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Access to the countryside in Northern Ireland – occupiers’ liability

1 Introduction and Context

This briefing paper has been prepared in response to a request from the Environment Committee for information regarding occupiers’ liability in terms of access to the countryside. The paper provides a contextual look at this issue by providing an indicative list of key legislation, types of access land and the amount of publically owned land for outdoor recreation. Concerns and perceptions regarding occupiers’ liability are addressed and details on the actual number of claims made are provided.

By way of a brief comparison, this does not provide the same level of access as legislation in other parts of the UK: Scotland has the “Freedom to roam” and “right to responsible access” under the Land Reform Act 2003. England and Wales have the Countryside Rights of Way Act 2000, and more recently the Marine Coastal Access Act which opens up a coastal route round England and Wales, all of which give greater levels of public access to most land.

However in 1999 the DOE undertook an access consultation which included the question of whether a right to roam policy should be established in Northern Ireland.

There was strong opposition to this proposal, due to widespread concern amongst landowners that with increased access comes increased liability, and for this reason the DOE discounted the proposal.

The following table provides a useful comparison of the number of public rights of way (PROW) in England, Wales and Northern Ireland. It shows that in relation to the amount of land available, Northern Ireland has a considerably smaller PROW network of only 0.02 miles per square mile in comparison to England and Wales.

Country	Total Size in SQM	Miles of PROW	Length of PROW per SQM
England	50,000	118,000	2.36
Wales	8,000	20,625	2.58
Northern Ireland	5,500	123	0.02

Table 1 - A comparative analysis of public rights of way^{1,2}

2 Key legislation

The following list provides an indicative guide to legislation governing access to the countryside with particular reference to occupiers' liability in Northern Ireland.

Occupiers' Liability Act (Northern Ireland) 1957

This Act requires that an occupier has a common duty of care towards 'visitors' on their land. It legislates that the occupier will take care to see that the visitor will be reasonably safe for the reason that he or she is visiting their land.

Access to the Countryside (Northern Ireland) Order 1983

This legislation gives district councils power to enter into public paths agreements with landowners creating public rights along linear routes, and access agreements permitting persons to have access to open country for open-air recreation. The

¹ Sport NI, *Bridging the Gap*, May 2009

² Ibid. The availability of PROW in Scotland is more complex and cannot be easily compared

legislation also gives district councils powers to make public path creation orders and access orders.³

Part 2 of the Order lays down that councils shall assert, protect and keep open and free from obstruction any public right of way. It also requires that the landowner ensures that any existing gates and stiles are safe to use.

Occupiers' Liability (Northern Ireland) Order 1987

Article 3 of the Order legislates for the duty that an occupier owes to a person on their land who is not a visitor. It does not place an automatic duty on landowners to 'non-visitors'. However an occupier owes a duty of care to those 'non-visitors' if:

- *He is aware of the danger or has reasonable grounds to believe that it exists;*
- *He knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and*
- *The risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.*

Furthermore, it addresses steps a landowner may take to warn those entering their land of potential dangers and willingly accepted risks:

Any duty owed by virtue of this Article in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk.

No duty is owed by virtue of this Article to any person in respect of risks willingly accepted as his by that person (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

It should be noted that the Occupiers' Liability (NI) Order 1987 is not the specific responsibility of the Department of the Environment and councils do not have any requirement to report to the Department on actions taken under this order.⁴

³ DOE and DFP, *Occupiers' Liability Law in the Context of Access to the Countryside in Northern Ireland, Information Leaflet*, (no date). Available at: http://www.doeni.gov.uk/niea/occupier_liability.pdf

⁴ NIA Deb, AW7 2763/11-15, 30 September 2011

3 Types of access

Public Paths

According to the 1983 Access Order, a public path means a way over which the public have (but subject to any conditions, limitations, orders or bye-laws) a right of way on foot, on horseback and on a pedal cycle, but not using a motor vehicle.

Public Right of Way

The term 'public right of way' is defined by 1983 Access Order as not including a road or any other way that is maintainable by a government department. Further clarification on the definition may be found through common law.

Private Rights of Way

A private right of way is for an individual or group (other than the general public) to gain access to a particular destination (e.g. a house).

Long Distance Routes

These are routes that have been formally approved under Articles 21-24 of the 1983 Access Order. The route may comprise a makeup of various types of access land, i.e. existing rights of way, permissive paths etc. The council submit a proposal to the Department of the Environment (DOE) who may approve, approve with modifications or reject.

Permissive Paths

These are designated paths that the public are permitted to use but are not public rights of way. These are made by Permissive Path Agreements between a district council and a landowner. Through this the landowner is consenting to the public crossing their land.

Access Agreements

The 1983 Access Order enables a district council to enter into an access agreement with a landowner for the purpose of enabling public to have access for open-air recreation to open country. In the absence of a suitable agreement with a landowner, the district council has the power to make an access order.

4 Publically owned land used for outdoor recreation

Countryside Access and Activities Network (CAAN) produced a report in 2010 detailing the accessibility of publically owned land across Northern Ireland for outdoor

recreation. The report provides a breakdown of the percentage of land owned by each public body.

