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The *Countryside and Rights of Way Bill* – Access and Rights of Way

Bill 78 of 1999-2000

This paper is concerned with Parts I and II of the *Countryside and Rights of Way Bill*, which is scheduled to receive its Second Reading on Monday 20 March. It deals with the access and rights of way aspects of the Bill.

This Bill makes provisions to give a general right of access to mountain, moor, heath, down and common land. It requires countryside agencies to map all access land and gives local authorities powers to ensure adequate means of access are provided by landowners.

The Bill makes provisions to amend rights of way legislation to change how rights of way may be diverted or extinguished. It would require local authorities to publish rights of way improvement plans and give local authorities greater powers to deal with obstructions of rights of way. A new category of right of way, restricted byway, would be created.

The Bill will cover England and Wales.

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Summary of main points

The Government included increased access to open countryside in its manifesto promises. Access on a voluntary basis currently exists in England and Wales covering around 5000 km^2 of land. Following an extensive consultation process to assess both voluntary and statutory options the Government announced that there would be legislation to provide a statutory right of access to mountain, moor, heath, down and registered common land. They also announced their intention to produce measures to improve rights of way, after consultation, as part of the package for increased access to the countryside.

Landowners, land managers and their representative organisations have consistently expressed a preference for voluntary agreements to increase access to land. This is also the approach that the Conservative Party favours. However the Government has not been satisfied by the slow progress achieved in increasing access to land on a voluntary basis.

The Bill provides for access to open land to all for the purpose of quiet recreation.

This main points of the Part I of the Bill

- make provisions to give a general right of access to mountain, moor, heath, down and common land
- would require countryside agencies to map all access land
- would give local authorities powers to ensure adequate means of access are provided by landowners.

The proposals in the Bill have been generally welcomed. Land managers have expresses some specific concerns, which they hope will be resolved during the progress of the Bill.

Local authorities have the responsibility of mapping and maintaining rights of way. The Countryside Commission had aimed to have all rights of way in England and Wales mapped by the year 2000. This has not been achieved and this is felt by many users to be a low priority for many local authorities, with funding a major concern. The difficulties of diverting or extinguishing a right of way have also been an area of concern, particularly for landowners.

The Bill provides for changes in the complex legislation relating to rights of way.

The main points of Part II of the Bill

- would require local authorities to publish rights of way improvement plans
- would give local authorities greater powers to deal with obstructions of rights of way
- would create a new category of right of way, a restricted byway.
- would amend rights of way legislation to change how rights of way may be diverted or extinguished.

The first three provisions have been generally welcomed, but the last one has caused concerns.

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I Access to Open Countryside

The question of access to private land in England and Wales has been an issue for a considerable time and the first Bill for a freedom to roam was presented to Parliament in 1884 by James Bryce MP.

The Countryside Agency has estimated that that 1.3 billion day visits were made to the English countryside in 1996. Walking was by far the most popular activity when visiting the countryside (33% of all visits). Current rights of access cover a relatively small area in England and Wales, and many exist as part of voluntary arrangements with landowners. In addition there is a 200,000 km network of rights of way in England and Wales which all members of the public have a right to use.[1]

Increased access to land has been a longstanding aim of organisations such as the Ramblers Association and National Park Authorities. They have wholeheartedly welcomed the provisions in the Bill for increasing access. Various opinion polls have also shown that the majority of the public is in favour of increased access and is likely to welcome this Bill.

Landowners and representative organisations have generally accepted the principle of increased access to land, however they have expressed a strong preference for a voluntary rather than a compulsory approach. They have argued that a statutory right to roam would cause increased conflict between those who work on the land and those who see it as a source of recreation. On this issue the Country Landowners Association has stated:

> The Government offers two options: we strongly support the voluntary approach and are totally opposed to the creation of a new statutory "right to roam". The Government should, as a matter of principle, favour a voluntary approach, supported by appropriate legislation, in improving access. A "right to roam" would not be sustainable - in economic, environmental or social terms - and would give rise to dissent and legal challenges. Access by consent offers the best way forward - preserving the right of owners to choose how best to satisfy public demands for improved countryside access, while safeguarding their land management interests, wildlife and the environment.[2]

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1 The Countryside Agency, *The state of the countryside 1999*

2 Country Landowners Association, *Access to the open countryside – the CLA proposal,* September 1999

A. Current Position

1. Existing Access

The Countryside Agency has estimated the area, beyond rights of way, to which access existed in England in 1999. Figures are set out in Table 2 below.[3]

Table 2: Access beyond rights of way

Permanent open access rights	Common land	1,110 km^2 (inc. National Trust Commons)
Land in public ownership/ management	Forestry Commission English Nature	1,900 km^2 690 km^2
Private land with access provided through formal agreement with public body	Conditional exemption from capital taxes Local Authority access agreements Countryside Stewardship Schemes	580 km^2 480 km^2 130 km^2

According to this the total area currently covered by access agreements is 4890 km^2 in England. This represents just over 4% of the total area of countryside in England of 116,000 km^2 (88% of land). Under the proposals put forward to allow access to "mountain, moor, heath, down and registered common land" a large portion of the 51,000 km^2 (44%) of land classified by the Countryside Agency as managed grassland or semi-natural land could become accessible. The Government intention with the current Bill is to open access to four million acres of land, which is equal to approximately 16,000 km^2 of England and Wales.

2. Access Schemes

Countryside Stewardship (CS)

This is a MAFF scheme that makes payments to farmers and land managers to improve the natural beauty and diversity of the countryside. Public access is not a requirement of Countryside Stewardship and not all areas are considered suitable for new or improved access. However, payments can be made for creating new public access.

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[3] The Countryside Agency, *The state of the countryside 1999*

Agreements under the National Parks and Access to the Countryside Act 1949

The 1940s legislation on negotiating access agreements was the *National Parks and Access to the Countryside Act 1949*. The Act is perhaps best known for its provisions on footpaths, with its requirement for every county council to map all the rights of way in its area. Part V of the Act covers public access. If an access agreement is in force, then a person who enters the land for the purpose of open-air recreation without breaking or damaging any wall, fence, hedge or gate, is not to be treated as a trespasser.

Exemption from inheritance tax

Exemption from inheritance tax can be claimed for transfers of qualifying heritage assets, a category that includes "land of outstanding scenic, historic or scientific interest". The exemption is conditional upon the owner maintaining and preserving the land and providing reasonable public access to it. The original scheme, which started in 1976, attracted widespread criticism because there was claimed to be not enough obligation upon the landowner to publicise the fact that the public had rights of access, and the Inland Revenue was prevented by the rules of taxpayer confidentiality from revealing the agreements that had been made. The publicity requirements have apparently been increased, although replies to PQs have insisted that the obligation was always there.[4] Confidentiality requirements make it impossible to know in detail about the obligations in individual agreements.

The Countryside Access Scheme

This was launched in September 1994 to encourage access to land set aside for five year agreements. The idea of the scheme is that the public would gain new free access to the countryside for walking or cycling or horse-riding where appropriate. The land is carefully selected to ensure that it provides real benefits to the community - for example because it is attractive, or offers wildlife or historical interest, or particularly good views of the countryside, or because it is an area where existing access opportunities are limited. Access created under the scheme takes the form of access routes or open field sites.[5]

A 1997 Agriculture Select Committee Report criticised the scheme roundly.

> Whatever one's views of the desirability of public access to farmland, the Countryside Access Scheme has been almost completely shunned by farmers and has so far been a dismal failure in terms of its own objectives. Nor have the access options in ESAs been taken up to any significant degree. We see no future for the Countryside Access Scheme or its equivalent in other parts of the UK in their current form.[6]

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4 HC Deb 29 March 1996, Vol 274 c 776W

5 MAFF Press Notice 333/94, *Minister launches new countryside access scheme*, 8 September 1994

6 Agriculture Committee, *Environmentally Sensitive Areas and Other Schemes under the Agri-Environment Regulation*, 11 March 1997, HC 45-I 1996-97

In July 1999 the Government announced in that no further applications for this scheme would be accepted. Instead access to enclosed farmland would be met as part of the more comprehensive Countryside Stewardship and Environmentally Sensitive Areas (ESA) schemes.[7]

Environmentally Sensitive Areas Scheme

The ESA scheme was launched by MAFF in 1987 with the aim of pursuing environmental objectives in designated areas of high environmental value, through the encouragement of appropriate agricultural practices. In March 1994 MAFF launched a new optional public access tier in all 22 English ESAs. The purpose of this option is to promote public enjoyment of the countryside. Agreement holders who make public access agreements with MAFF receive payments of £170 per hectare of land covered by the access route.[8]

Tir Cymen

This is an agri-environmental scheme confined to Wales. Agreements are conditional upon the farmer maintaining rights of way free from obstruction and allowing public access on foot to all areas of unenclosed moorland and upland grassland. The farmer receives no payment for either of these requirements. Tir Cymen offers payments to farmers for opening new paths on their land and 55 km of new paths have been created through this voluntary option.[9]

3. Right to Roam Abroad

Comparisons between countries are always difficult, partly because of different legal systems and partly because of the different physical characteristics of the countryside. The following short descriptions give an overview of the position.[10]

France

Traditional rights of access are largely restricted to rights of way in the form of servitude de passage (right of passage) and droit de marche-pied (right to walk, along canals and canalised rivers). There are about 120,000 km of footpaths in France, in other words about 50,000 km less than in the UK, although France is a very much larger country. Rights of public access, other than rights of way, are only available within national parks and nature reserves.

