the role of the Scottish Outdoor Access Code, despite the Code being approved by the Scottish Parliament and section 1.4 of the Code stating that "the Code may be said to have evidential status" where "a dispute cannot be resolved and is referred to the Sheriff for determination".

4. In our view the Code is of critical importance in the interpretation of privacy issues in relation to large houses in the countryside. The Sheriff accepted that the 11 acres that Mrs Gloag sought declarator over contained both garden ground, including extensive lawns, and approximately 4 acres of woodland, much of which he recognised as being remote and out of sight of the house. The Ramblers and Perth and Kinross Council agreed with Mrs Gloag that statutory access rights did not apply to the garden ground. Both the Council and ourselves were agreed that statutory access rights applied to the woodland area, based on section 3.16 of the Code. This refers to large houses surrounded by quite large areas of land usually referred to as the "policies" of the house and states that "the wider less intensively managed parts of the policies, such as grassland and woodlands, whether enclosed or not, would not be classed as a garden and so access rights can be exercised". Elsewhere section 3.16 indicates that access rights do not apply to the lawns, flowerbeds etc which are intensively managed for the domestic enjoyment of the house. We regret that the Sheriff did not appear to make this distinction between the garden and woodland ground at Kinfauns when reaching his judgement.

5. This judgement from Perth Sheriff court is not binding on other courts so, if the Kinfauns case is concluded at this stage, no precedent is set for cases involving other

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courts where landowners seek declarators. Nevertheless the Kinfauns judgement may encourage other landowners to enclose large tracts of woodland behind high fences, claiming such areas are needed for their privacy needs. This possibility needs to be addressed by the Scottish Parliament and others.

6. The Kinfauns case points to a need for Sheriffs to have a better understanding of the relationship between the Land Reform (Scotland) Act 2003 and the Scottish Outdoor Access Code, which is an integral part of the legislation, as defined by section 10 of the Act. The land reform legislation is innovative, based as it is on the type of access arrangements usually found within other European countries, notably the Scandinavian countries, rather than in the rest of the UK. In this respect the Land Reform (Scotland) Act is different from the traditional legislative structures which legal professionals and Sheriffs are more used to dealing with. There is a need for a clearer understanding of the importance of the Code in helping both landowners and access takers manage their responsibilities.

7. To put the matter beyond doubt, however, there may be a need to modify section 10 of the Act to make it clear that the Code has the role of explaining not only the principles of responsible behaviour under the land reform legislation but also in helping to define the areas of land and water to which access rights do or do not apply.

8. We regret that Mrs Gloag did not choose to resolve this dispute through negotiation, including use of the Local Access Forum, as recommended in the Scottish Outdoor Access Code. We have always maintained that the needs of her family and the wider public interest could have been met satisfactorily at Kinfauns without moving the security fence and by appropriate application of the full range of powers contained within the land reform legislation, including section 11 (exemption orders) and section 12 (byelaws), as well as the application of the Code provisions (section 10), as necessary.

9. We also regret that Mrs Gloag erected the mile long security fence without first obtaining the necessary planning approval. The process by which she obtained retrospective planning approval was unusual, notably in the way in which approval was granted before the end of the consultation period and without the Council adequately taking into account the representations made to them about the planning application. We have noted the very critical remarks made by Historic Scotland when they finally learnt of this retrospective approval and we hope that Perth and Kinross Council and other local authorities will take due note of the need to avoid such mistakes in the future.

10. Neither do we understand how the development control section of Perth and Kinross Council could have considered it sensible to grant this planning approval without reference to elected members and knowing that their own access officials were making it clear that access rights applied inside the fence. The Council's decision to give retrospective approval for this fence, while at the same time providing no arrangement whereby the statutory access rights could be exercised within the fence, provided the starting point for this conflict. Local Authorities in future must not grant planning permission without first ensuring that such permission is compatible with the land reform legislation.

11. In drawing a line under the Kinfauns case we are also conscious of the desire of Mrs Gloag to construct a swimming pool complex in the grounds of Kinfauns and

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understand that progress with this development is held up until the court action is resolved. We recognise that such delay is undesirable.

12. We have noted some critical remarks made by the Sheriff as regards the actions of the Director of Ramblers' Association Scotland, Dave Morris, during a visit to Kinfauns in January 2006, nearly six months before Mrs Gloag launched her court action for a declarator. We wholly reject this criticism which does not reflect in any way the evidence given in court by Mr Morris, his cross examination or any comments made or questions asked by the sheriff. Our understanding of the situation that day is that the police officers who were called to investigate the Ramblers' visit to Kinfauns were perfectly satisfied with the explanation given by Mr Morris and raised no objection to the walk continuing through the Kinfauns grounds.

13. We welcome the excellent financial support provided by RA members in Scotland who responded to our appeal for funds to engage in the Kinfauns court action. If additional, unexpected costs arise as a result of this case the Ramblers may wish to consider a much wider appeal for funds, extending to the public as a whole.

14. In conclusion we regard the Kinfauns case as having provided an excellent opportunity to examine the effectiveness of the land reform legislation. The case has led to the loss of access rights over just 4 acres of woodland near Perth. On the other hand this court case, along with others recently concluded or in progress, is almost certain to bring about improvements to the land reform legislation or better understanding of how it is supposed to be applied. We are very pleased at the public and political reaction to the Kinfauns decision and are confident that the Scottish Parliament and Scottish Executive will act sooner rather than later to ensure that the loss of access rights at Kinfauns will not extend to similar situations elsewhere in Scotland.

15. The Land Reform (Scotland) Act 2003 remains a superb achievement of the first Scottish Parliament. We will continue to work with land managers, local authorities and other interests to ensure that it provides the people of Scotland with world class opportunities to enjoy our magnificent countryside."

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