

Advice on Rights of way and equestrian access in Scotland

Many people in Scotland mistakenly refer to any established or historic path as a right of way, without necessarily understanding the legal complexities or implications.

Although rights of way exist in some parts of Scotland, unlike England and Wales, Scotland has no definitive map, most rights of way are claimed rather than legally asserted, and in Scotland rights of way can be extinguished because of lack of use. Ordnance Survey maps in Scotland do not show rights of way (no matter what the key suggests!), nor offer any indication of the suitability of paths or tracks for equestrian or other use. Bridleways, byways and other such terms used to classify rights of way in England and Wales do not apply or bear any relevance in Scotland.

The system used to catalogue rights of way in Scotland resulted in most claimed rights of way being recorded as pedestrian, even those with a long history of equestrian or multi-use. The Land Reform (Scotland) Act 2003 now provides the main framework for outdoor access in Scotland – for further information see BHS Scotland's factsheets "Equestrian access rights and responsibilities", "Horse Sense" and "Responsible riding and carriage driving in Scotland".

This information sheet provides a brief summary of what rights of way mean in Scotland, and where they still have a role to play as part of the outdoor access path network.

Legal definition of a right of way in Scotland

A right of way is a route or path along which the public enjoy a legal right of passage under common law. To qualify as a right of way, a route must satisfy all of the following criteria:

- it must have been used by the public without substantial interruption for at least 20 years
- it must have been used by the public as a matter of right i.e. without requiring the landowner's permission
- it must connect two public places (e.g. public roads or other rights of way)
- it must follow a more or less defined route.

Classification of rights of way

Rights of way are established in Scotland through the collection of sufficient evidence to demonstrate and assert the route as a right of way, either by acceptance of all interests, or through court action.

Rights of way are classified according to their legal status as falling into one of three categories:

- Claimed rights of way which appear to meet the common law conditions, but which have not been legally asserted, accounting for 84% of all rights of way in Scotland.
- Asserted rights of way which the landowner has accepted as a right of way or where local authorities have indicated that they would, if required, take legal action to protect the route, accounting for approximately 15% of all rights of way in Scotland.
- Vindicated rights of way which are the only category of rights of way in Scotland which have been legally recognised, accounting for only 1% of all rights of way in Scotland.

How are rights of way recorded in Scotland?

In England and Wales highways authorities have a duty to maintain a definitive map of legally recognised maps of rights of way. In Scotland, different legislation applies, and there is no legally recognised record of rights of way.

During the 1990s, Scottish Rights of Way and Access Society (now Scotways) co-ordinated an ambitious project producing a national Catalogue of Rights of Way (CROW). The project was undertaken in partnership with Scottish Natural Heritage, local authorities and local communities. Access authorities and local volunteers provided mapped details of routes which, in their opinion, met the necessary criteria to be claimed as a right of way. They also volunteered information on the category of use for each right of way. The information is recorded on a set of 1:50,000 scale OS maps held in Scotways' Edinburgh office, and in an accompanying database with basic information about each route. It is widely acknowledged that both then and now, local authorities have differing policies on rights of way. As a result, the amount and quality of information about recorded rights of way varies throughout Scotland.

In total CROW records almost 7,000 rights of way in Scotland, totalling approximately 15,000 km. The average length nationally is approximately 2 km, although there is significant variation in length and character of rights of way around the country. In Dundee, for example, the average length of right of way is <1km, including many urban paths, whereas in the Highlands, the average length of recorded right of way is 6.2 km, with many far longer former drove roads and other historic routes such as the Lairig Ghru and Minigaig Pass.

Categories of use

In England and Wales, rights of way are clearly and simply categorised as footpaths, bridleways, roads used as public paths, byways etc., and the legitimate types of use for each category are legally defined.

In Scotland, the category of use for rights of way is much less straightforward. In theory, the category of use depends on how the public used a route over the claimed 20 year period and the evidence available, or which can be collected to demonstrate the types of use. In practice, little effort has been made to collect or demonstrate equestrian use of rights of way.

Most of the volunteers and local authority staff involved in producing CROW were walkers, and/or had limited interest in or awareness of equestrian access. Few access authorities recorded category of use, so records are incomplete and variable. As a result, the great majority of rights of way are recorded as pedestrian only, even those with a long history of multi-use.

84% of all rights of way are claimed rather than legally asserted.

< 4% of rights of way include horses within their recorded user category.

Do rights of way still matter in Scotland?

The introduction of the Land Reform (Scotland) Act 2003 fundamentally changed the legal basis for recreational outdoor access in Scotland. Section 5 of the Act clearly states that “the existence or exercise of access rights (under the Act) does not diminish or displace any other rights, whether public or private, of entry, way, passage or access”. However, in confirming a right of responsible access for non-motorised users to most land, the Land Reform Act largely obviated the relevance of rights of way in Scotland. On most land, and on most paths and tracks, people can now confidently enjoy access without worrying whether a path is recorded as a right of way, or whether they are likely to be challenged by an angry landowner questioning whether they are legally entitled to use the path.

As horse riders and carriage drivers share exactly the same access rights and responsibilities under the Land Reform Act as walkers, cyclists and other legitimate non-motorised access takers, the very limited recognition of equestrian rights of access in relation to rights of way has become less of an issue. Incorporation of most well used rights of way (regardless of whether they were claimed, asserted or vindicated) into local core path plans has afforded these paths greater recognition, protection and usually access authority commitment to signage and maintenance.

Situations where rights of way still have an important role to play in Scotland include:

- where rights of access do not apply under the Land Reform Act, for example a track through a steading or within the curtilage of buildings;
- where a land owner or manager contests access rights under the Land Reform Act;
- limitations on access and statutory means of limiting access under the Land Reform Act e.g. for land management purposes do not apply to rights of way.

How do I check if a route is recorded as a right of way?

Scotways maintain the CROW, adding new rights of way as these are identified. Neither the CROW map or database are available online, but after first checking that the route in question meets the necessary criteria to be classed as a right of way, you can write to Scotways with an annotated map identifying the route and check if it is on their records. Access authorities also hold a digital copy of the CROW map for their area.

Can new rights of way be established?

Access authorities are usually, and understandably, reluctant to pursue assertion or legal vindication of routes as rights of way because of the high cost and resource implications of gathering the necessary evidence of 20 years public use. They will usually only consider asserting rights of way if there is a strong argument for doing so, for example where a route with a long history of public use, not recorded on CROW, exempt from access rights under the Land Reform Act, has now been obstructed and the landowner has refused all approaches to remove the obstruction. In such circumstances, local horse riders and carriage drivers will be expected to help gather the necessary evidence demonstrating past history of uninterrupted use.

If you need further advice on equestrian access in Scotland, contact your local BHS access representative (see www.bhsscotland.org.uk for contact details) or Helene Mauchlen, national manager for BHS Scotland Tel. 01764 656334 or email Helene.Mauchlen@bhs.org.uk.

For guidance on equestrian access in England and Wales, contact Access and Rights of Way Department, The British Horse Society, Abbey Park, Stareton Lane, Kenilworth, Warwickshire CV8 2XZ. Telephone 02476 840581. Email access@bhs.org.uk.

IMPORTANT This guidance is general and does not aim to cover every variation in circumstances. The Society recommends seeking advice specific to a site where it is being relied upon.