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Right to Roam Bill

Bill 16 of 1998-99

This paper summarises the background to the Right to Roam Bill, a Private Member's Bill introduced by Gordon Prentice. The paper summarises the main conclusions of the Government's Consultation Paper of 1998, along with reaction, existing access provisions and the law in other European countries. It also analyses the Clauses of the Bill. The Bill only applies to England and Wales.

The Government announced on 8 March 1999 that they would support a right to roam, as part of a broader Government Bill. Mr Prentice's Bill had its Second Reading on 26 March 1999, but was then withdrawn.

Christopher Barclay

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Summary of main points

- The 1998 Government Consultation Paper favoured trying to increase access to the countryside by voluntary methods, but considered the main issues in a legal right to roam.
- There are several existing access provisions, often as part of schemes in which the landowner receives payment, but they cover only small parts of the countryside.
- The rights of way network offers widespread scope for walking, although not for wandering from the path. It is protected by legislation.
- Access to the countryside provisions abroad vary enormously, often reflecting simple geographical differences.
- The Bill provides a framework for a statutory right to roam on non-agricultural land.
- The Government has not yet made its views on the Bill known.

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I Introduction

Access to the countryside has been a controversial topic for centuries. For many years, the main issue has been recreational access, rather than the right to exploit the land. Although land in the UK is mainly privately owned, and mostly agricultural, there are certain traditional rights of access, of which the most important remaining part is the network of footpaths. These rights of way are protected by law. Particularly up to the 18th century common land was also important, but its importance declined with the enclosures. Common land is land over which rights of common exist for the commoners, and it is not necessarily publicly owned nor does it have automatic public rights of access.

The idea of a right to roam goes further than the traditional arrangements. Virtually all the discussion concentrates on the right to roam on non-agricultural land. Few people seriously suggest that the public has the right to walk across modern farms.

The idea of legislation to ensure the right to roam dates back more than a century and the campaign was relaunched by the Ramblers Association in 1985.

The Labour Manifesto in 1997 stated: "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."[1] The Government's attitude towards the current Bill has not yet been announced.

The Conservative Manifesto in 1997 stated: "We will also encourage managed public access to private land – in agreement with farmers and landowners – but strongly resist a general right to roam, which would damage the countryside and violate the right to private property".[2]

The Conservative Party's reaction to the Government's consultation paper was announced in December 1998. The party favours increased access to the countryside, achieved by consent with the landowners, and considers that the priority should be to increase local awareness of the Rights of Way network, strengthening the local authorities' powers if necessary. The statement contained several recommendations:

A Redefine the law of trespass
B Introduce new legislation on owner liability
C Bring in new legislation to control dogs in the open countryside
D Give consideration to the effect of increased access on land values[3]

The statement concluded that if these steps were taken, there would be no need for draconian legislation to force rights of access. Newspaper speculation that the

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1 T Austin (ed), *The Times Guide to the House of Commons May 1997*, 1997, p 324
2 T Austin (ed), The *Times Guide to the House of Commons May 1997*, 1997, p 353
3 Conservative Party News 2689/98, *Right to Roam*, 8 December 1998

Conservative Party was about to abandon its opposition to the right to roam was incorrect.[4]

The 1997 Liberal Democrat Manifesto stated: "We will help landowners meet the environmental costs of increased access to the countryside."[5]

In 1997 Paddy Tipping introduced his Access to the Countryside Bill 1997/98 (Bill 54) as a ten minute rule Bill. It did not reach a second reading. His Bill was very similar to the present one.

4 "Tory U-turn gives ramblers victory", *The Independent,* 20 November 1998

5 T Austin (ed), *The Times Guide to the House of Commons May 1997, 1997,* p 370

II The February 1998 Consultation Paper

The Government issued a consultation paper in February 1998.[6] It is an open consultation paper in the sense that the issue is discussed without pushing a particular solution. Initially the Government hopes to increase access via voluntary agreements. The aim is to extend access to mountain, moor, heath, down and registered common land, although the Government is also considering how to give people greater access to other types of open country. There are several parts of the executive summary relating to possible legislation:

