

Public access to land

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Legal routes for access in Scotland

PRIVATE

- ▶ Neighbours may have rights over nearby land.

PUBLIC

- ▶ Statutory rights of access under Part 1 of the Land Reform (Scotland) Act 2003.
- ▶ Public rights of way that connect one public place to another.
- ▶ Adopted road.
- ▶ Other rights, like access to the foreshore or navigable rivers

How the 2003 Act works

A primer

Statutory rights of access in one slide: Land Reform (Scotland) Act 2003, Part 1

- ▶ Right of responsible access in Scotland (aka right to roam), i.e. to be on and to cross land in Scotland without a landowner's prior consent.
 - ▶ “Land” includes inland waters, underground terrain and airspace.
- ▶ “Everyone” has access rights (s 1), but only if they are exercised responsibly (s 2).
- ▶ Subject to certain exceptions based on
 - ▶ the characteristics of the land in question (s 6) or
 - ▶ the conduct undertaken by the access taker (s 9).
- ▶ Owners/occupiers must manage access land sympathetically to access (s 3).
- ▶ Regard to be had to Scottish Outdoor Access Code for responsible access/management
- ▶ Formal disputes might involve [purported] access taker, land owner/occupier, and/or access authority.

What are the rights?

- ▶ Statute confers:
 - ▶ a right to enter, stay and leave land when access is taken for: i) recreational, ii) educational or iii) certain other activities; and
 - ▶ a right to cross land (i.e. enter land and exit, without - in this instance - dallying).
- ▶ That right of responsible access brings a duty of responsible management on access land.
- ▶ Statute clarifies “where” and “how” those rights of responsible access can/must be used.

“Where” exception

- ▶ No statutory access rights in relation to, for example, buildings, domestic gardens, growing crops. (Other exclusions in s.6 too.)
 - ▶ *Gloag v Perth and Kinross Council* 2007 SCLR 530.
- ▶ Core paths?
- ▶ Existing rights of way? These are non-statutory routes and are not subject to the same restrictions.

Manson: Penicuik

https://www.midlothian.gov.uk/info/200226/walking_and_cycling/441/outdoor_access_in_midlothian/2

- ▶ Path 20 metres from a dwelling.
- ▶ TPO.
- ▶ Human rights?

“How” exception - starting point of responsible access

- ▶ Unreasonable interference of the rights (broadly defined) of others is not responsible access.
- ▶ Such “rights” include:
 - ▶ pertinents of landownership;
 - ▶ access rights; and
 - ▶ any other rights.

“How” exception - banned list

- ▶ Responsible access only.
- ▶ Conduct that is never responsible includes:
 - ▶ breaching an interdict;
 - ▶ *most* motorised access; and
 - ▶ hunting/shooting/fishing.

Responsible management

- ▶ Land management and use that unduly interferes with access rights on land where access rights apply is not responsible (section 3).
- ▶ Local authority or, if relevant, a national park authority can take action to require land owner/occupier to restore access.
- ▶ Section 14
 - ▶ Prohibition of signs, obstructions, dangerous impediments “for the main purpose of preventing or deterring any person entitled to exercise these rights from doing so”
 - ▶ Access authority enforcement via s 14(2) notice.
- ▶ Reported cases tend to begin with s 14 (e.g. *Re nyana Stahl Anstalt* case from the Trossachs (see below)).

“How” it works?

Must a landowner allow some responsible access before stepping in to prevent a volume of access that is not responsible?

Damaging (and managing) the land?

Case of *Tuley v The Highland Council* 2007 SLT (Sh Ct) 97, rev 2009 SLT 616 (about horse riding, in the Black Isle).

See also *Re nyana Stahl Anstalt*, on inappropriate management.



Image credit - [BBC](#)

Responsible access and management has regard to...

- ▶ The Access Code...



- ▶ ...and aspects of natural and cultural heritage (as signposted by NatureScot (formerly) SNH or the Scottish Ministers).
- ▶ (Image credit - NatureScot, and see <http://www.outdooraccess-scotland.com/>)

A recent access case:
ReNyana Stahl Anstalt v LLTNPA [2018] CSIH 22



2020 view

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Exploring wild Scotland, or making Scots wild owing to inappropriate access? The right to roam in a summer of staycations

by Malcolm Combe - Posted on 31 July 2020

The Covid-19 pandemic and the related public health response continues to play out in a variety of ways. The initial lockdown, which required people to stay at home, save for certain recognised reasons including local outdoor exercise, and now the gradual easing of lockdown, has led people to engage with outdoor recreation and leisure trips in manners that is without precedent in recent years. How does this interact with Scotland's outdoor access law, commonly known as the right to roam? In this post, Malcolm Combe considers the legal landscape and current controversies.



<https://www.strath.ac.uk/humanities/lawschool/blog/exploringwildscotlandormakingscotswildowingtoinappropriateaccess>

<https://www.walkhighlands.co.uk/news/walkhighlands-to-run-responsible-access-campaign/>

Possible reform to dispute resolution

- ▶ Section 28 currently takes you to the Sheriff Court.
- ▶ Reform to bring declarator actions to newly combined Scottish Land Court/Lands Tribunal?

Responsible access disputes - who might be involved?

- ▶ Owners/occupiers.
- ▶ Access takers.

Declarator under section 28.

- ▶ Local authority or (if relevant) National Park Authority.

Section 14 notice.

How rights of way work

Public rights of way

- ▶ DIFFERENT TO THE 2003 ACT
- ▶ From the common law.
- ▶ Join one public place to another by a particular route, which can be used by the public by a permissible means (pedestrian/equestrian/vehicular).
- ▶ For passage only.

Cove

Making a new right of way?

Another recent case: *B v C*

- ▶ Anonymised judgment, by Sheriff Murray.
- ▶ Path through a wood which the Pursuers claimed was a right of way.
- ▶ In 2011, it was designated as a “core path” within the meaning of the Land Reform (Scotland) Act 2003.
- ▶ In 2016, realigned.
- ▶ Parties agreed there were public termini and that the path was continuous.
- ▶ Issue: had it been used **by members of the public** for the prescriptive period of 20 years openly, peaceably and without judicial interruption.
- ▶ Pursuers did not lead any acceptable evidence of use by anyone other than themselves, their visitors and employees (who are not “the public”), so not even a need for the Defenders to rebut the Pursuers’ case.
- ▶ (No mention of section 5(5) either.)

A relatively recent article

► Combe and Cusine, 2019 Jur. Rev. 96

96 The Juridical Review

Public Access to Land in Scots Law: Two Cases on the Continuing Place for Public Rights of Way

Malcolm M. Combe^{*}

Douglas J. Cusine^{**}

*Where to the mountains, there to him were friends;
Where rolled the ocean, thereon was his home;
Where a blue sky, and glowing clime, extends;
He had the passion and the power to roam.¹*

I. INTRODUCTION

Access to land stirs the soul, stirs emotions, and can stir conflict. Two recent cases, *B v C*² and *Kolhe v Robertson*,³ demonstrate the conflicts that can arise.

To a greater or lesser extent, both these cases related to claims that public rights of way existed. Rights of way afford access by suitable means to members of the public along a course between two public termini. They have a long pedigree in Scots law, although in recent years they have been somewhat subordinated by the statutory right of responsible access that allows passage and access for recreational, educational and even some commercial activities across much of Scotland's land and inland waters. These cases ably demonstrate the continued importance of public rights of way notwithstanding the power to roam conferred by the Land Reform (Scotland) Act 2003, and also demonstrate just how hard-fought issues of access can be.