



REGULATION OF ACCESS TO THE COUNTRYSIDE IN GB AND EUROPE

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INTRODUCTION

The purpose of this note for the Environment Committee is to outline:

- How access to the countryside is regulated in GB and the rest of Europe.
- The main differences in such regulation between NI and GB and the rest of Europe.

REGULATION OF ACCESS TO THE COUNTRYSIDE IN ENGLAND

The Countryside and Rights of Way Act 2000¹ was initiated by the Department of the Environment, Transport and the Regions (DETR)², in conjunction with the Secretary of State for Wales, and received Royal Assent on 30 November 2000. The right of access described in the Act came into effect across the whole of England on 31 October 2005.

The Act contained measures to:

- Improve public access to the open countryside and registered common land, while recognising the legitimate interests of those who own and manage the land concerned.
- Amend the law relating to rights of way.
- Amend the law relating to nature conservation by strengthening protection for Sites of Special Scientific Interest, including tougher penalties, and by providing extra powers for the prosecution of wildlife crime.
- Provide a basis for the conservation of biological diversity.
- Provide for better management of Areas of Outstanding Natural Beauty.

Part I of the Act:

- Was intended to give greater freedom for people to explore open countryside.

¹ http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen_20000037_en.pdf

² Now the Department for Environment, Food and Rural Affairs (DEFRA)

- Contained provisions to introduce a new statutory right of access for open-air recreation to mountain, moor, heath, down and registered common land.
- Included a power to extend the right to coastal land by order, and enables landowners voluntarily to dedicate irrevocably any land to public access.

There are restrictions on the new right; for example:

- Provisions for landowners to exclude or restrict access for any reason for up to 28 days a year.
- Provisions for landowners to exclude dogs on grouse moors and in small fields during lambing time, without seeking permission.
- Provisions for landowners to seek further exclusions or restrictions on access for reasons of land management, fire prevention and to avoid danger to the public.
- Countryside bodies (such as the Countryside Agency in England) and the National Park Authorities will be able to direct the exclusion or restriction of access on grounds of nature and heritage conservation.

Part II of the Act:

- Contained provisions designed to reform and improve rights of way in England and Wales.
- Introduced measures for the strategic review, planning and reporting of improvements to rights of way, and the promotion of increased access for people with mobility problems.
- Introduced a new category of right of way, restricted byway, with rights for walkers, cyclists, horse riders and horse drawn vehicles.
- Required local authorities to have regard to nature conservation when performing some of their rights of way functions.
- Introduced other environmental safeguards, including extended powers to regulate traffic for conservation purposes and new powers to divert rights of way to protect Sites of Special Scientific Interest.
- Gave a new right to certain landowners and occupiers to apply to a local authority for an order to divert or extinguish a footpath or bridleway over their land, and to appeal against refusal.
- Allowed occupiers of any land to temporarily divert a footpath or bridleway which passes over that land where specified works are likely to cause danger to users of the right of way.
- Provided stronger measures for dealing with obstructions.
- Required local authorities to have regard to the needs of disabled people when authorising the erection of gates and other barriers across rights of way to control livestock, and allowed them to enter into agreements to improve or

replace existing barriers to make them safer or more convenient for disabled people.

- Widened local highway authorities' powers to provide barriers in footpaths to safeguard the public.
- Made unauthorised driving off-road an offence.

The following sections of the Act are of particular note:

Section 1 sets out the categories of access land to which the public are to acquire a right of access:

- Open country (land which is wholly or predominantly mountain, moor, heath or down) will qualify as access land if it has been shown on a map of open country issued by the countryside bodies. However, land is not to be regarded as mountain, moor, heath or down if it is improved or semi-improved grassland.
- Land over 600 metres above sea level and registered common land immediately qualifies as access land without any requirement for mapping by the countryside bodies.
- Access land will also include land which is irrevocably dedicated by the owner to public access.

