

# DEALING WITH EQUESTRIAN ACCESS PROBLEMS IN SCOTLAND

Equestrian access problems come in many different shapes and forms, including locked gates, ladder stiles, kissing gates or other types of barrier on paths and tracks which you want to take your horse along or a new fence across a path you have enjoyed using in the past. Sometimes the problem might be a sign banning horses or an aggressive landowner discouraging access rather than a physical barrier. Or the problem might be complaints about riders behaving irresponsibly, which can have knock-on implications for others trying to enjoy the countryside. The summary notes which follow are intended to help individuals, access representatives and equestrian access groups deal with equestrian access problems in Scotland.

If you are an individual trying to deal with equestrian access problems in Scotland, your first port of call is your local BHS access representative or your local equestrian access group, who will usually be happy to help resolve the problem. For local contact details check the BHS website [www.bhs.org.uk](http://www.bhs.org.uk) or contact Helene Mauchlen, BHS National Manager for Scotland tel. 07808 141077 or email [helene.mauchlen@bhs.org.uk](mailto:helene.mauchlen@bhs.org.uk)

## Legal context for equestrian access in Scotland

Whether you are faced with a locked gate, a new fence across a path you have used for years, a sign saying “no horses” or an aggressive landowner telling you that you have no right to ride along his/her track, the aim in dealing with access problems is always to try and find a mutually acceptable solution to resolve the problem. You don’t need to be a legal expert but a basic understanding of the legal context for access in Scotland is essential to resolving problems.

BHS Scotland has produced a whole series of information sheets to help you determine how and where access rights apply, and where you might realistically expect restrictions. All of these fact sheets are freely downloadable from <https://www.bhs.org.uk/bhs-in-your-area/scotland/resources/scottish-access-resources-and-riding-routes>). The most relevant when dealing with equestrian access problems are:

- Access rights and responsibilities in Scotland
- Where can I ride and drive a horse in Scotland
- Rights of Way and equestrian access in Scotland

Access rights apply to most land in Scotland, so as a matter of principle, any kind of access facility which is readily recognisable as providing access to paths, tracks or other areas of less well defined access, such as beaches, should not be locked, or otherwise obstruct access by any legitimate non-motorised user, which on most paths and tracks in Scotland includes horse riders as well as cyclists and walkers. But this doesn’t necessarily mean that each and every gate on each and every field, forest or other piece of land necessarily has to be permanently unlocked. For example, there isn’t usually a problem if a farmer locks a roadside gate from a field which is not used for public access. Or if there is a locked barrier across a track to restrict or prevent illegal vehicular access – provided there is a gap or alternative access alongside.

Section 3 of the Land Reform Act places obligation on landowners

*“to use and manage the land and otherwise to conduct the ownership of it in a way which, as respect those rights, is responsible. In determining whether the way in which land is used, managed or the ownership of it is conducted is responsible, an owner is to be presumed to be using, managing and conducting the ownership of land in a way which is responsible if it does not cause unreasonable interference with the access rights of any person exercising or seeking to exercise them.”*

Concerns about biosecurity and liability are not valid justification for locking gates or otherwise obstructing equestrian access (see BHS Scotland’s factsheet on equestrian access and livestock in Scotland), nor is illegal vehicular access, which can be addressed by other more appropriate mechanisms. Similarly fly tipping, which is a social issue unrelated to public access.

## **Legal obligations in relation to resolving access problems in Scotland**

Access authorities (local authorities and national park authorities) have a duty to uphold public rights of access under the Land Reform Act. This means they are legally obliged to assert, protect, keep open and free from obstruction any route or land by which access rights may be reasonably exercised under the Land Reform Act.

Section 13 of the Land Reform Act states that

- (1) *“It is the duty of the local authority to assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access rights may reasonably be exercised.*
- (3) *The local authority may, for the purposes set out above, institute and defend legal proceedings and generally take such steps as they think expedient.”*

Section 14(s) of the Act states that

*“Where the local authority consider that anything has been done in contravention of subsection (1) (which defines actions which might deter or prevent access), by written notice served on the owner of the land, require that such remedial action as is specified in the notice be taken by the owner of the land within such reasonable time as is so specified.”*

Section 19 of the LRA states that

*“A local authority may do anything which they consider appropriate for the purpose of maintaining a core path, keeping a core path free from obstruction or encroachment, providing the public with directions to, or with an indication of the extent of, a core path.”*

In theory, therefore, one might reasonably ask or expect an access authority to take action to ensure removal of unjustified obstructions to legal rights of access, particularly on core paths. Stringent budget cuts mean that most access authorities have very limited resources for path maintenance or development, and most are reluctant to deal with obstructions or other problems on paths not identified in the core path plan.