Public Body	Total land owned that is used for outdoor recreation
Forest Service	90%
DOE (NIEA)	4%
Local District Councils	4%
NI Water	1%
DARD	0.2%
DCAL	0.1%
Waterways Ireland	0.03
Loughs Agency	0.0005

Table 2 - Publically owned land in Northern Ireland used for outdoor recreation⁵

5 Occupiers' liability; concerns, issues and perceptions

This section is intended to give a brief overview of the concerns surrounding occupiers' liability.

5.1 Guidance available to councils, landowners and the public

Government guidance on the issue of access to the countryside and occupiers' liability is addressed in 2 publications. Firstly, in a 12-page information leaflet by DOE and DFP on *Occupiers' Liability Law in the Context of Access to the Countryside in Northern Ireland*.⁶ The aim of the information leaflet is "to describe the relationship between the Government's aim in promoting managed access to the countryside and the role of occupiers' liability legislation."⁷ Secondly, in 2006 the DOE (formerly Environment and Heritage Service) produced *A Guide to Public Rights of Way and Access to the Countryside* (known as the Red Book).⁸ Whilst publically available on the DOE website, the 231–page 'guidance manual' is aimed at district councils and provides advice on access legislation.

5.2 Addressing perceptions

There is a perception amongst landowners and public land managers that if they allow recreational users onto their land there is a higher risk of potential liability claims. Indeed the Department of the Environment (DOE) recognised the concerns of landowners and farmers in its 'Red Book' guidance for councils:⁹

⁵ CAAN, *Accessibility of publicly owned land across Northern Ireland for outdoor recreation*, August 2010, p. 67

⁶ DOE and DFP, *Occupiers' Liability Law in the Context of Access to the Countryside in Northern Ireland* (No date). Available at: http://www.doeni.gov.uk/niea/occupier_liability.pdf

⁷ Ibid, p. 1

⁸ Environment and Heritage Service, *A Guide to Public Rights of Way and Access to the Countryside*, 2006. Available at: *A Guide to Public Rights of Way and Access to the Countryside*, 2006. Available at:

⁹ Ibid

The sensitivity may arise from the direct experience that an individual farmer or his or her neighbour has had of public misuse of the countryside. More commonly, however, it will arise from the perception of what might or could happen. The concerns that are likely to be raised include the possibility of vandalism, litter and trespass; of gates being left open or of dogs worrying livestock; and anxieties about the security of farm holding, loss of privacy or interference with farming practices. The question of occupiers' liability also invariably arises in any access negotiations.¹⁰

Ulster Farmers' Union (UFU)

UFU concerns in relation to occupiers' liability and access to the countryside are illustrated in the Sport NI study *The Impact of the Current Occupiers' Liability Legislation* (June 2011).¹¹ Occupiers' liability is amongst a number of concerns raised that included bio-security, dogs not under control and litter and vandalism. They feel a change in the current Occupier's Liability legislation is not needed however more clarity needs to be provided on it. They also feel that farmers need to be protected through a fund for example against rogue claims.

Ulster Federation of Rambling Clubs (UFRC)

The UFRC presented to the Environment Committee on 22 March 2012. Their view is that there should be a change in the law on occupiers' liability so that farmers do not have a liability to recreational users on their land. They feel that access to land for walking is very restricted and this is preventing more walking trails being established. They also feel that DOE should take over responsibility for establishing long distance walking trails as Councils do not have a coordinated approach.

6 The impact of occupiers' liability legislation

6.1 Sport Northern Ireland Study

¹⁰ Ibid, p. 16-17

¹¹ Sport NI, *The Impact of the Current Occupiers' Liability Legislation*, June 2011. Available at: <http://www.sportni.net/about/PolicyAndResearch/Recent+Research>

Sport NI published *The Impact of the Current Occupiers' Liability Legislation* (June 2011).¹² The study examined the background and reasoning for the continuing perception among landowners and public land managers that by permitting outdoor recreation to take place on their land they are subjected to a higher degree of risk in terms of potential liability claims. The study focussed on the public's use of land for 'informal outdoor recreation'. This section provides information on some of the findings and recommendations highlighted in the study.

6.1.1 Key themes emerging from the study:

- Widespread difficulty amongst land managers in particular in understanding what is meant by 'informal outdoor recreation' – respondents commonly thought only in terms of 'facility-based' recreation
- Tendency to confuse the concept of occupiers' liability with the requirements of health and safety legislation
- Lack of understanding as to the actual legal position

6.1.2 Key findings and number of liability claims

The study provides data on any successful and unsuccessful cases against a landowner, occupier or manager with respect to recreational users of land over the *last 20 years*.

- **No successful liability claims were identified by the study that related to an injury arising from the informal recreational use of the natural environment**¹³
- With regards to the Forest Service, claims have been settled relating to structures e.g. stone steps and wooden walkway. The Service expressed concern that there was still a lack of clarity around what constitutes a 'natural feature'.
- Out of 50 alleged injuries recorded at Northern Ireland Environment Agency (NIEA) 'tourist sites' from 2008-10, 6 claims were submitted, 2 of which were pursued. None of the claims fall within the definition of 'informal outdoor recreation'.

