Greenspace governance: statutory solutions from Scotland?

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Greenspace Governance: statutory solutions from Scotland?

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ABSTRACT

The environmental, social and economic benefits provided by greenspace are well-documented, and the closure of other types of Third Place has popularised them further. Yet, public sector funding cuts have necessitated local authorities prioritising other facilities that they are statutorily obliged to provide, resulting in a facilities-hierarchy which leaves financially-neglected greenspaces facing a vicious circle of decline. The Big Society agenda has seen local authorities increasingly rely on the voluntary sector to help plug the funding gap, yet there are concerns that such groups are not immune from the effects of austerity themselves which limit their panacean abilities.

In exploring whether statute could provide any answers to these greenspace governance challenges, this article considers the lessons to be learned from the approach adopted in Scotland, underpinned by the Land Reform (Scotland) Act 2003 ('the 2003 Act'). In particular, the 2003 Act establishes public rights of access over most greenspace, a local authority duty to uphold these rights and local authority powers to take remedial action. Whilst there have been some issues in implementation, this article explores the potential for adopting a similar model in England & Wales to help secure the future of its greenspace infrastructure.

1. CONTEXT

Greenspace can take a multiplicity of forms: 'from tiny scraps of overgrown "waste" ground… to stone-paved civic squares, and from closely manicured sports pitches to the meadows, marshes and woodlands of urban Wildlife Sites.'[3] Yet, whichever of these guises is adopted, greenspace can support a spectrum of activities, including: conservation, sport, recreation, education, health-care, aesthetic pleasure, economic growth, flood-protection, combatting pollution and community cohesion.[4] Such numerous benefits make greenspace an increasingly popular resource,[5] particularly given the well-documented decline of other types of Third Place[6] such as sports facilities[7] and youth clubs[8] due to the austerity agenda and its associated local-authority budgetary cuts.[9]

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[3] A McCall and N Doar 'The State of Scottish Greenspace' (*Scottish Natural Heritage*, No 88, 1997) <http://www.snh.org.uk/pdfs/publications/review/088.pdf> accessed 22 September 2017, 2.

[4] Ibid; Greenspace Scotland, 'Greenspace and Quality of Life: A Critical Literature Review' (*Greenspace Scotland*, 2008) <http://www.openspace.eca.ed.ac.uk/wp-content/uploads/2015/10/Greenspace-and-quality-of-life-a-critical-literature-review.pdf> accessed 22 September 2017; Saraev V, 'Economic Benefits of Greenspace: A Critical Assessment of Evidence' (*Forestry Commission: Edinburgh*, 2012) <https://www.forestry.gov.uk/pdf/FCRP021.pdf/$FILE/FCRP021.pdf> accessed 18 October 2017; House of Commons Communities and Local Government Committee, 'Public Parks' (*House of Commons Communities and Local Government Committee*, 2017). <https://publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/45/45.pdf> accessed 18 October 2017.

[5] House of Commons Communities and Local Government Committee, 'Public Parks' (*House of Commons Communities and Local Government Committee*, 2017). <https://publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/45/45.pdf> accessed 18 October 2017.

[6] R Oldenberg *The Great Good Place: Cafes, Coffee Shops, Bookstores, Bars, Hair Salons and the Other Hangouts at the Heart of a Community*. (De Capo Press 1989).

[7] D Conn 'Olympic Legacy Failure: Sports Centres Under Assault by a Thousand Council Cuts' *The Guardian* (London, 5 July 2015) <https://www.theguardian.com/sport/2015/jul/05/olympic-legacy-failure-sports-centres-council-cuts> accessed 18 October 2017.

Despite its popularity, greenspace has been increasingly subject to a variety of different challenges in recent times, not least because of these dwindling public sector budgets,[10] the consequent prioritisation of statutory facilities[11] (such as adult social care[12] and waste-collection[13]) and the consequential creation of a facilities-hierarchy which sees some financially-neglected greenspaces facing a 'vicious circle of decline'.[14]

Local authorities are frequently turning to the voluntary sector to plug this funding gap.[15] Despite their enthusiasm,[16] it is recognised that volunteers are similarly vulnerable to the

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[8] A Topping 'Farewell Youth Clubs, Hello Street Life – and Gang Warfare' *The Guardian (*London, 29 July 2011) <https://www.theguardian.com/uk/2011/jul/29/young-people-gangs-youth-clubs-close> accessed 18 October 2017.

[9] P Butler and S Laville 'UK Council Cuts will Lead to More People Sleeping Rough, Charities Say' *The Guardian* (London, 21 January 2017) <https://www.theguardian.com/society/2017/jan/21/uk-council-cuts-more-people-sleeping-rough-charities-warn> accessed 18 October 2017.

