

A Brief Guide to Laws relevant to Outdoor Access in Scotland

Natural Heritage Management



SCOTTISH
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INTRODUCTION

This booklet is intended to provide a quick-reference guide to the various legal powers and duties relevant for public outdoor access.

This guide is not necessarily exhaustive, but it aims to bring together the main pieces of relevant legislation, and it aims to be useful particularly to access officers, rangers, local access forums and others dealing with outdoor access.

Please note that this brief guide is not a definitive interpretation of the law, and the statutes or legal opinion should always be consulted if detail is required.

The guide is presented in three sections. The first section provides a brief summary of the Land Reform (Scotland) Act 2003, and the subsequent Orders. This is kept very brief, since other recent guidance has provided full coverage of this Act.

Section 2 details the various relevant statutory powers which are available for use by local authorities. National park authorities also have some, but not all, of these powers. These local authority powers include those relating to rights of way and public paths, powers of entry to land, powers to make byelaws and management rules, to undertake works and land acquisitions, and to control litter.

Section 3 deals with a range of other laws which may have relevance to public access. In no particular order this looks at relevant aspects of the planning system, of roads and traffic legislation, nature conservation, public order offences, common law offences and rights, and legal issues such as firearms and disability legislation.

Section 1

Land Reform (Scotland) Act 2003

Part One

Only a very brief summary of the Land Reform (Scotland) Act 2003 (LRSA 03) is produced here, because full descriptions and guidance are available in other recent publications. In particular, the statutory rights are cogently presented in the Scottish Outdoor Access Code section 2, while information and advice on the duties and powers is fully presented in the Scottish Executive Guidance (see References 1 and 9).

Principal provisions of the LRSA 03

- Nature and extent of access rights, s1
- Responsibility definitions, ss2,3
- Trespass, liability, foreshore, rights of way, roads, s5
- Where access rights are not exercisable, ss6,7
- Conduct excluded from access rights, s9
- Repeals and amendments, schedule 2 – see below

Access Authority Duties

'Access authority' being the local authority or national park authority (NPA)

- Publicise the Code, s10
- Uphold access rights, s13
- Core paths planning: prepare, adopt, review, ss17,18, 20
- Establish local access forum, s25
- Review (and modify) its existing byelaws within 2 years, s30

Access Authority Powers

- Exempt land from access rights for short periods, s11
- Make byelaws, s12
- Removal of prohibition signs, obstructions etc, s14
- Measures for safety, protection, guidance, s15
- Land acquisition, s16
- Maintenance of and directions to core paths, s19
- Path agreement, s21, Path order, s22
- Ploughing etc of core paths and rights of way, s23
- Appointment of rangers, s24
- Power of entry, ss24 & 26 (see 2.4 below)
- Judicial determination, s28:
 - declaration by sheriff on existence of access rights and rights of way
 - access authority entitled to be party to proceedings

Repeals and Amendments (Schedule 2)

- Trespass (Scotland) Act, 1865 – s3 amended: does not apply to anything done in the exercise of access rights
- Countryside (Scotland) Act, 1967 –
 - ss10-29 (access to open country) repealed
 - ss30-38 (creation, closure, diversion of public paths) repealed, except for land outwith access rights and public rights of way (see 2.2 below)
 - s43 (ploughing of rights of way) repealed
- Civic Government (Scotland) 1982 – s121 powers repealed (to make byelaws relating to inland waters)

- Criminal Justice and Public Order Act 1994 - insertions to clarify circumstances
- Natura regulations 1994 - amended: "appropriate assessments" apply to core paths, path agreements and path orders
- Town & Country Planning (Scotland) Act, 1997 - s208 amended: path diversion orders apply to core paths as to footpaths and bridleways.

Scottish Outdoor Access Code - prepared under s10 LRSA 03, and approved by Scottish Parliament. Provides further explanation and definition of responsible behaviour, and:

- summary of access rights and exclusions (part 2)
- guidance on exercising access rights responsibly (part 3)
- guidance on managing land and water responsibly for access (part 4)
- practical guidance in various common situations (part 5)
- where to get help and information (part 6)
- list of statutory criminal offences (Annex 1)

Scottish Executive Guidance to Access Authorities - provides full guidance to the LRSA 03 section by section, issued under s27.
(see Ref 1)

The Land Reform (Scotland) Act 2003 (Modification) Order 2005 modifies and clarifies the definitions regarding woodland and forestry in section 7 of the Act.

The Land Reform (Scotland) Act 2003 (Directions for the Purposes of Defence or National Security) Order 2003 enables the Secretary of State to make directions excluding or restricting the exercise of access rights if necessary for the purposes of defence or national security.

Section 2

Other local authority powers relating to access

2.1. Public Rights of Way

Public rights of way become established through a history of public use, and common law requirements for status as a right of way are that:

- the route must run from one public place to another public place
- the route must follow a more or less defined route
- the use must have been on the assumption of right, not based on express or implied consent
- there must have been continuous use of the route by members of the public (not merely use in connection with a particular property) from one public place to another, for at least 20 years. (This time period stems from the Prescription and Limitation (Scotland) Act 1973 s3(3)).

Countryside (Scotland) Act 1967 –

- “It shall be the duty of a local planning authority [including an NPA] to “assert, protect and keep open and free from obstruction or encroachment any public right of way which is wholly or partly within their area, and they may for these purposes institute and defend legal proceedings and generally take such steps as they may deem expedient” - s46(1)
- “A local planning authority may repair and maintain any public right of way (not being a public road or a footway) within their area, but this power shall not relieve any other authority or person from any liability with respect to such repair or maintenance” - s46(2)
- “Any person may with the consent of the local planning authority erect and maintain guide posts and direction notices on any public right of way other than a public road” - s46(3).

