

Travel for outdoor recreation – the Scottish Government’s latest coronavirus restrictions

Description

This post takes a critical look at the new laws on travel that the Scottish Government introduced last week and their implications for outdoor recreation, in all its forms. I argue that the restrictions would, if interpreted by the police and courts as the Scottish Government apparently intends, be unjustified and discriminatory and fail to respect our fundamental human rights and therefore need to be changed.

The new regulations

On 2nd November, the Scottish Government introduced a new system for trying to control Covid-19 in Scotland consisting of five different levels or tiers of restrictions based on Local Authority areas. Legally these were given express by The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020. Alongside these, the Scottish Government issued advice about travel between areas subject to different levels of restrictions. On 10th November Nicola Sturgeon told the Scottish Parliament that the Scottish Government was looking to put that advice into law.

The third version of the regulations, which came into force at 6pm on Friday, introduced the new laws, with widely announced provisions “Restrictions on Movement”, for people living in Tier 3 and Tier 4 areas, and travel between England and Scotland.

Title	Years and Numbers	Legislation
The Mandatory Use of Closed Circuit Television in Slaughterhouses (Scotland) Regulations 2020	2020 No. 384	Scottish Statutory Instruments
The Land Reform (Scotland) Act 2016 (Commencement No. 11) Regulations 2020	2020 No. 383 (C. 33)	Scottish Statutory Instruments
The Valuation Appeal Committee (Procedure in Civil Penalty Appeals) (Scotland) Regulations 2020	2020 No. 382	Scottish Statutory Instruments
The Animal Health and Welfare and Official Controls (Agriculture) (EU Exit) (Scotland) (Amendment) Regulations 2020	2020 No. 380	Scottish Statutory Instruments
The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 (Commencement No. 1 and Transitional Provision) Regulations 2020	2020 No. 379 (C. 32)	Scottish Statutory Instruments
The Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 23) Regulations 2020	2020 No. 378	Scottish Statutory Instruments
The Coronavirus Act 2020 (Suspension: Adult Social Care) (Scotland) Regulations 2020	2020 No. 377	Scottish Statutory Instruments
The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees) (Coronavirus) (Amendment) Regulations 2020	2020 No. 376	Scottish Statutory Instruments
The Scottish Parliament (Constituencies and Regions) Order 2020	2020 No. 375	Scottish Statutory Instruments
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 2) Regulations 2020	2020 No. 374	Scottish Statutory Instruments

Snapshot of published regulations 8.15am on Monday. Note the bottom entry, the second version of Restrictions and Requirements Regulations, which was published on 13th November. The No 3 Regulations were nowhere on the list.

The final regulations were not published until 9am on Monday ([see here](#)) which meant that if you had wanted to check whether travelling somewhere was legal or not, you would not have been able to do so over the weekend. This is quite important because of the way that the Scottish Government has throughout the corona crisis muddled “advice” with “rules”. On Friday, for example, my partner and I drove east to the Moorfoots, believing this might be our last opportunity to go for a hillwalk outside Glasgow. This broke government advice, but not the rules. We were concerned that had we returned to Glasgow after 6pm we might have broken the law as the Scottish Government had said no-one residing in a tier 3 or 4 area should travel more than 5 miles outside that area for exercise.

A first reading of the regulations suggested we were right to be concerned. The legislation makes it an offence to leave a Tier 3 or Tier 4 area without a reasonable excuse. It then provides a list of reasonable excuses, including:

- (t) exercise outdoors, provided that the exercise—
 - (i) is not organised, and
 - (ii) starts and ends at the same place, which place must be—
 - (aa) in the local government area in which the person lives, or
 - (bb) within 5 miles of such local government area,

This clause accurately reflects previous government advice BUT what I had not realised was that, as in March, the Scottish Government would follow the UK Government and include this in a NON-EXHAUSTIVE list of reasonable excuses for not observing the restrictions. This meant that as long as we could have provided OUR OWN reasonable excuse for going for a walk in the Moorfoots it would not have been a criminal offence had we returned after 6pm.

Physical exercise or outdoor recreation?

During the first lockdown, I commented on several occasions about the differences between physical exercise and outdoor recreation and why it was wrong to allow people to leave their homes for physical exercise but not for outdoor recreation more generally ([see here for example](#)). Despite the evidence of the adverse impacts that these original restrictions have had on the mental well-being of the population, the Scottish Government has still chosen to frame the new restrictions in terms of “exercise”. According to the government list of accepted reasonable excuses, you can leave your council area for informal exercise but not for informal outdoor recreation.