Until recently, persuading access authorities to pursue legal action has also been more difficult because of case law. Although many would argue that the verdict on the infamous Tuley case was due to the failings of the access authority’s representation, judgement against the authority raised uncertainty about the outcome of legal action in relation to equestrian access rights. As a result, many access authorities lacked the political will to pursue the necessary legal action to remove obstructions to access rights, even on well used paths.

A further reason why access authorities have been reluctant to pursue legal action is because of a crucial clause in Section 14(1) of the Land Reform (Scotland) Act which states

*“The owner of land in respect of which access rights are exercisable shall not, for the purpose or for the main purpose of preventing or deterring any person entitled to exercise these rights from doing so...”*

Inclusion of the words “any person” will, in the majority of situations, include horse riders. However, the ambiguity of the remainder of the wording in this clause allows scope for some less scrupulous landowners and managers to claim to have locked a gate for reasons other than preventing or deterring public access, and in so doing effectively claiming immunity to legal action.

The good news is that several recent cases have helped clarify the law and set important precedents which should make legal action quicker and cheaper to pursue, and in many cases encourage and support resolution of issues without need to go to court.

You don't need to become an overnight legal expert to deal with access problems but as case law underpins the implementation of Scottish access legislation, it is worth reading a bit more about the Drumlean case to support any argument you may have in trying to resolve access problems in Scotland, or persuading access authorities to take action.

The key points from the Drumlean case in terms of resolving access problems are:

- ❖ Lord Carloway (one of the highest judges in Scotland) ruled that assessment of whether locked gates, signs or other restrictions obstruct access should be decided objectively by the impact on legal rights of access, rather than subjectively depending on what proportion of a farm or estate is affected by restrictions.
- ❖ Section 62 of summation of the Drumlean case states that “it is not the intent but the effect of action by a landowner/manager that is relevant”, which means that farmers and landowners can no longer legally justify locking gates or obstructing access “for land management reasons”, as has all too often been the case in the past.
- ❖ The case concluded that “deterring access is effectively one and the same as blocking, obstructing or preventing access”, which means that signs discouraging legitimate non-vehicular access are as unacceptable as physical barriers such as stiles, kissing gates and locked gates.

You can read more about the Drumlean case at:

[http://www.scotways.com/images/pdf/Drumlean\\_CoS\\_Note\\_Scotways\\_Combe.pdf](http://www.scotways.com/images/pdf/Drumlean_CoS_Note_Scotways_Combe.pdf) and at <http://parkswatchscotland.co.uk/2018/03/29/the-drumlean-case-1-an-incredibly-important-decision-for-access-rights-in-scotland/>.

## Practical steps to dealing with equestrian access problems

**Step 1: *Make a note of exactly what and where the problem is. If possible, take a picture.***

- Who else uses the track and how?
- Does the problem apply only to horse riders, or carriage drivers?
- Are walkers or cyclists still able to use the path or track or access the land beyond the obstruction?

- Is the problem recent, or has it been a longstanding issue?
- Is the problem seasonal or intermittent, or a year-round problem?
- Are there any signs or other indications why access is restricted?

BHS Scotland have produced a simple standardised sheet to record access problems, downloadable from the BHS website. The form includes boxes and prompts to make sure you record all the relevant information.

## ***Step 2: Check whether access rights apply***

- Do access rights apply under the Land Reform Act, or would the land owner/manager be justified in restricting access under one of the exclusions specified in the Act, such as through a steading, garden or in the curtilage around buildings?
- If not, is the route a right of way? You can check this on the Catalogue of Rights of Way produced and maintained by Scotways. Most farmers and landowners respect rights of way which can make it easier to resolve the problem, although most rights of way are only claimed rather than asserted and horses are rarely mentioned in records of past use.
- If the problem is on a path or track, is it identified as a core path in the relevant local core path plan? If so, you are likely to have a far stronger case for getting any obstruction removed or problem dealt with (but bear in mind that there is no legal compulsion for all core paths to be accessible with a horse). Core path plans for most access authorities are available online, or you could look at a hard copy of the core path maps in your local library or council office.
- Is the path/track/route signed or otherwise promoted, which usually confirms that the landowner has agreed to access, or received funding for allowing people access, even if access rights do not apply under the Land Reform Act.
- If none of the above apply, has the relevant land owner or manager given permission for access?