> 4 If legislation proves to be necessary, the Government will introduce a new statutory right of access to open countryside in England and Wales. The Government is clear that, whether a statutory or voluntary approach is adopted, a proper balance needs to be struck between the rights and responsibilities of those benefiting from greater access and of others affected by it. For example, it is vital to reconcile the interests of walkers with those whose livelihoods depend on open countryside. The Government's proposals would not involve any extension of rights of access to developed land or to land used for agriculture, other than extensive grazing.
>
> 5 Promoting greater access is not intended to interfere with other legitimate activities. The Government recognises that to ensure this, some areas of open land would need to be closed to the public either permanently or temporarily…
>
> 6 Should legislation be necessary, owners and occupiers would, in general, still be free to use their land, subject to the same constraints as at present. They should not deliberately obstruct or threaten those seeking to enjoy rights of access, and their liability to those exercising such rights would remain that currently owed to trespassers. Walkers would continue to bear the primary responsibility for their own safety.
>
> 8 There would be restrictions on the activities which might be undertaken by those exercising the new freedom of access…[T]here would not necessarily be similar access for dogs as for people.
>
> 10 Should new access legislation be needed, payments would continue to be made under existing agreements to provide access to open country, but new agreements should take any legislative proposals into account.

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6 DETR, *Access to the Open Countryside: a consultation paper*, February 1998, Deposited Paper 3/6096 pp vii-viii

III Views of other bodies

Organisations representing landowners and farmers have opposed the idea of a right to roam, while the Ramblers Association has supported it.

A. The Country Landowners Association (CLA)

The CLA argues that it would be cheaper and more effective to rely upon an extension of voluntary measures. The following passage presents their view:

> E4 Our belief in the principle that voluntary agreements offer the best way forward is borne out by extensive research work which we have commissioned from authoritative academic sources to fill key gaps in current knowledge, policy and practice. In the light of these findings, we conclude that:
>
> - The Gallup poll confirms that people do not seek unrestricted access and generally prefer to follow way–marked paths. People seek access close to their homes. They are generally unaware of the extent of existing access in the countryside.
> - What is needed is not an indiscriminate statutory "right to roam" to secure access to 1.6 million hectares (4 million acres) of land but, instead, targeted voluntary access arrangements for specific parcels of land, amounting to between 500,000 and 925,000 hectares (1.25-2.31 million acres).
> - The new access should be provided by agreement – primarily by well marked paths, but with provision for access over additional specific areas – where compatible with land management and environmental needs. Management is needed to safeguard wildlife, the environment and land management interest. The access provided should be properly publicised.
> - The area for targeted improvements needs to be justified in the light of the extensive and growing existing statutory and voluntary provision, and social welfare requirements. Further provision can be achieved by building incrementally on the growth in voluntary provision observed since 1991-92.
> - The annual costs of a statutory "right to roam" to taxpayers – over 1.6 million hectares – should exceed £60 million (losses and costs to owners, costs to local authorities and costs to the Government, statutory agencies and the courts). There would be significant opportunity costs – particularly if the costs of administering a "right to roam" were taken from rights of way budgets. In contrast, the annual costs of voluntary access agreements to meet public demand over 500,000 to 925,000 hectares would amount only to between £3.95 million and £7.275 million.
> - In economic, social and environmental terms – indeed on any rational assessment of costs and benefits – we conclude that voluntary provision, targeted on sites where new access is required, would be far more cost-effective than an indiscriminate statutory "right to roam" which secured access over a wider area.
>
> E5 The Consultation Paper proposes that owners and occupiers should not be eligible for general compensation for access to their land under a "right to roam".

> On the basis of a legal Opinion obtained from Mr Peter Duffy QC and Mr Paul Stanley, we conclude that, if a "right to roam" were to be introduced, there would be a case for compensation to be paid to owners for the costs and losses that they would sustain, and that any failure to provide compensation would be challenged.[7]

B. The National Farmers Union (NFU)

The NFU has opposed the idea of a right to roam, even though most proposals, such as the current Bill, exclude agricultural land from the land over which the right would be applicable. The NFU considers that the distinction in the White Paper between voluntary and regulatory approaches omits the more fruitful area of negotiation and compromise. The following paragraphs show the NFU approach:

