Land Reform Bill: consultation response

10th February 2015

Introduction

Ramblers Scotland welcomes the opportunity to submit evidence to this Scottish Government consultation on a forthcoming Land Reform Bill. Our comments below relate mainly to the statutory rights of public access and to aspects of deer management issues, but we have also contributed to and supported the submission by Scottish Environment LINK which covers wider aspects of land reform.

Ramblers Scotland is the representative body for walkers in Scotland and is recognised by **sport**scotland as a governing body of sport. We played a key role in the development of Part 1 of the Land Reform (Scotland) Act 2003, both by our contribution to discussions in the National Access Forum (NAF) over the previous decade and by the efforts of our staff and members who made representations on the draft Bill and on the Bill itself as it proceeded through the Scottish Parliament. Since the legislation came into effect we have been monitoring and assisting with its implementation. This has included a significant role in some of the court actions which have accompanied the implementation phase. We continue to participate in the NAF where we reflect the interests of a wide sector of the public who enjoy outdoor activities from the urban environment to the summits of our mountains.

We regard the establishment of statutory rights of public access over most land and water in Scotland as one of the most significant achievements of the Scottish Parliament since it was reconvened in 1999. These statutory rights have built on the custom and tradition by which access has always been taken to land and water in Scotland, with the recognition that these statutory rights supplemented and did not diminish any existing customs, traditions and rights.

The rights of the public to take access to land are not dependent on the ownership of that land. These rights apply over most land and inland water in Scotland, as long as they are exercised responsibly. There are reciprocal responsibilities for land managers to facilitate access to their land. In the years since Part 1 of the Act came into effect in February 2005 with the publication of the Scottish Outdoor Access Code there has been a widespread general acceptance of these rights by all but a minority. The cooperation and support of the organisations which represent land managing interests in facilitating the implementation process is acknowledged.

Nevertheless, there are still difficulties in certain aspects of the implementation of this legislation, and we would also like to take the opportunity to raise a number of issues, beyond those covered in the consultation document, which we feel would lead to an improvement in the implementation process. We welcome the Scottish Government's commitment to land reform as an ongoing process and hope that, while some of the issues that we address below may not be appropriate for the forthcoming legislative action, there may be other ways to resolve current problems and increase opportunities for public enjoyment of the outdoors.

Answers to specific questions within the consultation document

Q4/Q6. We support in principle the establishment of a Land Reform Commission and suggest that matters relating to public access to land and water are part of its remit and membership of the Commission includes a person/persons with appropriate expertise on the statutory rights, customs and traditions that determine how people take access to land and water in Scotland.

Proposal 10: Wild deer

Q35. We agree that further deer management regulation measures should be introduced to ensure that public interests are effectively protected. While we support the approach advocated in the consultation document which strengthens the role of deer management plans, as well as the improvements being recommended by Scottish Environment LINK, we are not convinced these will be sufficient to deal with present day problems and the obligations on land managers to manage deer in ways which are of benefit to society as a whole.

The way that deer are managed has a great influence on the natural beauty of our land, especially in the uplands. Control of population levels determines the state of the vegetation and soils in most areas of deer range, directly affecting the extent of grassland versus heather moorland growth, the extent of native shrub and tree growth and indirectly affecting many other aspects of land use. These include:

- forestry practices in Scotland, with a much greater tendency to use plantation type forestry and less use of native woodland, including its natural regeneration, when compared to other European countries;
- fencing to exclude deer from newly planted areas, with ever increasing costs on the public purse, rising from approximately £500,000 to over £5 million per annum during the period 2003-2012;
- new types of deer fencing, including many miles of electrified deer fencing which is virtually impossible to cross by walkers and other users; and
- many miles of newly constructed vehicular tracks which diminish the remoteness and wild quality of many upland areas.

All these developments, many of which relate directly to the ways that deer are managed in Scotland, are leading to a steady loss and attrition of wild land values which are at the heart of what people, both residents and visitors, regard as a key determinant of the natural beauty of Scotland. They also affect the extent to which the management of our land can assist in mitigating the impacts of climate change and in influencing the role of watersheds and upland areas in general in affecting the flow of water in our rivers, with associated downstream consequences through flooding.