[10] House of Commons (n 5).

[11] National Audit Office, 'The Impact of Funding Reductions on Local Authorities' (*National Audit Office*, 2014) <https://www.nao.org.uk/wp-content/uploads/2014/11/Impact-of-funding-reductions-on-local-authorities.pdf> accessed 18 October 2017.

[12] Pursuant to the Care Act 2014.

[13] Pursuant to the Environmental Protection Act 1990.

[14] House of Commons (n 5) at 31.

[15] R Jones 'Partnerships in Action: Strategies for the Development of Voluntary Community Groups in Urban Parks' (2002), 21 (3-4) *Leisure Studies*, 305-325.

[16] Heritage Lottery Fund, 'State of UK Parks 2016' (*Heritage Lottery Fund*, 2016) <https://www.hlf.org.uk/state-uk-public-parks-2016> accessed 18 October 2017.

effects of the austerity agenda and may therefore be incapable of providing the requisite, long-term panacea.[17]

Such problems presented by greenspace governance are shared by stakeholders across the globe. Environmental justice seems to be one of the most prevalent concerns, predominantly in respect of deprived communities and socially excluded groups.[18] Yet, whilst such common denominators are apparent in terms of the types of challenges faced, the approaches taken to address them vary considerably. This article briefly summarises strategies that have been adopted by two Commonwealth countries, New Zealand and Australia, before continuing to explore in detail the more recent regime that has been adopted in Scotland.

Established by the Conservation Act 1987, the Department of Conservation's work 'sits at the very heart of New Zealand's nationhood'.[19] With a vision to make 'New Zealand the greatest living space on Earth', this government body 'oversees the management of about a third of New Zealand's land area'.[20] Forming part of the government's Natural Resources Sector,[21]

[17] House of Commons (n 5); A Mathers, N Dempsey, and J Froik Molin 'Place-Keeping in Action: Evaluating the Capacity of Green Space Partnerships in England' (2015), 139 (July) *Landscape and Urban Planning* 126-136.

[18] Forest Research, 'Social and Environmental Justice' (*Forest Research*, no date provided) <https://www.forestry.gov.uk/fr/urgc-7eegj8> accessed 18 October 2017; ESRC, 'Environmental Justice: Rights and Means to a Healthy Environment for All', (*Friends of the Earth*, 2001) <https://www.foe.co.uk/sites/default/files/downloads/environmental_justice.pdf> accessed 18 October 2017.

[19] Department of Conservation Te Papa Atawhai, 'Statement of Intent 2016-2020 & Annual Report for the Year Ended 30 June 2016 (*Department of Conservation Te Papa Atawhai*, 2016) <http://www.doc.govt.nz/Documents/about-doc/annual-report-2016/annual-report-2016.pdf accessed 18 October 2017> accessed 18 October 2017, 13.

[20] Ibid.

the Department's remit is wide. Section 6 of the Conservation Act 1987 obliges its members to: manage resources for conservation, advocate their preservation, promote their benefits, foster their use for recreation and allow their use for tourism. In essence, the Department has a broad-based legislative mandate to protect and care for New Zealand's natural environment and heritage.[22]

Fulfilling these statutory duties in practice, the Department acts as a policy consultant for other Natural Resources Sector agencies. At a more operational level, it provides visitor facilities to encourage recreation and, underpinned by community engagement, supports other visitor experiences where there are high recreational/tourism values at stake. The Department also authorises third parties to use public conservation land for a spectrum of activities; from grazing to telecommunications operations.[23] Recognising that it cannot solve the multitude of conservation challenges alone, the Department has increasingly collaborated with other key stakeholders, for example from the education and tourism and recreation sectors, to 'gain efficiencies and make a stronger collective impact'.[24]

In Australia, greenspace governance is similarly underpinned by legislative duty. Rather than being imposed on a central government body, the responsibility instead falls to an agency, the Director of National Parks. Under the Environment Protection and Biodiversity Conservation Act 1999, the Director's statutory obligations include: managing and protecting biodiversity

[21] The Natural Resources Sector also includes: the Ministry for the Environment, the Ministry for Primary Industries, the Ministry of Business, Innovation, and Employment, Land Information New Zealand, Te Puni Kokiri, and the Department of Internal Affairs.

[22] Department of Conservation (n 20).

[23] Ibid.