> 21 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.
>
> 22 We regard access as no exception…we believe that more attention needs to be given to alternative methods of meeting the Government's access objectives other than by relying on crude voluntary or regulatory alternatives. In that context, we believe that the Government needs to give greater priority to developing effective partnerships with farmers and landowners at national and local levels as a means of delivering its objectives for access to the countryside. We feel that such an approach would be consistent with the Government's stated objective to work in partnership with business and seek joint ownership of both policy problems and solutions. [8]

C. The Countryside Commission

In a discussion paper, the Countryside Commission set out three ways in which access to the countryside might be made more effective and less contentious:

- A more integrated approach, at both national and local levels, to get away from previous attempts to focus on different sorts of provision. Links need to be made between the different types of access, for instance the relationship between access to open country and the Rights of Way system;

- The scope for local diversity; certain general access rights and responsibilities need to be universal but some arrangements, like the limitation of access at different seasons, or in places where local traditions

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7 Country Landowners Association, *Access to the open countryside - the CLA proposal, 1998*

8 NFU, *Access to open countryside in England and Wales*, June 1998, paragraphs 80 and 81

apply, and the need for closures could vary from the national pattern. Local or regional fora might have a place in determining this kind of detail;

- Sufficient, well targeted resources. One of the most important factors in making access succeed is finding the resources that are needed and ensuring they achieve the maximum benefit. Highway authorities need to increase their investment in Rights of way if the network is to be maintained and secured for the future. Greater access to open countryside will also require new money.[9]

D. The Ramblers Association

The Ramblers Association has long campaigned for a right to roam and welcomed the Bill. The Association is sceptical about claims that improved access could be achieved without legislation. It noted that the Government had said that landowners had to volunteer access in order to avoid access legislation, and that access must meet six criteria. These are that the access must cover all 3-4 million acres of open country, must be of good quality, be permanent, be clear and certain, be cost-effective, and capable of being monitored and enforced. The Association then examined the 2,107 voluntary access sites on the CLA's website against these criteria. It concluded that only 388(18%) of the sites appeared to fulfil the Government's six criteria for access. Of those landowners fulfilling the criteria, most are legally or morally bound to provide access anyway (eg charities and local authorities).[10]

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9 Countryside Commission News Release 98/52, *Fresh thinking on access needed*, 9 December 1998

10 Ramblers Association Website (www.ramblers.org.uk/accnews.html)

IV Existing access schemes

A. 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.

> Countryside Stewardship can:
> - create linear routes to make:
>   - new circular walks or rides (bridleways, cycle tracks)
>   - new links or bridge gaps in the existing rights of way network;
> - provide open access to new parts of the countryside such as:
>   - viewpoints, lakesides or archaeological sites
>   - picnic sites
>   - open spaces close to villages and towns
> - improve opportunities for people with disabilities or mobility problems to enjoy the countryside;
> - offer opportunities for educational visits by schools, colleges, clubs and so on, especially where land has some special interest, such as archaeological remains.[11]

13,100 hectares are open to the public under this scheme, and the access would last for five years.[12]

B. 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. In particular, in section 64:

> (1) A local planning authority may with the approval of the Minister make an access agreement with any person having an interest in land, being open country, in the area of the authority whereby the provisions of this Part of this Act shall apply to the land.
>
> (2) An access agreement may provide for the making of payments by the local planning authority of either or both of the following descriptions, that is to say in

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11 MAFF, *The Countryside Stewardship Scheme: information and how to apply*, January 1999, p 27

12 DETR, *Access to the Open Countryside in England and Wales*, February 1998, Deposited Paper 3/6096, p 36

> consideration of the making of the agreement and by way of contribution towards expenditure incurred by the person making the agreement in consequence thereof.

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.

48,000 hectares have public access under this scheme.[13]

C. 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 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.[14] Confidentiality requirements make it impossible to know in detail about the obligations in individual agreements.

