

PUBLIC ACCESS



CORE TOPICS:

- Public rights to access land that may affect rewilding projects.
- Restricting public access to land and practical difficulties in doing so.

KEY TAKEAWAYS:

- The Scottish “Right to Roam” provides extensive public access to land and inland waterways across Scotland for recreation, education and some commercial activities.
- Each local authority area contains a network of core paths allowing public access to land and which must not be blocked or obstructed.
- Land can also be subject to servitudes which are usually recorded in title deeds.
- The law allows landholders to take action against people who cause damage to land or unreasonably interfere with it.

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1. INTRODUCTION

In Scotland, most of the land suitable for rewilding purposes is accessible to the public for recreational, educational, and certain commercial purposes under the Land Reform (Scotland) Act 2003 (the “**Land Reform Act**”), also known as the “Right to Roam” legislation. Land used for rewilding may also be subject to other public rights of way. Landowners planning to rewild land need to be aware of their responsibilities to protect public access and how this might affect their ability to close paths or introduce animals onto sites.

2. PUBLIC RIGHTS TO ACCESS LAND

The public is allowed to access most land suitable for rewilding in Scotland unless there are particular restrictions or the area has specific characteristics (e.g. a railway). It is therefore difficult for a landowner, particularly of a large estate, to entirely prevent access to their land. In addition to these broad access rights, there are often public rights of way, core paths, and general access rights, particularly in rural land, all of which can be used by the public and must be considered when rewilding.

2.1 Land Reform (Scotland) Act 2003

In Scotland the “Right to Roam” refers to the rights of responsible access introduced by the Land Reform Act. This is the basis for public access to most land and inland water across Scotland. It includes the right to cross land or to be on land for certain purposes. It is not limited to paths. People accessing land can cross in any direction, provided they act responsibly. The permitted purposes include recreation, education and commercial activities where they could be carried on non-commercially (e.g., a mountain guide)¹.

The permitted purposes include a vast array of activities, from walking, cycling, horse riding, kayaking and swimming to paragliding, wild camping, and foraging amongst others. They are set out in the guidance document called the “Scottish Outdoor Access Code” (the “**Code**”). The Code provides guidance to individuals and landowners when using or managing land.

Certain conduct is excluded from access rights.² This means that if a person is carrying out excluded conduct on the land, they cannot rely on the access rights under the Land Reform Act. Examples of excluded conduct when on or crossing land are:

- hunting, shooting or fishing³;
- taking away anything in or on the land for commercial purposes or profit⁴; or
- travelling in a motorised vehicle (unless it is one constructed or adapted for a person with a disability and is being used by them)⁵.

All land is included by default unless it is subject to a specific exemption. Some examples of exemptions are⁶:

- land containing buildings, plant, or machinery;
- where another law prevents access to the area;
- school grounds;
- land around a residential property⁷; or
- land where crops are growing⁸.

Some landowners have raised actions asking the court to determine whether some of their land is “excluded land” under the Land Reform Act.⁹

Additionally, where areas are of natural or cultural heritage¹⁰, public bodies have powers to put up notices warning individuals about the impact access and activities may have on natural or cultural heritage¹¹. For example, advising against climbing on certain rock-faces during bird nesting

season. Another reason to restrict access could be for the protection of rare species of plants or an ancient monument.

Other powers include giving specific public bodies (e.g., NatureScot) power to make byelaws ‘for the protection of a site of special scientific interest’. When considering this type of site, landowners should consider the regularity of access, and what effect this might have on wildlife at any particular time. The public must take special care where sites are in one of these protected categories. Where such sites are privately owned, NatureScot works with site owners and managers to ensure the natural features of the sites are protected¹².

As land used for rewilding generally encompasses large rural areas, it is likely that access rights under the Land Reform Act will be allowed to be exercised over it. See section 3 (*Landholder Responsibilities regarding Public Access Rights*) below for a discussion of how this may impact management of rewilding land.

2.2 Core Paths

Each local authority area also includes a system of core paths.¹³ Every local authority is responsible for preparing a map of core paths for use by the public that allows them access to the local area. These are published on the local authority website for each area and cover every local authority in Scotland. They can be found in many rural areas and there is a comprehensive map available on the [NatureScot website](#). Core paths are largely based on historic rights of way but can also be created by notification (e.g., via adoption of a Core Paths Plan)¹⁴ or agreement with the landowners. These paths allow for horseback, pedal and/or foot access. Local authorities have the power to change and close routes and are responsible for maintaining them. There are powers within the Land Reform Act relating to the amendment of core path plans and agreeing delineation of paths.

