

Access rights and Historic and Environment Scotland's legal grounds for closing the Radical Road

Description



Far from stabilising the rockface, it has now been revealed that HES was considering closing the Radical Rd permanently. Note how the notice fails to give the legal grounds for the closure (Photo May 2022)

After a number of FOI requests, Rob Edwards revealed in an excellent article in the Ferret on 18th January ([see here](#)) that officials at Historic and Environment Scotland (HES) had been considering trying to close the Radical Rd below Salisbury Crags in Edinburgh permanently. While shocking, that was hardly surprising. Having fenced off access for over five years on safety grounds and with no plan to make the road “safe” for public use, the easy option from a HES perspective would be to shut off the Radical Rd permanently and pretend it does not exist. This post will consider whether they would have the legal power to do so.

The confidential briefing to the November 2023 HES Board meeting obtained by Rob Edwards also reveals their legal grounds for doing so. That it took five and a half years and an FOI request for this to become public says a lot about HES’ secrecy and lack of accountability ([see here](#)). As readers of my previous posts will know ([see here](#)), ([here](#)) and ([here](#)), I had concluded that HES had no grounds for closing the Radical Road under the Occupiers Liability Act or Health and Safety law and therefore that that they must have been relying on their powers under the Holyrood Park Regulations 1971. It turns out that I was mistaken.

Section 2.1 of the HES board paper, headed “Our right to Restrict Access”, states they have closed the road using powers under the Ancient Monuments and Archaeological Areas Act 1979:

“As a property in state care [PIC] we may only close a property under the 1979 Ancient Monument Act in order to protect the site from a conservation perspective, or for reasons of safety. This Act gives us the powers to implement full or partial closures in this scenario – Section 19(1) of the Ancient Monuments and Archaeological Areas Act 1979 gives the public a right of access to PICs. However it is not an absolute right. Indeed section 19(2) of the 1979 Act (which is delegated to HES under the Scheme of Delegation: Properties in Care) permits HES to exclude public access to all/ part of a property in care where HES thinks it is necessary or expedient to do so in the interests of public safety (or for the maintenance/ preservation of the PIC)”.

The board paper makes no mention of HES’ powers under the Holyrood Park Regulations. This is strange because another board paper, in June 2019, clearly stated that:

“Holyrood Park is legally regulated by The Holyrood Park Regulations 1971 (as amended) (“the Regulations”). While somewhat archaic and in clear need of update, the Regulations are a very useful management tool for those operating the park”.

The Regulations include a long list of prohibited acts among which is “going on any enclosure, flower bed or shrubbery whatsoever or on any lawn access to which is prohibited by notice”. This means that as long as HES put a fence round the Radical Rd and a notice on the fence, they could have used the Holyrood Park Regulations to close it .

Indeed, in my view HES they still could if their use of their powers under the Ancient Monuments Act were subject to a successful legal challenge. Therefore whatever HES are now claiming about their legal grounds for closing the Radical Rd, the Holyrood Park Regulations still need to be revised by Scottish Government Ministers to make them compatible with the Land Reform (Scotland) Act 2003. The regulations are not just “somewhat archaic”, they are not fit for purpose. It is completely wrong that any public authority has the power to fence off a bit of land and as long as they put a notice on that fence can ban access.

Access rights and the Ancient Monuments and Archaeological Areas Act 1979

The HES board paper makes the following argument as to why they are legally able to close the Radical Road:

The Land Reform (Scotland) Act 2003 is the legal basis for the general right to roam. However that right is also not absolute. Section 6(1)(d) of the 2003 Act provides that the right to roam doesn't apply to any land to which public access is prohibited, excluded or restricted by any other Act. Because we are using our 1979 Act delegated powers to exclude access to Radical Road on safety grounds, section 6(1)(d) applies, which means the public don't have a right of access under right to roam.”

HES is quite correct to say the right to roam doesn't apply where “public access is prohibited, excluded or restricted by any other Act”, hence why I thought the closure was under the Holyrood Park Regulations. The question, however, of whether the provisions in the Ancient Monuments and Archaeological Areas Act 1979 (henceforth the “1979 Act”) can be used to exclude people from land that comes under access rights and more specifically can be applied to the Radical Rd is not nearly as straightforward as HES suggests.

Interpreting the 1979 Act is particularly complex because many of its provisions as they apply to Scotland have been amended by the Historic Environment (Amendment) (Scotland) Act 2011 ([see here](#)) and the Historic Environment Scotland Act 2014 ([see here](#)). The latter Act created HES and empowered Scottish Ministers to delegate many of their functions to that body. I am not a lawyer and have only had limited time to cross-check the legislation but it appears, for example, that sub-clauses (a) and (b) of clause 19 (2) (below), which state that regulations and the consent of the Secretary of State is required before it can be used to restrict public access, do not apply to Scotland:

