Federated Mountain Clubs of New Zealand (Inc.)
P.O. Box 1604
Wellington

PUBLIC ACCESS OVER PRIVATE LAND : SOME OVERSEAS EXPERIENCE

Compiled by Peter Clough, Chairman, Wellington District Walkways Committee

The original inspiration for Walkways was drawn from observation of scenic trail development in overseas countries in the 1950's and '60s. At this turning point in the history of New Zealand's Walkways, it is useful to consider current practice in some other countries.

ENGLAND AND WALES

Great Britain has a relatively small percentage of its land area in public ownership so access over private land is an essential feature of countryside recreation. Even areas of moorland and 'common' are rarely held in joint or common ownership, but merely represent private land over which a number of specified individuals hold rights and easements in common with others (eg the right to graze animals, cut peat). Currently England and Wales has a network of around 120,000 miles of public rights of way, virtually all on private land. These include public footpaths (pedestrians only), public bridleways (pedestrians, cyclists and horses) and a minor category of tracks with limited vehicular access as well.

These routes have various origins and methods of creation:

Customary: English Common Law will recognise a route as a public right of way if it has been used by the public for 20 years or more "without force, stealth or permission". By far the majority of farmland tracks fall into this category. These tracks give the public a right of passage, NOT a general right of access - stopping for a picnic, picking flowers, camping etc are strictly illegal, as is straying from the path.

Statutory: A number of bodies have powers to create new rights of way under various statutes, principally the National Parks and Access to the Countryside Act 1949, the Countryside Act 1968 and the Highways Act 1980. Local councils and National Park Boards have used these provisions to dedicate paths to the public in a number of instances, usually with financial compensation where landowners' rights are infringed. They have also been used by the Countryside Commission in the creation of long distance footpaths such as the Pennine Way. For the most part such long distance footpaths simply designate existing stretches of track, the statutory powers being used to create linking sections between them.

Negotiated: Local councils and National Parks Boards are empowered to negotiate access agreements with private landowners. In special circumstances compulsory access orders can be made, but this provision has been used only rarely. Access agreements apply only to open grazing land, and allow the public general access to a defined area which is not restricted to a particular route. Compensation is paid to the landowner at rates depending on public use level and its presumed effect on productive land use (usually on an annual basis). Although superficially similar to Walkway agreements, access agreements are not written into the title to land and must be renegotiated periodically or on change of land ownership. In many cases such agreements have been used simply to formalise de facto public use.

Permissive: These are purely at the discretion of the owner, subject to periodic closure, diversion and other specific conditions of use. Such tracks have been widely used by private owners of eg grouse moors and by public/institutional landowners such as Water Authorities and the Forestry Commission. Permissive routes are not rights of way, but private owners can (but rarely do) dedicate such routes as public rights.

Funding and enforcement of public rights of way is usually the responsibility of the "Highway Authority", which in most cases is the District Council (local territorial authority). Each Highway Authority has a responsibility to maintain in good order stiles, bridges and signposts (at the point where paths join sealed public roads); produce a definitive map of public rights of way in its area (which are shown on 1:50,000 topographical maps); and prosecute those who obstruct rights of way.

Landowners are obliged not to deliberately obstruct paths (eg by locking gates) or to erect false or misleading signs (eg "Private Road" - implying no thoroughfare when only vehicles are in fact prohibited). The Wildlife and Countryside Act 1981 provides regulations for landowners grazing bulls in fields crossed by public paths and requires that they reinstate paths which are ploughed over in the normal course of their farming.

User groups such as local branches of the Ramblers Association have had a prominent role as vigilantes, reporting obstructions and prompting Highway Authorities to take action in restoring paths or prosecuting incalcitrant landowners.

Voluntary labour such as local groups of the British Trust for Conservation Volunteers are used by some landowners for track work, eg National Trust.

The Countryside Commission provides grant aid to Highway Authorities for maintaining long distance paths; gives advice to local authorities on track creation and maintenance eg sponsoring experiments on track restoration in cases of severe degradation; and provides publicity on the range of countryside tracks available.

Particular features of the English rights of way include:

Closure is only by a statutory order by the Highway Authority after an extensive public participation process. Rights are not extinguished by lack of use, although a right of way can be lost by physical destruction (eg cliff collapse).

