

Access rights and responsibilities – Differences Between England and Wales, and Scotland

Scotland

The Land Reform (Scotland) Act 2003 establishes statutory rights of access to land and inland water for outdoor recreation. The Statutory right of responsible access commenced on 9 February 2005.

The Scottish Outdoor Access Code provides guidance on the responsible use of the access rights.

The new access rights enable people to access land, whether simply to cross it, or for the purposes of carrying out a recreational, educational or other activity. Those activities might include:

- picnicking, photography, sightseeing
- active pursuits, including walking, cycling, riding, canoeing, wild camping
- taking part in recreational and educational events
- travelling from one place to another.

The rights specifically exclude:

- any kind of motorised activity (unless for disabled access)
- hunting, shooting, fishing.

The rights apply over all of Scotland – from urban areas, to the hills, and include, farmland, forests, beaches, lochs and rivers.

However, the rights of access do not apply within buildings, structures or their immediate surroundings, to houses & gardens, and to land which is growing crops. Note that grass is not deemed to be a crop unless it is grown for hay/silage and is at such a late stage of growth that access would damage it. Access is also permitted to the margins of fields.

The right of access may be exercised subject to the responsibilities which are set out in the Scottish Outdoor Access Code. Therefore users must:

- take responsibility for their own actions
- respect people's privacy and peace of mind (for example by keeping a reasonable distance from houses and private gardens, especially at night)
- help farmers, landowners and others to work safely and effectively, including:
 - keeping a safe distance from any work
 - taking note of signs about dangerous activities such as tree felling or crop spraying
 - leaving gates as found
 - not blocking entrances or tracks
 - looking for alternative routes before entering a field with animals
 - not feeding animals
 - using local advice to take account of shooting & stalking
 - not damaging fences or walls
 - avoiding damage to crops by following paths, tracks, the margins of the field or going over ground that hasn't been planted
- care for the environment by:
 - following advice & information

- taking litter home
- treating places with care and leaving them as found
- not recklessly damaging or disturbing wildlife or historic places
- keep dogs under control
- take extra care if running a business or organising a group.

Responsibilities are also placed on owners and managers. They must:

- respect access rights and not unnecessarily obstruct them (e.g. by locking gates or fencing)
- act reasonably when asking people to avoid a particular area (for example by explaining clearly why a route can't be used, keeping safety measures to a minimum, and removing information that is not up to date)
- work with local authorities and other bodies to help integrate access and land management.

Comment

The emphasis on responsible use will require considerable education – authorities estimate that it will be many years before the rights and responsibilities are fully understood and complied with. Authorities have had particular problems in lochside areas where fires are lit by campers and not dealt with properly. Litter is also an issue in such areas. On rivers, the right of access does not generally give rise to conflict, except in certain hotspot locations. These conflicts have been particularly aggravated by commercial users (e.g. rafting companies) utilising rivers and coming into conflict with fishermen. Local solutions are being sought – for instance to restrict rafting/boat use to certain times/days – but these agreements are necessarily voluntary (because there is a right of access), require “buy-in” from all parties, and can offer only temporary solutions if they are agreed at all.

The fishing organisations are particularly resentful in these hotspot areas that their legitimate, paid interests are being damaged by the commercial activities of bodies which have been granted free right of access under the code.

In terms of rivers, the conflicts tend to arise in areas where the river is confined. Many Scottish rivers are very wide which means that dual uses can be successfully accommodated. The scale of use is also critical.

Why Can't England and Wales follow the Scottish Access Solution?

Population

Population levels between the various countries are very different.

The population of Scotland at 5.06 million¹ works out at 160 head/square mile (based on an estimated size of 31510 sq miles).

¹ 2001 census

In contrast, Wales, at 8015 sq miles with a population of 2.9 million² works out at 351 head/square mile, and in England, the density is even higher, with 49.13 million³ crammed into 50,352 sq miles making a staggering density of 975 head/sq mile.

These population densities go a long way to explaining the enormous pressure on the countryside, and why access requires considerably more management within the more densely populated countries of England and Wales, than in the less dense areas such as Scotland.

Sweden – frequently quoted as offering unrestricted open access - is 173,731 sq miles which with a population of 9 million⁴ (estimated July 2007), gives an average of just 5 head/sq mile. It is not even comparable to the England and Wales situation.

Land Type

In Scotland, Scottish Natural Heritage estimates that 28% is grassland, less than 25% mire, 15% heather moorland, 11% arable, 14% woodland, 3% water (of which half would be lochs), 4% built or bare land and 3% bracken or scrub.

In England the land use is rather different⁵. 37% is grass, approximately 8% moorland, heathland or down, 30% arable, 5% in set aside or used for farm buildings and tracks, 9% woodland, less than 1% water and 10% built or bare land.

In Wales, a significant 72% is grassland, 3% arable, 14% woodland, less than 1% water and 10% built or bare land, including moorland.

Although the sources used are different, and therefore the figures may be differently calculated, it is clear that in Scotland, there is a considerably greater area of what may be termed mountain, moor and heath (approximately 43%) compared to 8% in England and less than 10% in Wales.

Essentially, a greater proportion of land in England and Wales has a more intensive economic use than in Scotland. This is not to say that the moors of Scotland do not carry economic uses; but they are different from the farmed landscapes of England and Wales.