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7 MAFF Press Release 224/99, *Countryside access scheme closed for new applica*tions, 1 July 1999

8 ibid

9 Countryside Council for Wales, *CCW welcomes Government consultation paper on open access to the countryside*, 25 February 1998, www.ccw.gov.uk/english/pr/98022e.txt

10 Peter Scott, *Countryside Access in Europe*, October 1991, Prepared for Countryside Commission for Scotland, Chapter 2

Germany
The traditional right of public access - Betretungsrecht - has been given a modern statutory basis. The basic principle is that of a public right of access to forests, unenclosed land and foreshores, and along footpaths and roads. The right does not give access to enclosed farmland, except on farm roads and tracks. Under Federal legislation the rights extend to walking, running, sitting, camping and playing; cycling, horse riding and using wheelchairs in forests; and, in some Länder include skiing and skating. This right applies to about one third of the former West Germany. Comparable information is not available for the former East Germany.

Austria
There is a traditional right to roam throughout Austria and the Forstgesetz provides a legal right of access to forests, subject to conditions and restrictions.

Switzerland
There is a Betretungsrecht mainly over uncultivated land and there are ancient rights of access to forests and woodlands. However, access may also be restricted if the land is being cultivated.

Netherlands
This is a small, crowded country with intensive agriculture. The main access rights are the public rights of way.

Denmark
Legislation provides for access to public forests and to all beaches. The 1968 Conservation of Nature Act provides access for walking and short visits to uncultivated and unfenced areas and roads in private forests.

Norway
Allemannsretten, the public right of access, is part of Norway's cultural heritage, and has traditionally enabled the public to travel over, enjoy short stays, or collect natural products for personal consumption on land and waters owned by others. The 1957 Outdoor Recreation Act adapted traditional rights to modern circumstances and codified them in detail.

Sweden
Sweden enjoys a similar traditional right of access, but has not codified it in modern legislation.

B. The Consultation Process

The Labour manifesto for the 1997 election promised greater access to the countryside:

> Our policies include greater freedom for people to explore our open countryside. We will not however permit any abuse of a right to greater access.[11]

In February 1998 the Government published a Consultation Paper on access to the countryside.[12] The Government's stated intention was to ensure that walkers would be given greater access to explore the open countryside in England and Wales:

- access is extended for people to walk across mountain, moor, heath, down and registered common land, to around ten per cent of the total land of England and Wales - equivalent to 3.5million acres;
- extended access to the other types of countryside such as woodland and foreshores if there is insufficient access by the year 2000;
- the opening of land is permanent;
- the quality of access is higher than it has ever been, and
- a proper balance between the rights and responsibilities of those who benefit from greater access, and of those affected by it.

"The principle of greater access is not negotiable," said Mr Meacher.
"We are ready to examine both voluntary and legislative routes to meet our objective" [13]

Analysis of the response to the consultation was published in February 1999. The conclusions the Government drew from the consultation process were as follows:

> The consultation paper elicited a large number of responses from organisations and individuals representing a wide spectrum of interests. Many of these commented on only a few issues but a significant number gave detailed views on most of the proposals. Detailed information on costs and powers available, for example to local authorities, was contained in only a few responses. On the core theme of a voluntary or statutory approach, the majority of respondents considered that a voluntary approach was not adequate. Despite the fact that this was a key question set out in the consultation paper, over 50% of landowners and local authorities did not address the question directly. Of those who did, two thirds of landowners and about 18% of local authorities supported voluntary means, while 27% of local authorities thought that voluntary arrangements were not sufficient. The vast majority of recreational users supported a statutory approach. Organisations including the Countryside Council for Wales, Farmers' Union of Wales, National Trust, English Nature, some National Park Authorities,

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11 Labour Party Manifesto 1997 Election

12 DETR Consultation Paper, Access to the Open Countryside of England and Wales, February 1998, http://www.wildlife-countryside.detr.gov.uk/consult/access/index.htm

13 DETR Press Release 129/Env/1998, *Meacher makes access to open countryside a top priority*, 25 February 1998

> National Farmers' Union and Farmers' Union of Wales supported retention of at least some element of voluntary agreement, either with or without statutory backing. This aspect and others will be the subject of recommendations to Ministers and will require a policy decision. Other detailed aspects will require further consideration: for example the definition of "open countryside", definition of agricultural land which should be excluded, arrangements for the administration of closures, liability and the roles of local authorities and statutory agencies.[14]

At the same time an appraisal of the options available to increase access to the countryside was published by the DETR. This was part of the Government's commitment to "looking thoroughly at the implications of its policies, not only in financial terms but also in terms of the impacts on the environment, and society as a whole".[15]

The appraisal was carried out by independent consultants Entec and examined four options for increasing access to land:

A) Incentive-led voluntary approach
B) Compulsion using access enforcement orders
A+B) Largely voluntary but with compulsion as fall back.
C) Compulsion using new legislation with permitted restrictions

The report looked at effects on landowners and occupiers, on access users and local economies, on the environment and on public sector bodies.

Of all the above options the least expensive, as can be seen in Table 1, was calculated to be option C. It was also calculated to be the option that yielded the highest benefit to cost ratio. In terms of unquantified benefits option C was predicted to give both landowners and access users clarity and certainty over access situation on all open countryside, create about 100 jobs though local authority spending and simplify access management by public bodies. Table 2 shows the quantified benefits by sector for the different options.[16]

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[14] DETR, *Analysis of Responses on Access to the Open Countryside of England and Wales*, February 1999 http://www.wildlife-countryside.detr.gov.uk/access/appraise/index.htm

[15] DETR, *Appraisal of Options on Access to the Open Countryside of England and Wales*, March 1999 http://www.wildlife-countryside.detr.gov.uk/access/appraise/4.htm

[16] ibid

Table 2Assessment of Annual Benefits by Sector for Each Option (£000)				
Option	**A**	**B**	**A + B**	**C**
Landowners				
-Incentive payments	13,325	-	8,950	-
Access Users				
-Usage	3,680	3,680	3,680	3,680
-Travel	1,135	1,135	1,135	1,135
Total	**18,140**	**4,815**	**13,765**	**4,815**

> The three main and quantified elements within the benefits are - benefits of increased amenity value to users; reduced travel costs; and, in the options which have a voluntary component, the benefit to landowners of receiving incentive payments.[17]

Following publication of both the above reports the Government announced in March 1999 the introduction of new laws giving walkers the right to explore the countryside.[18]

At the same time a Private Members' Bill on Right to Roam, introduced by Gordon Prentice, was progressing through Parliament. The Bill was withdrawn when the Government announced its intention to introduce a statutory right to access, though a second reading debate did take place. During the debate the Minister for the Environment, Michael Meacher, explained why the government had decided to make access to land a statutory instead of voluntary matter:

> We thought long and hard about whether a voluntary approach would deliver the three criteria we seek: the extent of access, permanence of access and cost-effectiveness. We considered carefully the initiatives taken by the Country Landowners Association to encourage landowners voluntarily to offer greater access. I hope that the CLA will discuss those matters further; I think that its members deserve much credit for their action in developing access assessment and their access register--which I am prepared to take further. With the statutory countryside agencies, we shall consider how to build on that work in developing our own proposals.
>
> However, the key point is that the CLA tried to deliver voluntarily, but it was not able to do so. When assessed against the key criteria--especially that of permanence--set out in our consultation paper, a voluntary approach cannot deliver. By its nature, it cannot deliver permanence. With regard to extent, we have tried for 50 years to extend access and achieved 3 per cent. of our target; extent has to be statutory, if we think that 4 million acres is an appropriate area for access. As for the cost of access, the consultants showed that a voluntary

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17 ibid

18 DETR, Press Notice 1999/211, *Government promises right of access to open country*, 8 March 1999

> right of access would probably cost four times as much as a statutory right. For all those reasons, a statutory right of access is needed and that is the appropriate way in which to proceed.[19]

The intention to create a statutory right of access to land was confirmed in the Queens Speech in November 1999:

> A Bill will be introduced to give people greater access to the countryside

C. Proposals for increased access in Scotland

The Scottish Parliament is also to consider increasing access to land. The proposals for increased access were set out in the Land Reform White Paper published in July 1999. [20]Proposals are more wide ranging than for England and Wales as they include access to inland waters and agricultural land. The following brief from the Scottish Parliament Research Service describes the proposals:

> PROPOSALS FOR NEW ACCESS LEGISLATION
>
> The proposals relating to access contained within the White paper, 'Land Reform: proposals for legislation', if implemented, would clarify and simplify the law relating to both *de facto* and *de jure* access.
>
> The proposals suggest that a right of responsible access to all land (not just rural land to which the rest of the White Paper refers) in Scotland should be created. This right would include enclosed agricultural land, open and hill ground and inland water. The right would not include buildings, their curtilages or places to which public access is already proscribed by law for safety reasons. The proposals suggest that access might be constrained temporarily if potentially unsafe or damaging for the land use. Such constraints would apply over a minimum area and for a minimum duration.
>
> The proposed legislation relating to a right of responsible access would impose certain responsibilities on both those seeking and those providing access. It will require SNH [Scottish National Heritage] to prepare and promote a Scottish Countryside Access Code setting out guidance on what constitutes responsible behaviour for landowners and occupiers and the general public. This code will be essential for interpretation of the potential impact of the proposed legislation. SNH is working with the Access Forum on the preparation of the Code and has been asked to put proposals to the Executive by the end of September 1999.

