

Marine and Coastal Access Bill A briefing from the BMC – June 2009



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The British Mountaineering Council (BMC) is the representative body for climbers, hill walkers and mountaineers in England and Wales. We have over 67,000 members, many of whom participate in a range of activities along the coast including walking, sea cliff climbing, coastering (a mixture of swimming, climbing, scrambling, and traversing the coastline) and deep water – soloing (participants climb and then jump into the sea from a height). The BMC is a statutory consultee under CROW and rock climbing is included within this right of access.

The BMC interest in the Marine and Coastal Access Bill is focussed and direct. It is focussed in that our interest is in Part 9, Coastal Access, and direct in that the BMC has been actively involved in managing access to coastal sites for rock climbing and other activities for over 30 years.

The BMC along with other leading recreational and conservation organisations, who together represent over 4 million people, has been campaigning for a permanent right of access to our coast, which should extend from the mean low water mark to a point inland, and include areas such as beaches, the foreshore and cliffs.

- The Government's vision for coastal access as set out in Part 9 of the Marine and Coastal Access Bill has received cross-party support. The recognition that open air recreation is intrinsically valuable along the coast of England is key to the coastal access vision.
- The Marine and Coastal Access Bill and Natural England's Coastal Access Scheme must ensure that current management arrangements such as those of the BMC continue under the new access regime. The least restrictive approach must be taken when considering any restrictions along the coastal margin.
- The BMC is concerned with the lack of access for members of the public, user groups and representative bodies to the objection mechanism and to the consultation stage of reports. Without third party involvement at an early stage in the implementation there is a considerable risk that 'fair balance' set out in clause 291(3) will not be achieved.
- Islands form an important part of the English coastal heritage and their coastal margins offer unique recreational opportunities. It is essential that Government realise the whole vision of the Bill and provide access for principle islands.
- The coast has long been a focus for open air recreation and it will be important to allow people to make their own decisions with regards safety, particularly along the coastal margin. The BMC supports the proposed reduction in landowner's liability and the inclusion of the phrase "physical feature" into the Occupiers Liability Act 1984. This will be easier to objectify than 'natural features', the form of words used in the CROW Act 2000.

1. The BMC and current coastal management practices

The coast has long been a focus for open air recreation undertaken by BMC members, including coastal path walking, rock climbing and coasteering. We have been involved in managing access for these activities for over 30 years. In total, there are 169 climbing sites along the English coast which carry between them some 10,000 rock climbing routes. In managing access we co-operate with landowners and conservation organisations, particularly the National Trust, RSPB, and the Wildlife Trusts. Our management activities bring benefits to both conservation and recreation.

The BMC has a wealth of knowledge and experience in the management of voluntary bird nesting restrictions and what constitutes real rather than perceived disturbance. Along the English coast there are currently 79 seasonal bird nesting restrictions in place. The bulk of these are to protect Schedule 1 listed species or large colonies of nesting seabirds. In 2008, 18 different species of bird were protected. Restrictions are agreed on a case-by-case basis and often last for only a few weeks during which time the birds will breed and fledge. All of the nesting restrictions that are agreed, are advertised on the BMC Regional Access Database (RAD). RAD contains a comprehensive list of all the crags (including coastal cliffs) where there are restrictions and provides up to date access information (www.thebmc.co.uk/bmccrag/). The BMC encourages the ongoing monitoring and reviewing of restrictions and actively encourages climbers to inform us of any significant changes in nesting patterns or new nest sites.

Seasonal restrictions are based on consensus, partnership, flexibility, site-by-site assessment, and where possible, scientific fact and evidence. The current system works because climbers respect restrictions that are agreed between the BMC and conservation organisations. It is therefore essential that the design and management of the coastal access scheme recognises and draws on current experience and expertise. Voluntary climbing restrictions are covered by paragraph 6.4.9 of Natural England's draft scheme which states that, "**where Natural England considers that voluntary climbing restrictions are already effective in protecting features such as nesting birds or cliff flora, these should continue to apply**".