Section 1 also sets out the categories of excepted land, to which the public do not acquire a right of access, including:

- Land on which there are buildings, golf courses or parks, and land within 20 metres of a dwelling.
- Land where the soil has been disturbed within the past year by ploughing, drilling or similar agricultural or forestry operations for the purposes of planting or sowing crops or trees.
- Land over which there are byelaws in force made by the Secretary of State for Defence for the purposes of military training or national defence.

Section 2 gives people a right of entry onto access land, as defined, for the purposes of open-air recreation, provided that they enter without breaking any wall, fence or gate, and that they do not contravene any of the restrictions set out. People who break any of these restrictions will lose their right of access to land in the same ownership as that on which the breach occurred, for a period of 72 hours, and may be treated as trespassers by the owner of the land.

Sections 4 and 5 require the countryside bodies to draw up, and consult on, maps of open country and registered common land.

Section 12 provides that:

- The right of access does not increase the liability of a person interested in the land, in respect of the state of the land or things done on it.

- Persons interested in the land will not be liable for the breach of any covenant restricting the use of the land.
- Use of any path or area of land in exercise of the right of access cannot support a claim for the existence of a right of way or of a town or village green.

Section 13:

- Amends the Occupiers' Liability Act 1957, so as to reduce the liability of occupiers of land owed to those exercising the right of access, to the same level which would be owed to trespassers.
- Amends the Occupiers' Liability Act 1984, so that, at any time when the right is exercisable, occupiers of access land will owe no liability to those exercising the right of access, nor to trespassers, in respect of risks arising from: natural features of the landscape; any river, stream, ditch or pond; and the passage of any person across a wall, fence or gate (except by proper use of a gate or stile).
- Does not exclude liability in any of these circumstances if the risk arises from anything done intentionally or recklessly by the occupier.
- Provides that the courts, in determining whether any liability is owed to non-visitors on access land, must have regard to certain additional considerations.

Section 14 introduces a new offence of displaying a notice containing false or misleading information on or near access land (or a way leading to it) likely to deter the exercise of the statutory right. The offence would apply, for example, to notices forbidding access to access land, or purporting to indicate that access land is closed when it is not.

REGULATION OF ACCESS TO THE COUNTRYSIDE IN WALES

Arrangements in Wales largely mirror those outlined above for England, as the same Act legislated for both England and Wales. The Welsh Assembly Government is responsible for drafting secondary legislation to implement in Wales the Countryside and Rights of Way Act³.

REGULATION OF ACCESS TO THE COUNTRYSIDE IN SCOTLAND

Scotland has a different system to England and Wales; this partly reflects their different legal systems, but also might emphasise a sense that Scotland holds a presumption in favour of the general public, rather than the landowners and status quo.

In practice, however, the effect of the measures taken in all GB regions is not substantially different.

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<http://new.wales.gov.uk/topics/environmentcountryside/consmanagement/countrysidecoastalaccess/?lang=en>

Part 1 of the Land Reform (Scotland) Act 2003⁴:

- Establishes a right to be on land for recreational, educational and certain other purposes, and a right to cross land. The rights exist only if they are exercised responsibly.
- Imposes certain duties on local authorities in relation to access on and over land in their areas and, in particular, requires them to draw up and adopt a plan of core paths in their areas.

The following sections of the Act are of particular note:

Section 1 establishes statutory rights of access to land (above and below, as well as on the surface) for:

- Recreation.
- Relevant educational activity.
- Carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit.
- Crossing land for the purpose of getting from one place to another

Section 2 provides that access rights must be exercised responsibly. The presumption is that a person will be exercising access rights responsibly if they are not interfering unreasonably with the rights of others.

Section 3 places a reciprocal requirement on owners of land, in respect of which access rights are exercisable, to act responsibly in using and managing the land or otherwise conducting their ownership of it. The presumption is that an owner is acting responsibly if that owner is not interfering unreasonably with the exercise of access rights over their land.