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[19] HC Deb 26 March 1999 c 700

[20] LRPG, *Land Reform: Proposals for Legislation*, July 1999, The Stationery Office, Edinburgh, http://www.scottish.parliament.uk/

In its recommendations to government, the Access Forum suggests that the Scottish Countryside Access Code should be as simple as possible although 'sub-codes' may be necessary to deal with more detailed responsibilities for specific activities and settings. They suggest the Code should cover the following

- Care for the interests of people who live and work in the countryside by practising informal recreation peacefully, driving carefully and avoiding litter and pollution.
- Care for the needs of land managers by not disturbing farm animals, not damaging any fixtures to land and not interfering with buildings or machinery. People should also take all reasonable steps to avoid adverse effects on land management or water.
- Care for the natural heritage by not disturbing wildlife or vegetation.
- The proposals in the White Paper recognise that the creation of a statutory right of access will, on its own, do little to enhance opportunities for the public to enjoy the countryside. It is proposed therefore that the legislation will also place a duty on local authorities to plan access in their areas, maintain routes as part of a path network and establish a local access forum for their area.[21]

[21] Scottish Library Paper 99/08, *Land Reform White Paper*, 16 August 1999 http://www.scottish.parliament.uk/whats_happening/research/pdf_res_papers/rp99-08.pdf

II Part I of The Bill

The main provisions of Part I of the Bill, dealing with access to the countryside, were outlined in the accompanying explanatory notes published with it, which give a detailed account of the intention of each clause of the Bill.

- It contains provisions to introduce a new statutory right of access for open-air recreation to mountain, moor, heath, down and registered common land, subject to restrictions
- It also includes a power to extend the right to coastal land by order
- It requires that the Countryside Agency (in Wales, the Countryside Council for Wales) prepare a map of all registered common land and all open country, outside Inner London
- It allows landowners voluntarily to dedicate any land to public access in perpetuity
- It allows district councils to appoint wardens to ensure that provisions for access are complied with
- It provides for landowners to exclude or restrict access for any reason for up to 28 days a year without seeking permission
- Landowners will also be able to seek further exclusions or restrictions on access for land management reasons
- The Countryside Agency (in Wales, the Countryside Council for Wales — collectively known as the countryside bodies) and in national parks, the National Park authorities, will be able to approve such applications
- The Countryside Agency (in Wales, the Countryside Council for Wales — collectively known as the countryside bodies) and in national parks, the National Park authorities, will be able to approve exclusions and restrictions on grounds of nature and heritage conservation, fire prevention and to avoid danger to the public
- Gives access authorities powers to ensure adequate means of access is provided by landowners
- The Bill also includes provisions for restrictions on dogs on access land.[22]

The Bill will, according to the DETR Press Release:

> - create a new right of public access to some four million acres of mountain, moor, heath, down and registered common land, about one ninth of the land area of the country, much of which will be opened up to the public for the first time;
> - include safeguards so that landowners and occupiers can continue to use land to its best advantage and wildlife can be protected; and
> - allow landowners to dedicate land voluntarily for public access, giving access to areas not covered by the Bill, such as woodland and riverside.[23]

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[22] Explanatory Notes, *Countryside and Rights of Way Bill* [Bill 78-EN], HMSO, 3 March 2000, http://pubs1.tso.parliament.uk/pa/cm199900/cmbills/078/en/00078x--.htm

A. Initial Reactions to The Bill

The area of the Bill that covers access has been broadly welcomed by many organisations. However the National Farmers Union and the Countryside Alliance have expressed reservations about how the proposals will work in practice.[24,25] The Times was also critical:

> The right-to-roam element of the Bill bears all the hallmarks of what it is – an ill-conceived afterthought to sensible conservation legislation, devised as a sop to the disgruntled Labour heartlands. The decision to offer no compensation may also breach the European Convention on Human Rights: the Country Landowners Association plans a legal challenge. This flawed Bill adds weight to the charge that Labour is indifferent to rural affairs.[26]

1. The Ramblers Association

The Ramblers Association has long campaigned for a right to roam and welcomed the Bill. The Association has always been sceptical about claims that improved access could be achieved without legislation. In its response to the publication of the Bill it stated:

> The Ramblers Association today hailed the Governments new Countryside and Rights of Way Bill as the most significant piece of legislation in 50 years. The Bill will introduce a legal framework to roam in England and Wales, marking a pinnacle of a 116-year of campaign by countryside lovers nationwide.
>
> The public has campaigned to have access to their country for over a century. This is a dream come true for the British people, and on their behalf, we thank the Government for keeping its manifesto promise.[27]

2. The Country Landowners Association

The Country Landowners Association has campaigned for a long time for access to remain voluntary. However the Government made if clear over a year ago that it intended to legislate to increase access. The initial response to this was strong opposition:

> The Government's decision to proceed with a statutory right of access on foot alone to mountain, moor, heath, downland and common land has destroyed the goodwill of the countryside and confirmed the worst fears of all who took part in the Countryside March, says the Country Landowners Association.

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23 DETR Press Release 151/2000,*Greater access and wildlife protection – we're on our way, says Meacher*, 3 March 2000

24 NFU, *Access to open countryside in England and Wales*, June 1998, paragraph 80

25 Countryside Alliance Press Release, *Opportunities of Countryside Bill must not be outweighed by burdens*, 3 March 2000

26 "Meacher's Muddle: The statutory right to roam is ill-conceived and unfair" [editorial], *The Times*, 4 March 2000

27 The Ramblers Association Press Release, *Ramblers celebrate launch of freedom to roam Bill*, 3 March 2000

> It is a clear indication that the Government has chosen to ignore the needs of people who do not have cars, people with children, the disabled, horse riders, cyclists and the vast majority of those who enjoy the countryside.[28]

However on publication of the Bill the CLA expressed cautious approval, stating that common sense had won:

> The published proposals for increasing access to the countryside suggest that the Government is beginning to appreciate the practical problems which will arise, say landowners.
>
> "The Government has promised to include essential and welcome safeguards in the Bill," says CLA President Anthony Bosanquet.
>
> "We are of course disappointed that the Government has ignored the established precedent of compensating landowners for proven losses caused by the imposition of a right of access over private land," Mr Bosanquet added. "That agenda item will remain a subject for lobbying during the Bill's progress and may, ultimately, have to be decided by the Courts under the terms of the Human Rights Act.
>
> "The Bill can be further improved by clarifying what land is affected, strengthening controls on the abuse of access and delivering those promised clauses referred to, but not yet evident in the published bill," said Mr Bosanquet. "We shall be studying the detail carefully and proposing appropriate amendments." [29]

3. National Farmers Union

The National Farmers Union has been consistently opposed to a right to roam in the past. In 1998 it stated:

> In all aspects of countryside management and environmental protection, the NFU has long argued the case for policies based on a voluntary and incentives approach with regulation being seen as a necessary last resort. This argument is based on the premise that regulation is only really effective at preventing the undesirable. It seldom encourages the positive and co-operative approach upon which successful management usually depends.[30]

Its response to the publication of the Bill has been to warn that the Government risks "causing chaos in the countryside".

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[28] The Country Landowners Association, *Access decision is confrontation not co-operation says CLA*, 8 March 1999, http://www.cla.org.uk/access/99014hq.htm

[29] CLA Press Release, *Countryside Bill - Common Sense wins say landowners*, 3 March 2000

[30] NFU, *Access to open countryside in England and Wales*, June 1998, paragraph 80

> The NFU has warned today that the Government risks "causing chaos in the countryside" with its proposals to increase access to open land without fundamental amendments and guaranteed funding for the scheme.
>
> The comments from NFU President Ben Gill follow the publication of the Countryside and Rights of Way Bill. He said: "While we recognise that Government has listened to many of the concerns outlined by the NFU over this far-reaching piece of legislation, we fear it fails to fully address the fundamental mechanics of how this will actually work and how it will be funded.
>
> The NFU believes the Bill places huge additional responsibilities on local authorities and also has serious concerns about the inadequacy of safeguards it offers for farmers who manage open access land.
>
> Ben Gill said: "There is a welcome provision for land closure but this currently excludes weekends and public holidays. For example, the lambing season does not stop for weekends or holidays." There is also uncertainty over which types of grazing land are defined as open land.[31]

4. Countryside Agencies

The Countryside Agency will be responsible, in England, for approving applications for exclusions or restriction of access to land. It welcomed the introduction of the Bill:

> Which, amongst other things, represents the culmination of over 150 years of attempts to legislate effectively to provide widespread, permanent access to the countryside. Though there are areas of detail that we (and others) may strive to improve, we should welcome the way in which Government has sought to bring forward a fair balanced package of measures.[32]

A National Access Forum has already been established by the Countryside Agency, and has been meeting since July, to advise it on the development of policy and procedures that will assist in implementing the Government's legislative proposals.

The Forum comprises representatives from the following organisations:

Association of National Park Authorities	British Horse Society
British Mountaineering Council	Council for the Protection of Rural England
Country Landowners Association	Cyclists Touring Club
Local Government Association	The Moorland Association
National Farmers Union	National Trust
Ramblers Association	Royal Society for the Protection of Birds
Transport and General Workers Union.	