Ramblers Scotland has been involved in discussions about deer management with public and private sector interests since the early 1990s. The dominant issue in most of these discussions has been the overpopulation of red deer in many parts of the Highlands, a problem that was recognised many years ago by government and was one of the key factors that led to the establishment of the Red Deer Commission in the mid-1950s. Over the many decades since then there has been some progress, notably by a limited number of private individuals and

organisations, as well as public bodies, to get deer numbers into balance with the habitat within which they live and having due regard to the wider interests of local communities and other interests. But progress overall has been glacial. Over the majority of upland Scotland where deer are present they are not regulated effectively, in terms of public interest, or they are excluded from great tracts of land to a greater or lesser extent, by deer fencing. To most people who are familiar with the way in which deer are managed in other European counties, the situation in Scotland is absurd, with far too much control of population size in the hands of a limited number of private landowners and with far too little influence by local communities or the national public interest.

Ramblers Scotland, while welcoming the efforts in the land reform consultation to improve the arrangements for deer management, believes it is too little, too late. We therefore favour the introduction of a system of licensing in which deer managers are required to agree, on an annual basis, what culling levels they are expected to achieve. If the required cull levels are not achieved then government-led intervention should follow, associated with the suspension of the licence, until deer numbers are reduced to a level appropriate to the habitat. This system should be under the control of Scottish Natural Heritage, with the assistance of other public bodies such as Forestry Commission Scotland and the Scottish Environment Protection Agency.

Q36. The advantages would be that an annual licensing system would :

- affirm that the population levels of deer had to take into account public as well as private interests;
- enable the adjustment of population levels and their management from year to year to take into account environmental interests and the needs of society as a whole.

Q37. The disadvantages of an annual licensing system would be:

- there would initially be strong opposition from land owning interests but they would soon adapt to the new regime;
- there would be additional resource requirements on SNH in establishing al licensing system and in its annual implementation. These would however by offset by savings to the public purse through a reduced need for deer fencing and wider environmental benefits.

Proposal 11: Public access

This proposal 11 relating to public access suggests a few relatively minor changes to the legislation. We support the commitment by the government to update the statutory guidance which accompanied the Act, as per recommendation 53 from the Land Reform Review Group. Ramblers Scotland would be pleased to be involved in this process and we have a number of suggestions for sections of the guidance which need to be updated.

In terms of the three questions relating to minor changes to the core path planning process, our answers are as follows:

Q38. We agree with this proposal.

Q39. We agree with this proposal.

Q40. We agree with this proposal, but we also believe it is important to ensure that such amendments are subject to some measure of public consultation. This could be for a 30-day period, as currently is the case for planning applications, which would give the public opportunities to comment and object. There should also be a procedure for determining unresolved objections. This process should apply to deletions from the core path plan as well as additions or amendments.

Further comments relating to proposed changes to the Land Reform (Scotland) Act 2003 are set out below.

1. Proposed amendment to s.14.

It was hoped that the passing of the Land Reform (Scotland) 2003 Act would pave the way for many long-running, entrenched conflicts to be resolved, and for Scotland's countryside to become a more welcoming place for local resident or visitor. Resolving conflict and facilitating access for all is a cornerstone of the 2003 Act. A decade on from when the Act became operational, in Feb 2005, this vision has only partly been achieved. For example, there are still many examples of non-compliant signage in the countryside. These can deter people from taking access, leading to negative perceptions and experiences. Locked gates and other obstructions are also still widespread, which inhibits rather than facilitates the taking of access and can be a particular issue for horse-riders but also for cyclists, walkers and the less able.

While there may be logical reasons for some gates to be locked, such as where fields containing livestock are adjacent to busy roads, or where land managers need to prevent unauthorised vehicular access, we feel that many land managers are not upholding their duty to facilitate access to their land in the way that the Scottish Parliament intended. Far too many gates are locked or difficult to open or, where the gate is used by vehicles or animals and needs to be kept closed, there is a lack of willingness to install adjacent self-closing gates for non-motorised use, or to establish nearby alternative routes. Many access authorities are failing to pursue this issue with the result that substantial tracts of land are avoided by people. Too often people are only taking access to specific areas where they are confident of being able to continue without any obstructions being encountered. This is particularly significant around settlements where most people live and work and where there should be a multiplicity of opportunities to take access for social, economic, health and environmental reasons.

