

Novel types of outdoor activities and access rights

Purpose

1. The attached briefing papers provide information on the developing activities of (1) electric bicycles and (2) aerial drones, and discusses their relationship to access rights.

Action

2. **Members are invited to consider and discuss this paper.**

Background

3. Members have at recent meetings noted issues around relatively new and developing forms of outdoor pursuits, which can raise questions over if or to what extent they are covered by the statutory access rights and responsibilities under the Land Reform (Scotland) Act 2003.
4. The two activities discussed in the attached briefings are firstly electric bicycles, with the statutory definition of 'electrically-assisted pedal cycles'; and secondly aerial drones, with the context of CAA regulations and guidance.
5. This paper provides a summary discussion of relevant regulations and guidance that apply to these pursuits, and offers a commentary on the relationship between the activities and access rights, with the usual caveat that neither SNH nor the National Access Forum is the legal authority and that only the courts can provide a definitive position.

Rob Garner
Secretary

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1) Electric bicycles:

Background –

Electric pedal cycles are becoming increasingly available and popular, both for sale and also for hire in many areas. They can open up the enjoyment of cycling to many people who for various reasons may like to have some of the hard work taken out of cycling, while still enjoying the outdoor experience. Many electric bikes look fairly indistinguishable from an ordinary bike, and the motor can be speed-limited to less than ordinary bikes, so a blanket ban purely for having a motor may not necessarily be wanted or needed, as long as there are some limits. As it happens, there is a pre-existing body of legislation that provides such limits at an appropriate level.

The Land Reform (Scotland) Act 2003, Section 9 (Conduct excluded from access rights) states - *(f) being on or crossing land in or with a motorised vehicle or vessel (other than a vehicle or vessel which has been constructed or adapted for use by a person who has a disability and which is being used by such a person).*”

Pre-existing roads legislation and regulations provide precise definitions on what are termed “Electrically-Assisted Pedal Cycles” (EAPCs), particularly for use when determining if an EAPC is not a ‘motor vehicle’ in terms of the roads legislation. These criteria may be useful when needing to distinguish between those electric bikes that could be used on all paths without any real problem, and those faster/heavier types that might create practical problems. Schedule 2 of the Land Reform (Scotland) Act 2003 does not include any provisions to modify any of this pre-existing roads legislation, so the two areas of civil and criminal law co-exist.

Detailed criteria -

a) **Electrically Assisted Pedal Cycle Regulations 1983** (S.1.1168): – the regulation’s criteria for an EAPC are in summary:

- the bike must have pedals that can be used to propel it;
- the electric motor is 'limited' so that it is incapable of making the bike go faster than 25kph /15.5 mph;
- the bike (including its battery but not the rider) must not be heavier than 40 kilograms (kg) if a bicycle, or 60kg if a tandem or tricycle;
- the motor should not have a maximum power output of more than 200 watts on a bicycle, and 250 watts on a tandem or tricycle; and
- the bike must have a plate showing the manufacturer, the nominal voltage of the battery, and the motor's power output.
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b) **Road Traffic Regulation Act 1984 s140 (1)(c), and the Road Traffic Act 1988 s189:** both state that an EAPC meeting these above criteria “..shall be treated as not being a motor vehicle.”

c) **The Road Traffic Act 1988 s32:** provides that an EAPC shall not be driven on a road by a person under 14, and to do so is an offence.

d) **The Road Traffic Act 1988 s34:** states that the offence of ‘driving motor vehicles elsewhere than on roads’ consequently does not apply to EAPCs. Therefore it is specifically not an offence under the criminal law to ride an EAPC on paths, tracks etc away from the public roads.

Given this detailed legal basis, whereby EAPCs which comply with these criteria are specifically not a ‘motor vehicle’ under roads legislation, it is generally taken as valid that – if compliant with these criteria - EAPCs are similarly treated as not being a ‘motorised vehicle’ under the Land Reform (Scotland) Act.