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31 NFU Press Release, *Government must fully assess impact of Access Bill, warns NFU,* 3 March 2000

32 The Countryside Agency, *Countryside and Rights of Way Bill 2000: Part 1 – Access to Open Countryside (AP00/11a)* 9 March 2000, http://www.countryside.gov.uk/who/f_meet.htm

The Countryside Council for Wales, equivalent to the Countryside Agency in England, also welcomed the Bill, though they expressed strong reservations about sufficient funding being made available to implement its provisions.

> We …..welcome, in principle, the Countryside Bill provision for universal access. However, with only £100,000 allocated to take forward the government's proposals in Wales, against a bid we made to the National Assembly for Wales of £2 million, the Council can only take forward the work in one or two demonstration areas this year. These have yet to be named, but the priority will be first to establish local access forums, comprising access, land-owning and occupying interests together with local authorities in the area of the demonstration projects.[33]

B. Provisions of the Bill

1. Right of Access

Part I of the Bill gives the principal definitions, outlines the intended public rights of access and allows for the definition of open country to be amended by the Secretary of State to include coastal land.

Access land is defined as mountain, moor, heath, down and common land. Schedule 1 lists excepted land for the purpose of access. Cultivated land, parks and gardens, golf courses and MOD land are all excluded categories. Country side organisations such as the National Farmers Union (NFU) and the Countryside Alliance have expressed concerns about what kind of grazing land will included in the definition of access land.

There are concerns that increased access will result in farmers having to change management practices drastically to accommodate the increase of walkers on the land. Examples given are having to keep livestock away from highly visited areas and the problems of maintaining hay meadows if there is unlimited access to land. Where access already exists, such as in National Parks, the NFU feels practices have had to change to accommodate visitors and changes on a nationwide level could have undesirable impacts on farming.[34]

Park Managers do not feel that there has been any major conflict between farm managers and visitors as a result of increased access to National Parks land.[35] The Peak National Park Authority's response to the consultation on access stated:

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33 CWW Press Release, *CWW endorses countryside bill measures at open council meeting*, 7 March 2000
34 NFU Official, Personal Communication, 13 March 2000
35 Bob Cartwright, Head of Park Management, Lakes District National Park, Pers. Com., 13 March 1999

> We have worked closely with landowners and land management interests for almost 50 years. We are proud of what we have achieved together through voluntary access agreements given the constraints our resources. However, our experience in the past has been a lack of willingness by owners to agree new access areas. There are still 80 square miles of moorland block in the National Park with little or no public access.[36]

Access will be allowed on foot only. Schedule 2 of the bill sets out the restrictions that have to be observed by anyone entering land for the purpose of open-air recreation. There are restrictions in respect of dogs, which will have to be kept on a lead form 1st March to 30th June and will have to be kept away from livestock at all times. Any kind of sport, damage, disturbance or commercial activity is also restricted. Restrictions include using a vessel or sail board or bathing in non-tidal water. Any one who does not abide by the restrictions will forfeit their right to access and will be considered a trespasser for the rest of the day.

During the consultation process, landowners expressed concern that this offered inadequate sanction to deter prohibited activities. The difficulties in removing trespassers from land, preventing their return, the costs of taking trespassers to court and security risks to owners of remote sites were also emphasised by respondents.[37] As a result there have been some calls for trespassing to be made a criminal offence. This was not included in the Bill. One of the changes to the Bill the Country Landowners Association would like to see is an inclusion:

> Providing that anyone abusing the right of access becomes subject to criminal rather than merely civil sanctions – to stiffen the deterrent value of Schedule 2 restrictions.[38]

The Ramblers Association does not support this.

2. Owner Liability

The introduction of access to private land has implications for owners and occupiers in respect of their liability for the safety of walkers. During the consultation process it was agreed by the majority of respondents addressing this issue that the question of liability needed further thought, that open access should not increase the liability of the owners and that there might well be a case for reducing liability of owners and occupiers except where they were clearly negligent. Most agreed that those exercising access rights should

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[36] Peak District National Park Authority, Report of the Assistant National Park Officer, *Access to open countryside and improving rights of way in England and Wales*, October 1999

[37] DETR, *Analysis of Responses on Access to the Open Countryside of England and Wales*, February 1999, http://www.wildlife-countryside.detr.gov.uk/access/appraise/index.htm

[38] Dr Alan Woods, Deputy Director of Policy, Country Landowners Association, Personal Communication, 13 March 1998

be owed the same duty of care as trespassers.[39] Clause 12 of the Bill states that owner liability shall not be increased in relation to any access land. Clause 13 makes it clear that anyone exercising the right of access will not be treated as a visitor and will be owed the same duty of care as a trespasser. In addition it amends the *Occupiers Liability Act* 1984, which deals with the duty of owners to trespassers, as follows:

> An occupier of the land owes no duty by virtue of this section to any person in respect of a risk resulting from the existence of any natural feature of the landscape.

The reference to a "natural" feature of the landscape is one that may give rise to discussion. Owners are likely to want a strict definition of what exactly constitutes a natural feature. Concern has been expressed by landowners about the existence of many old man-made features. These could be considered a safety hazard and might require repair work to be carried out at expense of the landowner, and that might well affect the character of the area. For example the Countryside Agency has estimated that of the 112,600km of dry stone walls in the England in 1994, 29% were derelict. An official at the National Farmers Union stated that they would prefer "natural feature" to be changed to "features normally occurring on land".

The Countryside Agency summarised duties of a landowner towards a trespasser as follows in a recent document:

> A […] Royal Commission report in 1976 concluded that a […] statutory provision was needed to clarify the liability position towards trespassers. The Occupiers' Liability Act 1984 did this. It says in effect that an occupier owes a duty towards a trespasser (again in relation to any danger arising from the state of the land or property or from things done or not done there) if:
>
> - he is or should be aware of the danger; and
> - he knows or should know that people may in practice be exposed to the danger; and
> - he can reasonably be expected in all the circumstances to offer them some protection from it.
>
> In these circumstances, it says, the duty is to take such care as is reasonable in all the circumstances to see that the person is not injured as a result of that danger. This duty may in appropriate cases be discharged by giving suitable warnings. Unlike the duty to visitors, it does not apply to loss of or damage to property.
>
> Again the duty excludes people who willingly accept the risk, and people using public rights of way. Depending on the circumstances, a user of a right of way may have a claim against the highway authority if injured, or may be able to claim at common law against an occupier who has been malicious or grossly negligent.[40]

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[39] DETR, *Analysis of Responses on Access to the Open Countryside of England and Wales*, February 1999 http://www.wildlife-countryside.detr.gov.uk/access/appraise/index.htm

[40] Countryside Agency, Occupiers Liability in Open Countryside (NCAF 4/1), 1 February 2000

During a debate in the House of Lords last year on Right to Roam and insurance claims the Government made clear its position on potential for increased liability as a result of increased access:

> Lord Renton of Mount Harry asked Her Majesty's Government:
> Whether they will indemnify landowners against insurance claims arising from accidental injury on their land to those exercising a legal right to roam.
>
> Lord Whitty: My Lords, no.
>
> Lord Renton of Mount Harry: My Lords, I suggest that the Government do so. Not knowing how those exercising the right to roam will be compensated for accidents is another deterrent to landowners who might otherwise enter into voluntary agreements in relation to increased access to land. Does the Minister know that even in my gentle part of the Sussex downland, a large area, under the Minister's proposals, may well become available for free access? It is possible when climbing a fence to put one's hand on rusty barbed wire and contract tetanus, or walk through grass, put one's foot into a badger hole and break one's leg. Potholes do not exist only in Regent Street, as mentioned by my noble friend Lord Elton. Who will pay the vast claims that might arise? The Government should give thought to that.
>
> Lord Whitty: My Lords, the Government do not expect the new statutory right of access on foot to open countryside to have a significant impact on public insurance costs for landowners. Their liability to people who are exercising that right will be the same as the liability which they already owe to those who are not on the land by their invitation or licence. Therefore landowners and their advisers will wish to decide whether and to what extent insurance, including public liability insurance, is appropriate for their needs. An economic appraisal study by independent consultants for the Government suggests that any increase in the public liability insurance premium will be very small.[41]

3. Exclusions or Restrictions on Access

Clause 21 of the Bill gives landowners or tenants the discretion to exclude or restrict access for up to 28 days of each calendar year, with the exception of weekends and public holidays. Where there is more than one entitled person with an interest, there is discretion to split exclusion rights between interested parties as long as they do not in combination exceed 28 days.[42] The example given is that of tenants and those that have sporting rights.

The Country Landowners Association has expressed concern about the implications of a 28 day limit on exclusions on, for example shooting estates. These are often run as businesses and may be affected by the requirement not to close access on weekends and

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41 HL Deb 30 March 1999 c 201

42 Explanatory Notes, Countryside and Rights of Way Bill [Bill 78], HMSO, 3 March 2000

public holidays or for more than 28 days. In addition there is concerns about land management issues, such as lambing, that may extend over periods of longer than 28 days.

The bill does give the countryside authorities (or National Parks Authorities) the power to extend restrictions or exclusions beyond 28 days. These include land management, fire prevention, prevention of danger to the public, nature conservation, heritage, defence and national security. Clause 23 states that exclusions or restrictions may be made to avoid danger to the public by reason of anything done, or proposed to be done, on the land or on adjacent land. This might apply to land where shooting or other forms of sport are taking place.