It is an offence (s44) for the occupier of any field or enclosure to permit a bull to be in that field or enclosure if there is a public right of way through it (with certain exceptions). Fencing, gates etc on rights of way needed for controlling animals may be authorised by the local authority (s45). Definitions of ‘footpath’ and ‘bridleway’ are provided in s 47.

Public rights of way were categorised for the purposes of the National Catalogue of Rights of Way (CROW) as follows:

- Vindicated - declared in sheriff court or higher court, or confirmed by Ministers through the extinguishment or diversion process (see below)
- Asserted – local authority considers that a public right of way exists, and has asserted it (under s46(1) power as above)
- Claimed – the route is claimed as a right of way, but has not been asserted or vindicated.

A claimed or asserted right of way would become effectively ‘vindicated’ by applying a public path diversion order (see below) when a diversion is proposed.

Note – Local authorities have differing policies on the assertion of rights of way, so the distinction between routes which are ‘claimed’ or ‘asserted’ is therefore less significant in areas where the local authority practice means that few or even none of the rights of way have been asserted.

Town and Country Planning (Scotland) Act 1997 – s 206 and Schedule 16 –

Extinguishment of public right of way – A planning authority may by order extinguish a right of way where land has been acquired or appropriated for planning purposes and is being held by the local authority for the purposes for which it was acquired or appropriated. The extinguishment must be confirmed by the Scottish Ministers if it is opposed, or can be confirmed by the planning authority if there are no sustained objections. In either case, the authority must be satisfied that an alternative right of way will be provided or is not required.

‘Road’ – A right of way is a ‘road’ in terms of the Roads (Scotland) Act 1984 (see section 3.2 below). Consequently there are diversion and extinguishment procedures under this Act, and there are also various offences under s98 (straying animals) and s129 of this Act. Because rights of way are ‘roads’, local authorities can use the procedures for temporary closure of roads under the Road Traffic Regulation Act 1984, as substituted by the Road Traffic (Temporary Restrictions) Act 1991. Local authority roads departments will be very familiar with these powers and procedures.

Road Traffic Act 1988, s33 –

Control of motor trials on rights of way – The local authority has a role in the authorisation of any motor ‘trials’ on footpath or bridleway rights of way. Section 33 makes it an offence to promote or take part in a trial of any description between motor vehicles on a footpath or bridleway, unless authorised under this section by the local authority. A ‘footpath or bridleway’ may include a right of way or a public path under the 1967 Act as above. The local authority shall not give authorisation unless satisfied that the written permission of the landowner and occupiers has been given, and the local authority can attach such conditions to the authorisation as it thinks fit. An authorised trial will not need to abide by any statutory restrictions normally applying to the use of that path, but this does not prejudice any right or remedy of a person having an interest in the land.

2.2. Public Paths

Countryside (Scotland) Act, 1967 – ss30 – 38

These powers in respect of ‘public paths’ are repealed under the LRSA 03, but (under para 7 of Schedule 2 of the LRSA 03) continue to have effect:

- to the extent that these rights and facilities are not secured by LRSA 03
- in relation to land where access rights are not exercisable (s6 LRSA 03)
- in relation to Rights of Way.

Public Path Creation Agreement, s30 – the local authority is able to make an agreement with the person having control over the land, for the creation by that person of a public path over the land. The agreement may include terms of payment etc, and be subject to such limitations or conditions as shall be agreed.

Public Path Creation Order, s31 – for use to create a path where it appears to the local authority that a s30 agreement is impractical. The local authority must be satisfied over:

- the added convenience or enjoyment for the public or local residents
- the effects on the rights of those having an interest in that land

Public Path Extinguishment Order, s34 – for use where a local authority is satisfied that a public path in their area is not needed for public use and it is expedient to close it. The order must be submitted to Scottish Ministers, who have a duty not to confirm it unless satisfied over further specified considerations.

Public Path Diversion Order, s35 – for use where a land owner satisfies the local authority that it is expedient that the line of the path or right of way should be diverted “for securing the efficient use of land ... or providing a shorter or more convenient path”. The diversion order must be confirmed by Scottish Ministers, and Ministers have a duty not to confirm unless a further set of requirements are met, s35(5).

For the three types of Orders, compensation is payable for damage or depreciation arising. For all four procedures, the local authority must register the Agreement or Order as soon as possible in the Register of Sasines/Land Register, then it becomes binding on subsequent title-holders.

These powers for public path agreements and orders are complementary to the LRSA 03 powers for path agreements and orders (ss21,22), in that the LRSA 03 powers can only be applied to land on which access rights are exercisable.

Town and Country Planning (Scotland) Act 1997 – s 208 and Schedule 16

Stopping up or diversion of a public path – A planning authority may by order stop up or divert any footpath or bridleway which is a public path under these sections of the 1967 Act, if satisfied that it is necessary to enable a development to be carried out by a government department or where a planning permission has been granted. The order may provide for –

- the creation of an alternative path, or path improvement
- authorising or requiring works to be carried out
- the preservation of any statutory undertaker’s rights
- requirements over payment or contributions

The order must be confirmed by the Scottish ministers if it is opposed, or can be confirmed by the planning authority if no objections are sustained.

2.3. Long Distance Routes

Countryside (Scotland) Act, 1967 – sections 39- 43

These sections set out powers for establishing routes to enable extensive journeys on foot, cycle or horseback, wholly or mainly off-road. Route proposals, with maps and costings, are to be prepared by Scottish Natural Heritage in consultation with every planning authority on the route, and submitted to Scottish Ministers. Proposals as approved by the Ministers must be implemented by the local authorities. There are also powers for variation of approved proposals if required, and for providing and operating ferries.

