



HOUSE OF LORDS

Select Committee on the Constitution

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1st Report of Session 2008–09

# Marine and Coastal Access Bill

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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# Marine and Coastal Access Bill

1. The Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. In carrying out the former function, we regard our main task as being to identify questions of principle that arise from proposed legislation and which affect a principal part or parts of the constitution. This report draws to the attention of the House a constitutional issue arising in Part 9 of the Marine and Coastal Access Bill.
2. Part 9 of the bill proposes to place on Natural England and the Secretary of State “the coastal access duty”, which would require them to secure a route around the coast of England that is accessible for recreational purposes on foot or by ferry and a “coastal margin”, to be “accessible to the public for the purposes of its enjoyment by them in connection with that route or otherwise” (clause 286). This duty may be “discharged by them in stages and within such period as appear to them to be appropriate”. Natural England and the Secretary of State “must aim to strike a fair balance between the interests of the public in having rights of access over land and the interests of any person with a relevant interest in the land” (clause 289). The role of Natural England is to prepare a report, recommending to the Secretary of State how the coastal access duty will be fulfilled. Natural England’s reports will be in the form of a description, rather than a detailed map, of the accessible land. The Secretary of State may approve the scheme with or without modifications, or reject the scheme and require Natural England to prepare a new scheme (clause 288). Natural England must periodically review those schemes which have been adopted (clause 289).
3. Our work has been greatly assisted by the pre-legislative scrutiny of a draft bill in the 2007–08 Session,<sup>1</sup> carried out by the Joint Committee on the Draft Marine Bill and the House of Commons Select Committee on Environment, Food and Rural Affairs. The Government have responded positively to many of the recommendations made by those committees. The Government have not, however, accepted the recommendations of both committees that an appeal mechanism should be created in part 9 of the bill to enable landowners to challenge decisions to include their land in the proposed coastal route and coastal margin.

## Pre-legislative scrutiny in the House of Commons

4. Carrying out pre-legislative scrutiny of the proposals for the coastal access duty provisions contained in the draft Marine Bill, the House of Commons Select Committee on Environment, Food and Rural Affairs concluded in July 2008 that

**“The lack of a formal appeal process is a fundamental weakness of the Bill.** As it stands, Defra and Natural England have control of the whole process from policy development to implementation on the ground. Neither organisation has provided us with a convincing explanation why there cannot be a proper third-party appeal process as well as a requirement for consultation with landowners and occupiers.

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<sup>1</sup> Cm 7351 (April 2008).

We consider the right of landowners and occupiers to have an independent, third-party appeal process to be an important element of the fair balance between public and private interests that the Government is aiming to achieve. The Bill should provide for such a process.”<sup>2</sup>

### **Pre-legislative scrutiny by the Joint Committee**

5. The Joint Committee on the Draft Marine Bill reached a similar conclusion in their July 2008 report:

“The Bill contains no mechanism for appeal against decisions by the Secretary of State to designate land as coastal margin. The CROW [Countryside and Rights of Way Act 2000] appeals mechanism regarding mapping [of open country and registered common land to which the public have access] will not apply as there is no mapping process and Defra has confirmed that the Secretary of State intends to use powers in the Bill to disapply the CROW appeals mechanism for exclusions and restrictions. Under the draft Bill, the Secretary of State may by regulation make provision for interested persons or organisations ‘to be given an opportunity to make representations to Natural England about matters which relate to coastal access reports and are of a kind specified in the regulations’. In preparing its recommendation on the route, Natural England must consider the representations and send a copy of them to the Secretary of State, who must also consider them when deciding whether to approve the proposal. Evidence from the [Country Land and Business Association] and [the National Farmers’ Union] strongly argued for the need for an independent appeals mechanism, suggesting that the current mechanism under CROW using the Planning Inspectorate works well. Other witnesses supported the need for an independent appeals mechanism as exists in CROW and other access legislation, such as the Highways Act 1980.

The only legal redress for dissatisfied owners and occupiers in the absence of such an appeals mechanism will be judicial review. The representations process in the Bill does not provide for any ‘third party’ consideration or independent appeals process. Even the CROW appeals mechanisms would not provide this if applied in its current form to the coastal access provisions, as the Secretary of State would be both designating land (including exclusions and restrictions) and then deciding an appeal on that designation. Further thought is therefore needed to ensure that costly recourse to judicial review is not the only option to challenge the alignment, spreading room and exclusions and restrictions. We recommend that the designation of the route and spreading room, and decisions on exclusions and restrictions, be subject to an independent appeals mechanism.”<sup>3</sup>

### **The Government’s response to pre-legislative scrutiny**

6. The Government did not accept these recommendations. In their response to the committees’ reports, the Government said:

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<sup>2</sup> Draft Marine Bill: Coastal Access Provisions, 9th Report of 2007–08, HC 656, para 46.

<sup>3</sup> Draft Marine Bill, 1st Report of 2007–08, HL 159-I/HC 552-I.

“We have taken on board the lessons learned from the mapping of open country and registered common land under Part 1 of the Countryside and Rights of Way Act 2000 in terms of the cost incurred by the Government, the former Countryside Agency and land owners and managers in connection with over 3,000 appeals against the showing of land on the provisional maps. The determination of these appeals resulted in less than three per cent of land being taken off the provisional maps. Our conclusion from this was that the appeals process for the mapping of open country and registered common land was disproportionately lengthy and expensive.