Central to this problem is the reluctance of access authorities to use the powers that they have to uphold rights of access, especially in cases where landowners prove recalcitrant. The fear of the costs of litigation that might arise has led to virtually all access authorities showing excessive restraint in dealing with landowners who have far greater financial resources and the capability of continuing these cases to higher courts on appeal.

In s.3 of the Act it is clearly stated that every landowner has a duty to manage their land in ways which respect access rights; s.14 sets out the procedure to be used by access authorities to assert these rights where obstructions occur. However, one of the main difficulties for

access authorities is the wording of s.14 of the 2003 Act which states that action may be taken to remove obstructions when it is felt that this obstruction is:

> "for the purpose or for the main purpose of preventing or deterring any person entitled to exercise these rights"

Many access authorities have indicated that they are reluctant to take action to remove obstructions because of the difficulty of proving that the obstruction is there for the **purpose or for the main purpose of preventing access**. Too often landowners can suggest that the obstruction is in place for a land management reason unrelated to public access or its main purpose is not to deter access. The result is that no action is taken against the landowner and the obstruction remains in place.

We propose that an amendment to this clause, along the lines of the following would help to resolve this problem:

> "for the purpose or for the main purpose of, ***or which has the effect*** **of,** preventing or deterring any person entitled to exercise these rights"

Such a change in the wording of s.14 would then enable the statutory guidance to access authorities to be revised to indicate that the access authority simply has to conclude that a particular obstruction has the effect of deterring access before it initiates action to remove the obstruction. In addition, the duty to take appropriate action to deal with obstructions that have been put in place before the 2003 Act, as amended, becomes operational would also need to be incorporated into the forthcoming legislation.

2. Proposed change to s.30 regarding byelaws

The 2003 Act made provision for all byelaws relating to public access to be reviewed and modified to ensure they were consistent with the Act, within 2 years of the legislation coming into force. Since this period has now lapsed, we believe this section should be replaced, as follows. While it is not explicitly stated, we believe it was the intention of the Scottish Parliament to ensure that all byelaws are consistent with the statutory access rights, whenever those byelaws are established. The Scottish Parliament approved the Scottish Outdoor Access Code which states in paragraph 2.11 that "All byelaws need to be consistent with the access provisions in the Land Reform (Scotland) Act 2003". We therefore recommend that s.30 is replaced with a new section which makes it clear that all byelaws which may affect public access, whether established under UK or Scottish Parliament legislation, should be consistent with the access provisions of the 2003 Act.

This may also require some adjustment to be made to existing legislation which incorporated byelaw making powers. For example, there is no longer any need for there to be a power within the National Parks (Scotland) Act 2000 for national park authorities to make byelaws to regulate public access to land and water. Because such powers were subsequently included within the Land Reform (Scotland) Act 2003 their continuing use within the national parks legislation is leading to some confusion and misunderstanding. This could be corrected by ensuring that such byelaws in future, in so far as they relate to public access, can only be made under the land reform legislation. This would ensure that the restrictions contained within such

byelaws are consistent with all the other access provisions secured by the Land Reform (Scotland) Act 2003.

3. Other UK legislation which affects public access

We believe it would be useful to revisit the scope of the 2003 Act with regard to other UK legislation which can inadvertently impact on public access in Scotland. For example, we are concerned about licences granted under the Dangerous Wild Animals Act 1976 and the Zoo Licensing Act 1981. These legislative provisions do not specifically refer to access as a consideration when the local authority is minded to grant a licence under these Acts. Nevertheless, they can potentially have a large impact on public access to extensive tracts of land, without any formal opportunity for public comment or consideration. For example, a Dangerous Wild Animals licence has been granted over land in Perthshire to form an enclosure of around 800 acres, surrounded by a high electric fence, for the purposes of keeping bison. There is also a case at Alladale in Easter Ross where the landowner has proposals to erect electrified fencing around at least 37,000 acres of his land to introduce wolves or other wild animals. This project would be covered by a zoo licence and would not involve any consideration of public access to the land during the approval process. Schedule 2 of the 2003 Act does not make reference to legislation affecting wild animals or zoos. We suggest that a new section along the lines of that suggested above for s.30 could be inserted into the 2003 Act which states that any legislation passed by the UK or Scottish Parliaments which could affect public access must be consistent with the provisions of the Land Reform (Scotland) Act, as amended. This would also ensure that other UK and Scottish legislation, such as that dealing with health, safety and security matters, took proper account of statutory access rights in Scotland.