Current access agreements do not give landowners the power to close access to their land contained in the Bill. Consequently in some areas implementation of the Bill may result in reduced access to walkers. This could be a source of conflict in areas such as National Parks in particular.[43]

C. Compensation to Landowners

The Government has stated that it has no intention of offering compensation to landowners for creation of a statutory right of access to their land. The CLA has taken legal advice, and believes that this issue is covered by the *Human Rights Act 1998* and landowners are entitled to compensation. In addition it believes that the *The National Parks and Access to the Countryside Act 1949* provides a precedent for compensation.[44] The CLA's feels that:

> The compensation provisions in that Act seem to strike a fair and proportionate balance between the interests of owners and the public. Owners have to prove their loss, in the light of experience of the actual effects of access, thus allowing for genuine claims only.[45]

The Government position on compensation was made clear in response to a PQ in March 1999.[46]

> **Mr. Gordon Prentice:** To ask the Secretary of State for the Environment, Transport and the Regions what assessment he has made of the compatibility between his proposals to extend the right of access on foot to open countryside without compensation and the Government's obligations under the European Convention on Human Rights

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43 Bob Cartwright, Head of Park Management, Lakes District National Park, Pers. Com., 13 March 1999

44 Dr Alan Woods, Deputy Director of Policy, Country Landowners Association, Personal Communication, 13 March 1998

45 ibid

46 HC Deb 17 March 1999 c 670

> **Mr. Meacher:** The Government's view is that their plans for creating a new statutory right on foot to open countryside are compatible with their obligations under the European Convention on human rights. In deciding that there will be no general right to compensation, the Government have taken into account the limited nature of the new right of access; its application only to land which is undeveloped and not used for intensive agricultural purposes; the continued ability of landowners to develop and use their land after the introduction of the right; and the extensive provision made for closure of land for land management and other reasons. A cost/benefit study for the Government, undertaken by independent consultants, supports the view that landowners will not suffer significant losses or costs as a result of a new right of access such as would warrant the provision of compensation.

The CLA's response to the publication of the Bill, which contains no provision for compensation of landowners, was as follows:

> We are of course disappointed that the Government has ignored the established precedent of compensating landowners for proven losses caused by the imposition of a right of access over private land, […] That agenda item will remain a subject for lobbying during the Bill's progress and may, ultimately, have to be decided by the Courts under the terms of the Human Rights Act.[47]

[47] CLA Press Release, *Countryside Bill – Common Sense wins say landowners*, 3 March 2000.

III Rights of Way

The network of rights of way, covering approximately 200,000 km,[48] is the currently the basis for most public access to the countryside in England and Wales. The system dates back to the time when more people lived and worked in the fields, with the paths often reflecting their normal journey to work, or church or to market. Changes in country lifestyles over the last century have resulted in many footpaths falling into disuse and a loss of the knowledge of where rights of way exist. To counteract this a complex system for legally recording rights of way, and where necessary removing or diverting them, has arisen. Rights of way are slowly being officially recorded and mapped but the task remains incomplete.

Highway Authorities (the County Council, Metropolitan Borough or Unitary Authority) are responsible for recording the legal existence and location of rights of way, and for ensuring that paths are open for use. Farmers and land managers have a responsibility to ensure they are not blocked by crops or obstructed, and that the route is identifiable and the surface condition restored after cultivation.

The Government announced its intention to legislate to improve rights of way in March 1999, as part of the overall measures for access rights in the countryside.[49] The Countryside Commission produced recommendations on this issue, after which the Government produced a consultation paper entitled *Improving Rights of Way in England and Wales* in July 1999.[50] An analysis of the responses was released by the DETR in March 2000.[51]

The Government published the *Countryside and Rights of Way Bill* on 3 March 2000. In the accompanying press release it was stated that Bill will:

- modernise the rights of way laws – the needs of landowners and users have changed over the years;
- require local authorities to draw up plans to improve their rights of way networks;
- redesignate over 4,000 miles of rights of way as a new category of public highway for all traffic, except motorised vehicles, giving more certainty to horse riders, walkers, cyclists and drivers of horse-drawn carriages; and
- contain new measures to get obstructions removed from rights of way.[52]

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48 DETR Press Release 698/1999, A new deal for rights of way, 15 July 1999

49 ibid

50 DETR Consultation Document, *Improving rights of way in England and Wales*, July 1999, http://www.wildlife-countryside.detr.gov.uk/consult/rights/index.htm

51 DETR, *Improving Rights of Way in England and Wales, Analysis of Responses to Consultation Paper*, March 2000

52 DETR Press Release 151/2000, *Greater access and wildlife protection - we're on our way says Meacher*, 3 March 2000

The Government has already announced intended amendments to the Bill. These will encourage the completion of definitive mapping within 25 years, allow rights of way to be diverted to protect SSSIs (Sites of Special Scientific Interest), and give local authorities the power to make temporary diversions in exceptional circumstances such as plant disease.[53]

A. Current Position

1. Existing Types of Rights of Way

The rights of way network in England and Wales covers 200,000 km. These are classified according to the different types of right that exist over them and there are four types over which a right of way by foot exists.

- Footpaths (78% of the network)[54]: highways over which there is a public right of way on foot only.

- Bridleways (17 % of the network) highways over which pedestrians, horse riders and bicyclists (who must give way to people on foot or on horseback) have public rights of way. A bridleway may also carry a public right to drive animals

- Byways open to all traffic (BOATs) (2% of the network): highways over which the public right of way is for vehicles and all other traffic, but which are used mainly for the purposes for which footpaths and bridleways are used (i.e. by walkers or horse riders).

- Roads Used as Public Paths (RUPPs)(3% of the network): Section 54 of the Wildlife and Countryside Act 1981 requires surveying authorities to review all RUPPs appearing on their definitive maps and reclassify them according to the rights which are found to exist. If vehicular rights are found to exist over a RUPP then it should be reclassified as a byway open to all traffic. If no vehicular rights are shown to exist, a RUPP should be reclassified as a bridleway, unless bridleway rights are shown not to exist. A RUPP may also be reclassified as a footpath.[55]

2. Definitive Maps

The *National Parks and Access to the Countryside Act 1949* required local authorities to prepare a definitive map of existing rights of way. The idea was not to create new rights of way but to record the paths that had traditionally been used by people living in the countryside. That task gained particular importance as there was a great decline in the

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53 ibid

54 Figures from *The State of the Countryside 1999*, Countryside Agency

55 Explanatory Notes, *Countryside and Rights of Way Bill* [Bill 78-EN], HMSO, 3 March 2000, http://pubs1.tso.parliament.uk/pa/cm199900/cmbills/078/en/00078x--.htm

number of agricultural workers, so that paths fell into disuse and were often unknown to the new inhabitants in the area. However, most councils devoted few resources to the project and the map remains incomplete. In 1987 the Countryside Commission (now the Countryside Agency) set a national target for the rights of way network to be legally defined properly maintained and well publicised by 2000. This has not been achieved (to date only the Isle of White highway authority has managed this) as was highlighted in a recent report produced by the Country Surveyors Society:

> By 1998, only modest progress had been made towards completing a full legal record of all public rights of way
> - 29% of authorities had consolidated (brought up to date) their definitive Map
> - 41% of authorities had completed RUPP reclassification
> - there was a backlog of 2,492 applications for modification orders yet to be determined and some 9,712 cases, known to local authorities, that were likely to require a modification order, but were not yet formal applications.
> - 34% of local authorities had yet to compile a definitive map for previously excluded areas
> - there were 76,850 reported definitive map anomalies requiring rectification.[56]

Once a right of way has been added to a definitive map it can only be removed if it can be demonstrated that the definitive map is wrong or if a legal procedure is followed. There is currently no legal time limit set for a Definitive Map to be closed.

3. Stopping or Diverting Rights of Way

It sometimes happens that landowners are told that a right of way used to exist over their land, and therefore still does, even though neither they, nor other locals can remember it being used. There is no provision for abandonment of a footpath because of lack of use, and a strict procedure has to be followed for either stopping or diversion. If it can be established that a path was a right of way then it probably still. There is a common law principle "once a highway, always a highway", which is a very old legal principle, according to Marion Shoard:

> In 1320, during the reign of Edward II, the authority responsible for maintaining a track running from the tiny settlement of Stodmarsh to Canterbury in Kent tried to close it to save the cost of maintenance. In protest, the riders and pedestrians who used the path (mainly monks at a local monastery) took the case to court. The result was that the sheriff ordered his men to reopen the path since it was clearly "an ancient and allowed highway".[57]

There is a procedure for stopping up or diverting a right of way. With few exceptions this involves notice of the proposed change to be placed on the path, published in the local press

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[56] Slade, T, *An evaluation of the process of recording public rights of way in England: A report for the County Surveryors Society Countryside Working Group*, 1999

[57] Marion Shoard, *This Land is our Land*, 1997 edition, p 269

and either given directly to national organisations such as the Ramblers Association and Open Spaces Society or published in the London Gazette. The rules also allow objectors to the proposal to have their objections heard and determined by a person or body other than the body putting forward the proposal, usually the Secretary of State.[58] Applications can be made by a highway authority or a local council. The option is not open to a private citizen. Anyone can apply to a highway authority asking it to make an application of this sort, but it does not give the right to anybody to compel the highway authority to apply to the court. The authority may make a public path extinguishment order if it appears to it expedient on the ground that the path or way is not needed for public use. However, the magistrates' court needs to be satisfied that the highway is unnecessary or can be diverted so as to make it nearer or more commodious to the public, before authorising it to be stopped up or diverted.

