SECOND PROGRAMME OF LAW REFORM

Proposal from of Mountaineering Ireland

Background and Contact Details:

Mountaineering Ireland (MI) is the representative body for hillwalking and climbing clubs on the island of Ireland. MI is recognised as the National Governing Body for hillwalking and climbing by the Irish Sports Council and Sport Northern Ireland. The Company is a Company Limited by Guarantee. For more information on MI see www.mountaineering.ie

The Company employs (amongst others) a Chief officer, Karl Boyle. For the purposes of this submission, he is the first point of contact. karl@mountaineering.ie

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Area of Law Considered in Need of Reform:

MI's memberships recreation is impacted by the powers and responsibilities vested in both local government (District Councils) and the Department of the Environment (NI) (the Department) by the Access to the Countryside (Northern Ireland) Order 1983 (Statutory Instrument 1983 No. 1895).

This Order contains the principal legislative provisions affecting access to the countryside in Northern Ireland. It requires or empowers District Councils to carry out a broad range of functions in relation to 'rights of way', provides for the creation of 'public paths', the establishment of 'long distance routes', and for the protection of 'access to open country'. In the remainder of the United Kingdom, the capacity to ensure and indeed create access for rural recreation for health and wellbeing has always been better supported through legislation and has been dramatically enhanced through the provisions of the Countryside and Rights of Way (CROW) Act 2000 in England and Wales and the Land Reform (Scotland) Act 2003. Both these latter pieces of legislation are much more relevant to modern recreational trends and the creation of 'rights with responsibilities' for individual citizens.

Why the Current Law Needs Reform:

For the purposes of brevity, these matters will be outlined in sub-sections. Each of these areas can be covered in much more detail if desired and requested.

1) Inadequacies of the existing legislation and resulting issues:

   a) 'Rights of Way', Articles 3-10 of the Order. Rights of Way are meant to be the backbone of the public's recreational access network. It is clear from the legislation that the intent was that Councils would assert, maintain and map these and would do so to facilitate unfettered public use. However, very few have ever been asserted by District Councils and a larger number are 'presumed dedicated' in that no formal process has been undertaken. Those that are proposed for assertion (many of which having been presumed for years) often fail if challenged because the Order has little in the way of prescriptive criteria (such as an uninterrupted period of use or a proper definition of a 'Right of Way'). Furthermore, objections relating to their assertion (unlike the other UK jurisdictions) are determined by a Magistrate's Court. This lack of clarity and indeed any noticeable consistency by the Courts has led to some very costly and prolonged 'wrangles' and some almost perverse decisions. This has had the net effect of clearly deterring local authorities from asserting what in many cases are probably rights of way and are certainly widely considered as such. The end result is that even key access routes (such as many in well known tourist areas e.g. in the vicinity of the Giant's Causeway) are either presumed dedicated or are agreed as 'Permissive Paths' with local authorities using powers to enter into agreements under the 'Recreation and Youth Services (Northern Ireland) Order 1986. Such 'Permissive Paths' are exactly that and the landowner(s) can often withdraw their agreement at any time. (Some exceptions exist where local authorities have entered into a formal lease arrangement with the landowner(s) often to avail of grant-aid from the Department). The underlying issue is that many traditional Rights of Way are actually being lost as they have not been asserted or mapped as envisaged by the legislation and are thus not picked up through the Planning process or through public awareness. The overall effect is that this 'backbone' of access infrastructure has not materialised in a period of 27 years and that District Councils undertake little or no activity in this regard, arguably failing in their duty as set out in the Order.

   b) 'Public Paths', Articles 11-20. The intent of public paths was to supplement the Rights of Way network and District Councils have considerable powers within the Order to create a public path network. However, the Order places no obligation on local authorities to do so as it consistently uses the word 'may' in respect of these powers. Given the issues surrounding Rights of Way and the lack of any established framework in this regard, few Public Paths have been created even by agreement.

c) ‘Cycling’, Article 20. Given the advent and huge growth in off-road cycling in various forms, this Article is woefully inadequate in dealing with both the provision and management of cycling and indeed the need for dedicated (as distinct from shared) cycling routes. Such control as can be exercised can only be done through the use of bye-laws where this capacity exists and is a very negative approach.