Core paths cannot be blocked by landowners, nor can landowners discourage the public from using them. Local authorities have the power to “do anything which they

consider appropriate” for the purpose of keeping a core path free from obstruction or encroachment.¹⁵ There are other obligations on landowners, where core paths cross their land, including restrictions on disturbing the surface of a core path.¹⁶

2.3 Rights of way

Public rights of way connect two public places and allow for access between them. Their importance is now generally less significant than it was before the introduction of the Land Reform Act. However, they can still provide access over land in Scotland where land would otherwise be excluded under the Land Reform Act. [ScotWays](#) provides a search service for rights of way which allows landowners to find out where these cross their land.¹⁷ These cross many rural areas, including historic hill tracks and heritage paths. Some of these have been updated and signposted in recent years, however many more are recorded by local knowledge.

There are also some public rights of way which permit vehicle access. Under the Land Reform Act, the “right to roam” generally does not apply to motor vehicles (except those used for accessibility purposes). Rights of way are therefore very important where access needs to be taken via motor vehicles.

There is no individual process for landowners to close rights of way. It may be possible in some cases to argue that a particular right of way has ceased to exist by a lack of use over time,¹⁸ although it is likely to be difficult to prove legally.

2.4 Servitudes

In Scotland, particular individuals might have a right of access over land. These are known as servitudes (broadly equivalent to ‘easements’ in England). They can be created in several ways, the main one being inclusion in the title deeds of the property. Another is through usage over the passage of time where there is no other basis on which the person can reach the land. To discover where there are servitudes, landowners should look at their title deeds and find out from the local community if there is any regular

access taken through their property as not every servitude will necessarily be in the title deeds.

One of the main types of servitudes (however created) is a right of access. This is different to a public right of way because it only benefits the owner of the title giving rise to it (as well as their agents). The law of servitudes is complex but the key point to note is that a party, most likely neighbours, might have a servitude right of access over rewilding land.

Servitudes are likely to exist where land has been split into different parcels of ownership, and where there are other buildings and inhabitants nearby. This could include historic agricultural land and large estates which have been subdivided.

A servitude can be extinguished (i.e., removed) through (i) an express discharge by the servitude holder; (ii) through an implied discharge where they act in a way incompatible with the servitude; (iii) where the servitude is not exercised for 20 years; or (iv) where the landowner applies to the Lands Tribunal for the servitude to be discharged.

2.5 Permission

Landowners can also invite members of the public onto their land. If they do so, those members of the public will be able to access the land for any of the purposes for which they are invited (even where the land would otherwise be excluded under the Land Reform Act). Expressly permitting access at certain times will not grant individuals a servitude right of access over that land. This is because such a right must be exercised not on a personal permission basis, but rather as if the person has a right (when, in fact, they do not have any right).

A rewilder who wanted to encourage access to their land by setting up paths to enable more people to enjoy it (especially those who might otherwise not be confident to do so) should generally not need any special permission (beyond any applicable planning or environmental permissions) in order to do so, though specific advice should be sought in the circumstances.¹⁹ This assumes that the

rewilder would not be preventing or deterring access to the land surrounding the path (if that land would otherwise be accessible under the Land Reform Act) but rather is an optional alternative route for those who are less confident.

3. LANDHOLDER RESPONSIBILITIES REGARDING PUBLIC ACCESS RIGHTS

3.1 Restricting access

Where there is a right of access to land, the landowner is responsible for ensuring there is no obstruction or deterrent to access²⁰.

Where access is granted under the Land Reform Act, the landowner can only exclude the public where the land falls into one of the exemptions in the Land Reform Act,²¹ some of which are set out above.

Although erecting fences and gates is sometimes allowed, these should not interfere with the substance of access, i.e., where reasonably practicable, a gate should allow access for pedestrians, cyclists, horse riders, wheelchairs, and buggies, given that access rights can be exercised by these means. Generally, gates must not be locked nor create unnecessary obstructions to the public exercising their rights of access. Any measures introduced should prioritise safety and good, responsible access for all. There is detailed guidance as to how best to construct and maintain gates and paths on the [Paths for All](#) webpage.

Landowners must avoid putting up misleading or dissuasive signs such as “Keep out” or “Private” on land which the public are entitled to access. Signs saying “no access” should not be used, nor should misleading signs warning about dangerous animals or chemicals where no such risk exists.²² If landowners prevent or deter access rights under the Land Reform Act, landowners can be issued with a statutory notice from their local authority.²³

However, landowners can still manage access to their land. For example, landowners are allowed to put up accurate informational signs and gates (where these still allow access, unless it is exempted land). The Code provides further guidance on balancing a landowner's interest and the requirement to facilitate access.