4. Maintaining Rights of Way

There is no simple standard for maintaining the surface of footpaths. Almost all footpaths are publicly maintainable (meaning maintainable at public expense by the highway authority).[59] If the authority neither undertakes maintenance work itself, nor arranges for anyone else to do so, and a highway becomes "out of repair", there is a procedure whereby the authority's duty can be enforced through the courts.[60] Any stile or gate across a footpath must be maintained by the landowner in a safe condition and to the standard of repair required to prevent unreasonable interference with the rights of users.

Obstructions of rights of way, as a result of poor maintenance or deliberate blocking, were highlighted as a problem by the then Countryside Commission in its report *Rights of Way in the 21st Century*.

> Another significant problem, highlighted by all user groups, is the lack of effective arrangements to deal with obstructions to rights of way. This includes the lack of effective sanctions, both for highway authorities to use against those who obstruct paths, and for the public to use against highway authorities lacking commitment to this aspect of their duties.[61]

The Ramblers Association states that a quarter of the rights of way network in England and Wales is obstructed, and claims that many impassable routes have been blocked intentionally by landowners.[62] Ploughing up is the most common form of obstruction according to the Countryside Agency.[63]

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58 J.Riddall and J.Trevelyan, *Rights of Way: a guide to law and practice*, 2nd edition, 1992

59 ibid

60 ibid

61 Countryside Commission, *Rights of Way in the 21st Century*, March 1999

62 The Ramblers Association Footpath Campaign, htttp://www.ramblers.org.uk/footpaths.html

63 The Countryside Agency, *Countryside and Rights of Way Bill 2000: Part 1I - Right of Waye (AP00/11b)* 9 March 2000, http://www.countryside.gov.uk/who/f_meet.htm

B. Consultation Process

In March 1998 the Countryside Agency (then the Countryside Commission) published a discussion paper, *Rights of Way in the 21st Century*, which was produced after consultation with interested parties. The report set out the Countryside Commission's recommendations to the Government for improving the recording and management of rights of way.

The main conclusions were summarised as follows:

> Having considered all the responses carefully we have concluded that, in order to succeed, any measures to improve the recording and management of rights of way will need to include action on all the following main issues:
> - Adequate, long-term funding arrangements need to be put in place.
> - Highway authorities need to carry out their rights of way duties properly.
> - The legislative framework and administrative practice need to be improved.[64]

On the issue of funding the report stated:

> It is common ground between highway authorities, users and landowners that rights of way work has never been properly funded at any time since the present system was introduced by the 1949 Act. That lack of funding is the biggest single reason - although not the only one - for the failure of the current arrangements. Improved funding must be a top priority, as without it other necessary changes will have little effect.[65]

On the issue of highway authorities:

> It is clear that many highway authorities still do not take their rights of way duties seriously. This is one of the major issues of concern for all the user groups we consulted. Lack of funding is certainly a problem, but it is also - for some authorities - a convenient excuse. The Commission believes that there can be few, if any other statutory duties which local government, taken as a whole, carries out so poorly. (This is not a criticism of individual rights of way officers, many of whom are highly committed).[66]

The response from the different interested organisations was varied: though all agreed that the current situation needs improving, the solutions proposed differed.

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64 Countryside Commission, *Rights of Way in the 21st Century*, 1998, http://www.countryside.gov.uk/who/f_press.htm

65 ibid

66 ibid

- The most negative response from the main national organisations came from the Ramblers' Association (RA). They disagree with, or question, most of the legislative and administrative proposals we put forward. Their view, which is broadly supported by the Open Spaces Society (OSS), is that the real need is not to change the legislative system, but to address the reasons why the current system has failed to deliver; they perceive these reasons to be the lack of will in local government to provide the means to do the job, and a corresponding lack of will in central government to do anything about this failure.
- The organisations representing rights of way managers believe that, generally speaking, the current system would be capable of working effectively if it were better funded and staffed.
- Organisations representing "higher rights" users (i.e. horse riders, cyclists, horse drawn vehicle drivers and motorised users) are less satisfied with the current system. They perceive it as failing them in some important ways, although they too place much of the blame for the current problems on the failings of highway authorities.
- The main organisations representing landowners are not satisfied with the current system, and endorse the need for reform.[67]

The Government Consultation document, *Improving Rights of Way in England and Wales*, was published in July 1999. The document took into account the Countryside Commissions' recommendations and outlined the areas where the Government felt there could be a need to legislate.

> The Government believes there is a case for legislative action in eight main areas:
> - encouraging the creation of new routes including more provision for cyclists and equestrians;
> - encouraging completion of the historical record;
> - improving procedures for recording, changing and developing the rights of way network and dealing with the needs of land management;
> - measures to provide environmental safeguards;
> - measures to assist in crime prevention, and to rationalise certain diversion and closure powers;
> - removal of obstructions from rights of way;
> - measures to improve access to the rights of way network for disabled people;
> - improving the quality of the legal record and the availability of information to the public.[68]

The response to the proposals was mixed. In the analysis of responses published by DETR the main conclusion reached was:

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[67] ibid

[68] DETR Consultation Document, *Improving rights of way in England and Wales*, July 1999

> Overall the responses tended not to support the proposals. This was particularly true of individuals who responded, whose opinions would naturally reflect their personal interests, perhaps at the expense of wider considerations such as benefits to the general public or savings in public spending.[69]

Several of the proposals that received most support are included in the Bill. For example:

- provisions to enable members of the public to serve a notice on a highway authority for removal of an obstruction of a right of way;
- provisions enabling authorities to produce consolidated definitive maps for their areas;
- provisions to ensure that prohibitions to drive motor vehicles on certain type of rights of way apply to all types of motor vehicles;
- proposals to improve accessibility for disabled people.

Some of the proposals to which there was strong opposition have been included in the Bill in a modified form.

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[69] DETR, *Improving Rights of Way in England and Wales, Analysis of Responses to Consultation Paper*, March 2000

IV Part II of the Bill

The Countryside and Rights of Way Bill was published by the Government on 3 March 2000. The summary of what the Government hope to achieve with regards to rights of way, included in the explanatory notes that accompany the Bill, is outlined below:

- The Bill requires local highway authorities to carry out a review of and publish plans for improving rights of way in their areas, taking into account the needs of the public, including those of people with mobility problems. A power will be provided to require authorities to report on the implementation of their plans. The duty to report will be introduced under a wider power for the Secretary of State and the National Assembly for Wales to require local highway authorities to report on their functions relating to rights of way.
- Surveying authorities will be able to consolidate the legal record of rights of way in their area where it has become fragmented following boundary changes. Powers will also be provided so that surveying authorities can make a single order that both changes a public right of way and provide for that change to be reflected in the legal record.
- The Bill provides for Roads Used as Public Paths (RUPPs) to be reclassified as a new category of way known as a Restricted Byway having a right of passage for non motorised users. RUPPs are a category of right of way which was introduced by the National Parks and Access to the Countryside Act 1949. They were put on definitive maps on the basis that vehicular rights subsisted or were reasonably alleged to subsist over them. Under the Wildlife and Countryside Act 1981 surveying authorities have been under a duty to reclassify them either as footpaths, bridleways or byways open to all traffic.
- The Bill also gives a new right to land managers of agricultural and other types of land to apply to a council for certain types of orders diverting or extinguishing footpaths and bridleways, and a right of appeal against a council's refusal.
- Local authorities will be required to have regard to nature conservation when performing their rights of way functions. The areas in which traffic authorities may make traffic regulation orders on roads for conservation and recreation purposes will be extended to include SSSIs. Traffic regulation orders will also be permitted on minor highways throughout England and Wales to control vehicular use for the conservation or enhancement of natural beauty. The provisions applying in Greater London will be brought in line with the rest of England and Wales.
- Local authorities will be able to divert or close rights of way for the purpose of crime prevention in certain urban areas, and for protecting the safety of children and staff in school grounds.
- Magistrates' Courts will be provided with powers to require a person who has been convicted of wilfully obstructing a highway to remove the obstruction. Any person will be able to serve notice on a local highway authority to secure the removal of certain obstructions and, where the authority does not comply with the notice, to seek a Magistrates' Court order requiring the authority to do so.

- The unauthorised driving of off-road motor vehicles away from roads will become an offence.
- There is a new provision requiring local highway authorities, when considering applications to erect stiles or gates across footpaths or bridleways, to take into account the needs of people with mobility problems.[70]

A. Initial Reactions to the Bill

1. The Countryside Agency

The Countryside Agency has examined the rights of way section of the Bill in great detail and has produced a paper that summarises their position on the Bill. The document recognises the difficulties involved in making any amendments to rights of way legislation but expresses serious reservations about the Bill as it is currently drafted.

> We know that drafting this Bill has not been easy, given the links to wider highway law, the complexity if the underlying statute and case law and considerable sensitivity of the many interests in the subject. The result is a complex set of proposals that may well add to the complexity of the law.

