

Proposals for Access Legislation in Scotland

Richard Davison, Recreation Group Officer, Scottish Natural Heritage

Introduction

Access to the outdoors in Scotland is a devolved issue for the Scottish Parliament to address. This has resulted in a markedly different and wider approach to developing proposals for access legislation in Scotland. This paper describes the process followed, summarises the main proposals and outlines the next steps in terms of the legislation and its implementation.

Process

In October 1997, the Government asked Scottish Natural Heritage (SNH) to provide advice on appropriate changes to the law relating to access in Scotland. It stated that "...The Government is committed to giving people greater freedom to enjoy the countryside. However, Scotland has distinctive laws and traditions relating to access, which are different from those in England & Wales, and it would not be appropriate to consider this issue on a GB basis. We need measures appropriate to Scotland, and this is something [we] would expect the Scottish Parliament to address."

The Government went on to say that it had "...asked SNH to consult anyone with an interest in the subject, whether from a land-holding or recreational point of view, and offer advice. SNH might wish to use the existing Access Forum to assist in the consultation or it may decide to set up a separate group. Whatever means is chosen, [we] expect SNH to complete the exercise by the end of 1998."

The Access Forum was established by SNH in 1994. Its membership is small to promote effective working; balanced, so that there are roughly equal numbers of recreation groups, land management interests and relevant public agencies; and representative, mainly of the "umbrella" organisations which can inform and consult their own memberships about the Forum's work. The main role of the Forum is to debate and resolve access issues at a national level on the premise that the public have an expectation of access to the

countryside and that the countryside is a place where people work and live and where a wide range of land uses are managed. The Forum is serviced by SNH.

Although its remit covers all aspects of access, the Forum was established with an initial membership appropriate for considering access to the open hill because it seemed possible to make early progress on this issue. A separate group, called the Access Forum (Inland Water), was established in 1996 to explore access issues relating to water-based recreation on inland waters. The group has the same tripartite structure, many common members with the Access Forum and is serviced by sportscotland.

On receipt of the Governments' request, SNH asked the Access Forum to act as its advisory group. Given the wider debate on access, the membership of the initial hill-based group was expanded to include the Scottish Rights of Way Society, Forestry Commission and the Scottish Crofters' Union. The Access Forum (Inland Water) has also been involved in developing the advice. The term "Access Forum" is used throughout to cover both groups described above.

In March 1998, the Access Forum (through SNH) issued a short consultation leaflet asking people to consider what the main needs for change were and what changes were needed in the law. SNH also consulted practitioners to discuss technical issues, including how the current law is used and what advantages and disadvantages it offers.

A detailed study of the access arrangements in Norway, Sweden, Denmark and Germany was commissioned from Peter Scott Planning Services. A sub-group of the Forum identified areas of agreement and disagreement on the existing law. A legal Opinion was sought from Professor Douglas Cusine of the University of Aberdeen on key issues and detailed comments were provided by Scottish Wildlife & Countryside Link.

The advice of the Forum was submitted to SNH in October 1998. SNH decided to accept the advice and to add its own “commentary”. These were then submitted to the Scottish Office. In February 1999, the Government accepted the advice as the starting point for legislation and asked SNH to prepare a draft Scottish Outdoor Access Code and to involve the Access Forum in this work. The details of the draft Code were sorted out by a sub-group of the Access Forum. On its own initiative, the Access Forum established a sub-group to explore in more detail the issues relating to paths.

In July 1999, the Government issued a White Paper on Land Reform which set out the basic legislative proposals for access. The consultation generated a large number of responses, with many from landowners and farmers.

The draft Code, together with the paper on paths, were submitted to SNH in September 1999. These, in turn, were passed to the Scottish Executive in November. Copies of these can be found on our website (www.snh.gov.uk). Since then, there have been further refinements made to the Code.

Legislation is currently being drafted by the Scottish Executive. Prior to being considered by the Scottish Parliament, the draft Bill, together with a copy of the draft Scottish Outdoor Access Code, will be put out to consultation. This is expected to happen by the early summer.

The Need for Change

SNH and the Access Forum agreed that there were four key needs for change.

The first need is for a distinctive new approach, based on a modernised law designed to meet Scotland’s needs. It was concluded that the existing law would not deliver the Government’s commitments, particularly because: much current access is insecure and uncertain; the land manager has few, if any, effective remedies against irresponsible behaviour; public rights can only be

asserted through often costly and complex procedures; it is based on often out-dated case law; and, it favours the confident user and the land manager who does not wish to encourage access. It results in resources being concentrated on asserting rights, in access being tolerated with little promotion or signposting to help the visitor, and in solutions being short-term. These problems are particularly evident in the lowlands where there is a clear shortage of paths offering the public assured and welcoming access.