2.4. Powers of Entry

Land Reform (Scotland) Act 2003, s24 – ‘a person appointed under this section as a ranger’ by the access authority may enter any land where access rights apply, to advise and assist the owner and other members of the public in any matter relating to the exercise of access rights, and to perform other duties in relation to access rights as determined by the access authority.

Land Reform (Scotland) Act 2003, s26 – ‘any person authorised by the access authority to do so’ may enter any land for a purpose connected to the exercise of an access authority’s functions under Part 1 of this Act. This must be at a reasonable time, and after giving reasonable notice to the owner, except in the case of an emergency or when dealing with safety matters or maintenance in relation to core paths.

Countryside (Scotland) Act 1967, s65 – provides a specific power for public authority rangers to enter land for the purpose of exercising any of the functions for which they were appointed.

Countryside (Scotland) Act 1967, s75 – gives a general power of entry for the purpose of surveying land in connection with the making of public path creation agreements and public path creation, extinguishment and diversion orders, for land acquisition, and for the assessment of any related compensation claims.

Town and Country Planning (Scotland) Act 1997, s269 – provides powers of entry for persons authorised by the planning authority for surveying in relation to preparing structure or local plans and development control matters.

Roads (Scotland) Act 1984 – gives powers of entry to persons authorised by a roads authority to enter land to carry out duties under the Act. It is usual for the person entering land using any of these powers to carry evidence of authority and, where required, to give reasonable notice.

2.5. Byelaws

Byelaws may be used to restrict or regulate particular public rights in specific areas, and may be useful in that they have legislative force and carry criminal sanctions. Byelaws are secondary legislation (made by a public agency not by Parliament) but they must be consistent with and must not duplicate the general law. They can be quite cumbersome to establish, require confirmation by Scottish Ministers, and need to be reviewed after ten years. They have tended to be less used in recent years - partly reflecting more positive general approaches to visitor management - and if still in use tend to be seen as an instrument of last resort with a more focused, problem-solving role.

National Parks and Access to the Countryside Act 1949, s.20:

Local authorities may make byelaws to protect local nature reserves. Such byelaws may provide for prohibiting or restricting entry or movement within the reserve, preventing or restricting disturbance to soil, vegetation and species, prohibiting or restricting the shooting of birds, controlling the depositing of rubbish, and regulating the lighting of fires,

Countryside (Scotland) Act 1967, s.54

Local authorities may make byelaws relating to public paths, long distance routes, public rights of way, country parks, land or water acquired for public access by the authority or the subject of an access agreement or order, and picnic sites managed by them under the Roads (Scotland) Act 1984, s.4. Byelaws may be made for the preservation of order, for the prevention of damage and for the management of behaviour so as to avoid undue interference with the enjoyment by others. Although the powers to make public paths and access agreements and orders have been repealed by the LRSA 03, the byelaw-making power remains relevant for these access provisions. The NPA may be consulted if the byelaw would apply in their area.

Countryside (Scotland) Act 1967, s.56A:

Local authorities may make byelaws to control the use on land or waterways of vehicles (including hovercraft and boats) and the landing and taking off of aircraft. The byelaws must be promoted to prevent disturbance by engine noise to the enjoyment by the public of quiet areas of the countryside.

Local Government (Scotland) Act 1973, s.201:

Local authorities may make byelaws under this Act for all or part of their area, for the purposes of 'good rule and government', or for the prevention and suppression of nuisances. Sections 202-204 of this Act also establish procedural provisions for byelaws - made under this Act or made under any other enactments whenever passed - concerning matters such as authentication, periods for public notice, confirmation, offences and fines, and certification.

Civic Government (Scotland) Act 1982, s.121:

Local authorities may make byelaws for the 'seashore' and the adjacent waters, for the purpose of preventing nuisance or danger, or preserving or improving their amenity, or conserving their natural beauty. That includes conservation of flora and fauna and geological features. The 'seashore' is defined as the land between low and high water spring tides together with cliffs, banks, dunes, barriers, beach, flat, esplanade or other land above the high water mark and adjacent to the shore to which the public have a right of access. The byelaws may apply to the 'adjacent waters' within one kilometre of the low water mark. Such byelaws may regulate the exercise of sporting and recreational activities, control the speed of pleasure boats, regulate the use of pleasure boats having regard to the safety and consideration of others, require the use of silencers on pleasure boats, regulate the activities of people taking recreation in the water, control the use of vehicles and prohibit or regulate any business. These byelaws can no longer be made in respect of inland waters (LRSA03, Schedule 2.8).

Local Government and Planning (Scotland) Act 1982, s.18:

Local authorities and national park authorities may make byelaws for the regulation and preservation of, and for regulating the conduct of persons using, recreation, sporting, cultural and social facilities, including parks provided for public use. The facilities must be owned or managed by the authority, although byelaws may be applied, with the agreement of the owner to facilities owned or managed by someone else.

Land Reform (Scotland) Act 2003, s.12:

Local authorities may make byelaws in relation to land in respect of which access rights are exercisable for the preservation of public order and safety, the prevention of damage, the prevention of nuisance or danger, and the

conservation or enhancement of natural or cultural heritage.

National Parks (Scotland) Act 2000, Schedule 2:

National Park authorities may make byelaws for the purposes of protecting the national and cultural heritage of the Park, preventing damage to land and property and securing the public's enjoyment of, and safety in, the Park. Such byelaws may regulate the exercise of recreational activities, prohibit or regulate the lighting of fires, prohibit the depositing of rubbish, prevent or suppress nuisances and regulate the use of vehicles.

Scottish Natural Heritage has byelaw-making powers under six separate pieces of legislation.

