

The Right to Roam and Public Access Rights: What landowners need to know

In Scotland, members of the public have been able to enjoy access rights and rights of way over land for many years; rights that over time have been developed under common law, but most significantly in recent times under the Land Reform (Scotland) Act 2003, which has been in force for over 12 years.

There have been a number of high profile cases over the past few years. The most recent was the Drumlean Estate appeal (an appeal by *Loch Lomond and Trossachs National Park Authority against Renyana Stahl Anstalt*). The Drumlean Estate lies between Ben Venue and Loch Ard.

In this case, the National Park Authority successfully claimed that the Estate owner was preventing members of the public from exercising their access rights over the Estate in terms of the 2003 Act.

The appeal confirmed that the locking of gates and the erection of a sign stating "Danger Wild Boar" were clearly designed to prevent or deter persons from exercising access rights to which they were entitled, in contravention of the provisions of the 2003 Act.

The Court's decision highlights the importance for landowners and managers of being aware of the access rights members of the public can exercise over their land.

Nevertheless, the 2003 Act was intended to strike a balance between landowners' privacy and public access rights. So how has this worked in practice?

Access rights under the 2003 Act

The 2003 Act provides that "everyone" has the statutory rights established by Part 1 of the 2003 Act, which are:

- i. the right to be on land (for certain specified purposes); and
- ii. the right to cross land.

These access rights can be used for recreational purposes, some educational activities and certain commercial purposes.

The rights are able to be exercised on all land providing that the land does not fall within the exceptions listed by the 2003 Act over which the general rights cannot be exercised. These include (but are not limited to):

- Land with a building/other structure or works on it;
- Land which has a caravan, tent or other place affording a person privacy or shelter;

- Land which has been developed or set out
 - as a sports or playing field; or
 - for a particular recreational purpose.

Provision is also made to exclude from the access rights "sufficient adjacent land" in respect of a home (or other buildings which fit the criteria). This affords anyone living there "a reasonable measure of privacy" and aims to ensure that their "enjoyment of that house or place" is not unduly disturbed. Under the 2003 Act, an application can be made to the courts to declare that specified pieces of land are excluded from areas over which access rights are exercisable. A number of cases have considered exactly what is meant by "sufficient adjacent land". The most well-known of these centred on the Scottish businesswoman, Ann Gloag, and her property, Kinfauns Castle. There the court decided that around 11 acres was required as sufficient adjacent land to provide privacy for the property.

The 2003 Act also excludes certain conduct from access rights for example activities such as:

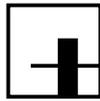
- Hunting, shooting or fishing;
- Any form of motorised recreation or passage (except by people with a disability using a vehicle or vessel adapted for their use); and
- Being on or crossing land for the purpose of doing anything which is an offence, such as theft or polluting water.

Public access rights must also be exercised responsibly. Generally, this means that access rights should be exercised so as not to cause unreasonable interference with the rights of any other person (including the landowner). The Scottish Outdoor Access Code, which was produced by Scottish Natural Heritage, provides a comprehensive guide to responsible conduct.

However, while access users must exercise their rights responsibly, there are also reciprocal obligations on land owners to act in a responsible manner.

What are the obligations on landowners?

Landowners have a duty to use and manage their land



in a responsible way with respect to access rights. Therefore, it is not permissible for landowners to carry out certain activities which seek to discourage someone from exercising their access rights, for example putting up a large sign prohibiting access or telling users to "Keep Out".

Landowners must also have regard to the Scottish Outdoor Access Code when assessing their conduct in respect of access rights over their land.

Landowners should be aware that the 2003 Act, while bringing many changes in respect of access rights, did not alter the legal position regarding liability. Consequently, landowners/managers still owe a duty of care to anyone on their land and remain potentially liable for any injuries sustained if they have not taken sufficient steps to protect access users on their land. For further comment on occupiers liability, please see our recent article [here](#).

Nevertheless, the 2003 Act does try and accommodate the right to privacy for landowners, although it will only extend to that which is "sufficient" for privacy. This is a subjective and fact specific test. It is unlikely that a court would determine that the whole of a large Estate would be sufficient to be excluded for privacy reasons, as highlighted by *Snowie v. Stirling Council* where a landowner unsuccessfully attempted to exclude almost his entire Estate.

What is the role of Local Authorities?

Local Authorities also have a duty to uphold access rights. They are required to assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access rights may be reasonably exercised. They have a number of powers to assist with this, for example, they are able to require an owner of land to take remedial action to remove a sign which prohibits or discourages the exercise of access rights.

Local authorities must also provide a plan of core paths

to facilitate giving access rights to the public throughout their area. Local authorities can enter into core path agreements with landowners and the hope is that members of the public will use the established paths.

Local Authorities are also required to establish "local access forums" for their respective areas to advise on the exercise of access rights and to give assistance, if needed, to parties involved in a dispute regarding the exercise of access rights.

Nevertheless, it is not always possible to resolve disputes in this way, and therefore it may be left to the courts to settle disputes as the cases of Drumlean, Glog and Snowie demonstrate.

What other ways can members of the public access land?

Members of the public can also use rights of way. These are normally created over land via public use for a period of twenty years or more. The access rights granted under the 2003 Act do not displace these rights and in certain circumstances where access rights under the 2003 Act are excluded, rights of way may still exist. Nevertheless, establishing such rights may prove more difficult.

Recommended actions for landowners

Undoubtedly, the introduction of the 2003 Act has changed the landscape of public access rights with the newly created statutory rights complementing the traditional public rights of way across Scotland. Both landowners and public access users need to consider their duties and obligations under the new access regime before exercising their respective rights.

Familiarity with the Scottish Outdoor Access Code is essential, and communication and collaboration with the relevant local authority can allow landowners to be confident that they are complying with their statutory duties, while maintaining an appropriate degree of privacy to allow them to enjoy their property.

Should you have any concerns or queries in respect of access rights under the 2003 Act, or forthcoming changes under the Land Reform (Scotland) Act 2016, please contact Peter Misselbrook or Emma De Saily in our Rural team.



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