

# ARTICLES

## Access exclusions under the Land Reform (Scotland) Act 2003: when does a building stop being a building?

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*The author considers exclusions to the right of access under the Land Reform (Scotland) Act 2003.*

Part 1 of the Land Reform (Scotland) Act 2003 liberalised access to Scotland's outdoors by allowing for a right to cross land and a right to be on land for recreational, educational and in some cases commercial activity without the owner of that land's prior consent, subject to two important qualifications. First, the land must not be excluded from the scope of the law. Second, the access taken must be responsible.

The way it confers broad rights of access on everyone, then stipulates that those enjoying and subjected to the rights must act responsibly, offers a sturdy framework but — almost unavoidably — it cannot cater for every feasible access dispute. This means there are occasions when the language of the Land Reform (Scotland) Act 2003 is not overly prescriptive, leaving much to be determined in any given context as and when something crops up. No criticism of the drafting is intended here. The observation is made simply to highlight that the way the legislation is framed lends itself to some speculative comment. Speculative comments are, I hope, to be welcomed, perhaps especially so owing to the fact that access disputes — particularly those involving one off, transient access taking — may not always find their way to court, thus denying some opportunity for judicial interpretation of them.

Two welcome comments on the Land Reform (Scotland) Act 2003 have recently been provided by Douglas Cusine ("*Access for photography*" 2017 S.L.T. (News) 21 and "*Access to gardens*" 2017 S.L.T. (News) 25). This note follows on from them, albeit it considers a separate point. It considers the first of the qualifications to the broad statutory

access rights mentioned above, about excluded land. As it happens, it considers the first exclusion in the relevant section of the Land Reform (Scotland) Act 2003, which provides that access rights do not apply to a building. Normally it will be perfectly clear whether something is a building. There are, however, circumstances when it will not be. The issue under discussion here does not relate to new, young buildings, where access is clearly excluded from the stage when construction begins. Rather, the focus is on old buildings, sometimes very old buildings. It is clear that the legislation and associated documents were drafted in the anticipation that access could be taken over heritage structures. What is not so clear is when a building stops being a building for the purposes of the Land Reform (Scotland) Act 2003.

### The legislation

Section 6 of the Land Reform (Scotland) Act 2003, augmented by s.7, sets out the land where access rights cannot be exercised. It is made operational by s.1(7) of the Land Reform (Scotland) Act 2003 and, per that subsection, access rights are exercisable on all land in Scotland, save when excluded by s.6.

Where land is excluded, no recourse can be had to access rights to validate any crossing of or remaining on land. This means there is no scope to even raise an argument that access was responsible: access under the Land Reform (Scotland) Act 2003 simply cannot happen on such land (although access might be possible via another legal route, such as a public right of way).

Part 1 of the Land Reform (Scotland) Act 2003 is predominantly about access to the outdoors. This is clear from the name of the Scottish Outdoor Access Code (the Code), a document drawn up by Scottish Natural Heritage (and approved by the Scottish Parliament in 2004) to give guidance about the rights and responsibilities under the Land Reform (Scotland) Act 2003 (per s.10 of that legislation). The outdoor nature is also clear from the very first exception, found in s.6, by excluding indoor access. Land where there is "a building or other structure or works, plant or fixed machinery" (s.6(1)(a)(i)) is excluded from access rights. There is also an exclusion in s.6(1)(b)(i) parasitic on the existence of a building that is not a house (or a group of buildings none of which is a house),

namely the curtilage of such a building or a group of buildings. (There is no definition of “curtilage”. That is a matter for another note.) The land around houses is dealt with by another exclusion in terms of s.6(1)(b)(iv).

The words in s.6(1)(a)(i) are not defined, but there is a clarification (in s.6(2)) that “[f]or the purposes of subsection (1)(a)(i) above, a bridge, tunnel, causeway, launching site, groyne, weir, boulder weir, embankment of a canalised waterway, fence, wall or anything designed to facilitate passage is not to be regarded as a structure.” As such access can be taken on or through such features, despite the fact they might be structures in another context.