4. Public access across level crossings

There are approximately 560 level crossings in Scotland, 150 of which are 'public' crossings, usually where a public road crosses the railway line and public rights of access to pedestrians and others also apply. The remaining crossings, (over 70% of all crossings) are classified as 'private' crossings, having been established through agreement between landowners and railway companies at the time of railway construction or subsequently.

At the time of establishment no specific legislative provisions were made to guarantee public access across such private crossings but public use of such crossings has taken place without hindrance, until 2004. Before this date Network Rail, Railtrack and all their predecessor bodies tolerated access by non-motorised users across these private level crossings. Since 2004, however, despite no legislative change having taken place, Network Rail has insisted that anyone who is not the specified authorised user would be at risk of committing criminal trespass by using any such level crossing.

These crossings are used by walkers, cyclists, horseriders and other non-motorised users. Indeed we would contend that probably all such crossings are used by non-authorised users, to a greater or lesser extent, but with thousands using some crossings annually. All private crossings are therefore of importance to local communities and recreation interests where

statutory access rights apply on both sides of the line and are most readily accessed by using the crossing. We believe the position taken by Network Rail is based on a misunderstanding of the basis on which access is taken in Scotland. They appear to be absolutely determined to apply the principles of England and Wales rights of way legislation to the Scottish situation, despite being told repeatedly since 2004 that this is not appropriate in Scotland.

As far as the public is concerned, they make no distinction between public and private level crossings, but we consider that it is fundamentally wrong in principle that the majority of users of level crossings in Scotland are exposed to accusations by Network Rail that they are committing a criminal offence by using such crossings. To add to the confusion it should be noted that officers of British Transport Police in Scotland appear to take a different view to Network Rail, recommending that all formal level crossings, whether private or public, should be available for use by non-motorised users.

The current consultation on land reform is an opportunity to resolve this situation by amending the Land Reform (Scotland) Act 2003 to specify that statutory rights of public access apply across all level crossings, both public and private, where statutory rights of access apply to land on either side of the railway line. This approach was advocated by the National Access Forum in a letter to Ministers in February 2014.

It is expected that future legislation on level crossings will be passing through the UK and Scottish Parliaments in due course, following a report on level crossings legislation by the Law Commission and Scottish Law Commission. However, we believe this issue needs to be resolved now. Network Rail have proved to be very uncooperative in resolving this issue over the last decade, unlike all other UK/GB organisations who have had to deal with the access rights that were secured by the 2003 Act. It is time that the Scottish Parliament took action to resolve this endless dispute with Network Rail and to ensure that the public's right to use level crossings in Scotland is no less than that available in every other European country.

Following the passing of this proposed amendment through the Scottish Parliament, we would anticipate that Network Rail would be able to apply to Ministers to close specific crossings where they can demonstrate unjustified risks to public health and safety, or to the safe operations of the railway. Such proposals should be subject to public consultation before final decisions are made.

5. Alternatives to sheriff determinations

S.28 of the 2003 Act refers to judicial determinations. However, we are aware that one of the reasons why few access cases come to court is the fear, on the part of access authorities, of the risks and potential costs associated with such court action. S.28 could be amended to include the use of arbitration or mediation processes, or a tribunal approach, as an alternative to court action. We are also aware that the core path planning process was dealt with by the DPEA whereby the Reporter's Unit primarily received written submissions, and another alternative would be to adapt this quasi-judicial administrative process for access disputes. .

Other issues to be resolved by measures that do not necessarily involve legislative change

1. The use of s.16 compulsory purchase powers and s.22 path orders

We have long had concerns over the lack of paths in many parts of Scotland and the apparent difficulties in expanding our existing path networks. Scotland has suffered in the past from a huge loss of paths due to agricultural, forestry and building developments at times when measures to formally protect paths for public use were largely ineffective. The result is that Scotland is probably one of the worst countries in Europe for its density of paths in lowland areas and around settlements.