[24] Ibid at 23.

and heritage in reserves and conservation zones, conducting relevant research, collaboration with other countries to establish and manage their national parks and reserves, and making recommendations to the Environment Minister.[25] Operationally, the Director is supported by Parks Australia, a division of the government's Department of Environment, which is specifically dedicated to providing 'healthy and resilient parks, gardens and marine reserves that protect nature and culture and are valued and enjoyed by the community now and into the future.'[26]

Whilst Scotland similarly responsibilises greenspace governance through statute, the duties are not imposed on either central government or agency but have been devolved to a broad spectrum of local greenspace stakeholders, including local authorities, landowners and those who access their land. Yet, in England & Wales, there is neither statutory greenspace governance nor any devolution of its associated responsibilities despite the political agenda of a 'Devolution Revolution'.[27]

In analysing whether there is an opportunity for England & Wales to adopt Scotland's greenspace model, this article explores the circumstances which led to the introduction of the

[25] Australian Government Department of the Environment and Energy, 'The Director of National Parks' (*Australian Government*, 2017) <http://www.environment.gov.au/topics/national-parks/parks-australia/director-national> accessed 22 September 2017.

[26] Australian Government Director of National Parks, 'Director of National Parks, 'Annual Report 2014-5' (*Australian Government*, 2015) <https://www.environment.gov.au/system/files/resources/c2ee8dd0-2198-4b8a-8f5f-1f4e77899352/files/dnp-annual-report-web.pdf> accessed 19 September 2017, iv.

[27] Gov.UK, 'Radical Shake-Up of Power Puts Communities in Control' (Gov.UK, 2016) <https://www.gov.uk/government/news/radical-shake-up-of-power-puts-communities-in-control> accessed 22 October 2017.

new regime, analyses key greenspace governance provisions and evaluates whether the 2003 Act has achieved its aims.

2. THE LAW REFORM (SCOTLAND) ACT 2003

Backdrop

In its 2003 Review, the Scottish government noted greenspace's 'impact on the… sustainability… and… quality of the cityscape'. Recognising that there was 'a paucity of information' about people's use of greenspace, it called for 'a better understanding of how people in cities interact with their environment.'[28]

Several years beforehand, Scottish National Heritage (SNS) reported how a surge in development activities was eroding Scotland's greenspace. In bids to generate additional income, local authorities, schools and hospitals were enticed into selling off their greenspaces to developers. In addition, their Report noted that some of Scotland's greenspace portfolio was either subject to access issues and/or was deemed to be unsafe due to 'low quality, unimaginative or inappropriate management.'[29]

Criticising the system for its lack of central guidance and consequent inconsistencies in approach, SNS also recognised the importance of collaboration, suggesting that 'protection through the planning system [could only be] part of the story'.[30] Reflecting New Labour policies, which placed communities at the heart of decision-making processes around public

[28] Scottish Government, 'A Review of Scotland's Cities - the Analysis' (*Scottish Government*, 2003) <http://www.gov.scot/Publications/2003/01/15950/15155> accessed 22 September 2017.

[29] A McCall and N Doar (n 3) at 2.

[30] Ibid at 4.

services,[31] SNS recommended a form of subsidiarity because 'projects which originate from a community wanting to improve their own environment will be more successful than those thought up elsewhere and imposed on a local area.'[32] Drawing its key findings together, SNS called for an overarching approach to greenspace governance which would be spearheaded by National Planning Policy Guidance and underpinned by sufficient resources.[33]

Following manifesto pledges to support tourism, benefit public health and clarify confusion over existing public rights to access private land, the Labour government committed itself to creating a new legislative framework for greenspace governance. Yet, despite the commonality in objectives, Mackay[34] notes that there was a dichotomy of approach and the resulting regimes differed greatly. In England & Wales, Part 1 of the Countryside & Rights of Way Act (CRoW) 2000 facilitated a regulatory regime which involved the precise specification of permitted public access rights on detailed maps. In Scotland, the 2003 Act exhibited more inclusive tactics by subjecting all of Scotland's greenspace to public rights, save for limited exceptions, enabling a 'social obligation norm and… series of virtue-

[31] Office of the Deputy Prime Minister, *Participatory Planning for Sustainable Communities: International Experience in Mediation, Negotiation and Engagement in Making Plans* (2003); Office of the Deputy Prime Minister, *Improving Delivery of Mainstream Services in Deprived Areas: The Role of Community Involvement Research Report*' (2005); Imrie, R., and Raco M., eds. *Urban Renaissance? New Labour, Community and Urban Policy* (Policy Press, 2003); Albrechts, L., 'The Planning Community Reflects on Enhancing Public Involvement' (2002) 3(3) *Planning Theory and Practice*, 332‑347.

[32] A McCall and N Doar (n 3) at 4.

[33] Ibid at 5.