- The National Parks and Access to the Countryside Act 1949 - s.20: byelaws for the protection of nature reserves.
- The Countryside Act 1967 - s.54: byelaws in respect of land or water owned or managed by SNH.
- Wildlife and Countryside Act 1981 - s.35: byelaws for the protection of a nature reserve held and managed by another approved body on application to SNH; s.37 byelaws for the protection of marine nature reserves;
- The Conservation (Natural Habitats &c) Regulations 1994, reg.28 – SNH may make byelaws under s.20 of the 1949 Act (above) for the protection of a European Site, even if not a nature reserve.
- The Conservation (Natural Habitats &c) Regulations 1994, reg.36 – SNH may make byelaws under s.37 of the 1981 Act (above) for the protection of a European marine site.
- The Nature Conservation (Scotland) Act 2004 - s.20: certain of the provisions of s.20 of the 1949 Act (above) are applied to the making of byelaws for the protection of Sites of Special Scientific Interest (SSSI).

National Trust for Scotland Order Confirmation Act 1935, s.33:

The National Trust for Scotland may make byelaws for the regulation and protection of, and for the prevention of nuisances and the preservation of order upon, lands owned or managed by the Trust. The activities that may be regulated under the byelaws are wide-ranging.

Forestry Act 1967, s.46:

Forestry Commission Scotland may make byelaws with respect to any land under their management or control and to which the public have access. The byelaws may be made for the purpose of preserving trees, timber or property, prohibiting or regulating conduct tending to injure or disfigure land or its amenities, and for regulating the reasonable use of the land by the public for recreation.

Furthermore, the Commission may make byelaws under s.46 for regulating the use by the public of recreational, tourist and sporting facilities provided by them (under the Countryside (Scotland) Act 1967, s.58).

Water (Scotland) Act 1980, s.71:

Scottish Water may make byelaws to protect water, which belongs to them or which they are for the time being authorised to take, from pollution. Scottish Water also has power under s.63 of the Countryside (Scotland) Act 1967 to promote the recreational use of its waters and to make byelaws prohibiting or regulating the use of land or water in which it has an interest for boating, swimming or other recreational use.

British Waterways Acts 1971 and 1975 (amending the British Transport Commission Act 1954, s.16):

British Waterways may make byelaws for regulating the use of canals and inland waterways and the conduct of people using them. Amongst other things, byelaws may provide for the specification of vessels using the canals, prohibiting the loading, discharging and mooring of vessels, preventing or regulating bathing, and for prohibiting the passage of persons, vehicles and animals along the towpaths. They may also exclude vessels from canals and waterways, and they may prohibit water skiing and similar activities on the canals and waterways.

2.6 Management Rules and Management Agreements

Civic Government (Scotland) Act 1982, ss112-117 –

Management Rules – these may regulate the use of any land or premises which are owned, occupied or managed by the local authority, and the conduct of persons while on the land. These powers to make Management Rules have two key advantages over byelaws, because they are procedurally less cumbersome to make, and because the sanction of direct expulsion is more directly enforceable than seeking a prosecution.

The process of making management rules involves giving public notice of the proposed rules and making copies publicly available for at least one month. Any objections arising must be considered, with a hearing if necessary, and the Rules then come into effect on the date specified. They continue for a period of ten years.

The sanction is that an authorised officer of the authority may expel from the land area any person who is, or is likely to be, in contravention of the Rules. Persons who persistently contravene the management rules may be made subject to an exclusion order.

Countryside (Scotland) Act 1967, s49A –

Management Agreements – a planning authority may enter into a management agreement with any landowner, for the purpose of doing whatever may be agreed as being necessary for preserving or enhancing the natural beauty of the countryside, conserving the flora and fauna, or promoting the enjoyment of the countryside by the public. A management agreement may contain financial provisions, and the wide terms of reference encourage parties to take a relatively comprehensive approach to the use and management of land. SNH can also enter into such management agreements with landowners for similar purposes. These agreements may be registered against title in the Register of Sasines/Land Register and so become binding upon subsequent owners during the term of the agreement.

2.7 Powers for Works and Expenditure

Local Government (Development and Finance) (Scotland) Act 1964,

s 2 – Provides general powers for a local authority to carry out works which are considered expedient for enabling members of the public to enjoy the countryside or engage in open-air recreation there. These works may for instance include providing picnic-places, paths, gates, bridges, seats, shelters, or

viewpoints, providing passenger ferries, or providing facilities like piers, landing stages and slipways to enable boating and water sports.

These powers may be exercised on land belonging to the authority, or with consent on land belonging to other parties. In the latter case, the authority may enter into an agreement with the landowner(s) to arrange the provision of such facilities, and to fix the terms on which the authority will exercise the powers and to safeguard the interests of the public. Such agreements, similarly to the management agreements above, may be recorded in the Land Register so as to be enforceable upon subsequent title-holders.

Other provisions under this Act enable the authority to contribute to appropriate expenditure by other authorities or voluntary organisations, or to receive such contributions; and to provide and maintain litter bins, and treat and dispose of litter.

Countryside (Scotland) Act 1967 -

This Act establishes various powers for local authorities to establish country parks and regional parks (s48), to provide recreational caravan and camping sites (s49) and parking places (s51, see below), to do works to improve waterways for water sport or recreation (s61), and to appoint rangers (s65).

2.8 Powers for Land Acquisition

Land Reform (Scotland) Act 2003, s16 -

Section 16 of the LRSA 03 provides powers for access authorities to acquire land where necessary or expedient to facilitate or enable the exercise of access rights. Acquisition can be either by agreement, or compulsorily with the consent of Scottish Ministers. Further details are provided in the Scottish Executive Guidance, which explains that this power is expected to be very much a last resort. The LRSA 03 repealed the previous power of land acquisition for public access purposes under the Countryside (Scotland) Act 1967 s 24.