The second need is for the concerns of land managers to be addressed. The concerns of land managers are not well addressed under the existing law or by current arrangements for managing access. Whilst most people behave responsibly, some do not and this can cause significant problems for land managers. Some irresponsible behaviour (eg. poaching, vandalism, poor dog control, litter dropping) is already covered by legislation but there is often little support available to the land manager faced with such behaviour. Past effort at encouraging responsible behaviour through education and information has often been inconsistent and under-funded. Whilst the Country Code has been available for many years, as have a growing number of activity codes of conduct, the messages have not been well promoted and so knowledge of them is quite low.

The third need is to engage and involve local communities and land managers to a much greater extent. Communities, including land managers, are often not involved in the preparation of access strategies, in the early development of proposals or in the management of facilities. Perhaps the most significant need, particularly compared with elsewhere in northern Europe, is to improve the sense of responsibility for and stewardship of the natural heritage and countryside generally by the public and local communities. The fourth need is for better mechanisms and additional resources for facilitating and managing access. Whilst new routes and local path networks are being created, progress

has generally been limited and slow, and the provision of routes and networks is poorer than in countries like England, France or Germany. Off-road provision for cycling and horse riding is particularly poor. More investment is needed in support, dialogue, involvement and practical help, particularly as, given the scale of informal recreation, it is clear that the current levels of investment is too small. Although many local authorities have sought to act positively, the current legal framework works against real progress and results in low levels of investment and a generally limited and reactive approach by many local authorities.

The Proposals

All interests on the Forum, and SNH, concluded that the existing law does not provide a sensible or workable foundation for providing people with greater freedoms to enjoy the countryside. A distinctive new approach is needed which is underpinned by a modernised law designed to meet Scotland's needs. The Forum and SNH recommended that Scotland's tradition of tolerance towards public access should be confirmed as a statutory right of access to all land and water, exercised responsibly, for informal recreation and passage. This right should be one part of a balanced package which includes: safeguards for privacy, land management operations and conservation; a new code of responsible behaviour; a major programme of information, promotion and education; obligations on local authorities and land managers; better powers for facilitating and managing access; a co-operative approach in which the needs of all interests are respected; and, additional resources.

This package will satisfy the Government's commitment to giving people greater freedoms to enjoy the countryside and help it to implement its new policy agenda on:

- rural development - encouraging people to visit Scotland and meeting their needs will play a key role in helping to deliver the Government's new agenda aimed at supporting local rural development in a sustainable way;
 - transport - making better provision of safe, off-road routes for walking and cycling will help the Government to persuade people to make less use of their cars and thus deliver a more sustainable transport system;
 - health - encouraging people to walk, cycle or ride will help to get more people active and thus help the Government to reverse the extremely poor health record of Scotland's population;
 - social inclusion - providing good access, particularly close to where people live, will help those without a car and those with disabilities to enjoy and appreciate the countryside and thus help the Government to implement its policy of "social inclusion" and to show that the European Convention of Human Rights is being utilised to improve society.
- It is proposed that the right of access will:
- extend to all land and inland water in Scotland, except for buildings and their curtilages, and for places where public access is already restricted by the law;
 - be available to any person, either on their own or in a social group (such as with family or friends) or as part of a club outing;
 - extend to any time of the day or night (though the degree of responsibility increases at night time);
 - be available for a wide range of informal open-air recreation activities and for passage (this includes walking, cycling, horse riding, canoeing, climbing).
- There are a number of qualifications on the right of access which aim to protect the interests of others and the outdoor environment. As proposed, the right of access would not extend to:
- land reform - access will be an essential part of any stronger emphasis on land stewardship aimed at meeting the future economic, environmental and social needs of society;

- any building or its curtilage (defined as “land or water immediately surrounding a building and which serves the purposes of the building in some necessary or reasonable way”), or places where public access is already restricted by the law;
- field sports, angling or any motorised activity on land or inland water;
- taking anything away from the outdoors;
- any organised event or activity which is large-scale or requires facilities, services or the regular or exclusive use of a specific area.
- anyone behaving irresponsibly and causing damage or significant disturbance (the law already provides sanctions against many forms of irresponsible behaviour and these will continue).

