

Locked Down? Outdoor Access in Scotland and COVID-19 Public Health Measures

Malcom Combe, author of "The ScotWays Guide to The Law of Access to Land in Scotland" looks at the measures introduced to fight the COVID-19 outbreak and how they interact with Scotland's outdoor access legislation.

Being able to get out and about is still important in these extraordinary times. Sure, measures to prevent people catching and spreading COVID-19 rightly take priority at the moment, but if people emerge from their new world of home working, home dining and generally avoiding people to the effect that they have flattened the coronavirus curve but not flattened their bellies, that will be a new problem. A trip outside for exercise is accordingly something that the UK and Scottish Government has allowed to continue, as things stand.

The [initial advice](#) was for one bit of outdoor exercise a day, alone or with people from your household. Exercise is also something that gets a specific mention in the [Health Protection \(Coronavirus\) \(Restrictions\) \(Scotland\) Regulations 2020](#). These new, emergency regulations do many things. For present purposes, and amazingly when you stop to think about it, the Coronavirus Regulations introduce a starting point that it is an offence to leave your own home. There is however no offence when you leave your home with a reasonable excuse: someone who would otherwise be committing an offence is offered a defence in terms of [regulation 8\(4\)](#). A number of reasonable excuses are offered, in a comprehensive but actually non-exhaustive list. This could be an important point: the drafting of regulation 8(5) is careful to say "a reasonable excuse *includes...*" rather than "a reasonable excuse *is...*". I'll come back to that point below. In terms of a relevant reasonable excuse for outdoor exercise, the drafting specifically includes "*to take exercise, either alone or with other members of their household*". Incidentally, in the regulations this is not limited to one occurrence (albeit one exercise activity continues to be stressed in Scottish Government [advice](#)). For completeness, leaving your home is allowed for various other reasons, such as getting necessary supplies, going to a key job, or going to a (scaled-down) funeral.

The approach in the Coronavirus Regulations is aimed at *restricting what people do* rather than *restricting any particular geographical area*. It does not repeal any existing rights to use land, such as a public right of way or the right of responsible access. It can accordingly be noted that a trip to work, a shop or perhaps even to the blood donation centre could follow the route of a public right of way for some or all of the way. The rest of this post will gloss over the traditional [public rights of way](#), and I'll explain the interaction of the existing Scottish rules for public access to the outdoors in a moment. Just as a reminder though, the Scottish right to roam is found in [Part 1 of the Land Reform \(Scotland\) Act 2003](#). This is explained and augmented by the [Scottish Outdoor Access Code](#), a document drafted by Scottish Natural Heritage and approved by the Scottish Parliament. The 2003 Act provides that people have a right to cross land and be on land for certain purposes (including recreation) provided the land is not excluded from access rights (as a result of the particular characteristics of land – I will refer to non-excluded land as "access land") and that the person taking access is acting responsibly (i.e. not interfering with anyone else as a result of taking access). Access authorities (namely the relevant local authority or, if relevant, national park authority) play a role in making sure there is adequate provision for local access, such as by having a core path network for their area (core paths being guaranteed access land, save in extreme circumstances), and by ensuring any access land is not restricted without justification.

A key point to pin down is the concept of responsible access. I've already noted that, in normal circumstances, you can be pretty sure access is responsible when you are not interfering with the rights of anyone else, be they land owner, occupier, another access taker, or whatever. There is more though. Certain activities can never be responsible: driving a motorised vehicle, for example (save in the case of mobility-aiding vehicles that are properly in use). Such activities are on the [section 9](#) banned list.

That's not the end of the story though. Access can only be responsible if it is lawful, per [section 2\(3\) of the 2003 Act](#).

Turning now to the Coronavirus Regulations, no mention is made of the 2003 Act, but it gets caught in the wake. It might be useful to explain exactly how this might be, and why access rights do in fact continue notwithstanding any lockdown, albeit in a highly curtailed form.