d) ‘Long Distance Routes’, Articles 21-24. Again, the legislation presumed action on the part of District Councils (individually or collectively) to provide these routes as a major element of the recreational infrastructure. To facilitate this, quite elaborate infrastructure (including ferries) is ‘allowed for’ mindful of the Department’s powers to grant-aid all such works. The reality of the provision of long distance routes is that the Countryside Access and Activities Network has had to take the lead on a series of ‘Ways’ in conjunction with the District Councils concerned. The premier long distance route, the Ulster Way, remains incomplete and largely on road. Again the criticism of the legislation is that it places no onus on Councils to carry out such activities, rather their role is optional, and many Councils take no action at all on such matters whatsoever.

e) ‘Access to Open Country’, Part 111 of the Order. Quoting from the legislation:

(1) For the purpose of enabling the public to have access for open-air recreation to open country, this Part applies to land which is, or which gives or forms part of access to, open country, being land to which Article 26 is applied by an access agreement or an access order or acquired under Article 39 or 40.

(2) In this Order “open country” means any land appearing to the district council or the Department to consist wholly or predominantly of mountain, moor, heath, hill, woodland, cliff, foreshore, marsh, bog or waterway.

It is thus sad to report that in the 27 intervening years no ‘Access to Open Country’ has been established in any form by any local authority. Such access as does exist is de facto access to and over lands such as those in the High Mournes currently in public ownership albeit through a Government owned Company (for now), Northern Ireland Water. Further areas of public land, including other lands owned by NI Water, have no right of access, often with no justification. In the case of Forest Service land, the Forestry Act (Northern Ireland) 2010 has now created a statutory right of access to such lands by foot and given Forest Service powers to provide appropriate recreational facilities albeit on an optional basis. However, overall, the citizens of Northern Ireland are poorly served compared to those in Great Britain and considerable concern exists as to the long-term security of open country areas such as the Mournes.

Specific Issues Which Need Addressed

Again, for the purposes of brevity, these are numbered with a short statement on each. Such matters can be elaborated on if requested.

1. The need to place a clear responsibility on local authorities to create and maintain an access infrastructure in their areas. The acknowledged link between countryside recreation and improved mental and physical health ties in with the proposed new powers of Northern Ireland's local authorities in the areas of community planning and wellbeing. Recreation cannot be seen to solely relate to the provision of Leisure Centres, Parks and other formal facilities. Such responsibility could extend to the requisite preparation of a 'Countryside Access Strategy' for their area but must be tempered with simplified procedures (such as the use of Departmentally appointed Commissioners rather than Magistrate's Courts). The legislation should also allow for greater support and guidance from the Department and (depending on the final outcome of local government reform) the capacity to require the Department's Agency (NIEA) to intervene in either complex cases or when a local authority is clearly in default. The legislation needs to establish clear quasi-judiciary roles for the Department and a definitive, supporting, grant-aiding, enabling role for NIEA.
2. A stated right of access to all public land subject to reasonable management provisions. In the absence of any right of access to private land (as covered in both the CROW Act and the Scottish Land Reform Act, this would be a minimum manifestation of 'the public good' in Northern Ireland. This (as per GB) would also allow for specific references to Occupier's Liability in respect to countryside access given that the wider issue of Occupier's Liability covers all property and has proved contentious in the area of countryside. MI supports the concept of 'responsible access' and feel that the key elements of responsibility in respect of both users and owners could be incorporated into amended legislation.
3. Amended Access legislation could also pre-empt some of the issues which will arise if and when National Park's are designated. Whilst it may be possible to draft this legislation to facilitate the establishment of such areas and the management of same, it is not considered appropriate that a different set of legal access criteria or rights should apply to some areas and not to others. If this were the case, it could prove very controversial adding to what is already a very controversial debate and could in fact see a loss of access opportunities.

In Summary:

MI believe that the current legislation is inherently flawed, a matter first highlighted by Countryside Recreation Northern Ireland to the Department in the 1994 Access to the Northern Ireland Countryside Report (HMSO ISBN 0-337-08339-8), a report jointly commissioned by them. Since that time matters have only become worse and opportunities and indeed certain specific routes have been lost forever.

Northern Ireland is now marketing itself as a base for both home based and out of state tourism with ‘activity tourism’ as one of the main elements of the tourism ‘product’. We are living in a very different society with very different dynamics than those that applied in 1983.

Fundamentally, our Access legislation must enhance our capacity to create opportunities for individual health, wellbeing and indeed the economy.

The existing legislation has singularly failed to do this and has left us with a precarious and disjointed infrastructure with a general lack of understanding at the public level as to what one can or cannot do or indeed go.

We feel that it is more than pertinent that these matters must now be addressed.