> Looking at the legislative package as a whole, and bearing in mind the absence (so far) of any commitment by central or local Government to finding the important additional resources that are needed, our general conclusions is that the rights of way proposals whilst good in parts, are unbalanced as they currently stand. The main problem is that proposals which will guarantee specific improvements in the network are few, compared with several proposals which, taken together, could lead to some diminution of it. Allied to this is the concern that the overall effect will be to add the administrative burden of already underfunded rights of way departments at a time when some of them are also likely to come under pressure to deal with the effects of access to open countryside.[71]

2. The Ramblers Association

The initial reaction from the Ramblers Association to the rights of way proposals was positive.[72] However on further consideration they produced several criticisms to the Bill

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70 *Countryside and Rights of Way Bill*, Explanatory Notes, HMSO, 3 March 2000

71 The Countryside Agency. *Countryside and Rights of Way Bill 2000: Part 1I - Right of Way AP00/11b)* 9 March 2000. http://www.countryside.gov.uk/who/f_meet.htm

72 The Ramblers Association, Countryside and Rights of Way Bill - Ramblers' Association analysis and reaction, 8 March 2000. http://www.ramblers.org.uk/freedom.html

> The Bill, as presently drafted, is completely lacking in any bold and imaginative proposals which will genuinely improve public rights of way for all concerned. We are concerned that, despite government claims, the legislation hasn't been made any simpler and that it will, in many instances, simply increase the burden on local authorities.[73]

3. Local Government Association

The Local Government Association (LGA) is the representative organisation of the nearly 500 local authorities in England and Wales. They are responsible, as highway authorities, for the mapping and maintenance of the public rights of way network. The LGA stated in its press release in response to the publication of the Bill:

> LGA Rural Chiefs have supported moves to improve public access to the countryside – but argue that local authorities will need more cash to do so.

The LGA they support the objectives of the Bill and are ready to shoulder their responsibilities. They recognise that a balance needs to be struck between public and landowner responsibilities. They feel it is very important that sufficient resources are made available. Many of the spending requirements in the bill are discretionary which might result in them not being given a high priority.[74]

4. Landowner and Countryside Organisations

The Country Landowner Association organisations have been strongly in favour of reforming the law applying to rights of way.[75] The have welcomed provisions which they think will:

- modernise rights of way,
- set deadlines for definitive mapping of public rights of way,
- make it easier to divert rights of way to meet the needs of users, owners and the environment,
- make it easier to get temporary diversions of existing paths so farmers can manage their land.

They would like amendments ensuring that powers to close rights of way on security grounds are available in rural as wells as urban areas.

The Countryside Alliance also welcomed measures in the Bill to simplify the alteration of inappropriate rights of way.[76]

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73 Ramblers Association, Meeting of Access and Rights of Way Organisations, 13 March 2000

74 LGA Office, Personal Communication, 8 March 2000

75 Countryside Commission, *Rights of Way in the 21st Century*, 1998

76 Countryside Alliance Press Release, *Opportunities of Countryside Bill must not be outweighed by burdens*, 3 March 2000

5. Environmental Organisations

Environmental organisations have expressed general support for the Bill as a whole.

The Royal Society for the Protection of Birds has expressed some concerns about the section of the Bill that deals with rights of way.

> The RSPB recognises the value of the rights of way network in providing access to the countryside. However, usage of the network can conflict with nature conservation and existing legislation does not reflect this problem. Unfortunately, in its current form, the Bill does not carry forward some of the welcome proposals for environmental safeguards that the Government made in its DETR consultation of last July.

However

> The RSPB welcomes the fact that (based on the published Bill and promised Government amendments), highway authorities will for the first time be able to:
>
> - Regulate the use of the rights of way network where it poses a risk to an SSSI's interest;
> - Divert rights of way where their use is leading to the damage or deterioration of an SSSI's interest.[77]

B. Provisions of the Bill

1. Reclassification of Roads Used as a Public Path (RUPP)

The aim of this is to remove the burden on local authorities of reclassifying each Road Used as a Public Path (RUPP) individually, which has created a backlog of cases. A new category of right of way is created, a restricted byway, which allows access on foot, horseback or non-mechanically propelled vehicles. Where vehicular rights exist on a RUPP there will be the option to apply for reclassification as a Byway Open to All Traffic (BOAT).

This is a modification of the proposal contained in the consultation, which suggested reclassification of RUPPs as bridleways and would have excluded all kind of vehicles. This proposal attracted the most disagreement during consultation, particularly from the Recreational Motorised Vehicle User group.[78]

The Countryside Agency thinks that this approach will leave the difficult issue of vehicular rights unresolved, as they will still have to be proved on a case by case basis. In

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[77] RSPB Parliamentary Brief, *Countryside and Rights of Way Bill, Part II - Rights of Way*, March 2000

[78] DETR, *Improving Rights of Way in England and Wales, Analysis of Responses to Consultation Paper*, March 2000

addition the Agency would like to see the redefinition of a BOAT, as the current definition in case law prevents any highway which is not currently mainly used by walkers or riders from being added to the Definitive Map.[79]

2. Stopping or Diversion of Public Paths

The Bill formalises the arrangements for requests for changes to the network. The summary of the Bill produced in the explanatory notes states:

> The Bill also gives a new right to land managers of agricultural and other types of land to apply to a council for certain types of orders diverting or extinguishing footpaths and bridleways, and a right of appeal against a council's refusal.

The Bill allows for the Secretary of State to bring in regulations to set time limits for appeals from land managers to be dealt with. Currently only local authorities have the right to apply for the diversion or extinguishment of a right of way.

This is one of the parts of the Bill that has caused most concern. Landowners have generally welcomed the new powers. However other organisations have reservations about the Bill as it is currently drafted. In the consultation document this proposal included both land managers and members of the public. The majority of respondents disagreed with the proposal, though a majority of landowners did agree with it.[80]

Both the Countryside Agency and the Ramblers Association would like to see the right to apply for orders to be extended to the general public, for example in cases where there are rights of way through gardens. They would also like the inclusion of a right to apply for creation orders as a way of ensuring there is no net loss to the network. There are also concerns that setting a time limit on applications by land managers to be dealt with will result in this area of work being prioritised.

The Countryside Agency, supported by the Ramblers Association, stated on the issue of setting a time scale for applications:

> our advice that local authorities should determine requests for changes to the network within a specified time limit has emerged as a proposal simply to give those with an interest in land a formal right to apply for closures and diversions. This has been done on the premise that all other requests for change (ie for path creations and any requests made by anybody other than landowners) would continue to be dealt with efficiently by highway authorities in the public interest. We are concerned that with new duties to deal with formal applications for

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79 The Countryside Agency. *Countryside and Rights of Way Bill 2000: Part 1I - Right of Way AP00/11b)* 9 March 2000

80 DETR, *Improving Rights of Way in England and Wales, Analysis of Responses to Consultation Paper,* March 2000

> closures and diversions within a specified time scale, other proposals will be treated with a lower priority.[81]

3. Rights of Way Improvement Plans

The Bill requires local authorities to prepare and publish rights of way improvement plans, they will also have to review the plan every ten years. Highway authorities will also be required to report on work they have done to improve accessibility of the rights of way network for disabled and less agile people.

Local Authorities have been criticised for lacking commitment to carrying out their right of way duties in the past.[82] The Ramblers Association and the Countryside Agency have both commented on the fact that there will be no requirement in the Bill for local authorities to act on the improvement plans.

4. Obstructions

The Bill introduces a power for any person to apply for an order requiring the local authority to secure the removal of an obstruction from a right of way. Anyone failing to comply with a removal order can be fined by a magistrate's court.
The Ramblers Association has welcomed the new provisions, but would like to see them extended.

> We particularly welcome the introduction of powers to allow individuals to enforce the duty of highway authorities to prevent obstruction. However, this could be amended to make it far more effective.
>
> - it should apply to all highways;
> - it should cover buildings;
> - it should cover building works;
> - it should cover interference with the surface of a path;
> - it should be made a parallel power to that which already exists in Section 56 of the Highways Act 1980 (enforcement of the duty to maintain);
> - There should be protection against costs being awarded against the complainant.[83]

The Countryside Agency is happy to see legislation introduced to deal effectively with obstructions, but is critical of the fact that the legislation as drafted does not deal specifically with ploughing up, which it sees as the most common cause of obstruction.[84]

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81 The Countryside Agency. *Countryside and Rights of Way Bill 2000: Part 1I - Right of Way AP00/11b)* 9 March 2000

82 Countryside Commission, *Rights of Way in the 21st Century*, 1998

83 Ramblers Association, Meeting of Access and Rights of Way Organisations, Personal Communication, 13 March 2000

V Political Parties' Reaction to the Bill

A. Conservative Party

The Conservative Party response to the publication of the Bill was very critical.