Section 5 sets out the relationship between the access rights created by this Act and existing rights, as well as making provision for the effect of access rights on occupiers' liability. As a general rule:

- Access rights will not diminish or displace existing rights.
- Exercise of access rights does not of itself amount to trespass.
- Exercise of access rights will not by itself be used to claim a public right of way or servitude or a public right of navigation.
- Any person who obstructs lawful passage and fails to desist, or wilfully obstructs lawful passage, is guilty of an offence.

Sections 6 sets out categories of land over which access rights are not exercisable and is supplemented by section 7. Land excluded from access rights includes:

⁴ http://www.opsi.gov.uk/legislation/scotland/acts2003/en/asp/en_20030002_en.pdf

- Buildings of all kinds and other structures, works, plant and fixed machinery, as well as caravans, tents or other places used to give a person privacy or shelter.
- Land surrounding and associated with non-domestic buildings, structures, works, plant and fixed machinery.
- Land contiguous to, and used for, the purposes of a school.
- Land which is adjacent to a domestic building, caravan, tent or other similar place as is sufficient to give persons living there reasonable measures of privacy and enjoyment.
- Private gardens to which there is a right of common access, such as Queen Street Gardens in Edinburgh.
- Land which has been developed or set out as a sports or playing field or for a particular recreational purpose.
- Land in respect of which a charge was levied for public admission for at least 90 days prior to 31 January 2001 and for which a charge continues to be levied for the same period after that date.
- Land on which building, civil engineering or other works are underway.
- Land on which crops have been sown or are growing.

Section 9 sets out the conduct which is outwith the scope of access rights. Any person purporting to exercise access rights who engages in the conduct listed in this section will be treated as not exercising those rights responsibly. Persons on land for the purposes of carrying on an activity commercially or for profit are to be treated as conducting themselves irresponsibly if they take away anything in or on the land for that purpose. Access rights are not exercisable on land which is a golf course; the Act provides only for a right to cross golf courses.

Section 10 places a duty on Scottish Natural Heritage to draw up the Scottish Outdoor Access Code setting out in relation to access rights guidance on the circumstances in which those exercising access rights and the owners of relevant land may be regarded as acting in a way that is either responsible or irresponsible.

Section 11 enables local authorities, whether on applications from third parties or on their own initiative, by order, to exempt a particular area of land from access rights for a particular purpose.

Section 13 places a duty on local authorities to uphold the exercise of access rights, so far as doing so is consistent with their other functions, on and over any route, waterway or other means by which access rights may be exercised. A local authority may institute and defend legal proceedings and take any other steps which they think fit for the purposes of carrying out the duty.

Section 14 prohibits an owner from doing, or from refraining from doing, certain things for the purpose, or for the main purpose, of preventing or deterring the exercise of access rights.

Section 15 permits local authorities to take steps to warn and protect the public against any danger on any land in respect of which access rights are exercisable, and to indicate or enclose recommended routes over, or to give directions to, such land.

Section 16 enables local authorities to acquire land either by agreement or, with the consent of Ministers, compulsorily, where necessary or expedient to enable or facilitate the exercise of access rights.

Section 17 places a duty on each a local authority to draw up, within three years of this section coming into force, a plan for a system of paths sufficient to provide reasonable public access throughout its area. Each path within such a system is to be known as a core path.

Section 19 allows local authorities to do anything which they consider appropriate for the purposes of maintaining a core path, keeping a core path free from obstruction or encroachment and providing the public with directions to, or with an indication of the extent of, a core path.

Section 21 makes provision for a local authority to enter into an agreement for the delineation and maintenance (and, if necessary, creation) of a path over land in respect of which access rights are exercisable. Such an agreement will be on the terms and conditions agreed between the local authority and the person with whom they enter into the agreement. Those terms and conditions may, amongst other things, provide for the making of payments.

Section 22 gives a local authority power, where they consider it impracticable to delineate a path by agreement, to make an order delineating it, having regard to the rights and interests of the owner of the land over which the proposed path passes and persons likely to exercise access rights on or over the land.