The BMC are supportive of this and are confident that it forms a good basis for the continued management of coastal climbing sites.

2. The coastal access vision & duty

The Marine and Coastal Access Bill utilises provisions in the National Parks and Access to the Countryside Act 1949 (NPAC Act) and the Countryside and Rights of Way Act 2000 (CROW Act) to establish long distance routes and a right of access for open air recreation in a coastal margin.

The BMC fully supports the Government's vision for coastal access as set out in the Bill. The two elements, the 'long distance route along which the public are enabled to make recreational journeys on foot' and the 'margin of land along the length of the English coast with a right of access for open-air recreation' are together, an appropriate and welcome vision of access to the coast of England (Clause 290). This vision has the support of all the parties, as demonstrated by the comments made during the committee and report stages of the House of Lords, and as outlined by Lord Hunt of Kings Heath, Minister of the Department for Environment, Food and Rural Affairs "**our vision is for access to coastal land as a whole. It is to allow people access to their coastline so that they can play and explore and gain a deeper understanding**" (Column 13, Report (4th Day)).

It is essential to the vision that the right of open air recreation over a coastal margin runs from the foreshore to an appropriate inland boundary. This will allow people to participate in a full range of foot based activities and to enjoy the recreational and landscape qualities of the coast.

2.1 The proximity of the coastal route to the coast

The integrity of the access corridor and its proximity to the coast and the opportunity to take open air recreation within it and along it, are fundamental to the delivery of the coastal access vision. As outlined by Lord Greaves, Liberal Democrat spokesperson for Environment, Food and Rural Affairs, **“the prime objective ought to be a coastal path as near to the coast as is reasonable and practical, and other considerations should follow from that”** (Column 942, Committee (Day 11)).

The BMC’s experience is that where the public have confidence in an access regime, they act responsibly. Problems occur where there is a lack of clarity about what the public can do and where management restrictions do not appear to reflect the situation on the ground. Exceptions from the access right and deviations to the route away from the coast must only be made where there is clear evidence of need. They must also respect the overriding principle that access should be over the full coastal margin, inland from the foreshore, and that the coastal route must be in close proximity to the coast.

2.2 Convenience and public safety on the coastal route and coastal margin

The BMC support the meaning of convenience in Clause 291(2) when it relates to the route itself but are concerned that convenience and public safety may be used to limit access along the “margin of land along the length of the English coast.....accessible to the public for the purposes of its enjoyment” (Clause 290 (3)).

The coast has long been a focus for open air recreation undertaken by BMC members, and we have been involved in managing access for these activities for over 30 years. The BMC support the view expressed by Lord Davies of Oldham that in the coastal margin, **“it is important to allow people to make their own decisions and we do not want to exclude anywhere that might be dangerous in such a way that we restrict opportunities available to the more adventurous to explore what the coastal margin can provide”** (Column 896, Committee (10th Day)).

The BMC has always taken the view that people must take responsibility for their own actions. This is clearly set out in the BMC participation statement which reads; *‘The BMC recognises that climbing, hill walking and mountaineering are activities with a danger of personal injury or death. Participants in these activities should be aware of and accept these risks and be responsible for their own actions. ‘*

2.3 The boundaries of the coastal margin

The BMC strongly support the Government’s intention, as expressed by Lord Davies that **“where the boundary of the coastal margin is drawn to meet a physical feature, where the feature is a cliff or rock face, the boundary will always be drawn to include it within the margin”** (Column 898, Committee (Day 10)).

It is essential that the coastal margin includes all cliffs on the seaward side of the route and that there is the flexibility to include cliffs and rock faces on the landward side of the route. The BMC acknowledge the Government amendment, 55D (3) (a) (b) that requires the production of a map to properly define the coastal margin, but feel this should only be used in areas where the boundaries may be unclear. The BMC is keen that mistakes made during the CROW mapping process, where sites and crags were erroneously excluded and mistakes were made in executing the methodology, are not repeated here. As expressed by Lord Davies of Oldham, it will be **“important that there is clarity about what land forms part of the coastal margin”** and **“to allow Natural England to give a clear boundary to the coastal margin and enable it to make sense of the geography”** (Column 897, Committee (Day 10)).