What is meant by “building”? That is not clarified. Other occurrences in the Land Reform (Scotland) Act 2003 are not useful in any deduction exercise. All that can be gleaned from them is that a building can include a “house” (s.6(1)(b)(i) of the Land Reform Act) and may be a “home” (s.97C of the Land Reform (Scotland) Act 2003, as introduced (but not yet implemented) by the Community Empowerment (Scotland) Act 2015, in relation to the other strand of the Land Reform (Scotland) Act 2003, which facilitates community ownership of land).

The explanatory notes are similarly unhelpful, they state a building can be “non-domestic” (para.25) or “domestic” (para.27). Another occurrence clarifies the exclusion of land that is contiguous to a school. None of that is relevant to this exercise. The nearest thing to relevance in the explanatory notes is found in para.24, which explains that the access exclusion relates to buildings “of all kinds”. On one interpretation, those additional words are redundant. If someone tried to stretch “of all kinds” to mean “of all ages” that would (as we shall see) rub against the fact that other parts of the legislation do seem to allow for access over what was once a building.

There is nothing here that indicates the age of a building is relevant, and in particular there is no clarification of the point at which what was once a building stops being one, but it does seem from elsewhere in the Act that access can be taken at places which were formerly buildings. As noted at the outset, access can be taken to cross land or for recreational, educational or some commercial

purposes. “Relevant educational activity” is the only purpose that is specifically defined in the Land Reform (Scotland) Act 2003. Section 1(5) explains an educational activity is one which a person performs for the purposes of furthering that person’s understanding of natural or cultural heritage (or enabling or assisting another person in that same endeavour). “Cultural heritage” and “natural heritage” are also defined in the Land Reform (Scotland) Act 2003. For present purposes, “natural heritage” is not relevant. “Cultural heritage” is defined in s.32 as follows: “*cultural heritage*” includes structures and other remains resulting from human activity of all periods, traditions, ways of life and the historic, artistic and literary associations of people, places and landscapes.

The reference to structures and other remains of human activity across the ages opens up what were once buildings to access. The scheme of the Code does the same. It recognises the existence of “ruins” (para.3.50) and envisages access might be taken to such areas. Paragraph 3.51 sets out what is responsible access in these areas, highlighting sites can be “*vulnerable to the pressure of visitors and might be easily damaged*” before going on to note *what you should do when exercising your access rights (namely, treat these sites carefully and leave them as you find them, and giving examples of what is not responsible)*. Then, at p.78 of the Code, it is noted that many cultural heritage sites charge a legitimate entrance fee, but “[i]n other cases, such as many unsupervised historic or archaeological sites, access rights apply”.

The net effect of this is the framers of the Code thought access rights could be exercisable on (very) old buildings, or at least what was once a building. It is acknowledged that a note of caution should be sounded about the Code in this context, given the scepticism with which it was treated in the case of *Gloag v Perth and Kinross Council*, 2007 S.C.L.R. 530 (which concerned another aspect of s.6, and the Code’s insights as to how much garden ground around a residence might be treated as excluded), but the Code remains an important document and, coupled with the Land Reform (Scotland) Act 2003’s treatment of cultural heritage, it seems clear that it is possible for a building to lose that status. The difficulty relates to when that loss of status occurs.

### Guidance from other sources

Absent a clear definition, a court dealing with a question of statutory interpretation will give an ordinary word its ordinary meaning. As a noun, the Oxford Dictionary of English states “building” means “a structure with a roof and walls, such as a house or factory.” Chambers offers “a structure with walls and a roof, such as a house.” (On giving words ordinary meanings see Oliver Jones, *Bennion on Statutory Interpretation* (6th edn, 2013, LexisNexis), Section 195, and on recourse to a dictionary see Section 375.) Again, no particular guidance about the aging process is provided, although loss of a roof would seem to lead to loss of status as a building. (This opens up a related issue, whereby the aging process of a roof is something else that could need to be considered.)