The words are important. While the regulations define lots of terms, they don’t define “outdoor exercise”, so I think we can take it that the intention was it should have its ordinary language meaning. That is very different to “outdoor recreation” and much narrower. What the Scottish Government is effectively saying is that you have to travel five miles out of your Council area to start to walk, cycle or run but not to sit on a beach, look at a view or go fishing. In between these two ends of the spectrum, outdoor exercise and generally inactive outdoor recreation, there are many shades of grey. Most people, for example, walk for recreation as well as exercise and will stop to look at a rock, bird or flower, or to have a talk. If you go by the official listed reasonable excuse, it would appear that if you travel five miles out of a tier 3 or 4 area to walk your dog that is fine. But only so long as you keep moving and don’t stop to talk to another dog walker (suitably distanced of course)!.

Unfortunately the Scottish Government appears to have learned nothing since March. This contrasts with what has happened in England where the law ([see here](#)) now officially recognises “open air recreation”:

Exception 1: leaving home necessary for certain purposes

(2) Exception 1 is that it is reasonably necessary for the person concerned ("P") to leave or be outside the place where P is living ("P's home")—

- (a) to buy goods or obtain services from any business or service listed in Part 3 of the Schedule, for—
 - (i) P or for those in the same household,
 - (ii) vulnerable persons, or
 - (iii) persons in the same household as a vulnerable person;
- (b) to obtain money from or deposit money with any business listed in paragraph 43 or 44 of the Schedule;
- (c) to take exercise outside—
 - (i) alone,
 - (ii) with—
 - (aa) one or more members of their household, their linked household, or
 - (bb) where exercise is being taken as part of providing informal childcare for a child aged 13 or under, one or more members of their linked childcare household, or
 - (iii) in a public outdoor place, with one other person who is not a member of their household, their linked household or their linked childcare household,

and paragraph (3) applies in determining whether a person is complying with the limits in this sub-paragraph;

- (d) to visit a public outdoor place for the purposes of open air recreation—
 - (i) alone,
 - (ii) with—
 - (aa) one or more members of their household, their linked household, or
 - (bb) where exercise is being taken as part of providing informal childcare for a child aged 13 or under, one or more members of their linked childcare household, or
 - (iii) with one other person who is not a member of their household or their linked household,

and paragraph (3) applies in determining whether a person is complying with the limits in this sub-paragraph;

At first sight these regulations might appear more restrictive than in Scotland because the reference point for limiting movement is still defined by where a person is living rather than their Council area. However, in England, there are now no rules restricting a person to their council area. This means that people in England are deemed to have a reasonable excuse if they travel (away from their house and outside of their area) to sit on a beach, enjoy a view or go fishing. Accommodation may have been shut down but people living in the towns in the north of England can still visit the Peak District, Lake District, Pennines etc for the day. Officially, far greater freedom for outdoor recreation is now tolerated in England than in Scotland.

The travel restrictions

The reasonable excuse listed by the Scottish Government that states it's acceptable to travel 5 miles outside tier 3 and 4 council areas for outdoor exercise is highly discriminatory, both in theory and in

practice.

In theory there are 27 official reasonable excuses for leaving a Tier 3 area and 24 excuses for leaving a Tier 4 area. (The difference is that it is not a reasonable excuse to travel outwith a Tier 4 area to donate blood, to take part in organised sport if you are under 18 or to have a driving lesson/test). Outdoor exercise, is the **ONLY** listed reasonable excuses which places any limits on travel. You can travel as far as you want for work, volunteer, buy food etc but not to go out into the countryside for outdoor recreation. This is incoherent. Based on the scientific evidence, outdoor recreation is less likely to spread Covid-19 than any of these other permitted reasons for travel (apart from checking a house where the risks are similar), as these all involve people meeting others indoors, where there are far higher risks.

In practice, the way the reasonable excuses are framed also impacts on people unequally, depending on their preferred forms of outdoor recreation and the accidents of how Council boundaries are drawn. For example:

- Road cyclists resident in Tier 3 and 4 areas are relatively little affected because as long as they are doing exercise they can cycle as far as they want. By contrast, hillwalking and mountaineering have become almost impossible for many people living in Tier 3 and Tier 4 areas in the central belt
- For hillwalkers and mountaineers living in Tier 3 Stirling, however, which has miles of hinterland, there are numerous options within their local authority area. For people whose solace is a visit to the beach, those living in North or South Lanarkshire or East Renfrewshire have had their lives turned upside down, while those who live in Edinburgh can just about manage. Broadly speaking, within Tier 3 and Tier 4 areas, those who live in small local authorities by geographical area or the densely populated cities with little countryside within their boundaries are far more affected by the Scottish Government's list of reasonable excuses than those who don't.

The Scottish Government's list of reasonable excuses and Human Rights law

Under Human Rights law any restrictions on civil liberties such as freedom of movement must be necessary and proportionate to prevent some greater harm, in this case the spread of Covid-19.