Countryside (Scotland) Act 1967, s 51- 52 -

Section 51(2) gives planning authorities powers to provide parking spaces, where that is considered desirable in order to facilitate the public enjoyment of the countryside. These powers are the same as those available to roads authorities under the Road Traffic Regulation Act 1984, and specifically include the power to acquire land compulsorily for providing parking places.

Section 52 provides a specific power of compulsory land acquisition as part of the general powers of planning authorities under the Local Government (Development and Finance) (Scotland) Act 1964.

2.9 Powers on Litter, Dog fouling, Dangerous wild animals

Environmental Protection Act 1990, s 87- 88 -

It is an offence under this section for a person to deface by dropping or leaving litter any public open place, areas where the public has access, or publicly-owned land. Local authorities may make this known to the public, taking any

steps they consider appropriate, in order to help control littering. An authorised officer of a litter authority (local authority or national park) has the powers to issue a fixed penalty notice for this offence. The offender has 14 days to pay the fixed penalty to the litter authority before proceedings may be instituted.

Dog Fouling (Scotland) Act 2003 -

It is an offence under this Act for the person in charge of a dog not to remove its faeces immediately from any public open place, unless having reasonable excuse or relevant permission. Local authorities have a duty to authorise in writing at least one authorised officer to issue fixed penalty notices under this Act, and have powers to authorise 'such other number of persons' as they consider necessary or expedient for issuing fixed penalty notices in their area (s4). These authorised officers have the statutory powers to require suspected offenders to give their name and address, as well as the powers to issue the fixed penalty notices.

Under both the above Acts, it is lawful to convict on the evidence of just one witness.

Dangerous Wild Animals Act 1976 -

Provides that a licence is required from the local authority for the keeping of any dangerous wild animals, including specifying the conditions in which the animals are kept, and powers to inspect the animals and premises. The types of animals are specified in a Schedule to the Act, and include for instance wild boar and ostrich.

3.1. Access and the Planning system

Town and Country Planning (Scotland) Act, 1997 -

Includes development planning (structure plans, local plans), control over development through planning applications and enforcement, with provisions for planning conditions and planning agreements (see below). Policies in structure and local plans can set the local framework for access protection and creation in relation to development.

Sections 208 -210 provide for diversion of footpaths or bridleways to enable development for which permission has been granted – now amended to include diversion of core paths. Note LRSA 03, s 7(2) – development land remains under access rights if planning permission not granted or conditions not complied with.

‘Material Consideration’ – Access rights and other aspects of the access legislation are ‘material considerations’ in development control – that is, they are factors which are to be taken into account when the planning authority is considering a planning application. If not satisfactory, they may even constitute a valid reason for refusing planning permission. This is confirmed in Scottish Planning Policy 11: “Access rights and core paths plans are a material consideration in determining applications for planning consent”.

Note: under the **Planning etc (Scotland) Act 2006** structure plans will be abolished and replaced by strategic development plans for the largest cities and their hinterlands. Local development plans will cover the whole of Scotland. Sections 208 – 210 are not affected by the 2006 Act, and material considerations remain unchanged. The 2006 Act is likely to be brought into force by various orders over a period of time.

Planning Conditions, s37 –

Planning authority may grant planning permission either unconditionally or subject to such conditions as they think fit, or may refuse permission.

Circular 4/1998, and case law, define criteria which conditions must meet, as being:

- necessary – otherwise application would be refused
- relevant to planning as a material consideration
- relevant to the development to be permitted
- enforceable – must be worded to ensure compliance
- precise – developer must know exactly what is required
- reasonable – not unreasonably restrictive
- may apply to applicant’s landholding outwith the development site
- compatible with government policies and development plan

These provisions are unaffected by the Planning etc (Scotland) Act 2006.

Example of use for access - eg a planning condition requiring subsequent approval of the construction and layout details of the paths system within a housing development.

A draft model planning condition in relation to access rights is provided in the Scottish Executive Guidance (p.30), to assist the consideration of public access: "Prior to the commencement of works.." (if attached to a full planning permission) or

'As part of the detailed application....' (if attached to an outline consent)

'....a detailed plan of public access across the site (existing, during construction and upon completion) will be provided for the approval of the council as planning authority. This will show:

- a) all existing paths, tracks and rights of way, and any areas currently outwith or excluded from statutory access rights*;
- b) any areas proposed for exclusion from statutory access rights, for reasons of privacy, disturbance or curtilage, in relation to proposed buildings or structures;
- c) all paths and tracks proposed for construction, for use by walkers, riders, cyclists, all-abilities users, etc. and
- d) any diversions of paths - temporary or permanent - proposed for the purposes of the development. "

*Under Part One of the Land Reform (Scotland) Act 2003.

Planning Agreement, s75 and Planning Obligations

This section enables the planning authority to enter into a planning agreement with the developer interests which can restrict or regulate the development or use of the land, or can deal with certain associated provisions which may be outwith the scope of planning conditions.

Circular 12/1996 specifies relevant circumstances for use:

- must serve a planning purpose
- must be related to the proposed development
- should be related in scale and kind to the proposed development
- should satisfy a test of reasonableness.

The agreement must be registered in the Land Register of Scotland or the Register of Sasines for it to be enforceable on subsequent title-holders.

The Planning etc (Scotland) Act 2006 substitutes s75 agreements with what are called 'planning obligations', which may arise either through an agreement with the authority as before, or as unilateral undertakings put forward by a developer, operating in a similar fashion to an agreement. The 2006 Act introduces means by which planning obligations or agreements may be modified or discharged. This includes a right of appeal against the Planning Authority's refusal of an application for modification or discharge of a planning agreement.