3.2 Keeping animals and livestock

One way in which a landowner may be considered to be preventing or deterring any person from exercising their access rights "is positioning or leaving at large any animal"²⁴. Landholders engaged in rewilding should consider how this might affect them.

Where animals are particularly dangerous (e.g., bulls or perhaps bison), these must be kept away from areas to which the public generally take access. For example, if there is a principal hill track through one field, and no regular access taken through a second field, potentially dangerous livestock should, where possible, be kept in the latter field. Landowners should be particularly conscious of increased risks to the public, such as during school holidays where people new to rural areas may be more likely to pass through land. Landowners should erect suitable gates and fences to protect the public from such animals. However, a balance needs to be struck between safety and disproportionate prevention of access. Individuals are still entitled to take access through land where animals are present, however, they should take alternative routes where available, and take access responsibly if they do need to pass through a field containing dangerous animals.²⁵

The Health and Safety Executive set out [further detailed guidance](#) for farmers, landowners, and individuals on how to effectively balance access rights and keep cattle safely, which provides general considerations for how other livestock or reintroduced animals could be managed²⁶.

By way of example, introducing large animals in areas where the public regularly take access in an isolated manner (e.g., positioning them deliberately in a field close to the path) may be considered to deter access and therefore be incompatible with the rewilders' obligations under the Land Reform Act.²⁷

It will depend on the facts and circumstances in each case, e.g., whether as part of an overall rewilding strategy across an estate or done in isolation. To mitigate the risks here, rewilders should engage with their local authority to make clear the purpose of introducing animals on their property. This is to check the local authority's position on rewilding as measured against their duty to "uphold access rights".²⁸ Whilst the assessment of 'purpose' of a landowner's act that might deter access is objective, if the animal(s) on the property are endangered species and there is publicity about rewilding, it may be difficult for a court to conclude that the objective purpose of introducing such animals was to prevent exercise of access rights.

However, the way in which rewilders go about introducing these animals will be a relevant consideration for the local authority. Where large areas have been fenced off with no consideration for the current use of the site, it is less likely that the local authority will consider the "purpose" or "main purpose" of the introduction to be something other than preventing access. Where infrastructure such as deer fencing is introduced, landowners should be careful to ensure they provide appropriate alternative access for the public.²⁹ Another reason for engaging with the local authority is that they have powers to exempt particular land from access rights under the Land Reform Act.³⁰ The power does not entitle the local authority to exempt the land permanently, but temporary exemptions can be renewed.

Landowners should ensure that they have effective signage and take other appropriate steps to mitigate or prevent incidents between animals and the public. This includes signs requiring the public to shut gates properly and warning in advance of the location of any animals or electric fences, for example.³¹ For further information about potential liabilities associated with the keeping of animals as part of rewilding projects, please see notes entitled *Rewilding in Scotland: Liability to Visitors and Neighbours* and *Rewilding in Scotland: Liability for Damage Caused by Animals*.

Separately, it may be relevant for rewilders to understand that individuals taking access under the Land Reform Act must ensure dogs are kept on a tight leash or under close control. If a dog or other animal is "not under proper control" then individuals do not enjoy the rights of access under

the Land Reform Act.³² This can also lead to the individual being charged with "worrying livestock" if animals under their control cause alarm or harm. Individuals should first be warned and can be asked to leave if they fail to comply with the principles of responsible access set out by the Land Reform Act.³³ The police should be called if you think a criminal offence may have been committed.³⁴ However, the relevant legislation only applies to cattle, sheep, goats, swine, horses or poultry, and currently not to other species that might be introduced by rewilders.³⁵

4. RESTRICTION OF ACCESS RIGHTS

Local authorities in Scotland have a legal duty to "uphold access rights" for the public.³⁶ The landowner could also face legal action from any interested person (e.g., local people who have taken access to an area) if they seek to restrict access. In such a case, the court would be asked to decide on the existence and extent of access rights.³⁷ Where paths are closed temporarily or wider access is temporarily denied for the purpose of carrying out repairs or moving livestock, these are unlikely to result in legal action. Any such restrictions should be as short-term as possible and alternative access should be facilitated where practicable.