[34] J Mackay 'New Legislation for Outdoor Access: A review of Part 1 of the Land Reform (Scotland) Act 2003' (2007) 59 Spring, *Scottish Affairs* 1-29.

orientated standards of behaviour.'[35] Similarly, whilst England and Wales *prescribed* permitted behaviour on access land, Scotland more generally *responsibilised* those exercising such rights. Finally, whereas England & Wales limited greenspace access rights to those on foot who were seeking outdoor recreation, Scotland enabled access for a range of purposes including: access, education and commerce, in addition to recreation. Perhaps most pertinent is the difference between CRoW 2000's omission to include any statutory responsibility for greenspace provision (instead focusing on public access rights only) and the 2003 Act's encompassment of both aspects within its remit. Such an atypical approach, which combines both a legislative duty and devolution of responsibility, warrants more detailed consideration to establish the merits of calling for a similar framework in England & Wales.

Key provisions of the 2003 Act

Creating 'a framework for a social contract between those exercising rights and those who manage land',[36] the 2003 Act is constructed around five key principles: responsibilised rights, reciprocity, inclusivity, minimal regulation and a separate, operational code (the Scottish Outdoor Access Code). In shifting the balance of rights from the landowner to the public, this 'socially forward-looking' approach reflected one of the Scottish government's key aims which was to foster civic responsibility.[37]

Examining the 2003 Act in more detail, Part 1 simultaneously creates public access rights over most of Scotland's greenspace whilst imposing a specific statutory duty on local

[35] J, A Lovett 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska Law Review* 301, 739.

[36] J Mackay (n 35) at 4.

[37] Ibid at 20.

authorities to sustain such rights, even where they neither own nor manage the land, and to protect such rights through making legal challenges, as appropriate.

To complement such duties, the 2003 Act also provides local authorities with greenspace management powers, for example through the modification of facilities to ensure compliance with equality laws, thereby safeguarding access for all. In addition, s. 11 of the 2003 Act enables local authorities to balance access-facilitation against the recognition of local customs by exempting designated land from access rights for specified periods to enable such activities to take place.

Despite the seemingly wide-ranging extent of both these duties and powers, s. 13(2) of the 2003 Act clarifies that there is no requirement on local authorities to take any action which would conflict their other obligations. This would enable them, for example, to grant conditional planning consent to protect such access rights on a permitted development.

Furthering the Scottish government's desire to responsibilise the community, s. 13 requires collaboration between local authorities and greenspace stakeholders in greenspace governance, for example through the creation of local, public forums to help guide legislative implementation and facilitate dispute-resolution (s. 25).

These local authority duties are supported by ss. 14 and 15 which together prohibit landowners from preventing or deterring the exercise of access rights and enable local authorities to take remedial action in case of non-compliance. In addition, s. 15(2) enables local authorities to warn against dangers on access land, requiring landowners to take corrective action to remove anything which may likely cause injury to someone accessing

their land. Conversely, these provisions also enable individuals to take action against local authorities for non-compliance.

To avoid criticisms of discrepancies and stagnation which could otherwise be levied at this localised approach, the Scottish government provides centralised guidance, through their Scottish Planning Policy series (SSP), which local authorities are *required* to take account of when preparing their development plans. In a similar vein to ensure consistency, s. 30 of the 2003 Act required a review of all relevant byelaws that had been created within the previous two years.

3. SINCE THEN…

An initial reaction

Through the elevation of public access rights to statutory status, the 2003 Act better equipped Scotland's greenspace stakeholders to access funding. It facilitated a more coherent narrative with other policies which depend on access to greenspace, for example, tourism and public health. Despite these positive outcomes, Mackay recognised that such a 'shift in the legal presumption on access from the public to the private interest' could concern landowners, who may be anxious that the 2003 Act may erode their rights of ownership, increase their liabilities, disturb their operations, leave them more exposed to criminal activity and limit public body support. Mackay also noted potential for disconnect between the 2003 Act's aspirations and public behaviour in reality.[38]

In seeking to appease such concerns, Mackay firstly referred to the 2003 Act's notion of responsibility; stating unequivocally that 'those who act irresponsibly have no rights' and

[38] J Mackay (n 35).

therefore landowners should have nothing to fear.[39] He specifically cited s.5(2) of the 2003 Act in support which makes clear the legislature's objective to clarify the rights available, rather than increase liabilities. Whilst the 2003 Act does expand the area of land over which public rights of access can be exercised, and therefore the landowner's liabilities in protecting against any hazards, Mackay believed that landowners should take reassurance from the courts' tendencies to adopt a lenient approach in their favour.[40] In assuaging concerns about increased exposure to criminal activity, Mackay suggested that criminals are generally indifferent as to their legal status for accessing land, and therefore the extension of land over which public rights can be accessed should make no difference to their behaviour. Finally, in addressing landowners' anxieties concerning disruption to their daily operations, Mackay argued that the clarity produced by the 2003 Act should help rather than hinder them in tackling some of the operational problems that they face in practice.