Even if the path or track isn't identified in the core path plan or as a right of way, don't give up. Access rights apply to most land. You may just need to be a bit more persistent to resolve the issue.

## ***Step 3: Check whether access rights are being exercised responsibly***

Access rights under the Land Reform Act depend on people taking responsibility for themselves and their own actions, respecting the environment and other users.

- What grounds, if any, might the land owner or manager have for suggesting equestrian access would not apply or might not be responsible?
- Is the track used by farm or other vehicles? If so, it would be hard for anyone to argue that hoof prints are causing any damage. For further information see BHS Scotland's information sheet "Responsible riding and carriage driving in Scotland".

- Is there any other reason why horses should be restricted or excluded? Have you tried asking the land owner or manager why they want to deny access to horses?

Remember that the irresponsible behaviour of one rider, or one type of access taker (such as MTBs) does not provide legal justification to exclude others.

#### **Step 4: Contact the relevant access authority**

Check with the relevant local access authority (either the local council or national park authority) to see if they are aware of, or are already dealing with, the problem. It may be that no-one realises a tree has fallen across a path or track, or that they are already in discussion with a landowner trying to resolve access issues. Establish who you need to speak with, explain the problem as succinctly as possible, discuss who will do what and confirm a realistic timetable for action.

Most access authorities employ access officers to fulfil their legal duties in relation to outdoor access, and to help promote and manage public access. An up to date list of access officers is available from <http://outdooraccess-scotland.com/contact/local-authority-access-contacts>. Where there is no access officer in post, access is usually dealt with by the countryside, planning or community resources section.

#### **Step 5. Identify and speak with the relevant land owner/manager**

Most access authorities cover a large area and have very limited staff resources to deal with problems. If the access authority are not already dealing with an issue, most will expect you to approach the landowner and try and resolve the problem yourself before they get involved. First, you will need to find out who owns/manages the land in question – see BHS Scotland's factsheet on working with farmers and landowners for further guidance in this respect. Explain the problem to them, politely and calmly. It could be that they are not aware of something presenting a problem, or perhaps they have misunderstood the Land Reform Act and are unaware that horse riders and carriage drivers enjoy the same rights of responsible access as walkers and cyclists. Try to understand the land owner's or manager's concerns, and consider any points they raise reasonably. What might you be able to do to alleviate their concerns? Be willing to compromise, for example if alternative mutually acceptable routes are suggested.

#### **Step 6: Explore options to resolve the problem**

Locked gates, kissing gates, stiles and barriers are the commonest equestrian access problem in Scotland. In most cases the solution is to leave a gap at the side of the locked gate or where livestock control is an issue, to arrange for installation of a 1.5 m self-closing gate, 2-in-1 type gate incorporating a self-closing bridlegate (e.g. Centrewire's York 2-in-1 gate) or similar access facility. BHS has produced a summary factsheet identifying examples of possible solutions - see <https://www.bhs.org.uk/bhs-in-your-area/scotland/resources/scottish-access-resources-and-riding-routes>). The Outdoor Access Design Guide provides more detailed specifications and further information on gaps, gates, barriers and other infrastructure.

Where restrictive signage is the issue, the most positive way forward is often to suggest a more appropriate alternative. For suitable templates, guidance on wording, siting and design of signs see <https://www.outdooraccess-scotland.scot/access-management-guidance/signs>

Dealing with irresponsible behaviour can be less cut and dried. Sometimes it may be as simple as explaining to local riders what responsible riding means and that they risk losing their right of access if they continue to behave irresponsibly. BHS can help advise and provide support material for this.

## Dealing with persistent problems

### ***Option 1: Take your problem to the Local Access Forum***

If the access authority refuses or is reluctant to take action to resolve a problem, or you are not happy with their response, you could take the issue to the Local Access Forum (LAF).