¹² Sport NI, *The Impact of the Current Occupiers' Liability Legislation*, June 2011. Available at: <http://www.sportni.net/about/PolicyAndResearch/Recent+Research>

¹³ For the study, outdoor recreation has been defined as non-motorized sporting and recreational activities that take place in the natural environment and that generally do not require a dedicated pitch or built facility. Informal recreational use of land in terms of outdoor recreation is the land that is being used on a casual basis for recreational activity or the land is in a natural or semi-natural state. This includes old tracks or paths.

- Inland Waterways (DCAL) receives an average of 2 liability claims per year but these invariably relate to structures at specific facilities.
- A separate study of district councils showed that 25% have never received any liability claims relating to informal outdoor recreational activities. The majority reported that they have around one or two claims each year related to incidents set aside for recreation (e.g. urban parks) and involving some form of encounter with a man-made feature or obstacle.
- NI Water – claims arising from informal outdoor recreation are almost non-existent with only one such claim being received in recent years.
- The National Trust receives on average eight liability claims per year (from approximately 2 million visits) but it is not aware of any ‘open country’ claims.
- No claims have been received by the Ulster Wildlife Trust or the Woodland Trust.
- A separate telephone survey of leading members of the insurance industry in Northern Ireland confirmed that there are no records of any liability claims pertaining to the study having been made or threatened against a landowner by recreational users in the past 25 years.
- The study found a culture of risk assessment and management and ‘caution’ are deeply engrained in the procedures and attitudes of public and quasi-public landowners. This study also found there to be no evidence of a claims culture with regards to outdoor recreation. A separate survey of recreational users shows that they believe the user is responsible for their own safety.

In fact the DOE and DFP have stated in their 2006 publication:

There is no known reported case of adult trespassers successfully suing a landowner because of an injury caused due to natural features arising in the countryside.¹⁴

6.1.3 Recommendations arising from the study

The following table details key recommendations and suggested actions arising from the Sport NI paper. An update from the Department of Culture, Arts and Leisure (DCAL) has also been provided after a request from Assembly Research and

¹⁴ DOE and DFP, *Occupiers' Liability Law in the Context of Access to the Countryside in Northern Ireland* (No date). Available at: http://www.doeni.gov.uk/niea/occupier_liability.pdf

Information Service on how the key recommendations and suggested actions arising from the study are being taken forward.

Recommendation	Update on progress ¹⁵
A key recommendation is that an Assembly Policy Statement be sought on the positive use of all public land for outdoor recreation and on a right of access to such lands.	Sports Matters target. PL24 articulates a similar aspiration. While some public bodies have allowed some activities (e.g. Forest Service new Forestry Act grants a right of pedestrian access to all Forest Service land), Sport NI still holds to its policy position statement <i>“that there should be a public right of access to all suitable public land for sustainable and responsible Sport and Physical Recreation”</i> . While this can be partly achieved through policy development – the best way to achieve this would be through legislation and the development of the RPA legislation or National Parks primary legislation could be an opportunity to do this.
Further development of the cross-sector approach already started by Sport NI in taking the lead on addressing policy issues and progressing the new Outdoor Recreation Strategic Action Plan	The new draft Outdoor Recreation Action Plan (ORAP) has articulated the importance of communication issues around occupiers’ liability, access to public land and the development of access agreements. The plan has been developed by Sport NI and the Northern Ireland Environment Agency (NIEA) with support from a steering group representing a range of agencies and departments. The draft ORAP is currently ‘out’ to public consultation until January 2013.
Empirical research to quantify the benefits of Outdoor Recreation to the Northern Ireland society, including health, wellbeing and economy.	Sport NI and the NIEA have commissioned the Sports Institute Research Centre at Sheffield Hallam University to develop a methodology to start to capture this information. Phase 2 of this project will be to undertake a socio-economic study of the benefits of outdoor recreation across NI. It is anticipated that this project will begin in November.
The production of clear guidance, in conjunction with Departmental Solicitor’s Office, to help address operational land managers’ concerns and determine whether, and at what level, specific risk assessments are necessary.	Sport NI is not aware of any progress in this regard at this time.
Guidance to help promote responsible access and to educate the public about their rights and responsibilities.	Sport NI, the NIEA, Outdoor Recreation NI, the Health and Safety Executive, the National Trust and the Ulster Farmers Union have worked in partnership to develop two short publications on personal responsibility and responsible dog management in the outdoors. These will be widely distributed through outdoor retailers, outdoor education centres, tourist information centres, local authorities and other outlets.
The development of a specialist legal advice service, in partnership with the farming unions, to address and help allay landowners’ concerns over the potential for ‘rogue’ liability claims.	Sport NI is not aware of any progress in this regards at this time.

¹⁵ Information received from DCAL on 22 November 2012 via email following a request from RaiSe on 16 October 2012.