19 Public access to monuments under public control.

- (1) Subject to **[F1** sections 13(2A) and 15(3A) of this Act and to**]** the following provisions of this Act, the public shall have access to any monument under the ownership or guardianship of the Secretary of State or any local authority by virtue of this Act.
- (2) The Secretary of State **[F3** and the Commission**]** and any local authority may nevertheless refuse to grant public access to any monument under their ownership or guardianship by virtue of this Act if they consider it necessary or expedient to do so in the interests of safety or for the maintenance of the monument, entirely exclude the public from access to any such monument or to any part of it, or they think fit:

Provided that—

- (a) the power of a local authority under this subsection to control the times of no access to any monument shall only be exercisable by regulations under this section; and
 - (b) the power of a local authority under this subsection entirely to exclude the public from access to any monument with a view to its preservation shall only be exercisable with the consent of the Secretary of State.
- (3) The Secretary of State and any local authority may by regulations under **[F4** this subsection**]** refuse to grant access to any monument, or to all or any of the monuments, under their ownership or guardianship by virtue of this Act, and such regulations made by the Secretary of State may also apply to any monument, or to any part of it, under his control or management for any other reason.

[F5 The Secretary of State shall consult with the Commission before he makes regulations under this subsection in relation only to monuments situated in England.**]**

- (4) Without prejudice to the generality of subsection (3) above, regulations made by the Secretary of State or any local authority under **[F6** that subsection**]** may prescribe the times when the public are to have access to any monument to which the regulations apply and may make such provision as appears to the Secretary of State or that authority in question to be necessary for—
 - (a) the preservation of any such monument and its amenities or of any property of the Secretary of State or that authority; and
 - (b) prohibiting or regulating any act or thing which would tend to injure or disfigure any monument or its amenities or to disturb the public in their enjoyment of it;

and may prescribe charges for the admission of the public to any such monument or to any part of any monument to which the regulations apply.

If I am right about this, there appear to be no checks and balances in respect of how HES manages access to their properties or imposes restrictions using Section 19 (2) of the 1979 Act. That unlimited power would help explain why HES feels free to ignore opinion.

This still leaves some major questions about the applicability of the 1979 Act to the Radical Rd.

The primary intention of the 1979 Act was to protect monuments and archaeological sites, i.e structures that were a product of past human endeavour, not the natural world. But the intention behind the act was also to enable people to enjoy them, hence the statement in Clause 19 (1) “the public shall have access.....”.

Many scheduled (i.e protected) monuments consist of buildings or their curtilage and are therefore on land which is exempt from access rights (just like houses and gardens). At the other end of the spectrum are archaeological sites with no visible buildings or ruins, places where access rights apply subject to the law being respected:

Damage to ancient monuments	Ancient Monuments & Archaeological Areas Act 1979 (Sections 2, 19)	It is an offence to carry out, cause or permit any works, without the consent of Scottish Ministers, which result in the demolition or destruction of or any damage to a Scheduled Monument.
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Extract from the Scottish Outdoor Access Code which elsewhere explains the law on the use of metal detectors

Holyrood Park is a very unusual type of scheduled monument because of its extent and the range of features it contains: “the area to be scheduled consists of the entire royal park, all of the features mentioned above and all of the ground between them”. The scheduling ([see here](#)) includes:

- ruined buildings, where access rights don't apply but where HES has a legal duty to allow public access subject to Clause 19 (2) of the 1979 Act;
- many archaeological and historic features where access rights would normally apply (if it weren't for the Holyrood Park Regulations); and
- “all of the ground between them” where access rights would also normally apply.

Strangely the Radical Rd, unlike the quarries above on Salisbury Crags, is not mentioned in the Summary Site Description or Statement of National Importance (which is dated 7/2/13 i.e before HES was created). Set that aside, just like the quarries it is of human origin and clearly should be a monument to which the public have a right of access under clause 19 (1) of the 1979 Act. The question, then, is whether HES have a right to restrict that access under clause 19 (2) for reasons of safety (No-one is suggesting that the Radical Rd needs to be protected from overuse so clearly that part of clause 19 (2) does not apply).

I have not researched the debates in the UK Parliament at the time the legislation was passed but it appears the most likely intention of this clause was to protect the public when a building or ruin was in

a dangerous state and posed dangers, eg from falling masonry. HES has in the last few years excluded the public from many of the “Properties in its Care” for this very reason and on land which is completely exempt from access rights.

The Radical Road, however, is a very different type of monument. The road itself poses few risks ,apart from the risk of people stumbling or tripping which is present on every archaeological site. The safety risks derive not from the monument but Salisbury Crags, the natural feature that sits above it and lies outwith the scope of the 1979 Act (i.e. HES does not have the power to schedule natural features, only the land around and between monuments). This is demonstrated in HES’ statement of significance for Holyrood Park which includes the quarries, where ironically there is far less risk of stonefall, but not the outstanding landscape forms of the natural sections of crag. This suggests that HES is completely wrong to try and use the provisions of 19 (2) to prevent public access to the Radical Rd because of the dangers posed by a natural feature.