Section 23 allows an owner to plough, or to carry out other land management practices, on land incorporating a core path or a right of way. However, where core paths or rights of way are disturbed this way, it places a duty on the owner to reinstate the path or right of way within 14 days beginning on the day the path was first disturbed or within such longer period as the local authority may allow. An owner who fails to reinstate the path within the required period is guilty of an offence. If an owner fails to reinstate a path within the period set, the local authority may, after giving the owner 14 days notice of their intention, take all steps necessary to reinstate the path or right of way and recover their reasonable expenses from the owner.

Section 24 gives local authorities the power to appoint rangers in relation to any land in respect of which access rights are exercisable. Rangers functions are to provide advice and assistance on matters relating to access rights and to perform such other duties in relation to those rights as the local authority appointing them may specify.

Section 25 provides for the establishment of at least one local access forum by each local authority. This section places a duty on each local authority to establish a local access forum consisting of a reasonable balance of persons and bodies representing the interests of persons with an interest in public access on and over land and owners of land over which access rights are exercisable. The functions of a forum are to provide advisory and dispute resolution services in relation to the exercise of access rights, the existence of rights of way and the drawing up and adoption of core paths plans.

Section 26 confers power on persons authorised by local authorities to enter any land for a purpose connected with the exercise or proposed exercise of any of the authorising authority's functions under Part 1. Such a person may however enter land under this power only at a reasonable time and on having given reasonable notice to the owner of the land unless entry is needed in case of emergency or for the purpose of warning the public of and protecting the public from danger, taking measures to facilitate the exercise of access rights or fulfilling certain duties relating to core paths.

Section 27 permits Ministers to give guidance to local authorities on the performance of any of their functions under Part 1.

Section 28 allows persons to apply to the sheriff for a determination of whether access rights are exercisable over particular land, of whether persons exercising those rights are doing so responsibly, or of whether the owner of land in respect of which access rights are exercisable is using, managing or conducting ownership in a responsible way.

Section 29 confers a power to Scottish Natural Heritage to put up and maintain notices to protect the natural heritage of land in respect of which access rights are exercisable.

REGULATION OF ACCESS TO THE COUNTRYSIDE IN THE REST OF EUROPE

Rol

Under the Occupier Liability Act 1995⁵, an occupier is defined as a person exercising such control over the state of the premises that it is reasonable to impose upon that person a duty towards an entrant in respect of a particular danger thereon.

An occupier has a duty to 3 classes of entrants:

- Visitors.
- Recreational users.
- Trespassers.

A **visitor** includes:

- An entrant who is present on the premises of the occupier at the invitation or with the permission of the occupier or a member of his family.
- A member of the occupiers' family.
- An entrant who is present on the premises of the occupier for the purpose of an express or implied term in a contract (such as a person making a delivery).

⁵ According to Tormeys Solicitors, Castle Street, Athlone, Co Westmeath, at http://www.tormeys.ie/occupier_liability.htm

The occupier is under a duty to take such care as is reasonable to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger due to the state of the premises.

Regard may be had to: -

- The care which a visitor ought to have to his own safety.
- The extent of supervision and control that an accompanying visitor can be expected to exercise over such visitor.
- All the circumstances of the case.

An occupier may restrict or vary his duty towards a visitor downwards to a duty not to intentionally injure or act in reckless disregard of the visitor or his property. This may be done by a reasonable express agreement, or by a reasonable notice which the occupier has adopted reasonable steps to bring to the attention of the visitor. Such reasonable steps are prima facie presumed if the notice is displayed at the normal means of access to the premises. The notice only acts to absolve the occupier if its terms are such that they would have enabled the visitor to avoid the damage or injury.