(At the forum meeting there will be copy of an example advert of a currently available model of electric bike, to illustrate how the EAPC criteria are incorporated into design specifications.)

2) Drones:

Background

Various types of unmanned aircraft, commonly referred to as drones, have become available in the past few years and are being used for private leisure purposes as well as commercial aerial work. Drones used for leisure are generally lightweight, may be equipped with a camera, and are now relatively inexpensive (starting prices below £50) and readily available for purchase from shops and on-line retailers. There is little data about the numbers in users. For professional usage, the range of applications is wide and increasing, including surveillance, data gathering, film production (TV, marketing, promotional purposes), infrastructure inspection, conservation management, and agriculture and forestry operations. The size, level of sophistication and specification of those devices reflects this range of applications.

Drones in relationship to access rights

With the growth in use as a leisure activity, there has been debate about the rights and responsibilities that apply to the operation and use of drones. Concerns expressed have included perceived problems that the activity may pose over public safety, privacy, and potential disturbance to people, livestock or wildlife. On the other hand, the activity clearly interests and motivates a segment of the population to spend time in the outdoors, with a fresh perspective on their surroundings. There is debate over legal definitions, and also over the practicalities and requirements for supervision and enforcement through the general civil powers of the Land Reform (Scotland) Act, as compared to through other existing statutory regulatory mechanisms and agencies.

The use of drones as a leisure activity can be interpreted as falling with the scope of 'recreational purposes' in Section 1(3)(a) of the Act. There has been discussion around whether the exclusions described in S9(f) on "being on or crossing land in or with a motorised vehicle..." are or are not relevant to the issue. While drones are motorised, it is not fully clear that they are a 'vehicle' with the meaning of being a conveyance. It has also been noted that a user could be flying a drone for recreational purposes while standing on land not requiring access rights, like a road or the foreshore, but nevertheless overflying land where access rights apply.

The Code makes no specific mention of drones, although if it was taken to be within the scope of access rights, drone users would be required to undertake the activity in a manner that is consistent with the Code's three guiding principles of respect for other people, caring for the environment and taking responsibility for your own actions. The closest reference comes in 2.14, where the Code suggests that "the use of powered model craft" is out-with access rights, but the activities envisaged at that time are not directly analogous to those involved in the use of drones, with the line taken by the Code being guided by the then current practice of powered model aircraft being most frequently associated with club or group use of facilities or sites.

Access rights must be exercised in ways that are lawful and reasonable. Participation in several recreational activities is within access rights up to a certain level, beyond which legislative or regulatory controls exist which must be complied with, and where not doing so would then put that activity outside the access rights. For instance, being accompanied by a dog is clearly within access rights, but there are a range of statutory controls if dog-walking crosses boundaries into areas of dog control, sheep worrying or fouling. Similarly, nature study can normally be pursued within access rights, but if it crosses a boundary into damage or disturbance of wild birds and animals, then statutory sanctions come into effect (see Annex One of the Code).

Civil Aviation Authority Regulations on drones -

Drones fall within the regulatory functions of the Civil Aviation Authority (CAA), on the basis of the 2009 Air Navigation Order. The CAA publishes guidance as the 'Drone Code' for general users, and also supervises the statutory regulations, licencing and permissions process, as well as handling prosecutions for non-compliance

For unmanned aircraft systems (drones), different levels of restriction apply depending on the location of the airspace being used, the purpose of the use, and the mass of the device.

In summary the current regulations state that permissions are not needed where:

- the device has a mass of 20kg or less, and
- the operation is non-commercial
- the operation must not endanger anyone or anything
- the aircraft must be kept within the visual line of sight. This is normally taken to be 500m horizontally and 400 feet vertically of its remote pilot (the person in charge of it).
- the remote pilot has responsibility for satisfying his/herself that the flight can be conducted safely.