Temporary diversions can be made by landowners for up to 3 months if notication procedures are observed, the administrative costs being borne by the owner. Permanent diversions can only be made by special order of the Highway Authority.

Public rights of way are unencumbered by such conditions as firearm bans, dog bans or temporary closure (in contrast to Walkway agreements).

English law recognises Private Rights of Way which, in contrast to public rights, are specific to certain individuals and may include detailed

restrictions eg access restricted to stated times of year. Walkway Agreements in New Zealand resemble such private rights of way, in which the Walkway Commission acts as agent and contracting party for the general public.

Current problems with the English rights of way network are principally:

Obsolescence due to anachronistic path networks, recent changes of land use and field boundaries and the outdated continuation of dead-end tracks and routes across the middle of cereal fields, cottage gardens etc.

Fear of rationalisation (as advocated in the Countryside Commission Paper "Changing the Rights of Way Network" 1988) because of the precedent which might be set for non-marginal changes; resulting in user groups being locked in to supporting the current network in its entirety, including its absurdities.

Differences in emphasis between those promoting long distance paths (such as the Countryside Commission's "Paths, Routes and Trails" paper) which concentrate use and suffer congestion, and those wanting more resources put to minor path maintenance.

SCOTLAND

Scotland has different laws and traditions with respect to public access over private land from those of England and Wales. In settled areas there are public footpaths and bridlepaths similar to those south of the border. However, in upland areas there is also a tradition of freedom of access onto unenclosed land, provided walkers do not damage stock or property or interfere with farming operations. Certain areas are closed to public access during the shooting and deerstalking seasons, but offer unimpeded access at other times of the year. This is not a legal right, but it has been formalised into a voluntary code of practice agreed between landowners and recreation groups.

Given this tradition, Scotland has long resisted some of the bureaucratic responses to recreation in the countryside which have been developed in England. Scotland has no national parks (in England, which has 10, national parks are areas of special planning designation, not areas of crown land) and had no long distance paths until 1981, since when three have been created (compared with 12 official paths in England and Wales and a plethora of unofficial paths, promoted through privately produced footpath guidebooks). Long distance routes, which are maintained by regional councils (the upper tier of local government administration), have been created with grant aid from the Countryside Commission for Scotland. Other rights of way are, as in England, the responsibility of district councils (the lower tier). Pressure for further long distance path creation has come from tourist interests and the planning fraternity, whereas user groups have resisted the encroachment of such structures into Scotland which, in the British context, is the last frontier for quasi-wilderness recreation. "Traditionalists" fear that legalising defined routes could destroy the general freedom to roam and climb the Scottish hills. A further threat to the vulnerable tradition of freedom to roam is the recent development of plantation forestry of conifers by institutional landowners (insurance companies, pension funds) resulting in visual intrusion and the fencing off of large blocks of land in highland glens.

SCANDINAVIA

In Norway, Finland and Sweden there is widespread public foot access over private land, based on customary rights. In Sweden the 'Allemannsratt' (Everyman's right) permits access over forest and unenclosed land on foot, cycle and horseback, provided this does not interfere with the farming operations or the privacy of those living in the countryside. In practice, this means that access is prohibited across arable land, plantation forests and private gardens and houseplots. Elsewhere, there is a general right of foot access and cycles and horses, because of their potential for causing damage, have general access along formed tracks. The right allows camping in all land which does not infringe the privacy of residents (otherwise farmer's permission must be sought). There are also trails which, although not fenced off from neighbouring properties, are highways of the same legal standing as roads, under the jurisdiction of local councils.

CONTINENTIAL EUROPE

In West Germany a Federal law prohibits fencing of private woodland areas so as to allow public access for recreation. The traditional fragmentation of landholdings and limited use of permanent fencing because of the indoor housing of stock, means that access through farmland is not objected to, provided walkers keep to farm tracks and field edges. This is particularly apparent in the south of the country, where villages are surrounded by open fields of arable land, each comprising many individual strips belonging to different farmers. In such areas each villager has a right of access to each of their scattered strips, and in practice other members of the public can move through the farmland providing they do no damage to crops.

France has an extensive network of long distance paths ("grandes randonees") which are maintained by local councils as part of the public highway network. They are seen as part of the tourist infrastructure and are linked with some local pensions, camping barns (gites) and farm tourist developments. Some GR tracks link up with similar trails in neighbouring countries (the Benelux countries in particular make an extensive use of canal towing paths) and there is some movement towards developing a pan-European classification of such routes.