In reviewing the new regime two years after its implementation, Mackay noted a general compliance and that cases which had reached the Sheriff Court would have done so regardless. Whilst Mackay predicted some future impediments to implementation, for example through conflicting stakeholder objectives and testing of thresholds, he suggested that these would just be 'shadowy threats, and a positive welcome to this forward-looking legislation is well justified'.[41]

A longer-term view

[39] Ibid at 20.

[40] Ibid; Scottish Natural Heritage http://www.snh.org.uk/pdfs/publications/review/074.pdf accessed 27 October 2017.

[41] J Mackay (n 35).

To establish whether Mackay's positive predictions were correct, the legislation could potentially be evaluated against Cohen's tripartite model of legisprudence, which asks '(1) whether its avowed purpose or purposes have been efficiently achieved; (2) whether it is consistent with other expressions of overall legislative policy; and (3) whether it is morally justifiable.'[42]

First, the introduction to the 2003 Act indicates that part of its purpose was to 'establish statutory public rights of access to land for recreational and other purposes, and to extend some of the provisions for that purpose to rights of way and other rights'. Yet, Cohen admits that properly evaluating such legislation against this fit for purpose criterion would require a resource-heavy, technical, empirical evaluation and specially trained skills'[43] which is beyond the scope of this doctrinal paper.

Cohen's second measure of evaluation, that of consistency with overall legislative policy, is an important one; Cohen notes that any 'inconsistency is disruptive, produces uncertainty and often results in claims of injustice and disrespect for law'.[44] Furthermore, Cohen points out that the judiciary's ability to correct any such deficiencies in their interpretation cannot be relied on as a panacea. In assessing the 2003 Act against this second criterion, it is clear that a key element of Scotland's approach to greenspace governance is its non-statutory, Scottish Parliament-endorsed Code which is used to flesh out the 2003 Act's skeletal framework and clarify how the statutory obligations and powers are to be implemented in practice. Reflecting

[42] J Cohen 'Legisprudence: Problems and Agenda' (1983) 11(4) *Hofstra Law Review* 1163, 1178.

[43] Ibid at 1179.

[44] Ibid.

Cohen's need for consistency, this close relationship between statute and policy is also similarly mirrored between the Code and related central policies, for example tourism as discussed earlier.

Finally, it can be argued that the 2003 Act meets Cohen's third criterion, that of morality, because it elevates public rights of access to greenspace to a statutory level in accordance with environmental justice principles.[45]

Legisprudence philosophies aside, perceptions of the 2003 Act's success would also equate with the 'increasing evidence that places developed with the active participation of local people meet their needs better.'[46] Such 'place-attachment'[47] could help to thwart the downward spiral of greenspace decline[48] (referred to earlier) by fostering an upwards cycle of increasing engagement with, and respect for, greenspace.

In presenting a balanced view, it should be noted that the implementation of the 2003 Act was not without its problems. First, both Greenspace Scotland and Scottish Natural Heritage noted that 'many councils' had not developed open space audits, strategies and standards, and

[45] Forest Research (n 19).

[46] Greenspace Scotland, 'Greenspace and Quality of Life: A Critical Literature Review' (*Greenspace Scotland*, 2008) <http://www.openspace.eca.ed.ac.uk/wp-content/uploads/2015/10/Greenspace-and-quality-of-life-a-critical-literature-review.pdf> accessed 22 September 2017 8.

[47] Ibid.

[48] House of Commons (n 5) at 31.

were 'struggling to find an appropriate approach.'[49] In response, Greenspace Scotland developed a framework for the creation of local authority benchmarks to cover 'open space quantity, quality and accessibility' which would universally 'appl[y] to new developments and existing areas, [link] directly to local… assessments of open space provision [and take] account of the nature and condition of the area around proposed developments.'[50]

Secondly, there were still criticisms about a lack of information about the extent of greenspace statutory duties and enforcement powers.[51]

Thirdly, there were concerns whether the Local Access Forums provided an effective dispute resolution mechanism, particularly given the complex, expensive process involved in escalating commonplace issues, such as dog fouling, to the Sheriff Court.[52] In response, the Land Reform Review Group has recommended referrals to generic alternative dispute resolution mechanisms, such as mediation and arbitration.

Overall, whilst the Group judged 'the new statutory framework [to be] a considerable achievement that has delivered significant public benefits',[53] it recognised the need for its

[49] Greenspace Scotland ' Developing Open Space Standards Supplementary report' (A Combined Report for SNH/Greenspace Scotland Projects Ref: 32040 and 47243, June 2013) (*Greenspace Scotland*, 2013) <http://www.snh.gov.uk/docs/A1018182.pdf> accessed 22 September 2017, 2.