Responsible behaviour will be defined through a new Scottish Outdoor Access Code, which will indicate how the right of access is expected to operate in most situations. It will be the reference point for the much shorter codes which, at a later stage, will be needed for general public use. Several shorter codes will be produced over the coming months. The Code will be an evidential document (similar to codes for health & safety and disability discrimination). When someone is not following the Code and, after being asked to modify his or her behaviour, fails to do so and damage or significant disturbance occurs, that person forfeits the right of access because he or she is not exercising it responsibly. In this situation, the land manager would be entitled to ask the person to leave. SNH will have a duty to promote the Code and responsible behaviour generally. A major educational and promotional effort is essential.

Landowners and occupiers will be required not to obstruct, interfere with or intimidate people from exercising the right of access. Equally, they will be able to manage how people exercise the right by, for example, asking people to follow an alternative route whilst a management operation is underway.

It is expected that the legislation will place a duty on all public bodies to recognise, accommodate and protect the right of access and the responsibilities set out in this

Code in their policies, plans and actions. Councils will be required to:

- establish at least one local access forum to achieve complete coverage of their areas;
- facilitate and plan for access in their areas;
- identify, and create a public record of the core path network for their areas;
- ensure that its core path network is well-defined, accessible, protected and managed; and to
- prepare a subject plan on access.

The “core path network” is a new concept. The local authority will identify the network through a subject plan and by involving the local access forum. Having identified the network, the local authority will then need to ensure that it is well-defined, accessible, protected and managed.

Councils already have a range of powers to provide facilities in the countryside. The new legislation will add considerably to these powers, particularly in relation to:

- the removal of obstructions from paths;
- the employment of ranger services over any land or water; and
- the introduction of management rules and byelaws over any land or water.

The creation of local access forums is seen as vital to ensure that all key local interest groups, including land managers, users, local agencies, and local communities, work together at a local level. These forums will have a tripartite structure (ie. land managers, users and public agencies) and will have an advisory and mediatory role, and act as a consultee on the diversion and closure of paths in a core path network, and on the introduction of management schemes.

Liability is a key issue. It is expected that the legislation will make clear that people exercising the right of access should do so at their own risk. However, land managers will still be liable for reckless or negligent acts.

The Next Steps

The draft legislation is currently in preparation and it is expected that it and a draft of the new Scottish Outdoor Access Code will be put out to consultation in early summer, 2000. Following consultation, a draft Bill will be laid before the Scottish Parliament for detailed consideration. The exact timetable is not yet clear but it is likely that the legislation would be agreed by early 2001.

Attention is already turning to how the legislation and the Code will be implemented. Three initiatives are of particular importance.

- A study is underway of seven local authorities to determine how the legislation might be most effectively and efficiently implemented and to identify more clearly the resource implications that will arise. This study will provide the background information for formal guidance and help to identify the support that local authorities will need.
- A feasibility study into the creation of a national baseline inventory of all paths and tracks is nearing completion. This inventory would provide the basis for identifying the new core path networks. Depending upon feasibility and costs, the inventory should be completed during the second half of 2001.
- A programme for promoting the new Code and responsible behaviour generally will be developed during 2000. Several projects are reviewing past campaigns, other types of code and the capacity of existing partner organisations to become involved.

Conclusions

Access to the outdoors in Scotland is a devolved issue and for the Scottish Parliament to decide on and this has led to a markedly different approach from that in England & Wales. Whilst the process has been a long one and is still continuing, the request from Government was to review the legal arrangements to the countryside as a whole, and not just to open countryside. Furthermore, the Access Forum in Scotland has had a direct, participatory role in the development of the proposals for access legislation.

The proposals for a right of access to land and water, exercised responsibly, for informal recreation and passage, for a new Scottish Outdoor Access Code setting out what constitutes responsible behaviour, for stronger duties and powers, and for more emphasis on information, management and education, are a Scottish solution to Scottish needs. They align Scotland very much with Scandinavian approaches. Implementation must be done effectively and work is already in hand to sort out the best ways of doing so.

Dr Richard Davison presented this paper at the CRN conference, "Managing the Challenge of Access" in April 2000. He is the Recreation Group Officer for Scottish Natural Heritage and can be contacted at Scottish Natural Heritage, 2 Anderson Place, Edinburgh, EH6 5NP.

The draft legislation is not yet ready. It is now expected to be put out to consultation, along with a draft Scottish Outdoor Access Code, in the autumn of 2000.