NORTH AMERICA

Canada and USA, like New Zealand, share the legacy of a colonising past in which the State took title to all land prior to settlement, retained a sizeable area (20-35%) and allocated the rest to private owners, free from incumbrances for public access (other than some specific easements, paper roads, etc). Also like New Zealand, both have developed walking trails in national park and reserve areas. In the USA, long distance scenic walking trails such as the Pacific Crest trail and the Appalachian trail have since developed across land which would not otherwise qualify for park status, as well as a number of less well-known local routes. For the most part, however, these trails are confined to state-owned land, with relatively short lengths of linking section being purchased from local landowners.

One restraint to public access over private land has been the legal liability of the occupier of a property should the members of the public suffer injury. US law recognises three types of visitor onto another's property - trespassers, licencees and invitees - towards all of whom certain standards of care are demanded of the landowner (least for trespassers, greatest for invitees). To encourage greater use of private land for recreational purposes, most States have enacted limitations to this law, usually putting recreational users on a similar status to trespassers and reducing the required standard of care. Such limitations do not apply to fee-paying visitors, who continue to be regarded as invitees. (Note that occupiers' liability has been virtually eliminated in New Zealand by accident compensation).

Some local trail-creation schemes, although purchasing land (rather than simply an easement across private land) show a high commitment to trail creation. The Maryland Open Space Program has purchased riverside 'corridors' and other land to maintain open space as urban development encroaches into the countryside. A tax of 1/2% is levied on each transfer of real estate (on the grounds that such transfers create urban expansion) to fund the continuation of the open space program. Appropriations are shared equally between state and local governments, both of whom are legally required to spend specified proportions on land acquisition and recreation development. The result has been an expanding system of "Greenways" across the state forming linked corridors, especially along rivers. (Interesting comparisons can be made in New Zealand with the chain-width "Section 58" reserve along surveyed river channels, along which the public have a right of access; and with the development levy, whereby local territorial authorities receive 0.5% of the capital value of "major works" in their districts).

PERSPECTIVES ON RECREATIONAL ACCESS FROM OVERSEAS EXPERIENCE

No other country has a system quite like the New Zealand Walkways for providing public recreation in the countryside. However, the systems in other countries provide some pointers to how walking opportunities might be managed.

Proximity to population: the principle of providing walking opportunities in easy reach of population centres has been well recognised overseas. In New Zealand, traditionally there has been something of a gulf between urban recreation facilities and those in back-country and semi-wilderness areas, a gulf which, if not formalised in some way, may happen on a de facto basis anyway. (Walkway Commission policy has given priority to tracks near urban areas).

Grading of opportunities: this applies both to the strenuousness of the walking opportunity, and to its likely role in the whole spectrum of opportunities. For example, the Countryside Commission in England is now proposing a distinction between tracks of local, regional and national importance, which would be reflected in the level of development and provision of each track. In some respects this is simply recognising a difference in usage levels which has already occurred.

Long distance trails: such trails, which offer many days continuous walking, are widely used overseas. While the majority of their use is undoubtedly by people who walk only limited sections at a time, the existence of the continuous trail generates a demand for long distance trail walking, which itself generates demand for accommodation and supplying businesses along the route. Such demand for long distance walks does not appear strong in New Zealand at present, partly because of the constraint imposed on walkers of having to carry their supplies in back country areas, but the overseas experience suggests that demand would grow if such trails were developed.

Linkage with tourism: public access rights are widely used to promote themes of tourist interest such as nature appreciation, history etc. ranging from short routes to particular sites to long distance paths such as the English Ridgeway (linking prehistoric monuments) or the Offa's Dyke Path (long a Saxon boundary). Walkways have been used in similar fashion and strengthen awareness of New Zealand's cultural and historic heritage.

