



Briefing Note

The Land Reform (Scotland) Act 2003 and the Right to Privacy

The Land Reform (Scotland) Act 2003 (“the Act”) received much attention from the media following royal assent and the subsequent introduction of the Scottish Outdoor Access Code again brought the Act to the forefront of many landowners’ minds. The Act provides members of the public with a right to take access to private land and following a number of court cases shortly after the introduction of the Act, concerns were raised about invasion of landowners’ privacy.

Section 1 of the Act provides members of the public with a general right of access to cross land, including private land, for recreational purposes subject to a number of exceptions contained in Section 6 of the Act. Section 6 excludes certain areas of land from public access and in particular excludes land adjacent to a house which forms “sufficient land” to afford persons living there a reasonable measure of privacy so as to ensure that their enjoyment of that house is not unreasonably disturbed.

As yet, the concept of “sufficient land” is still to be defined and it will undoubtedly be left to the courts to clarify.

Landowners do, however, have a right under the Act to try to take steps to ensure some degree of privacy. An application can be made to the courts by any occupier of land for a declarator that certain areas of land are excluded from the general “right to roam”. But how does this right under the Act sit with the general right to privacy? The right to privacy conferred by the Act is somewhat limited in its scope. While the Act endeavours to offer landowners or occupiers “reasonable measures of privacy” it is as yet uncertain whether this does in fact afford the same level of protection as the Human Rights Act.

It is now over 7 years since the “right to roam” legislation received royal assent and yet relatively few cases concerning the Act have reached the courts. It is therefore very difficult for landowners or occupiers to assess the degree of privacy, if any, to which they are entitled.

The application made to Perth sheriff court by Ann Gloag in her case against Perth & Kinross Council has come closest to providing a ruling on exactly what reliance can be placed on the right to privacy but ultimately failed to do so. In the 3 years since the case was brought before the court, relatively little progress has been made in clarifying the scope of the privacy provisions.

Article 8 of the European Convention on Human Rights provides individuals with a right to respect for private and family life, a right which is enshrined in UK law by the Human Rights Act 1998. Privacy rights in Britain have traditionally been difficult to enforce and the courts are often reluctant to make definitive rulings on the law of privacy. However, in recent years the courts have been more willing to uphold individuals' rights to privacy in one form or another. Nonetheless, the right to privacy is not absolute and it is therefore important that those considering court action take appropriate advice before embarking on litigation.

The relation between occupiers' rights and obligations conferred by the Land Reform Act, the Outdoor Access Code, the Human Rights Act and the common law is complex, however, landowners should consider the following points when considering the extent of access which may be allowed to their land:-

- Is the land excluded from access by virtue of the 2003 Act – sufficient land adjacent to a house?
- Can an application be made under the Act to the court for a declarator that access rights do not apply?
- Do the access rights otherwise constitute a breach of the right to privacy?

In considering this last point, the court's interpretation of what constitutes "sufficient land" to ensure a reasonable measure of privacy will be of great importance and will no doubt be the subject of much debate. In the meantime it appears that it will take a more robust decision from the courts to provide answers to these questions.

For further information please contact Lynn Richmond on 0131 228 8111 or lynn.richmond@turcanconnell.com.

This note is intended as a brief introductory outline of some of the issues arising from the Land Reform (Scotland) Act 2003. No responsibility can be accepted for any action taken in reliance of this note and specialist advice should be taken in every case. Turcan Connell would be happy to provide such advice. If you do not wish to receive further briefing notes and similar information from us please write to us at the address given above requesting that your name be deleted from our database. © Turcan Connell 2010

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