The current provisions in the draft Bill avoid the complexity of the previous mapping system but provide for Natural England to consult affected landowners before preparing its coastal access report which it has to submit to the Secretary of State. In addition, under section 55C (2)(c), the landowner is to be given an opportunity to make representations about the line of the route. Those representations must be considered by Natural England and passed by Natural England to the Secretary of State who must also consider them before making a determination as to the position of the route. The report which Natural England draws up does not constitute a decision or a series of individual decisions, which can be appealed against, but rather a recommendation to the Secretary of State. Moreover, the recommendation does not relate solely to the land of an individual landowner, but to an area of the coast where there is a variety of interests. Any proposal relating to the land of one landowner has implications for other interests and the report seeks to strike a fair balance between the different interests. It is then for the Secretary of State to make a decision on whether the report strikes the correct balance. This decision is a general approval of the proposals as a whole. So the resolution of issues arising from the particular concerns of individual landowners needs to be completed before the Secretary of State gives approval in relation to the proposals as a whole.

In carrying out these processes both Natural England and the Secretary of State are required to aim to strike a fair balance between the interests of the public in having rights of access over land and the interests of any person with a relevant interest in the land. There are also certain safeguards written into the Countryside and Rights of Way Act 2000 which are relevant.”<sup>4</sup>

7. The bill, as introduced to the House, does provide an appeal mechanism in the specific situation where, in the absence of an agreement with a landowner, Natural England gives notice that it will carry out works on land considered necessary to meet its coastal access duty (schedule 19, paragraphs 3–4). Such appeals will be to the Secretary of State, which in effect means that the appeal will be determined by the Planning Inspectorate. In respect of all other decisions relating to the implementation of the coastal access duty, there are no appeal procedures. As the Government said in the impact assessment accompanying the draft bill, the “current proposals for coastal access do not include a requirement to map all coastal land and the appeals system is being replaced by a less process-heavy representations system”.<sup>5</sup>

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<sup>4</sup> Department for Environment, Food and Rural Affairs, Taking forward the Marine Bill: The Government response to pre-legislative scrutiny and public consultation, Cm 7422.

<sup>5</sup> Draft Marine Bill (Cm 7351), Impact Assessment, p 104.

### Our concerns

8. Rights of appeal against administrative decisions of public authorities are an important aspect of the relationship between the citizen and the State. Without effective appeal procedures, the citizen cannot easily challenge the lawfulness or merits of a determination. In situations where legislation fails to provide for an appeal system, the ‘long stop’ of launching judicial review proceedings in the High Court is for most citizens more of a theoretical possibility than a realistic means of seeking a remedy for an allegedly unlawful decision. High legal costs, the prospect of being ordered to pay the other side’s costs if the claim fails, and the length of time taken for claims to be heard, are all barriers to the use of the judicial review procedure. In any event, the grounds of challenge on judicial review claims are limited to questions of law; it is rarely possible to raise disputes about facts or the merits of the public authority’s decision. In a number of different contexts, we have therefore argued that, as a matter of constitutional principle, rights of appeal should be created.<sup>6</sup>
9. **The range of powers contained in the bill to require coastal landowners to permit public access to their property ought, in our view, to be accompanied by a right of appeal to an independent body. The possibility of making a claim for judicial review in the High Court is neither a proportionate nor realistic option for the vast majority of aggrieved citizens in this context. We are not persuaded by the reasons, as we understand them, advanced by the Government for not including any appeal procedures in the bill.**
10. First it is said that few appeals will be successful and the experience of the appeal system under Part 1 of the Countryside and Rights of Way Act 2000 is that appeals were “disproportionately lengthy and expensive”. We do not regard predictions of the outcome of appeals to be a sound argument against the creation of an appeal system. Indeed, we would be concerned if an appeal system led to a large proportion of successful challenges as that would be a clear sign that there was something fundamentally wrong with the administration of the system or the terms in which the legislation was framed. In the absence of an appeals system, landowners (or rather those who can afford to do so) will have to resort to judicial review proceedings in the High Court, which are neither cheap nor quick. As to disproportionality in terms of length of the process and cost, it is in the Government’s hands at this stage to attempt to design an appeals system that seeks to minimise both the time taken and the costs involved in allowing citizens to question the judgements of Natural England and the Secretary of State.
11. **No-one is in favour of slow and extravagantly costly appeal processes: we acknowledge that some appeal mechanisms may have failed to strike the right balance between the public interest in implementing schemes approved by Parliament and the rights of individuals to question the application of policy to their particular circumstances. A measured response in relation to the coastal access duty would, however, be to attempt to create a better appeal system rather than to exclude one altogether.**

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<sup>6</sup> See e.g. *The Regulatory State: Ensuring its Accountability*, 6th Report of 2003–04, HL 68, para 230.

12. The second reason given for rejecting an appeal system is that there will be consultation and landowners will have a right to make representations before the line of the route is determined by the Secretary of State. This appears to us to conflate two different steps in the decision-making process. The principles of procedural propriety (or ‘natural justice’) clearly require that landowners be consulted and are given opportunities to make representations before a final decision is made, and we are pleased that such a right is given express recognition on the face of the bill. This is a right that will exist as a matter of the common law (if not spelt out in legislation) in relation to many, if not most, types of decision-making by public authorities. This right, however, is quite separate from the question whether a citizen should have a means of challenging the final decision after it has been made. Indeed, the ground of appeal may well be that the decision-maker did not properly understand or failed to give appropriate weight to the matters on which representations had been made earlier in the process.
13. **The idea of striking ‘a fair balance’ between different interests applies not only to the substance of the coastal access scheme but also to the procedures adopted in reaching that decision. On the basis of the arguments that we have seen so far, we find it surprising that a decision-making process that does not permit appeals by individuals can be thought to be a fair bargain between citizen and State.**