The most interesting aspect of the provisions in relation to the duty to visitors is the ability of the occupier to vary his duty by appropriate agreement or notice. This aspect of empowerment in the act is consistent with the objective of achieving a balance between the rights of entrants and occupiers. The theory is that if the occupier has gone to the trouble of warning entrants of the limits of his potential exposure for liability, there is no reason why the entrant should not be bound by that, as the entrant is consequentially put on notice that he ought to take more care himself.

A notable point is that the law applies equally to children and adults alike. Naturally, the age of the injured person is likely, along with all other relevant factors, to come under consideration as a relevant factor

A **recreational user** includes an entrant who, regardless of the occupier's permission or invitation is present on the occupier's premises without charge, for the purpose of engaging in a recreational activity conducted in the open air, scientific research, nature study, exploration of caves, or visiting sites and buildings of cultural significance.

A **trespasser** is simply defined as an entrant other than a visitor or a recreational user.

The occupier is under a duty to the recreational user or trespasser not to intentionally injure or act in reckless disregard of the person or his property.

The occupier is not under any duty to a trespasser present for the purpose of committing an offence.

The standard of care is that which used to relate to the category of trespasser. Note that no person is to be accounted a trespasser who enters in order to hold any manner of communication with the occupier or any other person on the premises, unless he knows or ought to know that his entry is prohibited. It should always be

borne in mind that the traditional concept of a trespasser as a furtive poacher, or some similar character, is not legally correct; a trespasser may be entirely innocent of any malicious intent, and may even be unaware that he is a trespasser.

FRANCE⁶

Traditional rights of access are largely restricted to rights of way in the form of servitude de passage (right of passage) and droit de marche-pied (right to walk, along canals and canalised rivers). Rights of public access, other than rights of way, are only available within national parks and nature reserves.

GERMANY

The traditional right of public access (betretungsrecht) has been given a modern statutory basis. The basic principle is that of a public right of access to forests, unenclosed land and foreshores, and along footpaths and roads. The right does not give access to enclosed farmland, except on farm roads and tracks. Under Federal legislation, the rights extend to walking, running, sitting, camping and playing; cycling, horse riding and using wheelchairs in forests; and, in some Länder include skiing and skating.

AUSTRIA

There is a traditional right to roam throughout Austria, and forestry law (forstgesetz) provides a legal right of access to forests, subject to conditions and restrictions.

SWITZERLAND

There is a betretungsrecht, mainly over uncultivated land, and ancient rights of access to forests and woodlands. However, access may also be restricted if the land is being cultivated.

NETHERLANDS

The main access rights are the public rights of way.

DENMARK

Legislation provides for access to public forests and to all beaches. The 1968 Conservation of Nature Act provides access for walking and short visits to uncultivated and unfenced areas and roads in private forests.

NORWAY

Allemannsretten, the public right of access, is part of Norway's cultural heritage, and has traditionally enabled the public to travel over, enjoy short stays, or collect natural products for personal consumption on land and waters owned by others. The 1957 Outdoor Recreation Act adapted traditional rights to modern circumstances and codified them in detail.

⁶ No up-to-date or definitive information was found on the situation in the rest of Europe. Information that follows on those countries was quoted by the House of Commons Library in its Bill Paper on the Countryside and Rights of Way Act 2000, at: <http://www.parliament.uk/commons/lib/research/rp2000/rp00-031.pdf>

SWEDEN

Sweden enjoys a similar traditional right of access, but has not codified it in modern legislation.

POINTS OF COMPARISON BETWEEN NI AND GB

- The role of local authorities in NI and GB seem to be broadly similar. The difference seems to be in the degree of action, priority or enthusiasm to exercise those responsibilities.
- There is no sense of any significant cultural differences between NI and GB in these matters; legislators in GB faced the same opposition and pressures from landlords and landowners prior to acting.
- The main difference seems to be that GB legislation acts in favour of what might be called a presumption in favour (unless problems arise), rather than a presumption against (unless no problems are found).
- GB legislation appears to give greater protection to both landowners as well as greater access to the public, despite unfounded landlord fears and objections.