[50] Greenspace Scotland, 'Developing Open Space Standards' (*Greenspace Scotland*, 2011). <http://greenspacescotland.org.uk/1greenspace-standards.aspx> accessed 22 September 2017.

[51] Garner, R. (2008), *Outdoor Access and the Planning System (2008). Report title. Scottish Natural Heritage Commissioned Report No. 307 (ROAME No. R07 AA 609).* Feb, available at: http://www.snh.org.uk/pdfs/publications/commissioned_reports/307%20-%20Outdoor%20Access%20and%20the%20Planning%20System.pdf (accessed 16 August 2017).

[52] The Land Reform Review Group, 'The Land of Scotland and the Common Good' (*The Land Reform Review Group*, 2014) <http://www.gov.scot/Publications/2014/05/2852> accessed 11 October 2017.

[53] Ibid at 210.

associated Code to be updated, elucidated and honed to reflect the experiences of those tasked with implementing and enforcing it. In doing so, the Group identified inherent problems in changing the Code too early before it has had chance to embed itself, and suggested that educational programmes would provide a better short-term solution.

4. A MODEL FOR ENGLAND & WALES?

If aspects of Scotland's greenspace governance model were to be adopted in England & Wales, the distinctions between their cultural and political backdrops would need consideration. As Mackay notes,[54] first, the Scottish Parliament engaged a range of key stakeholder bodies, including Scottish Natural Heritage, Justice 2 Committee and Ramblers Scotland, to encourage broad deliberations. Secondly, its unicameral structure enabled it to debate the issues in an open forum. Thirdly, its identification of the theme of land reform in its first session helped to drive forward legislative change.

The current dichotomy of strategy also needs consideration; whilst Scotland has adopted a universalist approach to access to land, England & Wales currently operate a partialist model. Whether England & Wales are willing or able to offer a similarly unlimited, geographical scope to access is questionable, but should not deter consideration of the needs to access identified greenspace.

The 2003 Act has additionally required a modification of approach by the Scottish courts which are faced with developing contextualised methodologies in their statutory interpretation. This has been evidenced in cases including *Gloag v Perth & Kinross*

[54] J Mackay (n 35) at 21-2.

Council,[55] *Tuley v Highland Council*[56] and *Forbes v Fife Council*[57] but has largely resulted in reasonable and doctrinally credible results. If aspects of the Scottish greenspace model were to be adopted in England & Wales, the judiciary could adopt similar practices.

Another difference between the two approaches concerns areas used for sporting activities. In England & Wales, golf courses and racecourses are excluded from free access, whereas in Scotland these areas, such as those used as playing fields and for grass sports, are freely accessible where the land in question is not in active use. The prohibition of use only applies where it would interfere with the recreational use to which the land is being put. Further, as Lovett[58] identifies, in principle the Scottish public may pass over golf courses provided that they do not interfere with an actual game or walk across the 'green.'

Clearly, any new legislative initiative granting access to greenspace in line with the 2003 Act would have to be reconciled with the CRoW 2000. The CRoW 2000 limits access to land through identification in five distinct categories, and the right to roam freely in mapped open country, mountain land, and coastal land. Mapped open country is land which is identified as such on a map issued by the appropriate 'countryside body.' This is mountain, moor, heath or down, and not registered common land. Here, a key difference in terminology would need to be addressed. The lay person will understand the designation of land as 'mountain, moor, heath or down' as that which is typically seen in relation to the highlands in many parts of the UK, often near to the coastline. The CRoW 2000 adopts a negatively exhaustive rather than

[55] *Gloag v Perth & Kinross Council and The Ramblers Association* [2007] SCLR 530, Sh Ct Perth.

[56] *Tuley v Highland Council* [2009] CSIH 31.

[57] *Forbes v Fife Council* [2009] SLT (Sh Ct) 71.

[58] J, A Lovett (n 36).

illustratively definitional structure. Here. mountain, moor, heath or down land excludes that 'which appears to the appropriate countryside body to consist of improved or semi-improved grassland.'[59] This, by its nature, implies that land, not subject to any kind of agriculture or intensive grazing activity, is to be considered as access land.[60] Thus, significant portions of agricultural land, fields, forest areas, and parkland, would be disqualified from inclusion.

Mountain land, a subdivision of open country land, is more effectively defined as being land situated 600 metres or more above sea level in an area for which a conclusive map has not been issued. This too, however, limits access through CRoW 2000 as those mountain areas below 600 metres are exempt from public access until they are included on conclusive maps as 'open country.'