Compensation: landowner compensation has become an issue in some places, due to recent recreational use of trails being far heavier than was anticipated when the access rights were first established. It is particularly strong in England and Wales, but must be seen in the context of general rural policy: since World War II there have been substantial government incentives towards agricultural production which have led to farm rationalisation, changing field boundaries and a rights of way network which appears increasingly in conflict with modern farming requirements. This should not divert attention from the fact that, particularly on grazing land with moderate levels of public use, the conflict between public access and farming is frictional, and of quite different magnitude from the more fundamental conflict between farming and nature reservation which, because it involves setting aside land, results in income forgone by the landowner. That the compensation issue is more prominent in Britain than Continental Europe may also reflect population density, the structure of landholdings, and the different attitudes towards private property in the Common Law and Civil Law codes.

Much of the experience in Europe is of customary rights, an historical legacy which can not be replicated in New Zealand. However, there is clearly a need for extension of walking opportunities beyond those found on Crown Land. The walking opportunity spectrum can be defined in terms of a number of dimensions:

a) strenuousness, such as the length or difficulty of a particular track;

b) range of countryside, terrain and human settlement through which tracks pass; and

(c) whether the opportunity consists of a defined route or general access.

Some people want to be 'led' along their walks; others want to explore and find their own routes. Some people find pristine bush attractive; others find an area totally devoid of settlement intimidating, even frightening.

While Crown land provision in the past has been good for wild bush, strenuous tramping and general access where navigation skills can be used, opportunities on Crown land have been relatively more limited for easy walks and appreciation of farmed or settled landscapes; and Crown land often scores badly in terms of proximity to population centres, contributing to Crown land usage being skewed in favour of the more well-off and mobile. Some mechanism is required in New Zealand to provide opportunities for walking which are intermediate between the purely urban facilities and back-country areas, and these may well require access over private land.

Such a gap in the walking opportunity spectrum could be filled in a number of ways.

Land purchase: this has been the option adopted in the regional parks in Auckland and Wellington, and in a number of lesser parks and reserves around provincial centres. In some cases local councils manage Crown reserve land on this basis to compliment their urban recreation programmes (eg Totara Reserve, Palmerston North). However, land acquisition by purchase requires heavy capital expenditure and results in recreation concentrated on specific blocks of land which may be irregularly spaced for the population it serves.

Land purchase and resale: an alternative is to purchase land, then resell it to a private owner with suitable easements and covenants attached to secure continued recreational use. This can also be expensive and time-consuming and, like the other purchase option, depends on suitable land coming onto the market. Both may be subject to the private landowner extracting a premium price for land which is perceived as the only suitable block for purchase.

Private Negotiation: any group or person can in theory approach a landowner and negotiate a right of access for the public. The problem with this approach is that many groups who might consider this task in certain circumstances are not suitably organised to undertake the task, or lack the specialist skills required to achieve a satisfactory outcome. Neither could individuals, clubs or other non-profit organisations vouch for public behaviour in using the access right, since such organisations only have sanction over their members, not over the general public. The likely outcome of a situation in which private negotiation was the only option available is the creation of numerous private rights of access, specific to certain groups, which would again result in less access for the less organised or less articulate.

In the past Walkway users, even more so than Crown land track walkers, have appeared to conform to the classic definition of users of a public good. Walkways are not predominently used by people organised in clubs or societies; users can not be clearly identified or subjected to 'user pays' instruments. Reliance on private negotiation would therefore undermine provision of recreation for a sizeable number of informal, unorganised walkway users.

Walkway Agreements: these appear similar to a private right of access, in which the Walkway Commission underwrites the behaviour of the public in using the walkway and insulates the landowner from the costs of walkway use by both

providing the funding to construct and maintain the walkways, and offering compensation for damage to stock and property arising through public use of the walkway. (Note that DOC is currently re-examining the compensation clauses in the Walkway Act to reduce its potential liability, applying an interpretation which may adhere to the letter of the Act, but not with the spirit in which many Walkway agreements were drawn up). Because of its dual role of (a) providing funding and (b) being able to negotiate on behalf of the public, the Walkways Act provides a unique example of facilitating legislation which is distinct from that found overseas.

CONCLUSIONS FROM THE OVERSEAS EXPERIENCE

Despite differences between the countries, certain similar themes emerge about the role of a walking council or commission-type body. One group of functions might be loosely termed as those of a **walking authority**, including definitive mapping of walking opportunities (and for compatible recreation like cycling, riding), setting standards for grading, construction etc and promoting certain routes for tourist trails. The other main functions are those of a **walking enterprise**, providing facilitating legislation, track expertise (often through public participation) and funding support for new tracks.