In short, the emergency legislation does not stop any land where access rights can be utilised from being access land. No new land is expressly exempted as an [excluded category of land](#). No new land falls within a periodic exemption: it is not like foot and mouth or any other animal disease, in terms of [section 7\(1\) of the 2003 Act](#), such that core paths can be switched off; nor is it like a time-limited suspension in terms of [section 11 of the 2003 Act](#) (such suspension being at the behest of a land owner or access authority, for specific purposes). And it's not like access being disapplied by the [Land Reform \(Scotland\) Act 2003 \(Directions for the Purposes of Defence or National Security\) Order 2003](#), where some security or strategic requirements necessitate that specific land is excluded from access rights.

What is it that stops public access then? The general criminal law. The new Coronavirus Regulations function just like any public order offence, say [aggravated trespass](#) or mobbing. The land might be accessible, but as soon as you commit a criminal offence, you are not responsible.

The Coronavirus regulations say it is an offence to leave the place where you are living without a reasonable excuse. Exercise is permitted. Exercise is accordingly fine, and this can be done – responsibly and at a social distance – on any access land.

Before anyone asks, driving or riding a motorbike to a place to exercise is arguably not itself exercise. That is another story though; ask [Derbyshire Police](#). For information, Scottish Natural Heritage's guidance about getting out and about is available [here](#). It asks people to "*keep it local*" and postpone outdoor trips that involve longer travel arrangements. For what it's worth, that guidance seems to be in line with the reasonable excuses that are specifically provided for in Coronavirus regulations.

Leaving the home specifically to drive to a place to exercise does not fall snugly within any of the provided reasonable excuses. (Cycling to such a place would be fine, as it itself is exercise and pedal-powered access is catered for in the Access Code.) You might be able to make a bit more of a case for motorised travel to an exercise spot if you manage to incorporate a stop on your journey to or from another place where you were entitled to be. One suspects a police officer could take a dim view of this if you happened to do this at a local beauty spot at the same time as other people were doing the same, but perhaps a sympathetic view could be taken of someone who suddenly struggles to find a spot suitable

for dog walking that is accessible from their front door in our new, locked down world. (General guidance about dogs can be found [here](#).) Also, remember the list of reasonable excuses is not exhaustive, so splitting hairs about someone getting to an exercise spot then engaging in that exercise whilst maintaining social distancing throughout might not be the best use of police resources in the days to come.

What of the land managers? Given access land retains that status, land managers are [under a duty to respect access rights in relation to that land](#). That duty remains notwithstanding the Coronavirus Regulations, it's just that – obviously – the footfall in hard to reach places will necessarily be lower than it might otherwise have been. For completeness, it can also be noted that land managers are allowed to restrict access to land for legitimate land management reasons, in terms of [section 14](#) of the 2003 Act. If a land manager is genuinely unable to manage land for fear of access takers being somehow unable to socially distance themselves from those undertaking management activities, then steps can absolutely be taken to regulate and in extreme cases temporarily prevent access. There may also be occupiers of outdoor facilities who are no longer able to staff those resources, and as such those occupiers will be keen to scale back operations and introduce clear signage about any risks at now unmanned sites to avoid any issues of occupiers' liability. If, however, the management activities can continue alongside suitable responsible and socially distant access then the usual rules of the game apply such that spurious closures, impediments or disincentives can be challenged by the relevant access authority.

To try to bring this to some sort of a conclusion, Scotland will still be available to enjoy when this is all over. So will Scotland's access rights. In the meantime, hopefully everyone keeps the heid, such that access takers don't push their luck too much and, conversely, land owners and managers don't use the situation as a means to restrict what should be perfectly legitimate, local access to land.

Thanks for reading. Now feel free to enjoy some responsible outdoor exercise. Then wash your hands.

A version of this post originally appeared on Malcolm Combe's blog, which is available [here](#).

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