To accompany the new regulations the Scottish Government has this week published a 28 page "Final Impact Assessment" ([see here](#)) entitled "*Scotland's Strategic Framework: Travel within Scotland and to/from the Common Travel Area*". The section on page 7 headed "Evidence of the spread of the virus through travel" makes reference to evidence about the risks of international travel and to people from Scotland bringing back Covid-19 from virus hotspots like Blackpool. This is not disputed. There is, however, no discussion of the evidence about the risks of spreading Covid-19 through outdoor recreation. That it an incredible omission given that it is now well documented ([see here for links](#)) that the risks of spreading Covid-19 through Outdoor Recreation are very very low.

Having provided no evidence, the Impact Assessment then jumps to this appraisal (P15) of the impact of the restrictions which have been now been imposed:

“This also includes impact on opportunities to interact with others and to engage in a wide range of leisure and recreation activities, that contribute to their wellbeing. However, by reducing the spread of the COVID-19 virus, these households also benefit from enhanced health protection.”

This treats outdoor recreation as having the same risks as other recreational and leisure activities, many of which take place indoors and so have quite different risks. That is wrong, besides which there is no attempt to weigh up the adverse impacts of denying people the right to travel to enjoy the outdoors with the risks this has of spreading Covid-19. Under Human Rights Law restrictions need to be proportionate. In failing to include outdoor recreation on its list of reasonable excuses for leaving an area, the Scottish Government has clearly not been proportionate.

For those concerned that people leaving Tier 3 and Tier 4 areas for outdoor recreation might spread Covid-19 by going into shops, cafes, filling stations etc, it is worth pointing out that there is NOTHING in the regulations to prevent people travelling for reasons the Scottish Government deems legitimate, like for work, doing any of these things. The risks are probably not that great, if people take sensible precautions. The majority of outdoor recreationists, if advised not to go indoors with other people, would observe that. If, however, the Scottish Government doesn't trust people to follow such advice, it could make it unlawful for ANYONE travelling from a Tier 3 or Tier 4 to go into specified indoor spaces like shops and filling stations. Those facilities would soon adapt to allow people to pay outdoors or order food while standing outside a shop, as happens in takeaways.

This illustrates that within the current Tiers Framework there are alternative ways to manage any small risks of Covid-19 spreading through outdoor recreation which the Scottish Government has failed to consider and further undermines the conclusions of their option

The need to safeguard wider civil liberties

While I have argued that outdoor recreation has been affected unfairly and disproportionately by the new regulations, it is worth noting some wider concerns about them and how they have been enacted

In the England, Regulation 5 states that *“No person may leave or be outside of the place where they are living without reasonable excuse”* and Part 5 then adds that *“A person commits an offence if, without reasonable excuse, the person— (a) contravenes a restriction or requirement imposed under regulation 5?, etc.* In Scotland, the Regulations are worded slightly differently. They make it an offence to breach the restriction on movement but then state in Paragraph 4) that *“It is a defence to a charge of committing an offence under paragraph (1), (2) or (3) to show that the person, in the circumstances, had a reasonable excuse”*. This may seem a small change of emphasis but it seems that in Scotland, unlike England, you are guilty unless you can prove yourself innocent. Even if your reason for travelling out of one of the Tier 3 or 4 areas fits with the list of reasonable excuses, the onus appears to be on you to prove this. This potentially gives Police Scotland a legitimate reason to stop anyone to check where they are travelling and makes it harder for people who have other reasonable excuses for travelling..

Under the Coronavirus Act 2020, these new restrictions also need to be approved by the Scottish Parliament within 28 days, an opportunity one might think to change them through the democratic

process. BUT under Schedule 19 of the Coronavirus Act, which covers the regulation making process in Scotland ([see here](#)), where emergency regulations “*cease to have effect*” that does not “*prevent new emergency regulations being made to the same or similar effect.*” In other words even if the Scottish Parliament were to reject these new laws as they apply to outdoor recreation, the Scottish Government could immediately re-introduce regulations containing exactly the same provisions.

What can be done?

It you believe these restrictions are excessive the options appear to be :

- to lobby your MSPs and ask them to challenge the regulations in the Scottish Parliament
- to challenge the legality of the restrictions through the courts (but that would cost a fortune)
- to undertake protests, whether online or outdoors, to highlight the anomalies and unfairness of the laws in order to persuade the Scottish Government to reconsider
- to work out if you might have a reasonable excuse for travelling past the five limit for outdoor recreation and test thatbut if you do, be prepared to go to Court if issued with a Fixed Penalty Notice and defend yourself there.

Had I got back to Glasgow after 6pm last Friday and been challenged by the police, I might have explained that I had travelled to the Moorfoots because, like for many other people in Scotland, outdoor recreation plays a very important part in both my physical and mental health, that the walk has set me up for the week, that I had taken very careful precautions and therefore in my view I had a reasonable excuse for travel.

Instead of testing whether such arguments are right or not through the Courts, it would be far better if the Scottish Government amended the regulations to refer to outdoor recreation and made it legitimate for people in Tier 3 and 4 areas to travel for outdoor recreation so long as they remained outside. We will see!

Category

1. Access rights

Tags

1. access rights
2. human rights
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