Safeguarding public access in Scotland since 1845

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The Scottish Parliament

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Dear Alison,

PETITION PE1422: COMMITTEE REQUEST FOR ADVICE

Thank you for inviting ScotWays to comment on the above petition. Clearly the petitioner is upset and feels aggrieved over her recent experience with the core path planning process, but we cannot comment on the specifics of the case, because disputes usually have at least two sides to the story, and we have only have some generalities over what happened from the petitioner's perspective. It appears that the petitioner is pursuing but may not yet have exhausted the normal procedures of complaint available to her in disputes involving public bodies.

In our response, we begin with the generalities of the core path planning process; then we address the petitioner's concern about the balance between landholder and public access interests; we then comment on the petitioner's three points of concern commenting on some of the general principles lying behind this legislation and on some of practicalities; finally we conclude with some comment on the petitioner's solution.

Core paths emerged as part of debate held at the national Access Forum about the design of the access legislation. This body – whose membership included landowning, and recreation interests and the relevant public bodies – all agreed on advice to Government on the content of the proposed legislation, and this advice was that a general right of access was the best way forward. But most access is linear, and most people look for welcoming and managed provision; landowning interests were also looking for reassurance that managed provision and promotion of access would help in integrating public access with land management. The procedures for core path planning, sections 17 to 20 in the 2003 Act, provide a balanced approach to the creation of the core path plan that allows for wide consultation, for objection and for the hearing of unresolved objections at public inquiry: finally a proposed core path plan that has outstanding objections can only proceed with the approval of Ministers.

Government's Guidance to access authorities on their role in the access legislation is strong on encouraging them to ensure that the formal core path plan procedures mentioned above are preceded by other means of engaging widely over access, say, through preparing outdoor access strategies, and it encourages that these pre-draft consultations be as 'widely inclusive as possible'. The local access forum (which has both landowner and user representation) is advisor to its parent local authority, and it plays an important role in the process of debate about core paths (and other access issues). With the help of their forum, all local authorities have been active in attempting to resolve objections before the process moves towards formal review at public inquiry.

Around Scotland, the core path planning process has been running behind schedule, and is not yet fully complete. It is our view, having commented on almost all plans for our own interest, that councils have been careful in following due process to balance the public and the private interests: indeed, only 15 of the 34 access authorities have needed a formal inquiry to resolve objections. We are aware that councils have conceded many objections before reaching for formal inquiry, and it is our view that there has been a tendency to accede to landowning objections, which has not always been helpful to the recreation interest.

Balance between the interests is at the heart of the petitioner's concerns. We cannot describe here the long and at times contentious past debate over public access to land. But about twenty years ago there emerged a mood amongst some forward-looking members of the landowning and recreation communities that there was a need to sit around the table to talk about arrangements for public access that were better suited to serve the needs of modern society. This forum (as mentioned above) became the advisory body assisting Scottish Natural Heritage and government when the prospect of there being an opportunity for legislation arose. The outcome of there being a general right of access to land aimed to provide clarity in the law for the public who, previously, had no clear right to be on land; and it also aimed to strike a balance with the need to manage land.

Debate outwith government by the main parties was an open means of trying to get to the right answer on a tricky public interest issue. There was public consultation as part of the process and further consultation of the draft Bill, which drew a large number of responses; and there was yet further consultation on the draft Scottish Outdoor Access Code, which is the reference point on what is or is not responsible behaviour in the exercise of access rights or the management of land in relation to the interests of those who exercise such rights. The outcome was Part 1 of the *Land Reform Act 2003*. At the outset of the Act (in sections 2 and 3) there is a clear and reciprocal balancing of responsibilities over access. It is wrong to say that these arrangements were forced on landowners: indeed, it was the landowning bodies that (to their credit) initially led at the forum on the option to aim for a general right of access. But it is understandable that not all land owners have welcomed this change in the law: for some, public access is not wanted, and others just are not reconciled to the arrival and purposes of Part 1 of the Land Reform Act.

On the three general complaints, we comment as follows.

- Inequality in the Land Reform (Scotland) Act 2003. Previously the public only had limited rights to be on land – as described above, the Scottish Parliament redressed this lack in the wider public interest, so we cannot agree that an inequality has been created. To the contrary, an inequality has been redressed: owners retain their rights to use their land for their own

purposes, and anyone exercising access rights who is not behaving responsibly, in line with the Scottish Outdoor Access Code, forfeits their rights.

- The petitioner's second point concerns the rights of the property owner. This is an important issue expressed in law through the rights that all persons have under the European Convention for Human Rights, as set out in the recent response on the Petition from the Scottish Human Rights Commission. The legislation is framed within the terms of the Convention as a change to the law determined in the public interest, and section 6 of the Land Reform Act (which provides for land that is exempt from access rights) does so to allow (in the case of a house) for sufficient adjacent land to be exempt from access rights for reasonable measures of privacy. There will be varied views on what is sufficient adjacent land and there have been some court cases.
- The third general point concerns property values: there are many factors that cumulatively affect property values. There is no evidence that access is a major issue here: indeed the law affects everyone, and the content of the argument being made by the petitioner makes clear that there already is existing public access adjacent to the property.

On one specific point, the petitioner mentions that the Council has created a right of way, but this cannot be so: the Council may be asserting that there is a right of way, which in turn may be disputed, but the Council will only be making such a claim if it feels confident that there is sufficient evidence in terms of use of the route.

The Petitioner suggests that an **independent review body** is needed as the Land Reform (Scotland) Act 2003 leaves the owner of land unfairly disadvantaged. It has already been mentioned that the Act places responsibilities on those seeking access both towards the owner (or tenant) of land, and towards other persons exercising access rights. Unless they behave responsibly access takers have no rights of access. Therefore the complaints about fly tipping, dog fouling, and illegal parking do not occur as a result of the Act, and indeed were widely experienced before the Act was passed. Anyone committing or permitting such actions may be committing offences under the general law, and under the Act he or she has no right to remain on the land. The remedies which owners then have remain the same as they were before the Act: requests to leave, reports to the police and actions of interdict. These may be awkward to use, but the Act has not changed that. The proposal for another tribunal will not alter the actual remedies of the owner.

Parliament foresaw some role for the local access forum, a body, as mentioned, designed to have balanced representation for different interests, and the experience is that members do take their responsibilities of objectivity seriously. If both parties in a dispute agree, the local access forum can give assistance to them in trying to resolve it (Sec 25 (2)(b).

Where there are doubts as to the appropriate amount of land to be excluded from access rights on grounds of privacy and reasonable enjoyment, or doubts as to what constitutes responsible behaviour, the owner is entitled to have the matter determined in Court, so it is untrue to say there is no appeal against the access taker, or the Local Authority trying to carry out its duty. Of the cases which have gone to court six of the ten cases have been decided entirely in favour of the owner, and one partially so.

Attempts to insert another tribunal as the petitioner suggests, would have to avoid overlapping with the present system of adjudicating on claims of maladministration, and would not, unless there was a right of appeal to the Courts, satisfy the procedural requirements in ECHR cases.

Above all it could not be a point of challenge to the law which parliament has enacted, which seems to underlie the petitioner's concerns.

Yours sincerely,

George MacQuarrie
National Secretary

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