3. The coastal access scheme

The BMC considers the draft Natural England scheme to form a good basis for a final version. It is important that this scheme and amendments to it are laid before Parliament and are therefore supportive of the Government amendment, Clause 292(6) which would require the Secretary of State, once he has approved the scheme, to lay a copy before Parliament. The BMC are pleased that the scheme will set out the implementation process in some detail and will explain how it is expected to work, particularly in relation to different types of coastal land.

4. The English Coast - Islands and Ferries

The principle of the Bill as it applies to coastal access in England is, as set out in the long title of Chapter 1, “to make provision for and in connection with the establishment of an English coastal walking route and rights of access to land near the English coast.”

It is essential that Government realise the whole vision of the Bill and also provide access for principle islands. Islands form an important part of the English coastal heritage and their coastal margins offer unique recreational opportunities, irrespective of whether or not the route around their coast is a “long distance” one (Clause 294(5)).

As Clause 294 stands at the moment, islands such as Lundy could only be included within the right of access to the coast by order at the discretion of the Secretary of State. The BMC believe that there is no difference between accessing an island on foot from the mainland or by means of a bridge, tunnel or causeway (Clause 294(3)), and accessing an island by ferry. Island environments are a nationally important part of the coast and those that can be reached by ferry must be included in the coastal access duty. Lord Greaves outlined clearly the case for the Isle of Wight to be included, “***it is a large, free-standing island which by and large possesses the same characteristics as a large part of the English coast and the hinterland of that coast. There is no reason why the Isle of Wight should not be included***” (Column 1408, Committee (Day 11)).

5. The duty of fair balance & consultation during preparation of reports.

The concept of fair balance is the foundation stone for successful legislation and successful implementation of the coastal access duty. It is essential therefore, that every effort is made to ensure that a fair balance can be struck between the “public in having rights of access over land and the interests of any person with a relevant interest in the land” (Clause 291(3)). Unless members of the public, user groups and national representative bodies have the same access to all parts of the process as land owners and managers, and that fair balance applies to both the coastal access duty and the coastal access scheme, it will be impossible for the fair balance requirement of Clause 291(3) to be met.

Reports produced by Natural England will propose the setting of the English coastal route and coastal margin after consultation with those with a relevant interest in land (Clause 291 (4)) - landowners, occupiers of land, local authorities and other Government bodies. Part 9 of the Bill does not require Natural England to consult with recreational user groups, conservation bodies or other local interest groups and comments made by third parties on coastal access reports need only be summarised for the Secretary of State. The BMC is concerned that existing best practice is not being recognised and that user groups and national representative bodies with local user knowledge are being dismissed. Lord Taylor of Holbeach stated that “***these, often local people, should be allowed and indeed encouraged to use their knowledge to question and improve the scheme***” (Column 1379, Committee (Day 11)).

The BMC agree with Government that a prescriptive list of third party organisations is not appropriate on the face of the Bill but wording to support the inclusion of recreational users’ views

during the preparation and review of reports is essential if the Bill is to work and fair balance be achieved.

During the 2nd reading of the Bill in the House of Lords, the BMC supported the amendment that “representatives of relevant recreational users and conservation interests” should be added to those that are given notice of the report (to be inserted into Clause 2 (2) of Schedule 19.) As outlined by Lord Judd, the inclusion of such a statement would **“underline the importance of such bodies being part of the list of people to be consulted, not least on appeals”** (Column 49, Report (4th Day)).

The BMC is however, pleased with the Government’s response following debate at Report Stage and their commitment that organisations to whom Natural England must give notice will be included in regulations which **“they have in mind.....would include the Ramblers Association, the Open Spaces Society, the British Mountaineering Council, the Country Land and Business Association and the National Farmers Union”** (Column 51, Report (4th day)).