Coastal land refers to land adjacent to the shore and the foreshore itself, including beach areas, dunes, cliffs and so on. This provides recreational routes along the entire coastline of England. As such, it is evident that the CRoW 2000 has been a useful mechanism to provide access to greenspace yet, even when fully implemented, the CRoW 2000 provides 'access land' consisting of approximately 8-12% of all land in England & Wales.[61] This percentage is significantly less than the responsible access to land provided for in Scotland through the 2003 Act.

The comparison between the English CRoW 2000 and the Scottish 2003 Act may be seen in the tightness of the wording and the scope for subsequent judicial interpretation. 'One of the

[59] CRoW 2000 s. 1(2).

[60] See J, A Lovett (n 36) for more discussion on this topic.

[61] Ibid at 781.

most vexing and pervasive problems facing legislative rule-making bodies is the inherent inability to frame rules that exhaust beforehand all of the particular cases to which they should be applied.'[62] Indeed, of course, exhausting rules through the establishment of a framework may not be an intention of the legislator. It is evident that, in many instances, the 2003 Act is content with disputable matters to be determined by the parties, and only then should the judiciary offer guidance. Whilst not of concern to the remit of this paper, the comparison between the CRoW 2000 and the 2003 Act in relation to the interpretations and scope of private space surrounding homes and residences is telling in the approach and flexibility permitted in both legislative instruments. The CRoW 2000 identifies a specific boundary line to access to land, where it exempts access to land within 20 metres of a dwelling and (admittedly less specifically) land used as a park or garden. Conversely, s. 6(1)(b)(iv) of the 2003 Act provides that the public can access land, in relation to a house or other place providing a person with shelter or privacy, but at a distance which will '… enable persons living there to have reasonable measures of privacy… to ensure that their enjoyment of that house or place is not unreasonably disturbed.' The term 'unreasonably' is open to discretion, yet the 2003 Act enables local authorities, landowners and the members of the public concerned to identify parameters of reasonableness. Where these parties cannot make an adequate determination, recourse to the courts is available. This is perhaps not ideal as it can lead to inconsistent application which '… produces uncertainty and often results in claims of injustice and disrespect for law. At times, judicial principles of statutory construction are not sufficiently elastic to correct such defects, and disharmony, accordingly results'.[63] Further, relatively little interpretive assistance is provided in the 2003 Act. It

[62] J Cohen (n 43) at 1168.

[63] Ibid at 1179.

appears that Scotland is willing to allow the parties' significant discretion in negotiating and contextualising the issue of privacy and reasonable behaviour. This is not necessarily a positive feature of the law and, were England & Wales to adopt a modified version of the 2003 Act, consideration of the developing issues from case law may have to be factored into legislative deliberations.

In *Gloag v Perth & Kinross Council*, the court considered the amount of land a landowner required for their privacy in barring the public from accessing gardens and woodlands surrounding a home. The landowner was a successful businesswoman who wished to erect a six-foot high, barbed wire fence across eleven acres of her property within which stood her home – Kinfauns Castle. The fence would also include woodlands, pathways and recreational areas including a children's play area. The issue for the Council, first defendants who were under the statutory duty to administer the 2003 Act, was that the landowner was attempting to enclose too much land. The case was decided in favour of the landowner but, somewhat surprisingly, the court dealt first with the issue of the 'genuineness' of the (second) defendants (a Rambling Association) and the distinctions between the case being brought in good faith, on the basis of access taking, or due to 'voyeurism.' The 2003 Act does not require such an assessment, indeed it is perhaps closer to the reading of the Act to remark that this approach contradicts the line of enquiry,[64] yet it has appeared in subsequent cases. The next significant aspect of the ruling was in the assessment of the landowner and their characteristics. Here, the landowner wished to argue that the status of both herself and the guest who visited her property should be taken into consideration. The court disagreed and adopted instead a more objective test when determining 'reasonable measures of privacy,' yet then proceeded to consider the issue of 'sufficient adjacent land,' by referring to what a

[64] s. 6(1)(b)(iv).

'reasonable person living in *a property of the type under consideration* would require' (authors' emphasis). Consequently, the type of house, its value and the expectations of the landowner appear to be relevant considerations. The assessment may therefore be the more expensive the property, the greater the privacy to be expected. The objective nature of the reasonable man standard seems to have shifted to a more subjective variant, and nowhere in the 2003 Act is this expressed.