Some guidance might also be sought from other legislation, as the Land Reform (Scotland) Act 2003 is not the only legislation that considers buildings. A definition in one act cannot be used to conclusively interpret another, but in this short note, it seems appropriate to focus on the Building (Scotland) Act 2003. It can also deal with old buildings, most notably in terms of ss.29 and 30 which set out certain situations when enforcement action can be taken by a local authority in relation to dangerous buildings, by service of a dangerous buildings notice. If a local authority were to take action in relation to an old and uninhabited construction that was thought to be dangerous, or indeed for any other reason, that would mean it was a “building” within the terms of s.55 of the Building (Scotland) Act 2003. That section provides: *In this Act “building” means any structure or erection, whether temporary or permanent, other than a structure or erection to which subsection (2) applies.*

(Subsection (2) applies to roads, sewers and water mains, aerodrome runways, railway lines, reservoirs and apparatus used for telephonic or telegraphic communication. These are not relevant to this exercise. A similar definition applied under s.29 of the Building (Scotland) Act 1959.)

Is it appropriate to use “building” as judged in one 2003 Act in the context of the other 2003 Act? It could be persuasive, but the subject matter of the statutes is not exactly in *pari materia* (i.e. dealing with the same subject matter: *Bennion on Statutory*

*Interpretation*, Section 210) and there are issues in transplanting ideas from the Building (Scotland) Act 2003 to the Land Reform (Scotland) Act 2003. One such issue is the Building (Scotland) Act 2003 also provides (in s.55(3)(a)) that references to a building include references to a prospective building, albeit only when the context requires. That would not make sense in terms of the Land Reform (Scotland) Act 2003. Another issue might be the “temporary or permanent” wording. More fleeting places of shelter are dealt with by the Land Reform (Scotland) Act 2003 in a different way (such as s.6(1)(a)(ii)), so again a direct transplant is problematic. Finally, given the purpose of the Building (Scotland) Act 2003, one would expect very few buildings to be exempt. All that said, with those caveats, a court faced with a question about whether access might be taken to a spot with a building-like feature on it could find a limited degree of guidance from the Building (Scotland) Act 2003 where it has been classed as a “building” under that regime.

Other legislation might also be looked to for assistance, up to a point. One example is the Works and Public Buildings Act 1874, which in s.5 legislated for “*The Royal Palace of Dunfermline or ruins thereof*” and “*the Royal Palace of Linlithgow or ruins thereof*”. This seems to cut both ways: at one level, these ruins were included in a statute about buildings; at another, the legislature felt it was necessary to specifically state that ruins were to be caught by that legislation

### What does this mean for an access taker at, or an owner of, an old building?

Whilst guidance from other statutes can be sought, in this case such guidance is somewhat ambiguous, leaving us with what s.6(1)(a)(i) itself says, with possible guidance from the Code and the clear terms of the act which give an ability to access cultural heritage, including structures and other remains, and dictionary definitions that highlight the need for walls and a roof.

Although there has been litigation about other provisions of s.6, there has not been litigation about s.6(1)(a)(i). Until there is (perhaps as a result of a landowner seeking a declarator under s.28 that access rights are not exercisable in relation to what she thinks is a building on her land) it is impossible

to give a clear opinion on when a building stops being a building in terms the Land Reform (Scotland) Act 2003.

Finally, before this note emboldens anyone to take access to any or all old buildings, it should be recalled that legitimate entry charges are levied at some cultural heritage sites (and there is an exclusion from access rights based on historic

charges that were put in place before 2001 and have applied since that year, under s.6(1)(f)), not to mention some heritage sites can be protected by law (such as s.19 of the Ancient Monuments and Archaeological Areas Act 1979). It should also be recalled that access must be taken responsibly, which has implications for visiting an old building (whether subject to a dangerous building notice under the Building (Scotland) Act 2003 or not).

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