6. Objections by persons with relevant interest in affected land (new Schedule 1A to the 1949 Act)

A review mechanism was introduced into the House of Lords during the Report Stage after Lord Hunt of Kings Heath expressed the Government’s vision to introduce a formal representation process. **“We want to encourage consensus building so that the route and coastal margin best meet the aspirations of the public for improved access while respecting the interest of landowners and occupiers.”** (Column 1459, Committee (Day 11)).

Schedule 19 inserts a new schedule 1A into the National Parks and Countryside Act and outlines the review mechanism. Those with a ‘relevant interest’ in affected land may make objections that Natural England’s proposals fail to strike a fair balance on certain grounds. These objections will be forwarded to the Secretary of State who must refer the objection to the appointed person. It is envisaged that this will be the Planning Inspectorate.

The BMC is pleased that Government are proposing a review mechanism that differs from the formal appeals process under CROW, but is concerned with the lack of access once more for members of the public, user groups and representative bodies to the objection mechanism. Without third party involvement at an early stage in the implementation process and with an objection mechanism limited to landowners and occupiers, there can be no guarantee that the information gathered by the appointed person will contain any of the views of members of the public, user groups or national representative bodies. The appointed person would not have the information necessary as a starting point for assessing the aim to strike a fair balance under Clause 291(3).

6.1 The proposed objection mechanism and BMC’s concerns - Grounds for objection and aiming to strike a fair balance.

If the objection mechanism is to achieve its designed aim of resolving genuine areas of disagreement, all stages of the process need to be based on the same set of principles. The coastal access duty placed on Natural England and the Secretary of State must comply with the requirement to “aim to strike a fair balance”. The achievement of fair balance is not an absolute requirement on Natural England or the Secretary of State but Clause 3 (3) of Schedule 1A to the 1949 Act indicates that this is an absolute requirement if the objections “fail to strike a fair balance”. It is essential that Clause 3 (3) is brought into line with Clause 291(3) or the appointed person will be looking at the route and coastal margin using different criteria from those used by Natural England and the Secretary of State.

7. Restrictions along the coastal margin / spreading room

Under CROW a process was put in place to identify those areas of land designated as SSSI's where changes in the level and type of activity could be expected after the introduction of the right of access, and to assess whether any exceptions or restrictions, formal or informal, might be appropriate. This process worked well and the BMC view is that the same principles should be applied in assessing the need for exceptions and restrictions under the coastal access duty.

The least restrictive option to restrictions and exclusions under CROW has proved very effective and there are now many examples of best practice based on this principle. For example, temporary bird nesting restrictions for the protection of wild birds operate successfully on a voluntary basis and it is essential that this continues.

The BMC is concerned that by not involving third parties who actively manage access to the coast at the report stage, a fair balance will not be met and that this best practice will not continue. The BMC would like to see a Parliamentary Commitment that the least restrictive option, which parallels Natural England's draft scheme and has worked so well under CROW, will be applied to any restrictions under the coastal access duty.

8. A right to compensation and landowner liabilities

Extensive consultation has been undertaken by Natural England in answering the concerns of landowners and in drawing up the draft coastal access scheme. The BMC view is that this consultation and the continuing efforts on the part of Natural England will ensure that there is no need for compensation to landowners. The BMC support the Government view, as expressed by Lord Hunt of Kings Heath that ***"the implementation of a new right will take account of the interest of landowners and minimise any impact on business.....land covered by buildings, or the cartilage of such land, will be excepted from the right of access. We expect the overall impact on business to be positive"*** (Column 1463, Committee (Day11)).

Clause 300 amends the Occupiers Liability Act 1984 by inserting the term 'a risk resulting from the existence of any physical feature (whether of the landscape or otherwise).'" The BMC fully supports the use of this wording and believe that visitors to the coast must take responsibility for their own actions as expressed in the BMC participation statement. The Bill must retain at its core, the freedom and wilderness which make the coastline so attractive. The BMC support the view expressed by Lord Hunt of Kings Heath who states that ***"people do not want to see overly managed paths and a plethora of warning signs every few yards..... we do not want a risk-averse approach"*** (Column 1478, Committee (Day 11)).