The Land Reform Act requires each access authority to create and maintain a LAF, made up of a representative mix of recreational and land management interests. LAFs may also include representatives from community groups and government agencies. A local voluntary representative – typically the BHS area/regional access representative or sometimes the chair of the local equestrian access group – usually represents horse riders and carriage drivers on most, if not all, LAFs.

Anyone can seek the advice of a LAF, who can be contacted through your access authority.

LAFs operate in an advisory capacity. Their remit includes giving assistance to parties in dispute over the exercise of access rights, the existence and delineation of rights of way, and the use of core paths. Where problems arise, LAFs will usually invite members of the forum to a site visit to consider the issues from all perspectives and agree appropriate action. There are some really good examples of LAFs succeeding in resolving problems where an individual approach to the landowner has failed. For example following a site visit, the collective decision of the Cairngorms National Park LAF was instrumental in persuading an estate who had previously been very resistant to allowing access to agree to installing self-closing 1.5m gates alongside cattle grids and locked barriers. However, a word of caution: in several other cases LAFs have misguidedly taken heed of ill-informed advice from an enthusiastic volunteer member of the LAF which has compounded problems resolving obstructed access. Hopefully such instances are now in the past, but it is worth checking who is involved and ensuring they fully appreciate access from all perspectives, including equestrian!

### ***Option 2: Mediation***

Informal mediation is the key to resolving any problem. For some intractable problems where approach from the access authority, LAF or others has failed to resolve a problem, more formal mediation may be a positive way forward. Bringing in an independent professional mediator to help reach a mutually acceptable outcome can be a cheaper, quicker, less stressful alternative to court action. The mediation process encourages both parties to think differently, focusing on interests rather than rights and positions, helps foster understanding of the others' perspective and identify common ground. Any outcome must be compliant with the Land Reform Act and Scottish Outdoor Access Code, but it is not legally binding, and does not establish case law. Even if mediation fails to resolve the issue entirely, it may help in narrowing down the issues. Refusal to take part in mediation cannot impact on the substance of a court decision but can help demonstrate attempt that the access authority (or person trying to resolve the problem) has attempted a reasonable



approach. Mediation costs are estimated at £2-3,000 compared with tens of thousands for pursuing a court case.

Usually mediation would be initiated by an access authority or LAF but it is worth bearing in mind as something worth raising or suggesting for problems which are dragging on without apparent hope of resolution.

### ***Option 3: If all else fails, apply to the Sheriff Courts***

Most problems or disputes can be resolved at a local level with the assistance of the local access officer and, if necessary, the Local Access Forum. Where this is not possible, Sections 14 and 28 of the Land Reform Act make provision for decisions about the existence and extent of access rights and rights of way to be made through the sheriff courts.

The costs associated with any legal action can be considerable. Before pursuing action through the sheriff courts, seek specialist legal advice and think carefully about the strength of evidence and how likely you are to win. BHS does not usually have the resources to get involved unless the case is likely to set a national precedent.

### ***Option 3: Complain to the ombudsman***

Only an access authority can pursue action against a landowner or manager under Sections 13 and 14 of the Land Reform Act. Where you are convinced access rights apply but the access authority is not willing to pursue action, or has failed in its attempts, you might consider complaining to the ombudsman that the relevant authority is failing in its obligation to fulfil its statutory duties under Section 13 of the Land Reform Act. However, Section 13(2) of the Land Reform Act says that

*“A local authority is not required to do anything in pursuance of the duty imposed by subsection (1) above which would be inconsistent with the carrying on of any of the authority’s other functions.”*

A solicitor acting on behalf of an access authority might conceivably argue that in the light of current local authority financial constraints, the costs of a legal case pursuing removal of an obstruction to access rights would conflict with other functions of the authority. Recent case law can help provide the necessary confidence to access authorities to pursue action without going to court.

If you need further advice on equestrian access in Scotland, contact Helene Mauchlen, National Manager for BHS Scotland Tel. 07808 141077 or email [helene.mauchlen@bhs.org.uk](mailto:helene.mauchlen@bhs.org.uk).

For guidance on equestrian access in England and Wales, contact Access and Rights of Way Department, The British Horse Society, Abbey Park, Stareton Lane, Kenilworth, Warwickshire CV8 2XZ. Telephone 02476 840581. Email [access@bhs.org.uk](mailto:access@bhs.org.uk).

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