Some 58,000 hectares of heritage quality land have public access under this scheme.[15]

D. 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. The annual payments available per hectare of land entered into the scheme are £90 per hectare for access routes and £45 per hectare for open field sites. The new access is signposted and publicised locally.[16]

The Agriculture Select Committee criticised the scheme roundly in a report in 1997:

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13 DETR, *Access to the Open Countryside in England and Wales*, February 1998, Deposited Paper 3/6096, p 36

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

15 DETR, *Access to the Open Countryside in England and Wales*, February 1998, Deposited Paper 3/6096, p 36

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

> 79 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 [Environmentally Sensitive Areas] 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. There is nevertheless a strong argument that the use of public money to protect or enhance the farmed environment entitles the public to experience and enjoy the results of its investment. We note that the Environment Committee saw the transfer of the Countryside Stewardship Scheme to MAFF as an opportunity to improve that scheme's access provisions. We consider that a re-appraisal of access policy across all agri-environmental schemes is now required; indeed, [a MAFF official] indicated that MAFF would be undertaking such a re-appraisal during 1997. We recommend that the Countryside Access Scheme should be closed to new applicants, and MAFF should require some degree of public access in all new agreements under agri-environmental schemes. In some circumstances this would entail year-round public footpaths, in others it could be as little as one day a year on which members of the public could be admitted, by prior arrangement and under the farmer's supervision if necessary, to view particular wildlife habitats or archaeological features for which payments were being received. [17]

Only 1,500 hectares are covered by the scheme, and the access would last for ten years.[18]

E. Tir Cymen

This is a 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.[19]

35,000 hectares are covered by the scheme, and the access would last for ten years.[20]

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

18 DETR, *Access to the Open Countryside in England and Wales*, February 1998, Deposited Paper 3/6096, p 36

19 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

20 DETR, *Access to the Open Countryside in England and Wales*, February 1998, Deposited Paper 3/6096, p 36

V Footpaths

The network of rights of way is the basis for most public access to the countryside in England and Wales, covering 169,000 km.[21] It 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. These footpaths are slowly being recorded. The Countryside Commission accepts that its aim in the 1990s that the task would be finished by the year 2000 was too optimistic.[22]

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 is, since the rights do not lapse through lack of use. There is a common law principle "once a highway always a highway". This 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".[23]

Section 116 of the *Highways Act 1980* allows application to be made by a highway authority to a magistrates' court for an order to stop-up or divert any highway other than a trunk road or special road. Section 117 allows anyone to 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.

Section 118 allows a council to 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. Again, that option is not open to the private citizen.

However, strict tests are applied. The magistrates' court (Section 116) 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. The criteria for a local council (Section 118) to stop up a footpath are slightly different.

> Where it appears to a council as respects a footpath or bridleway in their area...that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and

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21 Countryside Commission, *Rights of Way in the 21st Century*, 1998, p 2
22 Countryside Commission, *Rights of Way in the 21st Century*, 1998, p 10
23 Marion Shoard, *This Land is our Land*, 1997 edition, p 269

> submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.

The criteria for diversion are less strict, and they do take into account the interests of the owner. They come in Section 119(1*)*.

> Where it appears to a council as respects a footpath or bridleway in their area...that, in the interests of the owner, lessee or occupier of the land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted (whether on to land of the same or of another owner, lessee or occupier), the council may...by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, -
>
> > (a) create, as from such date as may be specified in the order, any such new footpath or bridleway as appears to the council requisite for effecting the diversion, and
> > (b) extinguish, as from such date as may be so specified...the public right of way over so much of the path or way as appears to the council requisite as aforesaid.

However, there is a further condition relating to the Secretary of State's confirmation, in sub-section (6).

> The Secretary of State shall not confirm a public path diversion order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that the diversion to be effected by it is expedient as mentioned in subsection (1) above, and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which -
>
> > (a) the diversion would have on public enjoyment of the path or way as a whole,
> > (b) the coming into operation of the order would have as respects other land served by the existing public right of way, and
> > (c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it.

VI 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.[24]

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 so much the larger country. Rights of public access are only available within national parks and nature reserves.

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.

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

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.

VII The Bill

Clauses 1-8 of the Bill establish the right roam on open country. Clauses 9 – 13 deal with problems arising from the obstruction of access. Clause 14 covers occupiers liability. Clause 15 covers publicity requirements. Clause 16 covers application to the crown.

A. The right to roam on Open Country

The basic definition of "open country" in clause 1 contains two elements: "mountain, moor, heath or down" and common land.