CAA permissions are required -

- for operations beyond the above distances,
- for small unmanned aircraft (irrespective of their mass) that are equipped for surveillance or data acquisition purposes, and so are subject to tighter restrictions, before commencing a flight within a congested area or in proximity to people or property.
- for all flights that are being conducted for aerial work (i.e. the operator is getting paid for doing it).

Failure to comply with the rules could lead to a criminal prosecution. A case at Westminster Crown Court in September 2015 saw the first instance of a prosecution in England for putting the public at risk by flying a drone over a busy built up area and in proximity to large assemblies of people.

Other legislative controls-

Other existing legislation provides further safeguards over concerns that have been raised over leisure use of drones. Data protection legislation means that the collection of images of identifiable individuals, even inadvertently, when using surveillance cameras mounted on small unmanned aircraft will be subject to the Data Protection Act's requirements covering the collection, storages and use of such images.

Existing wildlife legislation under the Wildlife and Countryside Act 1981 and the Habitats Regulations establish a range of criminal offences to prosecute deliberate or reckless disturbance or interference of wildlife. These offences would apply to any cases arising from an individual's inappropriate use of a drone. Breach of the peace provisions might also be relevant.

CAA Guidance – the “Drone Code”

The CAA has produced a number of information and promotional products to raise awareness of the rules and responsibilities when flying drones, including a short animated online guide which can be viewed at www.caa.co.uk/drones. The main messages of the “Drone Code” are:

You are responsible for each flight	You are legally responsible for the safe conduct of each flight. Take time to understand the rules - failure to comply could lead to a criminal prosecution .
BEFORE each flight, check drone for damage	Before each flight check that your unmanned aircraft is not damaged, and that all components are working in accordance with the Supplier's User Manual .
Drone is in sight at all times	You must keep the unmanned aircraft within your sight at all times.
YOU are responsible for avoiding collisions	You are responsible for avoiding collisions with other people or objects - including aircraft. Do not fly your unmanned aircraft in any way that could endanger people or property.

Keep your distance	It is illegal to fly your unmanned aircraft over a congested area (streets, towns and cities). Also, stay well clear of airports and airfields.
Keep your distance	Don't fly your unmanned aircraft within 50m of a person, vehicle, building or structure, or overhead groups of people at any height.
Consider rights of privacy	Think about what you do with any images you obtain as you may breach privacy laws. Details are available from the Information Commissioner's Office.
Permission to use drones for paid work	If you intend to use an unmanned aircraft for any kind of commercial activity, you must obtain a 'Permission' from the Civil Aviation Authority, or you could face prosecution. For more details, visit www.caa.co.uk/uas

The CAA publicises the Drone Code on its website, but it is not known what the level of awareness is among drone users of the CAA guidelines, or how far attempts have been made to encourage manufactures or retailers to provide information to purchasers on the regulations and responsibilities that apply.

There are established user representative groups and associations for model aircraft enthusiasts (eg British Model Flying Association; Scottish Aeromodellers Association), which can help to communicate messages to that interest group. We do not know if equivalent organisations or networks have emerged for leisure drone flying, which perhaps reflect the relative newness of the activity, or what users would gain from being a member of an organisation.

Detailed guidance on the regulations has been published by CAA – CAP722 Unmanned Aircraft System Operations in UK Airspace. The CAA acknowledges that these guidelines need to be kept under review and revised where necessary to respond to advances in technology and changes in application, recognised best practice and regulatory changes. As an aside, the CAA publishes separate guidance on the use of model aircraft – CAP658 Model Aircraft: A Guide to safe flying for sporting and recreational purposes. The main concern is around the use of model aircraft in regulated airspace or above a 400m vertical ceiling.

This paper provides a summary discussion of relevant regulations that apply to the flying of drones and offers a commentary on the relationship between the activity and access rights, with the usual caveat that neither SNH nor the National Access Forum is the legal authority and only the courts can provide a definitive position.