Strategic Environmental Assessment

This is a process for identifying, predicting, reporting and mitigating impacts of plans and programmes. For instance, core paths plans will generally be subject to SEA. The process arises from the SEA Directive (Directive 2001/42/EC), and the Environmental Assessment (Scotland) Act 2005. The key stages of an SEA are:

Screening – to determine whether a plan is likely to have significant environmental effects. If determined as insignificant, no further assessment is needed, but keep under review in case unexpected effects emerge as proposals develop.

Scoping Report – to consider the scope and level of detail proposed for assessing likely significant effects in the environmental report, and the appropriate consultation periods

Environmental Report – identifies, describes and evaluates the likely significant effects on the environment of the plan and reasonable alternatives. All significant effects should be monitored to confirm original assumptions. A non-technical summary is required.

(Ref: sea.gateway@scotland.gsi.gov.uk)

Planning permission for paths and tracks –

The detailed requirements for planning permission on ‘development’ and ‘land use’ are set out currently in the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (GPDO), and the local planning authority is responsible for the interpretation of the GPDO within their area. Path works are usually considered as too insignificant to qualify as ‘development’ requiring planning permission, but this interpretation rests with the relevant local planning authority, and if in doubt it is best to check with them. The GPDO provides for certain types of track works, such as for agricultural or forestry purposes, as being ‘permitted development’, except where the site is within a National Scenic Area or is subject to an Article 4 Direction. The GPDO does include circumstances in which a track or access road may require planning permission, being where a track joins/leads onto/leads off a ‘public road’ (see 3.2 below), or where a track is within 25 metres of a public road even if it does not connect with the road. (see Ref. 7)

3.2. Roads/Motor Vehicles/Parking

Roads (Scotland) Act, 1984, s151

A ‘road’ is defined as: ‘any way (other than a waterway) over which there is a public right of passage (by whatever means) and includes the road verges and any bridge or tunnel over or through which the road passes’.

Note – Access rights under the LRSA 03 do not constitute a public right of passage for the purpose of defining a road under this Act (LRSA 03, s5(6))

Section 151(2) defines types of ‘road’ according to the type of right of passage:

- Carriageway – public right of passage by vehicle
- Cycle track – rights by pedal cycle only, or by pedal cycle and foot only
- Footway – rights by foot only, associated with a carriageway
- Footpath – rights by foot only, not associated with a carriageway

A ‘public road’ means a road which a roads authority has a duty to maintain. Horses are not specifically mentioned in the 1984 Act, but may be taken as being included in the bracketed phrase ‘(by whatever means)’, so bridleways are therefore a form of carriageway in this definition.

Road construction – Under the 1984 Act, the roads authorities can alter or construct local roads, and Scottish Ministers can alter and create trunk roads and special roads (motorways). This process usually involves the publication of roads orders for consultation.

Appraisal and Assessment – All transport projects should be planned in accordance with the Scottish Transport Appraisal Guidance (Ref 12). The effect

on non-vehicular users ('accessibility') is assessed by looking at effects on community severance, public transport, effect on journey times, changes in travel patterns etc.

Road schemes are subject to Environmental Assessment using guidance in the *Design Manual for Roads and Bridges* (Ref 13). Volume 11, Section 3, Part 8 deals with 'Pedestrians, Cyclists, Equestrians and Community Effects'. When assessing roads schemes, an approach similar to the draft model planning condition (above) could be adopted, to take account of wider rights of access.

Road Traffic Act 1988 –

Use of motor vehicles off-road – Section 34 makes it an offence (except with lawful authority or in an emergency) to drive a motor vehicle on any land which is not part of a road (eg. common land, moorland, etc). It is also an offence to drive a motor vehicle on any 'road' which is a footpath (as defined above) or bridleway, ie. a right of way or public path.

Parking – Section 34 also makes allowance for a motor vehicle to be driven off-road for no more than 15 yards solely in order to park the vehicle. However, it specifically notes that this exception does not confer any right to park the vehicle on the land, and clarifies that this may constitute trespass if done without lawful authority.

Section 22 makes it an offence to park or leave a vehicle or its trailer in a position likely to cause danger to other road-users.

3.3 Access and Nature Conservation

Nature Conservation (Scotland), Act, 2004 –

- Duty on all public bodies and office holders to further the conservation of biodiversity in exercising their functions – the 'biodiversity duty', s1
- Duty on all public bodies and office holders in exercising their functions to conserve and enhance the specified features of SSSIs, s12
- New offence of intentional or reckless damage to features of SSSIs, s19
- SNH power to erect signs providing information to the public, s41
- New circular to replace 6/95 on SSSI's, Natura, Euro-protected species

The Conservation (Natural Habitats, &c.) Regulations 1994

These 'Natura regulations' apply the EEC Habitats Directive to GB. The regulations make provisions over the designation and protection of sites under the Habitats Directive ('Natura 2000' sites, eg. Special Protection Area, Special Area of Conservation); and the protection of animal and plant species which are scheduled as European Protected Species.

An "appropriate assessment"(reg. 48) is required where any plan or proposal is likely to have a significant effect on a Natura site, and is not directly connected with or necessary for the management of the site. Note: liaise with SNH on the scope of any appropriate assessment as early as possible.

Land Reform (Scotland) Act, 2003, s29 –

Section 29 establishes powers to put up and maintain notices for the protection of natural heritage by SNH, and of cultural heritage by Scottish Ministers. People not complying with the notices will be regarded as not exercising rights responsibly as required by LRSA 03 s 2.

3.4 Public Order/trespass/raves/vandalism

Public Order Act 1986, s. 14 –

Public trespassory assemblies – This section (as amended by s70 of the 1994 Act below) makes it an offence to organise or participate in any trespassory assembly which has been prohibited by a Council order following an application by the chief officer of police. Such prohibitions may only be ordered, for a period of up to 4 days, where such an assembly of 20 or more people may result in serious disruption to the life of the community, or may cause significant damage to a building or land of historical, archaeological or scientific importance, and would not have the landowner's permission.