1. Mountain, Moor, Heath or Down

The phrase "Mountain, moor, heath or down" relates back to the *National Parks and Access to the Countryside Act 1949* section 59 in which the basic definition of "open country" was: "mountain, moor, heath, down, cliff or foreshore (including any bank, barrier, dune, beach, flat or other land adjacent to the foreshore)". However, the 1949 Act did not define the terms. The 1998 Consultation Paper does offer some definitions relating to the Government's intentions, although these are not included in the new Bill.

> 3.4 We would intend to include all land over 600 metres high as mountain.
>
> 3.5 Moor and heath are overlapping categories (and may occur over 600 metres, overlapping with the definition of mountain). Heath is characterised by the presence of dwarf shrubs such as heather, gorse, cross-leaved heath, bilberry and crowberry. It may include scattered trees, scrub, bare ground, bogs and open water. Lowland heath is found below 300 metres; upland heath on higher ground.
>
> 3.6 Moor includes upland heath and grass. Soils usually have a peaty top and moor are characterised by semi-natural vegetation used as rough grazing. Although usually associated with uplands over 200 metres, moorland vegetation can be found down to sea level, especially in the north west…
>
> 3.7 Down is characterised by semi-natural grassland on shallow, lime-rich soils associated with limestone escarpments. Such calcareous grassland often contains an exceptional diversity of plants, typically including upright brome, blue moor-grass and the common rock rose.
>
> 3.8 In total, mountain, moor, heath and down account for some 1,240,000 hectares, about 8% of the land area of England and Wales. The proportion is much higher in Wales than in England….[25]

2. Common Land

The 1998 Consultation Paper also expressed the intention of extending the right of access to registered common land. Common land is not, as is often supposed, land in public ownership but land subject to rights of common. About 370,000 hectares (3% of the total

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[25] DETR, *Access to the Open Countryside in England and Wales*, February 1998, pp 6-7

area) in England, and over 185,000 hectares (9% of the total area) in Wales are registered under the *Commons Registration Act 1965*. Much of this land is covered by the categories mountain, moor and heath, according to the 1998 Consultation Paper, paragraph 3.9.

There are rights of access to most common land in urban areas, but not necessarily in the countryside. The idea of extending rights of access to all common land was recommended by the Common Land Forum in 1986. The Conservative Government initially thought that all interest groups were satisfied with the idea and planned to legislate on common land.[26] However, the Moorland Association was formed to represent landowners owning moorland, including grouse moors, and its members opposed a right to roam. In 1990 the Government argued that in most cases there was no reason why the public should not have free access, but that in some cases other interests such as conservation would need to be safeguarded. They therefore proposed that all interests concerned should try to reach agreement on arrangements to provide better access to common land. Cases of disagreement could be referred to the Secretary of State for the Environment.[27] In practice, the policy of relying upon the interested parties to sort things out did not secure widespread public access, perhaps because owners felt that the public would interfere with their management arrangements, for example for grouse moors. According to a PQ in 1998, members of the public have a statutory right of access to 20% of this land, and no central records are kept of individual arrangements.[28]

The Bill not only grants the right to roam on common land in clause 1, by including it in the definition of open country, but also states in clause 7 that a declaration of non-conformity cannot be made for common land. In other words, the right to roam on common land cannot be removed on the grounds that it is used for agriculture. The right to roam on common land would start from the commencement date of the Act, not from the date of the completion of the open country map as for other land, under clause 4.

3. Exceptions

In clause 6, there is a list of exceptions from the definition of open country: buildings and their curtilages; parks, gardens and pleasure grounds; mineral surface workings; statutory undertakings and telecommunications code systems works; and land being developed for such purposes. The 1998 Consultation Paper included a list in legislation proposed by the Ramblers Association, derived from the 1949 Act. It includes two categories not in the Bill:

- railways and tramways;
- golf courses, race courses and aerodromes.

