



THE MOUNTAINEERING COUNCIL OF SCOTLAND

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6/8/10

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Dear Ms Young

Level Crossings Consultation Paper

Please accept these comments from the Mountaineering Council of Scotland (MCoFS). The MCoFS is the representative body for hill walkers, climbers and ski tourers, and is the only national representative body of the sport of mountaineering in Scotland, hence our interests in this matter are restricted to those relevant to Scotland. We have 10,500 members, and are recognised by the Scottish Government as representing the interests of all mountaineers. We also represent the relevant interests on the National Access Forum advising government on access in Scotland.

Mountaineers regularly need access across rail lines, particularly in the highlands of Scotland where official crossings are infrequent, and even where they exist are claimed by Network Rail to be closed to the public. This effectively closes off large areas of Scotland to public access, and forces many to cross the railways where there is no crossing or advice about the safest way to do this, and under threat of prosecution. The NAF, has attempted to resolve this problem but found the company unwilling to discuss the situation, citing legal advice they were then unwilling to reveal the details of. The situation in Scotland with access users having no option, and no guidance about crossing rail lines, being threatened with prosecution is not acceptable. This is particularly inappropriate in light of the general presumption of access to most of Scotland based on the Land Reform (Scotland) Act 2003 (LRSA) when access users act responsibly by following the advice in the Scottish Outdoor Access Code (SOAC).

Nearly 2 years ago, the NAF were assured by Network Rail that the small number of “trial” private crossings open to the public (all of which are claimed rights of way anyway) were to be expanded in number after safety assessment. In the interim 2 years there have been no new “open” crossings or evidence of this process. For this reason the MCoFS welcomes the Commission’s review. We urge consideration of public non-motorised access across railway lines, even where there is no official level crossing. In many ways these pose less safety consideration than vehicular access across level crossings. Where possible, the law should allow for the maximum access possible. This would also follow the spirit of the LRSA. Consideration must also be given of the interaction with claimable rights of way as many unofficial crossing points have been used regularly for many years, often long enough for a right of way to be claimed. At these identifiable points it should be possible to give guidance by notices of danger from the train speed and sight line relationship, or create a non-motorised level crossing.

In paragraph 10 a level crossing is defined as, “a place where a railway is crossed by another type of way on the same level. This includes roads, footpaths, bridleways and other rights of way.” In reference to the paragraph above where there are regularly used unofficial crossing points, it would be useful to define what is meant by “footpaths.” Whether these are constructed, or encompass worn desire lines, may have implications for unofficial crossings where a route crosses a rail line,

particularly in Scotland where official footpaths offer no greater access rights to the general area as long as it is within access rights.

Paragraph 43 states that the Commission is unaware of any use of Transport and Works Act 1992 and the Transport and Works (Scotland) Act 2007 or compulsory purchase being used to close a private level crossing. MCofS, through NAF discussions, is unaware of Network Rail claiming the crossings they have “closed” have been done with the agreement of the owner either.

The MCofS strongly agrees with paragraph 45 & 46 that objectives also need to ensure the railway is not an unnecessary barrier to access, particularly in Scotland with the public presumption and expectation of generally open access across land and the difficulty of accessing huge areas of land without crossing a railway.

In reference to paragraph 58, from discussions in NAF it is clear that it is vital to simplify and clarify the system of regulating safety of level crossings as currently there is significant confusion. It would therefore follow that in response to paragraph 60 that there should be one regulator.

Paragraph 83 invites comment on the list of factors to be considered. The MCofS would strongly promote, “(4) the effect (in the case of public level crossings) on the integrity of the network of non-vehicular public rights of way.” Here it is relevant to highlight the Scottish access situation where rights to responsible access are not linear (unlike England in many areas), but area-based, and therefore is not just about “rights of way” but about the general right of access across most of Scotland.

Paragraph 116 is timely in that we, Forestry Commission Scotland and Argyll & Bute Council are currently working on a case where regular access is taken across a railway near Crianlarich where there is no official crossing of any type and no realistic alternative route to a large area of prime hill walking land. Network Rail, hiding behind fears of liability if they were to even acknowledge the issue beyond stating that the many access users are committing an offence and would be prosecuted, have proved absolutely inflexible. This included inflexibility to discussions about promoting safer crossing behaviour, or creation of a new pedestrian-only level crossing. This present review must find a legal mechanism to resolve this type of impasse by permitting statutory provision requiring the construction of new level crossings on existing railway lines in certain specified circumstances, or at least recognised crossing points where safety advice is provided.

With reference to paragraph 172, the introductory paragraphs to this response discuss the basis of this issue and illustrate the extreme complexity of the interaction of the relevant regulations. The LRSA and SOAC require land owners not to discourage access across land on which access rights are exercisable. Private level crossings are likely to be claimable rights of way, and as such it should be considered whether it is possible for these crossings to be recognised as within access rights through this route rather than re-open fairly recently, and hard-fought wording of the LRSA. However, it is recognised that legally, alteration of the Act may be the only route to achieve this, and definitely clarification of whether access rights do or do not extend over private level crossings is important.

The MCofS can confirm the 173 statement that, “crossing the railway otherwise than at level crossings is quite common in parts of the Highlands, in part because users feel it necessary to do so in order to exercise their access rights on both sides of the railway.” Certainly the introduction of a, “requirement to create new level crossings in such circumstances” would solve the difficulty that Network Rail claim to be in that acknowledging access across at such points would be encouraging illegal behaviour. This is despite that fact that them not encouraging it, or indeed discouraging it, is likely to have little or no impact in these remote locations. At such locations, and any other points

where crossing may become highly demanded (possibly due to changes in public road access, built developments, etc), the MCoS response to paragraph 174 is that, yes, there should be a provision where it would be possible for, “appropriate public authority to require the railway operator to install new non-vehicular public level crossings in order to facilitate the exercise of access rights.” The decision should primarily fall on the access authority (local council or National Park as appropriate), although Scottish Ministers may need to be involved to justify central expenditure. Access rights such as these may be a local community resource or a more general demand from those living outside the area. The case mentioned above is primarily used by non-local hill walkers. Private level crossings should always be available for general access use by the public as they will already have been assessed for safety, and in light of the access legislation in Scotland promoting access for all, it would be inappropriate to only permit a small number of access users. Public authorities should have the power to order that a private level crossing become subject to access rights.

Please do not hesitate to contact me to discuss these issues further.

Yours sincerely

Hebe Carus
Access & Conservation Officer