Criminal Justice and Public Order Act 1994 –

Trespass for common purpose of taking residence s61 – This section provides police powers, and applies where two or more persons have become trespassers on land because they have the common purpose of residing there for any period, and have caused damage/used threats, or have six or more vehicles with them.

In these circumstances, the police can direct those persons to leave.

Raves s63 – This provides police powers to remove persons attending or preparing for a rave which does not have a public entertainment licence. It defines a rave as 'a gathering on land in the open air of 100 or more persons at which amplified music is played during the night' and which, because of the loudness or duration, 'is likely to cause serious distress to the inhabitants of the locality'. The police can act if a senior policeman (superintendent or above) reasonably believes that (a) two or more people are making preparations, (b) 10 or more are waiting for it to begin, or (c) 10 or more are attending such a gathering in progress. The police can direct the people to leave, and can seize vehicles or equipment which are not removed.

Aggravated trespass s68 – This section provides police powers where levels of disruption constitute the offence of aggravated trespass, and the offender is intentionally using intimidation, obstruction or disruption in relation to people who are undertaking lawful activities on the land.

Criminal Law (Consolidation) (Scotland) Act 1995, s52 –

Vandalism – Any person who, without reasonable excuse, wilfully or recklessly destroys or damages any property belonging to another, shall be guilty of the offence of vandalism. This offence is a 'fixed penalty offence' under the Antisocial Behaviour etc. (Scotland) Act 2004, so a constable may issue a fixed penalty notice, for payment to the clerk of the district court.

Common Law –

Breach of the Peace – When one or more persons conduct themselves in a riotous, or disorderly manner, anywhere, which alarms, annoys or disturbs other people. Common law powers of arrest may be used, and the key issue is that someone is alarmed

Malicious Mischief – consists in the wilful, wanton, and malicious destruction of, or damage to, the property of another person. There must be malice involved, rather than accidental damage, and examples might include injuring growing trees, maiming animals, running to waste any liquid or substance. A difference from vandalism is that for vandalism there must be damage to actual property,

whereas with malicious mischief financial damage arising from a criminal act is sufficient. This offence may be cited, rather than vandalism, if the value of damage is high.

3.5 Access and Liability

Occupiers' Liability (Scotland) Act, 1960

- Occupiers of land must take reasonable care to ensure people do not suffer injuries or damage through negligence, s2(1)
- a duty of care is owed if the occupier of land can reasonably foresee that harm will be caused due to actions or omissions
- excludes liability obligations over willingly accepted risks, s2(3). This links to the "volenti non fit injuria" principle – a person's knowing participation in a risky activity means they accept the risk of injury in the event of an accident
- LRSA 03 s5(2) – the duty of care 'is not affected' by the Act or its operation. (See Ref 5).

Assessing liability – this will follow a general sequence of questions -

- Who is the occupier (more than one possible)?
- did they owe a duty of care to the visitor?
- what was the appropriate standard of care - depends on:
 - status of visitor (reasonably expected or not)
 - characteristics of visitors (child, able-bodied, elderly)
 - nature of dangers (eg. natural, obvious, familiar, hidden, unexpected)
- was injury or damage caused by breach of duty of care?
- were suitable risk assessments/inspections/measures carried out ?
- was the risk accepted by the visitor?
- did the visitor's negligence contribute to injury or damage?

Animals (Scotland) Act, 1987

- The keeper of an animal will have strict liability for injury or damage caused, if the animal is of a species known to be likely to injure or kill, or to materially damage property. Negligence does not have to be proven in such cases.
- Strict liability would not apply to animals straying onto road and causing a traffic accident - but ordinary liability could still arise if negligence is proven.
- This Act also provides a defence for landowners or livestock keepers who kill or injure an animal which is attacking their livestock or a keeper, s4.

Health and Safety at Work Act, 1974, s3

- Places duties on employers and self-employed to undertake their business in a way that ensures persons not in their employment are not exposed to risks
- the duty is owed to non-employees – eg. the public taking access outdoors
- test of "reasonable practicability" takes account of Codes of Practice
- prosecution possible on basis of risk existing – risk need not materialise.

Management of Health and Safety at Work Regulations 1999

- It is a duty on an employer to undertake risk assessments, including in respect of other people (ie. members of the public) coming onto the land or arising out of or in connection with the conduct of the employer's undertaking.

Control of Pesticides Regulations 1986

- The public must be kept out of fields for 3 days if sulphuric acid is sprayed
- in this situation s6(1)(d) of LRSA 03 applies, ie. access rights are not exercisable.

Reporting of Injuries, Diseases & Dangerous Occurrences Regulations (RIDDOR) 1995

- These regulations require, for instance, that an accident which injures a person and causes them to be off work for more than 3 consecutive days, must be reported to the relevant authority (HSE, police etc.).

Control of Substances Hazardous to Health (COSHH) Regulations, 2002

- Designed to protect people from injury or illness caused by substances and materials used in the work place
- assessments are required for substances and materials which, in path construction, includes whindust, cement, geo-textiles, wood preservatives etc. (see Refs. 3 and 5)

3.6 Access and Disability

Disability Discrimination Act, 1995

It is unlawful for a 'provider of services' to discriminate against a disabled person, in

- refusing to provide any service as provided to other members of the public,
- providing service of lower standard or on worse terms.

Discrimination occurs, irrespective of whether the service is charged for or not, when

- the disabled person is treated less favourably than others
- the service provider cannot show that the failure is justified

Providers of services have a duty (s21) to make reasonable adjustments to features or practices so as to avoid such discrimination.

