

## Resolving Rural Disputes: right to roam and e-bikes

Are e-bikes classed as motorised vehicles under Scotland's right to roam legislation? **Stephanie Hepburn, a Senior Associate in our rural disputes team**, addresses the scope of the legislation, and the remedies available for unlawful exercise of the right to roam.

Scotland is renowned for its natural beauty and grand landscapes. What's more, in Scotland we have unique legislation allowing the public access to most of Scotland's countryside, so long as that access is exercised responsibly. One issue that has cropped up is whether this right of responsible access - commonly referred to as the "right to roam" - can be exercised on an e-bike, an increasingly popular, environmentally friendly and easy mode of transport.

We shall explore that particular issue in this article and look at what remedies may be available where trespass or otherwise unlawful exercising of the right to roam occurs.

### Rights of responsible access

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Rights of responsible access - or the right to roam - has been embodied as a statutory right since 2005 in terms of the Land Reform (Scotland) Act 2003 (the "2003 Act"). This allows everyone access to most land and inland water in Scotland for recreational and other purposes. Our comprehensive guide to the right to roam can be found [here](#).

The public must act responsibly in exercising their right to roam and the Scottish Outdoor Access Code gives guidance on what behaving responsibly means, both for land managers and for those exercising the right. The right to roam allows the public to be on, or to cross, land for recreational purposes, to carry out relevant educational activities and for limited types of commercial activities. It is not permissible to use the access rights for certain types of conduct such as to hunt, shoot or fish, or for the purpose of committing an offence.

### Motorised vehicles

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Section 9(f) of the 2003 Act provides that conduct excluded from the right to roam includes:

*"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)"*

The only exception to this is that someone with a disability may use an adapted vehicle to enable them to exercise the right to roam. Section 9(f) is clear - you cannot exercise the right to roam on a motorised vehicle. This would clearly exclude quad bikes and land rovers. But what exactly is a motorised vehicle, and does this include e-bikes?

### What is an e-bike?

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Regulation 4 of the Electrically Assisted Pedal Cycles Regulations 1983 provided that:

- An electrically assisted pedal cycle (or EAPC) must have pedals that can be used to propel it.
- It must be fitted with no motor other than an electric motor which:
  - must have a maximum power output of 250 watts; and
  - should not be able to propel the bike when it's travelling to more than 15.5mph.
- It must show either:
  - the power output; or
  - the manufacturer of the motor.



- It must also show either:
  - the battery’s voltage; or
  - the maximum speed of the bike.

So, although many e-bikes look similar to ordinary pedal bikes, to be classified as an EAPC, they **must** have a motor. Does this automatically exclude them from the right to roam? “Vehicle” is not defined in the legislation, so we must take its ordinary meaning - as a bicycle is a means of transport, it is regarded as a vehicle. Is an e-bike a motorised vehicle in terms of the 2003 Act? In terms of the Electrically Assisted Pedal Cycle (Amendment) Regulations 2015; e-bikes that are EAPCs are classed as normal pedal bikes under road traffic law. You do not need a licence to ride one and it does not need to be registered, taxed or insured. An EAPC’s treatment as a normal pedal bike arguably means you can ride it on cycle paths and anywhere else pedal bikes are allowed.

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## The National Access Forum

The National Access Forum (which was set up to advise on national issues linked to access rights in Scotland) previously considered e-bikes in February 2016 and concluded that if e-bikes which meet the EAPC criteria are not regarded as “motor vehicles” for the purposes of road traffic legislation then they should not be regarded as motor vehicles for the purposes of 2003 Act.

This position appears to have become the accepted view, although this conclusion has not been tested in the courts. However, the 1983 Regulations and the 2003 Act are two completely separate pieces of legislation. One cannot assume simply because the road traffic legislation reaches this conclusion, that the 2003 Act does the same. For the purposes of road traffic law, an e-bike may be classed as a pedal bike but on a strict construction of the 2003 Act - which classifies vehicles as either motorised or not - one may conclude that the right to roam cannot be exercised on an e-bike without the landowner’s consent as, having a motor, it is arguably caught by the reference to “motorised vehicle” which is explicitly excluded from the scope of the 2003 Act.