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[26] HC Deb 29 January 1999 c 313W
[27] HC Deb 26 July 1990 cc 391-2W
[28] HC Deb 18 March 1998 c 608W

4. The exemption for agricultural land

Clause 7 allows any person having an interest in land to make an application to the authority (a Unitary Authority or district council) for a declaration – called a declaration of non-conformity - that the land (other than common land) is not open country. Sub-clause (2) covers agriculture:

> In an application for a declaration of non-conformity the applicant may claim that the land is agricultural land but agricultural land shall not include land which is agricultural land by reason only that it affords rough grazing for livestock.

It would be the responsibility of the farmer to secure the declaration and to ensure that the open country map does not show the farm as open country. However, schedule 2 deals with the procedures for making declarations for excepted and non-conforming land. Paragraph 1 states the presumption that land claimed to be excepted or non-conforming is such, unless there is evidence to the contrary. The schedule also lays down the procedure for cases in which the declaration is opposed. If the representation opposing the declaration is not withdrawn, the Secretary of State shall either cause a local inquiry to be held or offer the objector a chance to have the objections heard by a person appointed by the Secretary of State for the purpose (paragraph 4).

The NFU, in replying to the 1998 Consultation Paper, argued that increased access would involve costs for the landowner. Although it welcomed the exclusion of agricultural land from the category to which a right to roam would apply, it stressed the danger of over simplified definitions of different categories of agricultural activity. "In this context extensive grazing is a major area of concern to us. Extensive is not only difficult to define but is also incapable of easy recognition on the ground. In our experience the distinction between intensively and extensively managed grassland is not easy to make – indeed many people find it difficult to distinguish grass from cereal and other crops that are still green".[29]

The production of the open country maps should determine which areas of land are agricultural within the meaning of the Act. Hill farmers with farms near to open country, however, might fear that walkers would mistakenly consider their land to be rough grazing.

5. The Open Country Maps

Under clause 3, each National Surveying Authority has to prepare an open country map within two years. In England the National Surveying Authority is the Countryside Agency and in Wales the Countryside Council for Wales. If it fails to do so, then it has to prepare within a further six months a map of all the land for which an application has been made for a declaration of conformity. Under clause 5(1) the open country map will

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[29] National Farmers Union, *Access to Open Countryside in England and Wales*, June 1998 paragraph 33

be conclusive for determining that a piece of land is open country. In other words, if the land is marked on a map as open country, then the walkers can freely roam on it. On the other hand, under clause 5(3) if land is not marked as open country that in itself does not mean that it is not open country.

The time limit may be included because of the experience of the 1949 Act, which required county councils to produce maps of rights of way. These maps are still not complete some 50 years later.

6. Actions that are not allowed under the Right to Roam

Under clause 1(2) the right to roam is ended if someone breaks or damages a fence or contravenes any of the restrictions in schedule 1. These include having a dog out of control; lighting a fire; hunting shooting or fishing; depositing litter; wantonly disturbs any person engaged in a lawful occupation; and so on.

7. Temporary Prohibition Orders

Under clause 8, temporary prohibition orders may be made for different time periods according to the reason. An order to prevent access so as to allow shooting can be made for up to 21 days in the year. An order because of exceptional fire risk or so as to protect young lambs and kids may be made for up to 28 days, with two further 28 day periods if approved by the authority.

Orders for certain specific environmental reasons or for the prevention of accidents at a quarry, pit or mineshaft etc, can be for up to three years. A prohibition of a similar length can be made for the protection of a geological or physiographical feature of the land, the protection of an ancient monument, or the restoration of the land to open air recreation.

B. Obstructions to Access to Open Land

Clause 9 allows a complaint to a local authority that there is insufficient access from a public highway to open country. The local authority may improve the public access by improvement or repair of existing access or by creating a new right of way.

Clause 10 provides for the continuation of existing schemes of public access, made under other legislation. Clause 11 makes it an offence to wilfully obstruct a means of access to the open country, unless by means of a temporary prohibition order.

Clause 12 imposes extra penalties on those who obstruct footpaths. When grants are paid by the Government to landowners or farmers, the Government will have to obtain a declaration that every footpath on the land is unobstructed and free for public use. If the footpaths are blocked within the next five years, the whole of the grant would have to be repaid.