> Most of this Bill is devoted to an ill-conceived method of increasing access to private land in the country. The Government has missed a golden opportunity to modernise the Rights of Way network in a coherent and viable way, which would address the just concerns of all involved.
>
> Labour have failed to address the real problems of the countryside: over-development; animal sanctuary; the loss of rural services; badly sited mobile phone masts; pollution; and the livelihoods of all those who share the countryside.
>
> The Government is providing a hollow and meaningless approach towards the worsening crisis in the countryside. This Bill, three years in the waiting, should be dealing with real environmental concerns not simply proposing piecemeal attempts to speed the fulfilment of another insincere election pledge. This Bill is a sadly missed opportunity.[85]

On the issue of access the Conservative Party has made it clear that it favours a voluntary approach and has stated that there is no need for draconian legislation to force rights of access. In response to the Government's consultation it outlined the steps it would like the Government to take. Its proposals to improve access were as follows:

> We believe that the best way to achieve improved access to the countryside is to foster an atmosphere of increased trust on all sides.
> The Government should therefore:
> - define the need and demand for greater access;
> - define its own objectives; and
> - seek to increase awareness of local Rights of Way and strengthen if necessary local authorities' powers.
>
> What is needed is real action to increase trust. After all, the vast majority of those who go out to enjoy the countryside are highly responsible, and voluntary agreements on the part of landowners are fast proliferating.
> The Government should, in order to enhance the sense of security for all parties
> - redefine the law of trespass;
> - introduce new legislation on owner liability;
> - bring in new legislation to control dogs in the open countryside; and
> - give consideration to the effect of increased access on land values.[86]

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84 The Countryside Agency. *Countryside and Rights of Way Bill 2000: Part 1I - Right of Way AP00/11b)* 9 March 2000. http://www.countryside.gov.uk/who/f_meet.htm

85 The Conservative Party Press Release, *Government's approach to the environment is 'confused and insubstantial'*, 13 March 2000

86 Conservative Research Department, *Access to the countryside*, 8 March 1999

B. The Liberal Democrat Party

The Liberal Democrats have expressed concerns about sufficient resources being in place to ensure that the Bill works effectively.

They stated:

> The Government needs to reassure farmers who are already overstretched by burdens of unnecessary regulations that they will not be expected to meet the costs of improved access.
>
> Only through a managed and locally agreed format can there be a balance between those who work the land and those who want to enjoy it.[87]

[87] Liberal Democrats Press Release, *Countryside Bill: Farmers cannot be expected to meet costs of improved access*, 2 March 2000

VI Statistical Information

A. Open Countryside

The categories of land that are suggested will fall within the definition of open countryside are mountain, moor, heath, down and common land. Calculating the actual size of the areas that cover the different categories of land type is difficult. According to a DETR report [88] this is due to:

- The overlap between definitions;
- The absence of any dataset for England which corresponds to the proposed categories of land;
- Problems in interpretation of the definitions.

However, table 3 below shows the approximate areas of land by category in England and Wales.

Table 3
Approximate areas of land by category England

Land type	Area (000Ha)	% of total
Mountain, Moor, Heath, which is also Common	441	33%
Mountain, Moor, Heath	754	56%
Down	42	3%
Common land only	111	8%
Total	1,351	

Source: DETR *Appraisal of Options on Access to the Open Countryside of England and Wales*, Table 5.1, March 1999

Table 3 shows that there are just over 1.3 million hectares of land, or almost 9% of the total land area of England and Wales, that comes under the DETR definition of open countryside. By far the largest category of land type, over half the total area, is mountain, moor and heath. Of the land covered by the extended category; mountain, moor, heath and down, approximately two thirds of the area is defined as moorland grass or open canopy heath.[89]

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[88] DETR *Appraisal of Options on Access to the Open Countryside of England and Wales*, March 1999

[89] DETR consultation paper *Access to the Open Countryside in England and Wales* 18 December 1998

[89] Ramblers Association *Freedom to roam Questions and answers*, March 2000, http://www.ramblers.org.uk/questions.html

B. Opinions on Access to the Countryside

There have been many polls carried out to find the opinion of the general public about their rights to free access to the countryside. A series of NOP polls commissioned by the Ramblers Association revealed overwhelming public support for a legal right to roam.[90]

An August 1998 opinion poll carried out by NOP showed that 85% of those surveyed supported a statutory right to roam over mountains, moor, heath, down and common land, subject to common sense restrictions. Only 12% of respondents were opposed to greater access to the open countryside. A survey carried out by NOP across the UK in the following February found that 83% of the 1,001 adults questioned wanted their local MP to back Gordon Prentice MP's Right to Roam Bill. The results of the survey showed a high degree of support for a statutory right to roam across all ages and social classes with only 13% of the respondents who replied being against the right to roam.[91]

In a more recent telephone survey of 1,003 people aged 15 and over in Great Britain, carried out by NOP from the 5th-7th November 1999, the question was asked:[92]

> "Should the Government this year introduce an environmental bill to protect the countryside, endangered animals and plants and give the public the freedom to walk the open countryside areas like mountains and commons?"

Of those questioned who answered 88% answered yes and 12% answered no.

Finding comparable statistics on the opinions of the farming community proves more difficult. A study was undertaken by the Countryside Commission[93] in 1994 of seven specific study areas to determine what changes had occurred in the English landscape since their previous survey carried out in 1983.

As part of the 1994 survey some questions dealing with the attitudes of farmers to public access on their land were asked, the findings of six of these are reproduced in table 4 below.

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90 Ramblers Association *Freedom to roam Questions and answers,* http://www.ramblers.org.uk/questions.html

91 Ramblers Association 2000, personal communication

92 Ramblers Association 2000, personal communication

93 Countryside Agency Research Note *Agricultural Landscapes,* November 1998

Table 4
Attitude of farmers to public access

	Footpaths on farms	Problems with trespass	Encouraging access
Huntingdonshire	7	4	1
Dorset	6	3	2
Somerset	4	1	1
Herefordshire	7	3	3
Yorkshire	6	4	1
Warwickshire	5	1	2
All farms	**35**	**16 (46%)**	**10 (29%)**

Source: Countryside Agency Research Note *Agricultural Landscapes,* November 1998

Of the 36 farms with public access across there land just under half responded that they had problems with trespassers while almost a third responded that they were actively encouraging access to their land. The survey went on to show that: [94] "The majority of farmers did not mind visitors to their land but would like to see a rationalised access system. Re-routing paths, however, has proved difficult to achieve."

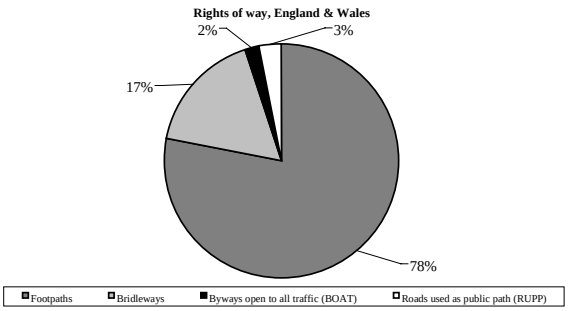
C. Rights of Way

Going for a walk has now become the nation's most popular outdoor activity, with 15 million people walking at least once every month.[95] Once an integral part of the country's transport system estimates of the actual length of rights of way vary considerably. Table 5 below shows the length of the rights of way network according to a recent DETR consultation paper.[96]

Table 5
Length of rights of way
England & Wales

	Km	
Footpaths	163,000	78%
Bridleways	35,000	17%
Byways open to all traffic (BOAT)	3,200	2%
Roads used as public path (RUPP)	6,400	3%
Total	207,600	100%

Source: DETR consultation paper *Improving Rights ofWay in England and Wales,* 16 July 1999



94 Countryside Agency Research Note *Agricultural Landscapes,* November 1998
95 www.ramblers.org.uk/footpaths.html
96 DETR Consultation Paper *Improving Rights of Way in England and Wales,* 16 July 1999

Of the 208,000km rights of way network in England and Wales by far the greatest proportion, 78%, are designated as footpaths. The Ramblers Association has suggested that around 52,000 km or 25% of the total network is either deliberately blocked or obstructed.[97]

D. National Trails

The best known rights of way in England are the ten National Trails. The first, the Pennine Way, opened in 1965. Table 6 below shows the length, the year each trail was opened and the percentage of trails open to access by horse riders, cyclists and motorised vehicles. These figures are included as they give an indication of the types of usage of rights of way in England and Wales.

Table 6
Percentage of National Trails open to horseriders, cyclists and motorised vehicles

National Trail	Opened	Length (km)	Horseriders	Cyclists	Motorised vehicles
Cleveland Way	1969	176	25%	25%	2%
North Downs Way	1978	246	50%	50%	30%
Offa's Dyke Path	1971	288	8%	17%	20%
Peddars Way / Norfolk Coast Path	1986	150	47%	47%	47%
Pennine Way	1965	412	20%	20%	9%
Ridgeway	1973	137	74%	74%	61%
South West Coastal Path	1973-1978	982	0%	4%	5%
Thames Path	1996	288	5%	6%	0%
Wolds Way	1982	127	35%	35%	16%
TOTAL		2,967	17%	19%	13%

Note: Excluding the South Down Way
Source: The Countryside Agency National Trails Fact File

Of almost 3,000km of National Trails in England: 17%, 19% and 13% are open to use by horse riders, cyclists and motorised vehicles respectively. The longest National Trail in England is the South West Coast Path that runs for almost 1,000km through Somerset, Devon, Cornwall and Dorset. The most open to access National trail is the Ridgeway, which allows horse riders, cyclists and motorised vehicles access to just over 74%, 74% and 60% of the trail running through Wiltshire and into Hertfordshire. There are also three new National Trails planned for the future. These are The Cotswold Way, Hadrian's Wall Path and the Pennine Bridleway.[98]

[97] www.ramblers.org.uk/footpaths.html
[98] The Countryside Agency, *National Trails Fact File*, http://www.countryside.gov.uk/news/f_roway.htm