My argument is consistent with Section 15 of the 1979 Act which deals with the “15 Acquisition and guardianship of land in the vicinity of an ancient monument” and which starts as follows:

“(1)References in sections 10 to 12 of this Act to an ancient monument shall include references to any land adjoining or in the vicinity of an ancient monument which appears to the Secretary of State [F1or the Commission] or a local authority to be reasonably required for any of the following purposes, that is to say—

(a)the maintenance of the monument or its amenities;

(b)providing or facilitating access to the monument;.....etc”

This suggests that one of the reasons why almost all of Holyrood Park was scheduled as an ancient monument was to facilitate access to the various monuments within it and adds to the arguments that is was never intended that Section 19 (2) should be applied to the areas inbetween, like Salisbury Crags

That HES staff are aware that their grounds for using clause 19 (2) to restrict access are not particularly strong is reinforced by their references in the board paper to obligations under the Health and Safety and Occupiers Liability Act. As I have previously explained these clearly don’t apply to the Radical Road, it is not a workplace in terms of the Health and Safety Act and Occupiers Liability basically does not make landowners responsible for “natural hazards”. But why mention them if the application of 19 (2) is as watertight as they claim?

There are lots of complex legal questions here but even if a Court did decide that Clause 19 (2) could be used by HES to protect the public from natural hazards, that same court might well find that using it to prevent access to the south end of the Radical Rd and Huttons Section, where there is no risk of stonefall, is completely unjustified and they should only have restricted access to part of the site.

Unlawful closure of a right of way

Until September I was not aware that the Radical Road had been recorded as a right of way ([see here](#)).

I have never been that much concerned about rights of way because the creation of the right to roam made the need to protect most paths legally in this way redundant. The important exception to this is where a right of way enables people to cross land that is exempt from access rights, like farmyards. I had not appreciated up till now, however, that where a path was recorded as a right of way this might offer a further safeguard where a landowner was claiming, as HES is doing, that they could use another Act of Parliament to restrict access rights using Section 6(1)(d) of the 2003 Act.

There is a legal process for closing or diverting a right of way through the local access/planning authority, which in the case of the Radical Road is the City of Edinburgh Council. HES has made no attempt to use that process. Conversely, the City of Edinburgh which has a legal duty to keep rights of way open and free of obstruction has taken no action to do so.

It is very strange that so far Scotways, the organisation that was formerly called the Scottish Rights of Way Society, has not threatened legal action in this case. The longer it waits, the less likely any legal action is to be successful because one of the criteria for a route to become a right of way is, to use Scotways words, that "it must have been used without substantial interruption for at least 20 years." The fences have now been up for five, a substantial period of time, though luckily a significant number of people have been finding a way through them and walking the Radical Road.

How to get HES to change course?

Five years have now been wasted by recreational organisations trying to engage with HES. During that time the senior management at HES has shown absolutely no willingness to discuss the issues let alone negotiate. A great demonstration of that is for five years they have kept from the public the legal grounds they believe justify the closure. In my view there are two broad options, legal challenge or direct action.

Legal action.

I have argued in this post that that HES' grounds for closing the Radical Road using Section 19 (2) of the 1979 Act might be open to legal challenge on the basis that this never intended to apply to safety issues caused by natural hazards and it should be the legal framework that was set out in the Land Reform (Scotland) Act 2003 that should apply instead. Doing so, however, would probably be very expensive and time-consuming, not least because HES might then try and switch to using the Holyrood Park regulations to justify the closure and these, in my view, are less open to legal challenge. (That's why they need to be repealed).

It might be more effective in the long term therefore to focus on the need for the Scottish Parliament to reform the 1979 Act, to make it clear it does not apply to the natural environment, and amend the Holyrood Park regulations. HES is doing so badly as an organisation, with dozens of the properties it is supposed to be managing for the public good closed, that legislative reform of its founding statutes may not be that far off the political agenda.

A much simpler and quicker legal option would be for Scotways to raise a legal action or alternatively shame the City of Edinburgh Council to remove the fences that are obstructing a right of way.

Direct Action.

Our public authorities have become so incapable of applying the law to protect our various rights of access that I think people need to seriously consider protests and direct action as the Right to Roam campaign has been doing in England. It is very good news therefore that the Right to Roam are organising their first public event in Scotland (apart from the symbolic event on the border with England in the Autumn) at Holyrood Park on Saturday 17th February.



Info from Right to Roam Instagram page. Further details from that or right2roamscotland@outlook.com

I hope this will lead to further protests. Given the Radical Road is recorded as a right of way and HES has failed to consult on its closure, it seems to me protesters would be fully justified in opening up the fences and asserting their right to walk along the road. While not covered by the law on rights of way, a similar position applies in the south quarry, which appears no more dangerous than any other climbing crags and which HES has no justification for closing under the 1979 Act.

It would be interesting to see if HES was prepared to ask the police to charge anyone taking part in such protests. If they did this could help bring matters to a head by exposing HES' abuse of their powers in court and result in even larger protests right next door to the Scottish Parliament. That might force the Scottish Government to act.

Category

1. Access rights

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