The major grants going to farmers come from the EU Common Agricultural Policy, but European Law would not currently allow the British Government to withhold some payments of support under the Common Agricultural Policy (CAP) to those farmers who did not keep footpaths open. Such withholding of grants would be against EU law under current arrangements, but the new arrangements proposed under Agenda 2000, if amended, might offer that possibility.[30]

The main support to arable farmers comes in arable area payments, whose rules are laid down in a 1992 Regulation.[31] Article 15 paragraph 3 states explicitly:

> The payments referred to in this Regulation are to be paid over to the beneficiaries in their entirety.

Hill livestock compensatory amounts contain a supplement paid by the British Government over and above the amount guaranteed by the EU scheme. That amount could be reduced according to UK rules, provided that the European Commission was satisfied that the reduction did not amount to a distortion of competition. However, hill farmers are usually the poorest farmers and arable farmers the richest. It might be seen as unfair to impose cross-compliance rules on poorer farmers meaning that they had to offer public access as a condition of receiving their grants, if the same conditions were not imposed on large arable farmers.

Clause 13 makes it an offence to display misleading signs on or near land to which the Act applies.

C. Occupier's Liability

Under current law, a landowner may be liable for damages to a visitor on his land, under the *Occupiers' Liability Act 1957*. Landowners feared that they might have to take out expensive insurance against the payment of such damages to walkers exercising their right to roam. Clause 14 states that such people would not count as visitors for the purpose of the 1957 Act. However, there is also an *Occupiers' Liability Act 1984*, which extends liability to other people on the land. Under s1(3) of the 1984 Act,

> An occupier of premises owes a duty to another (not being his visitor)…if –
> (a) he is aware of the danger or has reasonable grounds to believe that it exists;
> (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger (in either case, whether the other has lawful authority for being in the vicinity or not); and

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30 Agenda 2000 is the proposed reform of EU finances to allow for expansion of the union. A large part is the reform of the Common Agricultural Policy currently under discussion at the time of writing the paper

31 Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops (OJL 181)

> (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

Where the occupier owes a duty to another in respect of such a risk, the duty is to take care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned. However, there is a defence under 1(5):

> Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warnings of the danger concerned or to discourage persons from incurring the risk.

There is another defence under s1(6) suitable, for example, when people are climbing:

> No duty is owed by virtue of this section to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

In other words, clause 14 of the Bill removes some of the risk from landowners but by no means all. In cases where there are concerns over a path it is relatively easy to put up notices warning of the danger, but it is not so easy over a large area of land where people are free to roam.

The Country Landowners Association has expressed considerable concern about the occupier's liability aspect of increased public access. It mentioned that landowners often consider the current arrangements to be unduly costly both in terms of public liability insurance and also in terms of action that needs to be taken to avoid claims, for example fencing off remote land affected by mining. However, the CLA report suggests three possible options, one of which is that of Clause 14. One other option suggested was that the Highway Authority should bear the liability for walkers exercising the right to roam, in the way they do for walkers on public rights of way. The other suggestion is that landowners should be able to exempt themselves from liability by erecting appropriate notices.[32] The NFU has also expressed considerable concern about the idea of a right to roam because of fears over occupier's liability. It supports the idea of a new category of "recreational user" to whom occupiers would have a reduced liability.[33]

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[32] CLA, *Access 2000: countryside recreation and access into the next millennium*, 1996, p 15

[33] NFU, *Access to open countryside in England and Wales*, June 1998, paragraphs 80 and 81

D. Other topics

1. Publicity

Clause 15 requires publicity for land to which the public is to have access. For open country the owner and occupier are given the responsibility for publicity. In the case of land for which there has been an exemption from Inheritance Tax, the responsibility goes to the person who has given the undertaking and the person beneficially entitled to the property.

2. Application to the Crown

Clause 16 extends the right to roam to land owned by the Queen, to land held by the Crown Estate, and to land held by Government Departments. If there were no clause of this type, then the Crown lands would not be included, because of Crown Immunity. However, in recent years the idea of Crown Immunity has been eroded in several areas. The *Local Government and Rating Act 1997* made provision to end the exemption from non-domestic rates, and this is to come into force on 1 April 2000. In 1994 it was announced that the Crown immunity from planning legislation would be removed as soon as a legislative opportunity arose.[34]

[34] HC Deb 10 March 1994 c 375W