Core path planning was an attempt to stimulate the expansion of path networks while enabling potential conflicts with land management operations to be reduced. The first iteration of the core path planning process is now coming to an end and yet this has not led to the anticipated increase in path density, with no single access authority having more than 5% of new paths within its plan. We are also aware of difficulties faced by various organisations when trying to establish new paths, often with public or private sector funding support, when landowner agreement cannot be reached. This can lead to entire projects being abandoned because of one uncooperative landowner when all other landowners are in agreement. Sometimes alternatives have to be put in place, such as diversions on to adjacent roads for sections of an otherwise off-road path, which affects its integrity and the level of use by more vulnerable users.

In our view, access authorities seem reluctant to use powers which they have with regard to compulsory purchase or path orders, even when it is often only a narrow strip of land which is required. Just one path order has been used in Scotland since the 2003 Act became operational, to extend the Speyside Way, and this followed many years of fruitless discussion with the landowner concerned. Much time is spent by access authorities and others in negotiating with landowners across Scotland who are resistant to public access, with the public becoming increasingly frustrated with plans for path networks that they have helped to formulate but which have led to no action on the ground.

We believe that the reviewed statutory guidance needs to make it clear that all the various options within the toolkit should be used, in a timely manner, to ensure that path development takes place in an effective and efficient manner, so that local and national environmental, social, health and economic objectives associated with Scotland's path networks are met as soon as possible. We believe that this is in line with the government's overall intentions within this current land reform consultation to better reflect the public interest in land and address barriers to sustainable development.

Lack of use of compulsory purchase powers in particular are recognised as a widespread problem, as evidenced by the Scottish Law Commission's recent report which states:

> The law on compulsory purchase recognises that there will be circumstances where the public interest in a particular project will be more important than the individual's right to peaceful ownership of his or her private property.
> http://www.scotlawcom.gov.uk/law-reform-projects/compulsory-purchase

In terms of finding the investment required, a variety of funding mechanisms needs to be harnessed and access authorities encouraged to work in partnerships with local communities and the private sector to develop more paths. At a government level, all relevant departments need to recognise the role of access in terms of providing benefits to health, the environment, communities and tourism, which in turn should lead to the identification and development of appropriate funding streams from agriculture, transport and other budgets.

We also suggest that an added incentive to access authorities would be the establishment of a government fund which could underwrite any compulsory purchase orders and which access authorities could bid into. This could be specified for, for example, core path developments as a priority.

2. Greater controls over deer fencing

We have indicated above some of the difficulties that are arising as a result of the increased use of electrified deer fencing. It is virtually impossible to climb over such fencing, even though the ability to cross deer fencing in this way is secured by the statutory rights of access, providing no damage is caused. The erection of such fencing thus has the effect of preventing the exercise of statutory rights of access over very large tracts of land, except by very limited locations where gates are provided. Ramblers Scotland therefore believes that government action is required to prohibit the erection of electrified deer fencing, either through financial instruments (eg, grant aid or other payment mechanisms), or through legislative change.

Furthermore, the erection of deer fencing (without electrification) is becoming of increasing concern, partly because of the constraints this makes on public access but also because of landscape effects, especially in areas of high wild land value. We therefore believe there is a case for bringing all such deer fencing within the control of the planning system so that there is public scrutiny of proposed new fencing.

We hope you will find this submission useful and would be happy to discuss any of these matters further in due course.

Ramblers Scotland is the representative body for walkers in Scotland and recognised by **sport**scotland as a Scottish Governing Body of Sport. We have around 6,500 members in Scotland and 108,000 across Great Britain, and 54 local walking groups in Scotland run entirely by volunteers. We campaign to promote walking for health and pleasure, to safeguard and facilitate public access to land, and to protect the natural beauty of the countryside.

Contact: Helen Todd, Campaigns & Policy Manager, helen.todd@ramblers.org.uk, 01577 861222.

Ramblers Scotland, Kingfisher House, Auld Mart Business Park, Milnathort, Kinross KY13 9DA.
www.ramblers.org.uk/scotland
President: Dr Andrew Murray Convener: David Thomson Director: Jess Dolan