Cases allowing a more permanent exclusion of land have largely turned on the privacy of the landowners residing on the site, and the type of land excluded has been determined on a case-by-case basis.³⁸ Other cases have concerned appeals against a local authority's notice under the Land Reform Act. These cases turn on the landowner's purpose or main purpose (in the view of the local authority) in preventing or deterring access.³⁹

5. TRESPASS AND IRRESPONSIBLE USERS

Where individuals taking access to land do not do so in accordance with the principles of responsible access set out in the Scottish Outdoor Access Code and the Land Reform Act, they can be asked to change their behaviour, and if they refuse to do so, they can be asked to leave.⁴⁰

Where access is taken for purposes other than those set out in the Land Reform Act or otherwise allowed as set out above, then this would constitute trespass at least as a civil wrong (rather than a criminal offence). However, there are practical difficulties to enforcing the civil wrong of trespass. There needs to be non-trivial damage for a trespass to be actionable in civil courts. The Scottish Outdoor Access Code sets out examples of conduct that would constitute an unreasonable interference and therefore potentially be an actionable trespass. The legal issue will be whether such trespass resulted in damage. There will be other practical issues. The examples given in the Code as to unreasonable interference (i.e., conduct that would not be responsible) are: breaking a fence, trampling crops or posing a significant disturbance to land operations (like parking a car in front of a wild animal).⁴¹ These actions would therefore be outside the scope of the Land Reform Act and not be protected access rights.

There is also a criminal offence of trespass (as distinct from a civil wrong) in Scotland under the Trespass (Scotland) Act 1865 (the “**1865 Act**”). However, given the terms of the 1865 Act and the wide-ranging nature of the statutory right to roam under the Land Reform Act, its scope is relatively narrow.⁴² In its modern form, this only applies to (in summary) individuals lodging in property or lighting a fire on or near a road or enclosed or cultivated land that is outside the scope of the Land Reform Act.⁴³ There are a few further criminal offences which may be applicable where individuals prevent others from carrying out a lawful activity on land.⁴⁴

As a landowner, it is also possible to seek “interdict” (injunction) through the civil courts. This allows for a court decision prohibiting individuals from carrying out certain

actions or activities on the land. However, this is an expensive procedure and unlikely to be very useful where the parties only take access once or are not known to the landowner.

6. FENCES AND HEDGES

Generally, there is no statutory or common law obligation on owners to erect or maintain fencing along the boundaries of their land, however, title deeds or lease documentation may contain obligations to maintain fencing or hedging.

For example, a heritable proprietor or tenant may find that their title deeds or lease requires them to maintain some or all of the fencing or hedging separating their land from that of their neighbours. Where the title deeds to land imposes such an obligation, the obligation is likely to be binding on future purchasers. In some cases a fence or hedge may be owned in common by neighbours whose land it separates and the parties may be obliged to maintain it jointly.

If the land is occupied by a tenant under a tenancy agreement regulated by the Agricultural Holdings (Scotland) Act 1991 (“**AHSA**”) and any permanent fences (including hedges, stone dykes, gate posts and gates) are ‘fixed equipment’⁴⁵, the AHSA regulates the respective liabilities of the landlord and tenant to maintain and repair the same.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of October 2022.

ENDNOTES

1. Land Reform (Scotland) Act 2003, s1(3)
2. Land Reform (Scotland) Act 2003, s9.
3. Land Reform (Scotland) Act 2003, s9(c).
4. Land Reform (Scotland) Act 2003, s9(e).
5. Land Reform (Scotland) Act 2003, s9(f).
6. See more generally Land Reform (Scotland) Act 2003, s6.
7. Land Reform (Scotland) Act 2003, s6(1)(b)(iv), Scottish Outdoor Access Code, 3.14. This is defined in the Land Reform Act as sufficient adjacent land to provide a reasonable measure of privacy to the inhabitants and to ensure that their enjoyment of that house or place is not unreasonably disturbed. This will turn on the facts and circumstances of the individual property. ScotWays provides an [in-depth analysis of the case law](#) in this area.
8. Land Reform (Scotland) Act 2003, s6(1)(i). This does not include the headrigs, endrigs or other margins of the fields in which crops are growing: Land Reform (Scotland) Act 2003, s7(10)(b); Scottish Outdoor Access Code, para 2.2
9. Land Reform (Scotland) Act 2003, s6 sets out excluded land.
10. Both terms are defined in the Land Reform (Scotland) Act 2003, s32.
11. Land Reform (Scotland) Act 2003, s29; Scottish Outdoor Access Code, para 6.7.
12. [Sites of Special Scientific Interest \(SSSIs\) | NatureScot](#)
13. See Land Reform (Scotland) Act 2003, s17 onwards for the statutory basis of “Core Paths”.