Water

Scottish inland waters are characterised by wide rivers and deep lochs. In contrast the rivers of England and Wales tend not to be wide, and areas of inland water may be as much about use of reservoirs as natural bodies of water.

In terms of access, it is the rivers, with their fishing interests, which have greatest potential for conflict. Riparian ownership and fishing rights may be separately owned.

² 2001 census

³ 2001 census

⁴ Statistics Sweden

⁵ Defra

Many rivers have riparian owners associations as well as fishing associations, formed to aid the management of the river.

The Scottish Land Reform Act opened up rivers and inland waters to many types of recreational use. Fishing, however, continues to enjoy its historic protection and is only available where duly paid for. Scottish rivers are wide, and careful use by fishermen and other users can avoid conflict. However, conflict has not been entirely avoided, and the rights granted under the Scottish Act make these types of conflict hard to resolve⁶. Conflicts occur in certain hotspot areas where fishermen – who have paid to use stretches of river – suffer disturbance from rafting, canoeing and other users (who of course, are exercising their rights under the new act)⁷. These conflicts are magnified where the recreational users are gaining commercial benefit from their free access to the river.

It is clear that in such circumstances the Outdoor Access Code is of little benefit, as it fails to protect the legitimate interests of those who have paid to fish the river. It is possible that it was intended thus – that fishing interests should not be able to deny access to other users.

There is very real disruption to fishing from this type of conflict, and little that authorities – desperate to achieve agreement – can do to ensure that this type of situation is resolved. It could be argued that what is needed is a strengthening in the access code.

However, what is clear is that access, in the Scottish sense, relies on a fundamental understanding of what is reasonable behaviour. Where such behaviour does not occur – whether in terms of conflicts on rivers, or the inappropriate use of fires and dropping of litter around lochs – there is very little that either the land manager or an access authority can do about it.

Responsible Behaviour

This difficulty of enforcing responsible behaviour is a key concern of Scottish access authorities. There has been significant publicity and education is ongoing to attempt to reinforce this.

Scottish access authorities believe it will take many years before sufficient numbers of people are aware of the need for responsible behaviour in the countryside. There is a strong need for ongoing education of the public, a resource implication perhaps not fully appreciated when the Act was conceived.

The introduction of CROW in England and Wales has provided an indication of how responsible the public is. That responsibility (or lack of it) may well be due to lack of education and awareness. Figures so far suggest that there is plenty of work to do in this area. Evidence shows that restrictions on dogs on CROW land, for example, are frequently ignored – with consequent impact on livestock as well as wildlife.

⁶ Personal contact – Perth & Kinross Council

⁷ Salmon & Trout Association, Gamefisher, Autumn 2006

Arguments that increased access is about responsible use, and that increases in vandalism and crime are not reasons to not increase access provision are disingenuous. In other areas of public life – for example, when planning new housing estates – it is a pre-requisite that safe and secure areas are created and that opportunities for crime and anti-social behaviour are not created or increased. It is unclear why this same principle does not apply to rural access.

Legislative Differences

Rights of way legislation has progressed differently in Scotland than in England and Wales. In England the requirement for a Definitive Map and Statement, and the need to keep that under review, means that there is a clear record of public rights of way which provide a network of access. In addition, although it is contentious, the principle “once a highway, always a highway” means that routes can be added to the map if use as a highway can be shown. (This is, of course, subject to current legislation which has proposed a cut-off date of 2026 for adding these routes to the Definitive Map).

In contrast, in Scotland, that same principle does not apply. This means that after a period of disuse, old routes cannot suddenly be reclaimed. Scotland there has a significantly lower network of access than in England and Wales.

Indeed, Scotland has a substantially lower amount of paths than England or Wales⁸. The total length of routes amounts to some 15,000km, compared with over 160,000km in England and 38,500km in Wales. The density of paths also differs significantly. In Scotland there is a density of just 0.19paths/sq km. In contrast, England has a density of 1.3/sq km and Wales is even higher at 1.8/sq km.

The lower network of paths, combined with Scotland’s low population density and less intensive land use means that the access rights created under the Scottish Land Reform Act are not directly transferable to other countries which have markedly different existing access, population density and land use.

The Scottish Experiment – unproven

It is clear that the case for greater access is unproven. The new rights created in England and Wales under CROW are not widely used, and government’s own statistics show declining numbers visiting the countryside.

The Scottish experiment - undertaken in a country where the pressures on land are much less, and the population density lower – shows that issues of conflict and responsible behaviour cannot be resolved by the simple creation of a code; that increased rights do not mean increased responsibility; and that, as land managers have known for centuries, to maintain the land in stewardship for the future requires long term vision; the management, and if necessary, the denial, of conflicting interests; and the economic resources with which to undertake this management.

Access is not “free” – it is paid for by someone. It may be that several bodies contribute to the costs of access – the owner, whose fishing income reduces; the ghillie, who attempts to manage the river and nurture his beat, whilst suffering disturbance from

⁸ McCraw & Davison, Scottish Natural Heritage

other uses; government bodies, who fund educational resources about rights and responsibilities; and access authorities, who attempt to resolve conflict and difficulty without the back up of clear rights and responsibilities, powers of enforcement or dispute resolution.

Nor is access a “right”. It is a privilege, and one to be used responsibly, with due regard for those who make their living from the land, and the environment around. Free, unfettered access devalues this privilege and makes its responsible use harder to enforce.

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