Countryside services may be relevant to this Act, eg. walks programmes, events, information, paths. For instance, land managers may be 'service providers' if they actively promote paths. (see Ref. 6)

Disability Discrimination Act, 2005

This 2005 Act amends the 1995 Act in various ways, particularly in applying that s21 duty to all 'public authorities'. It also establishes a general duty (s49A) on every public authority, in carrying out its functions, to have due regard to

- eliminating discrimination and harassment,
- promoting equality of opportunity, encouraging participation, and
- promoting positive attitudes, towards disabled persons.

This 'disability equality duty' applies to all public authorities, including 'any person certain of whose functions are functions of a public nature', so for instance may include local access forums, and bodies delivering publicly funded projects.

3.7 Access and the Foreshore – common law rights

The public has common law rights over the sea, sea bed and the foreshore, being rights to fish and to gather shellfish, to navigate, and a right of recreation. The legal definition of the foreshore is the area of the shore between the high and low water marks of ordinary spring tides.

This right of recreation on the foreshore is taken to include for instance bathing, swimming and sunbathing; making sandcastles and playing games; having

picnics, lighting fires and cooking food; and beachcombing (ie. collecting small inanimate objects washed up by the sea, of negligible value and abandoned by their owner). The rights also include the right to shoot from the foreshore wildfowl which are on or over the foreshore or the sea. Similarly, to fish from the foreshore for sea fish other than salmon, and to gather shellfish other than mussels and native oysters. The foreshore rights also cover activities which are linked to the public rights of fishing and navigation in the sea. These include for example embarking/d disembarking and loading/unloading boats, drying nets and gathering bait, and similar 'ancillary activities' in relation to bathing, swimming, yachting, canoeing, surfing and diving. (see Ref. 4)

These common law rights have been established through case law, such as for instance the case of *Marquis of Bute v McKirdy & McMillan* 1937. (see Ref. 10) The Crown owns the foreshore, and can convey it to an individual (except in those parts of Orkney and Shetland having udal land-title). The Crown Estate estimates that it now owns about 55% of the UK foreshore. The common law rights apply regardless of ownership.

3.8 Firearms

Firearms Act 1968 s.19

Under Section 19 of this Act, a person commits an offence if, without lawful authority (for example, the consent of the landowner) or reasonable excuse, the person has with them in a public place a loaded shotgun or loaded air weapon, or any other firearm (whether loaded or not) together with ammunition suitable for use in that firearm. The Scottish Outdoor Access Code (2.12) clarifies that because of this offence, the carrying of any firearm is taken to be excluded from the reasonable exercise of access rights – except where the person is crossing land or water to immediately access or to immediately return from the area where they have shooting rights (for instance foreshore as above, or as authorised by the landowner).

3.9 Other criminal offences

Access rights of course do not extend to any criminal offences or activities. The Scottish Outdoor Access Code in Annex 1 lists the main categories of criminal behaviour that are statutory offences, as background information. That Annex 1 notes that the common law also prohibits certain actions which may amount to a breach of the peace or where malicious mischief is alleged. The annex is meant to provide only an overview summary, so detailed information must be found by looking at the relevant legislation.

In the same way, if you need more detailed information than can be provided in this brief guide, please look at the relevant legislation, and if required obtain formal legal opinion.

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References

- 1 Scottish Executive - Part 1 Land Reform (Scotland) Act 2003: Guidance to Local Authorities and National Park Authorities (2005)
- 2 Paull and Williamsons - Review of SNH Byelaw Making Powers: SNH commissioned report 112 (2005)
- 3 Paths For All Partnership - factsheets 5.3 and 5.4
- 4 Scottish Law Commission - Report on Law of the Foreshore and Sea Bed: report no.190 (2003)
- 5 Scottish Natural Heritage - A Brief Guide to Occupiers' Legal Liabilities in Scotland in relation to Public Outdoor Access (2005)
- 6 Scottish Natural Heritage - Disability Discrimination Act 1995 for countryside service providers - SNH Information and Advisory Note
- 7 Scottish Natural Heritage - Constructed Tracks in the Scottish Uplands (2006)
- 8 Scottish Natural Heritage - Public Access to the Countryside - A Guide to the Law, Practice and Procedure in Scotland: Prof J Rowan-Robinson (1993)
- 9 Scottish Outdoor Access Code (SNH 2005)
- 10 Scottish Rights of Way Society - Rights of Way - the Authority of Case Law (1998)
- 11 Scottish Rights of Way Society - Access Rights and Rights of Way - a Guide to the Law in Scotland: Prof R Paisley (2006)
- 12 Scottish Executive - Scottish Transport Appraisal Guidance (STAG)
- 13 Design Manual for Roads and Bridges (HMSO 1993)

All Acts and Statutory Instruments are available from The Stationery Office Limited, and may be available online from the websites of the Scottish Parliament or of the UK Parliament as appropriate, or at <http://www.statutelaw.gov.uk>.

Scottish Natural Heritage is a government body responsible to Scottish Executive Ministers, and through them to the Scottish Parliament.

Our mission:

Working with Scotland's people to care for our natural heritage.

Our aim:

Scotland's natural heritage is a local, national and global asset. We promote its care and improvement, its responsible enjoyment, its greater understanding and appreciation, and its sustainable use now and for future generations.

Our operating principles:

We work in partnership, by co-operation, negotiation and consensus, where possible, with all relevant interests in Scotland: public, private and voluntary organisations, and individuals.

We operate in a devolved manner, delegating decision-making to the local level within the organisation to encourage and assist SNH to be accessible, sensitive and responsive to local needs and circumstances.

We operate in an open and accountable manner in all our activities.



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