Just last year the National Access Forum produced a new discussion paper on e-bikes and their use in the

context of the right to roam and we understand that the Scottish Outdoor Access Code may be being revisited. Of course the Scottish Outdoor Access Code is not law – it is guidance and judicial interpretation on the issue would be welcomed, which, depending on the outcome, may lead to an amendment of the 2003 Act.

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## The English position

The English legislation dealing with public rights of way, the Countryside and Rights of Way Act 2000, explicitly removes EAPCs from the definition of ‘mechanically propelled vehicle’ (s 48(7)). People can therefore use EAPCs to exercise public rights of access in England.

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## Public rights of way

It is important to remember that the right to roam is very different from a public right of way. Public rights of way are formed by people using the same route for a number of years without challenge, provided certain conditions are met. Our guide to public rights of way can be found [here](#). The public right of way only extends to passage, but, unlike the right to roam, passage by motorised vehicles is allowed, unless of course the right of way is pedestrian or on horseback only. This is subject to provisions in the Roads (Scotland) Act 1984 which created an offence to ride or propel a vehicle (including a bicycle) on a footway or footpath unless it is also a cycle track.

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## Remedies

It is often said that “there is no law against trespass in Scotland”. That is not correct – trespass is a civil wrong. Trespass is essentially temporary intrusion into land owned by someone else. If you are lawfully and responsibly exercising your right to roam, this will not amount to trespass and Section 5(1) of the 2003 Act specifically says that the exercise of public access rights does not of itself constitute trespass. This means a landowner will not be able to take action against someone exercising their right to roam responsibly over land that the 2003 Act applies to.



But someone taking access on a land rover or on a quad bike will amount to trespass because these are motorised vehicles and thus their use cannot be the lawful exercise of the right to roam. Similarly, walking over someone's private garden – if that garden is land that is excluded from the scope of the 2003 Act, that too will be trespass.

The remedies for trespass are interdict and, if the land is damaged, compensation. Interdict is the Scottish equivalent of an injunction and would prevent the unlawful activity from carrying on in the future. The difficulty with interdict is that you cannot interdict the public at large – you need to know who the perpetrator is. So, if the access takers can be identified, interdict may be an appropriate option but if not, it is very hard to do anything meaningful via the courts and more practical ways of stopping the unlawful activity may be relevant.

Whilst interdict is an appropriate remedy for trespass, it is a discretionary remedy so it is open to the courts to refuse to grant it. There must be an apprehension that the trespass will occur again – if there is no reasonable likelihood of future trespass, there is nothing to interdict. The landowner is also expected to have given a warning to the trespasser, and to monitor its effect before seeking interdict. Interdict will not be granted if the trespass is trivial – there must be at the least an appreciable wrong. Since trespass is by its nature temporary, it is often vulnerable to arguments based on triviality.

## Self-help remedies

Self-help remedies are often the most effective remedy where trespass is taking place and are often designed to

prevent or discourage trespass, for example, putting up fences and gates. This is perfectly lawful – so long as it doesn't obstruct legitimate access takers.

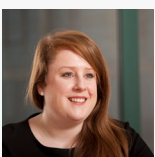
Section 14 of the 2003 Act prohibits signs, notices, obstructions and the like that have no purpose other than restricting the exercise of the right to roam and allows the local authority to serve a notice requiring obstructions to be removed. So a gate – or a fence or a wall - that prevents **all** access will not be allowed (unless of course the land itself is completely excluded from the scope of the 2003 Act). A gate that still allows access takers, including cyclists and those with buggies and on horses, but prevents motorised vehicles, would be permitted.

## Damages

Raising a claim for damages carries with it the same issue as interdict - identifying the perpetrator. If they can be identified, then compensation may be sought but a quantifiable loss still has to be established. This may be diminution in value of the land, damage to crops or loss of profits.

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