



## The Right to Roam: Know your rights and responsibilities



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The right to roam, embodied as a statutory right since 2005, allows everyone to access most land and inland water in Scotland for recreational and other purposes. But the right raises many questions, not least in the area of responsibilities both for landowners and members of the public. There have been several high profile cases since the right was introduced by the Land Reform (Scotland) Act 2003, showing that how it is interpreted can often be the subject of dispute. The purpose of this guide is to set out the key rights and responsibilities, both for landowners and the general public, in the exercise of access rights in Scotland.

### What is the right to roam?

Prior to 2003, access rights for recreational purposes had been exercised largely through the tolerance of landowners, rather than as of right, unless a public right of way had been established. Some limited statutory rights were created in 1967<sup>1</sup>, but there was considerable confusion about the extent of access rights and the rights of different parties. The 2003 Act introduced a general public right of access – commonly referred to as a “right to roam” – for ‘everyone’ over most land and inland water in Scotland, including canals and the foreshore, provided the right is exercised responsibly. The right allows the general public to be on, or cross, land for:

- recreational purposes
- carrying out relevant educational activities; and
- limited types of commercial activities.

### What are recreational purposes?

There are many activities that can be broadly classed as ‘recreational’. The Scottish Outdoor Access Code<sup>2</sup> (produced under the auspices of the 2003 Act) includes in recreational use of land activities such as “pastimes...

family and social activities...active pursuits....and participation in events”. This encompasses many activities, from sightseeing, picnic-ing and walking the dog, to horse riding, rock climbing, canoeing and camping as well as participating in marathons, triathlons and other sporting competitions.

### What are relevant educational activities?

The 2003 Act provides quite a general definition of relevant educational activities. They are activities intended to further a person’s understanding of natural or cultural heritage, or helping others to do so. This could mean supervised visits to the outdoors to learn about wildlife, landscape or geology, or field surveys of local flora or fauna.

### What types of commercial activities are permitted?

It is permissible to use public access rights to land to carry out only those commercial activities which could be carried out as recreational activities using public access rights. An example helps to clarify this slightly obscure provision: If an individual receives money to act as a hiking guide for a group, that would be a commercial



activity, but because hiking is a recreational activity, this is permitted. Conversely, if an individual brings a cool box onto land and starts selling cold drinks, that would also be a commercial activity but, as you cannot recreationally sell cold drinks, this activity would not be allowed under the 2003 Act.

### What is not covered by the right to roam?

While the access rights may appear to be very extensive, they are subject to many restrictions. Land over which statutory access rights cannot be exercised includes:

- any land to the extent that there are buildings on it, a fixed piece of machinery or anywhere that provides an individual with privacy or shelter, such as a tent or caravan. This covers both residential and non-residential buildings;
- gardens around houses, caravans or tents etc., of a sufficient extent to allow a reasonable degree of privacy.

Public access rights also do not apply to:

- common gardens that are restricted to residents, even if they are separated from the homes themselves;
- schools or land used by schools, such as a playground;
- land that has been developed as a sports or playing field, or for a particular recreational purpose; or
- land on which crops are growing (in order to protect farming).

Additionally, it is not permissible to use public access rights for certain types of conduct such as to hunt, shoot or fish, or for the purpose of committing an offence such as theft or polluting water (including breaching a court order).

Public access rights also do not apply to motorised activities, like off-road driving or motor biking, which still require the landowner's permission<sup>3</sup>. The only exception to this is that an individual with a disability may use any vehicle or vessel adapted to their use to exercise their access rights. While landowners cannot restrict individuals from exercising public access rights on land to which the 2003 Act applies, it may be lawful to prevent certain types of traffic if the land would be particularly damaged by this traffic.

In 2009, a court supported the actions of Mr and Mrs Tuley in preventing access by horses over a particular part of their land which was found unsuitable for horse traffic<sup>4</sup>, particularly when the Tuleys welcomed and encouraged access takers of all types (including on horseback) over other parts of their property.

### What about privacy?

The 2003 Act was intended to strike a balance between landowners' privacy and public access rights. The 2003 Act ensures homeowners retain a proper degree of privacy, so that their ability to enjoy their property is not disturbed. 'Sufficient adjacent land' to properties is excluded from the scope of the 2003 Act, to ensure it does not cover private gardens or space too close to the home. The test to determine this extent is what a 'reasonable person' would deem appropriate in the circumstances. It is unlikely that the whole of a large estate should be blocked off from access rights for privacy purposes, as this would be excessive. In a case that was well reported in the news at the time, a court found that Anne Gloag was entitled to such privacy over an area of her estate at Kinfauns Castle extending to several acres, and accepted her need for higher than usual security due to press and criminal interest in her activities, family and possessions. A person living in a house of this kind located in the countryside would view their enjoyment of their house as considerably reduced if it was not accompanied by reasonably large, private grounds<sup>5</sup>. In another case<sup>6</sup>, a landowner unsuccessfully attempted to exclude almost his entire estate.

Familiarity with public rights of access and the 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.

It's important to remember that public access rights apply in urban and sub-urban areas too. In a 2018 case<sup>7</sup>, despite concerns being raised about noise, littering, dog fouling and privacy, a court found that a path leading to Penicuik Estate running 20 metres from a house in suburban Penicuik should not be excluded from the scope of the 2003 Act. In the particular circumstances of the case, the path could not be considered as 'adjacent' to the house in question and low-level irresponsible access was not a reason to prevent the exercise of (otherwise responsible) access rights under the 2003 Act.