Case law has further considered the issue beyond where a person may access land to how it may be accessed. Thus, as with *Gloag v Perth & Kinross Council* where the landowner wished to erect fences, does a fence, hedge, notice etc. prevent or restrict access to land as a primary aim or one which is merely a secondary effect (for example where a hedge acts for the enclosure of livestock). Section 14 of the 2003 Act is breached through actions (as noted above) which have the 'purpose or main purpose of preventing or deterring' persons from exercising access rights. For Lovett, the cases (such as *Tuley v Highland Council* and *Forbes v Fife Council*) have '… demonstrated [a] willingness to open the door even more widely to subjective, and sometimes even speculative, inquiries into the personal circumstances and motivations of landowners...'[65]

The two legislative instruments also differ in relation to the extent to which the person has access to enter and remain on land. For instance, the CRoW 2000 provides a person with rights to enter and remain on access land, with the purpose of open-air recreation, where that person does not break or cause damage to a series of items including walls, fences and hedges etc., and that the person observes the general and/or specific restrictions applicable to the area they visit. Yet the CRoW 2000 refers to individuals accessing land on foot (save for the

[65] J, A Lovett (n 36) at 808.

exception of those persons using wheelchairs). Thus, other means of transport including cycling, skating horseback riding and possibly even the use of 'Heelys' may be excluded as legitimate forms of access. As noted above, the 2003 Act grants access rights to everyone to go on, pass over and remain on the land for recreational purposes – which is a more inclusive, albeit undefined term than 'open-air' recreation as used in CRoW 2000; for carrying on a relevant educational activity; and for carrying on one of these previously permitted purposes for the reasons of a commercial or for-profit endeavour. These guarantees are not certain in the CRoW 2000 and may therefore restrict the activities of personal trainers, commercial park-run organisations, even professional photographers etc. from taking advantage of the statutory rights available in Scotland.

In speculating whether it would be appropriate for England & Wales to adopt aspects of the Scottish model, we can utilise some of Mackay's criticisms which were levied against the 2003 Act. First, whilst the approach taken to introduce skeletal legislation which is then fleshed out in more detail through a non-statutory Code is commendable for its flexibility, it could cause issues around uncertainty. In particular, Mackay noted that the 2003 Act's use of 'open wording, such as responsible, reasonable, and taking proper account of' may cause problems in interpretation, and therefore clarity.[66] He also identified three specific aspects of the legislation which could cause pellucidic problems: first, as previously mentioned, the omission of a statutory definition of 'recreational purposes'; secondly, the unclear extent of the 'zone of privacy' around residential dwellings, and the nature of the rights that can be exercised there; and thirdly, ambiguity about the degree to which the rights of access can be used for commercial activities for either recreational or educational purposes. Mackay also

[66] J Mackay (n 35) at 23.

identified issues around awareness of the extent of the new regime but argued that none of these uncertainties should be considered to be 'a fatal flaw'.[67]

Recommending Scotland's approach for supporting, rather than governing, 'daily interactions between people', Mackay noted that its successful implementation stems from its dependence on 'the good sense and goodwill' of greenspace stakeholders. Citing the Foot and Mouth epidemic in 2000-1, he suggests that Scotland's legislative tactics work particularly well with greenspace governance because those participating in outdoor activities tend to do so with good intentions; any problems tend to occur as a result of misunderstandings or carelessness. Favouring a collaborative approach to greenspace governance, Mackay points out that if any 'serious transgressions [do] arise, 'there are ample, existing provisions in other criminal law, without creating new statutory sanctions'.[68]

CONCLUSIONS

The greenspace governance challenges facing England & Wales have not been fully addressed in the CRoW 2000. This article has sought to reflect on the open access to land provisions of the 2003 Act and assess whether it is a model which could be reproduced beyond Scotland. The issue of access to land in the 2003 Act has demonstrated a fundamental shift in the balance between public and private interests in land, adopting as it does a Scandinavian approach to its function.[69] There are undoubtedly interesting approaches to

[67] Ibid at 24.

[68] Ibid at 25.

[69] C Warren (2010) *Managing Scotland's Environment* (2nd Edition). Edinburgh: Edinburgh University Press., 277.

regulation of the space, the mechanisms of resolving disputes between parties, and how the judiciary have begun to develop their jurisprudence in the absence of clear statutory guidance. Commentators have identified the problems experienced by stakeholders through the application of the 2003 Act,[70] and divisions exist between the current statutory provision in England & Wales and that for Scotland. Yet despite the inconsistencies between the jurisdictions and the potential problems in creating a modified version of the 2003 Act for England & Wales, the benefits for the population and the scope for judicial activism in developing effective and protective greenspace governance are evident. A land reform Act for England & Wales may provide stakeholders, landowners and local authorities with the tools necessary to ensure access to greenspace is recognised, established and maintained.

[70] B Slee, K Brown, K Blackstock, P Cook, J Grieve and A Moxey (2008) '*Monitoring and Evaluating the Effects of Land Reform on Rural Scotland: A Scoping Study and Impact Assessment*' Scottish Government Social Research.