14. There was a recent challenge to the adoption of an amended Core Paths Plan by the Loch Lomond and Trossachs National Park Authority by way of Judicial Review: see *Gartmore House, Petitioner* [2022] CSOH 24.
15. Land Reform (Scotland) Act 2003, s19.
16. Land Reform (Scotland) Act 2003, s23.
17. [Solicitor Enquiry Searches | ScotWays](#)
18. Prescription and Limitation (Scotland) Act 1973, s8.
19. By 'special permissions', we mean any permissions under the Land Reform Act. Particular advice should be taken because e.g. there may be a concern that the paths are trying to deter access being taken from land surrounding the paths. In this case, consideration of s11 of the Land Reform Act should be given.
20. For examples of what this might be in practice, see Land Reform (Scotland) Act 2003, s14(1). The purpose or main purpose of this is to be considered objectively, not subjectively.
21. See Land Reform (Scotland) Act 2003, s6.
22. *Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority* [2018] CSIH 222
23. Land Reform (Scotland) Act 2003, s14(2). These can be appealed against by the landowner and there is reported case law of some such appeals.
24. Land Reform (Scotland) Act 2003, s14(1)(c).
25. Scottish Outdoor Access Code, 3.30
26. <https://www.hse.gov.uk/pubns/ais17s.htm>
27. See e.g. Land Reform (Scotland) Act 2003, s3(1).
28. Land Reform (Scotland) Act 2003, s13.
29. An example might be stiles – but these would need to be maintained. Consideration should also be given to accessibility issues (e.g. an alternative access that would allow wheelchairs to take access).
30. Land Reform (Scotland) Act 2003, s11.
31. Land Reform (Scotland) Act 2003, s15
32. This is the effect of Land Reform (Scotland) Act 2003, s2(1) and (2)(a) read with s9(d). See also Scottish Outdoor Access Code, 3.53, Land Reform (Scotland) Act 2003, s9(d) which requires that dogs must be "kept under control".
33. Scottish Outdoor Access Code, 6.13
34. Scottish Outdoor Access Code, 6.14
35. See the Dogs (Protection of Livestock) Act 1953, s3 (for definitions of "livestock" and "agricultural land", which are key elements of the scope of that Act). The 1953 Act was recently amended by the Dogs (Protection of Livestock) (Amendment) (Scotland) Act 2021.
36. Land Reform (Scotland) Act 2003, s13.
37. Land Reform (Scotland) Act 2003, s28.
38. *Gloag v Perth & Kinross Council and The Rambler's Association* 2007 SCLR 530; *Snowie v Stirling Council and Ramblers Association: Lindsay and Barbara Ross v Stirling Council* 2008 SLT (Sh Ct) 61; *Creelman v Argyll & Bute Council* [2009] B12/08
39. *Forbes v Fife Council* [2009], B375/077
40. Scottish Outdoor Access Code, 6.13
41. Scottish Outdoor Access Code, 3.3
42. Trespass (Scotland) Act 1865 is restricted in scope and does not extend to anything done by a person in the exercise of the access rights created by the Land Reform (Scotland) Act 2003: see 1865 Act, s3(2).
43. See endnote 42.
44. See those listed at Scottish Outdoor Access Code Annex 1, although each provision should be checked to ensure it remains in force.
45. Agricultural Holdings (Scotland) Act 1991, s5

WHO'S BEHIND THIS GUIDANCE?



This note is part of a range of information produced by Rewilding Britain and The Lifescape Project to provide practical guidance to rewilders. Each is designed to help rewilding practitioners across Britain overcome common barriers in their rewilding journey, as identified through conversations with members of our Rewilding Network.

Rewilding Britain's Rewilding Network provides a central meeting point for landowners, land and project managers and local groups in Britain, offering opportunities for collaboration and allowing smaller landowners to take on larger-scale rewilding together. If you find this useful, please consider joining the Network, where those in Britain can explore these issues further with others in the same boat.



The Lifescape Project is a rewilding charity using a multi-disciplinary approach to achieve its mission of catalysing the creation, restoration and protection of wild landscapes. Lifescape's legal team is working to support rewilders in understanding how the law applies to their activities and pursuing systemic legal change where needed to support the full potential of rewilding. These notes form part of Lifescape's Rewilding Law Hub which aims to provide a legal resource centre for those wanting to manage land in accordance with rewilding principles.



JOIN THE CONVERSATION

We'd love to hear what you've found useful in these notes and where we can help fill gaps in the guidance so that we can make sure they remain an up-to-date practical tool for rewilders.

Get in touch with us at:
Rewilding Britain: the Rewilding Network,
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