In this case, particular sensitivities of those living in the house were not relevant – the court was clear that it would be wrong to base any decision on reasonable privacy on the very personal and individual circumstances of those seeking to exclude land from the scope of the 2003 Act. Our commentary on this case can be found [here](#).

### Landowners' responsibilities

Landowners have an obligation to ensure others are able to exercise public access rights over the land they own. They must use and manage their land in a responsible way, having regard to the rights of the public.



### 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 recourse may be required to the courts.

### Obstructions

Landowners are prohibited from obstructing or discouraging others from exercising their public access rights. This includes putting up signs, erecting fences, growing hedges, positioning or leaving at large an animal, or carrying out agricultural work on the land to prevent or deter others. If the landowner is found to be contravening this they can be made to remove the obstruction by the local authority (unless it is a hedge or fence which was in place before the Act came into force – this does not breach access rights and will not be ordered to be taken down<sup>8</sup>).

In 2018, the Loch Lomond and the Trossachs National Park Authority successfully claimed that a local estate owner was preventing members of the public from exercising their access rights over the estate in terms of the 2003 Act. The court confirmed that the actions by the estate of locking gates and erecting a sign stating “Danger Wild Boar” were acts 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.

### Liability

The 2003 Act does not change the position of landowners in respect of the legal liability which they may incur for individuals accessing the land. This means that landowners still owe the same duty of care to individuals on their land, and will be liable for injuries incurred, if they

have not taken sufficient precautions to prevent injuries to those on their land. Landowners should maintain their land in such a way as to prevent injuries to those with public access rights over it.

### The requirement for responsible access taking

Access rights should be exercised responsibly. The Code provides guidance as to what this means in practice. ‘Acting responsibly’ consists of two key principles: not to interfere unreasonably with the rights of other people, and to act lawfully and reasonably, taking proper account of the interests of others and of the features of the land.

- Individuals cannot take anything off the land for profit or commercial purposes.
- If you are crossing the land with an animal, the animal must be kept under control.
- If individuals do not use their access rights responsibly, it can be lawful to restrict the access to the land. For example, residents were allowed to restrict access to a path next to their gardens at night following many incidences of anti-social behaviour<sup>9</sup>.

### What can I do if there is a dispute?

#### Determining there are no public access rights

If landowners believe that their land may be able to be excluded from public access rights, they can apply to the court to declare that the land concerned may not be accessed by the public.

#### Determining public access rights have been used responsibly

The court can also determine if public access rights have been used responsibly, or irresponsibly. This can be a useful tool for landowners and land users alike in settling disputes about responsible use of land.

#### Determining the landowner has fulfilled their obligations

Has the landowner upheld their responsibilities? An action can be raised by the landowner or any other person for declarator that the duties have, or have not, been met. An action is commenced by way of summary application in the Sheriff Court district where the property is located. An application must also be served on the relevant local authority as they are entitled to be a party to the proceedings.

If a sheriff finds that a landowner is interfering with public access rights in contravention of their duties under the 2003 Act the other party may seek supplementary orders against the landowner to prevent continuing breach. Orders of specific implement (specific performance) or interdict (injunction) could also be sought against the landowner. These remedies are discretionary in nature



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and are a matter for the sheriff to determine depending on the facts of each case.

### Rights of Way and other public rights

The Act does not affect existing public rights of way. In Scotland, it is possible for a route to become a public right of way when it connects two public places, follows a defined route, and has been used openly and peaceably, without challenge for 20 years. Such rights of way operate independently of the statutory access rights.

In some cases, statutory access rights and common law rights exist together, not always happily. The 2003 Act includes rights of access to the foreshore, for example, but there are also common law rights to the foreshore which are more extensive than the 2003 Act rights. While public access rights under the 2003 Act do not allow hunting,

fishing or shooting, or use of a motorised vehicle or vessel (other than for disabled use) and there is no right to be on land to take away anything for commercial purposes or for profit, the common law appears to permit these actions on the foreshore (although the extent of the common law rights is unclear). So while the 2003 Act has gone a considerable way to clarifying the public's right to be on land belonging to others, there are still aspects of general rights of access taking that would benefit from further statutory clarification.

*If you have any queries about this Guide or wish to discuss how public access rights affect you in more detail, please do not hesitate to contact Hamish Lean, Stephanie Hepburn or Emma De Saily, or your usual Shepherd and Wedderburn contact.*

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### Endnotes

1. Countryside (Scotland) Act 1967
  2. <http://www.outdooraccess-scotland.com/the-act-and-the-code/introduction>
  3. Our briefing note on exercising public rights of access on e-bikes can be found [here](#)
  4. *Tuley v Highland Council*
  5. *Gloag v Perth and Kinross Council and the Ramblers Association*
  6. *Snowie v Stirling Council*
  7. *Stewart and Gemma Manson v Midlothian Council*
  8. *Aviemore Highland Resort Ltd v Cairngorms National Park Authority*
  9. *Forbes v Fife Council*
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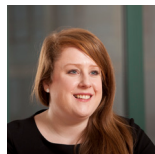
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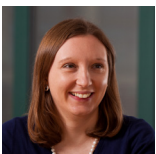
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