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CAIRNGORMS LOCAL OUTDOOR ACCESS FORUM

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**Title:** Permissions and Liabilities

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**Purpose**

To seek the Forum's advice on cases where individuals or groups have informed land managers of their intended route and where the responses have imposed restrictions and qualifying conditions to the general right of responsible access.

**Recommendations**

The Forum is asked to consider the issues raised in this paper concerning permissions, liability insurance cover and the duty of care and advise the National Park Authority on the conclusions outlined in paragraph 14 which are intended to frame the Authority's response to the relevant estates.

**Background**

1. A number of groups, as a matter of courtesy, inform land managers of their intention to take access over their land. It is commonplace for these groups to indicate the purpose of their trip, the numbers involved and the duration. Where overnight stays are planned they often seek advice on the most appropriate spots to camp. Early contact of this kind allows land managers to advise groups of any relevant land management operations that is under way and to point them, for example, to suitable areas for camping.
2. A number of cases, involving more than one estate, have been brought to the attention of the Park Authority where the land manager (or their agent) has replied to such groups, imposing conditions that could be deemed as preventing or deterring access. Some examples of conditions that have been imposed are shown below:-
  - All access to the estate will be limited to roads / tracks;
  - You are specifically requested to stay off the moorland;
  - There will be no fires lit at any site you stop at;
  - No dogs should be taken onto the estate;
  - We require sight of your Public liability Insurance Certificate. The level of cover must be at least £5,000,000.
3. In the restrictions highlighted above, the estates concerned have indicated that "permission" for access is only granted if these conditions are formally accepted by the

group(s). In addition, one estate has indicated that a request for liability cover is a requirement of the estates insurers. A further point in relation to liability is the view of estates that where access permission has been sought, they then immediately assume a legal responsibility and duty of care for those taking access.

### **The Land Reform (Scotland) Act**

4. The Land Reform (Scotland) Act 2003 indicates the duties that fall on owners of land in relation to land where access rights apply. These obligations are detailed in paragraph 3 of the Act which states:

*“(1) It is the duty of every owner of land in respect of which access rights are exercisable –*  
*a) to use and manage the land; and*  
*b) otherwise to conduct the ownership of it; in a way which, as respects those rights, is responsible.*

*(2) In determining whether the way in which land is used, managed or the ownership of it is conducted is responsible an owner is 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.....”*

5. These reciprocal obligations follow the right of the public to be on land, to cross land for recreational purposes, for relevant educational activity and for the purpose of carrying out a commercial activity that they could otherwise carry out under the general right of responsible access.
6. In assessing the type of restrictions and conditions listed in paragraph 2 of this paper against the obligations shown in the Act, it would appear that such restrictions are likely to be causing unreasonable interference with access rights and therefore the owners are not behaving responsibly.

### **The Scottish Outdoor Access Code**

7. The Scottish Outdoor Access Code provides clear guidance to individuals and to those taking groups into the countryside. Paragraph 3.58 reminds group organisers to consider the needs of land managers and other users of the countryside. Paragraph 3.59 indicates that where an educational visit is being planned contact should be made with the relevant land manager and follow advice on what precautions might need to be taken in relation to land management operations.
8. For owners of land the Code states that access rights should be respected in the management of land and water and this can be done by not purposefully or unreasonably preventing or deterring people from exercising access rights on or off paths and tracks. With regard to land management operations the Code requires land managers to act responsibly when asking people to avoid land management operations. This can be done through asking people to avoid using a particular route or area or to

avoid doing a particular activity where there are more serious or less obvious hazards to their safety.

9. The Code therefore places obligations on users to consider the needs of land managers and other users of the countryside and for land managers to act responsibly where land management operations are being undertaken. In relevant circumstances it may be entirely appropriate that some restrictions to access rights should apply. These should be clearly linked to specific management operations.

## LIABILITY

10. There are 2 separate, but related issues in relation to liability. The first concerns the requirement being placed on groups to hold Public Liability Insurance and the second relates to the duty of care that owners have to the public when they are on their land.
11. There is no qualifier to the general rights of access laid out in Section 2 of the Land Reform (Scotland) Act other than that of not causing unreasonable interference with other peoples' rights and following the guidance in the Code. Therefore any additional requirement such as instructing groups to hold Public Liability Insurance goes beyond both the Act and the Code and therefore can be interpreted as preventing or deterring any person entitled to take access from doing so. The requirement of the estate's insurers appears to be at odds with the access legislation. It is therefore a matter for the estate to negotiate with the insurance company, pointing out the changed legal framework in Scotland.
12. The duty of care that owners have to anyone on their land is unchanged as a result of the access legislation. This is specifically stated in paragraph 5 (2) of the Act. *"The extent of the duty of care owed by an occupier of land to another present on the land is not, subject to section 22(4) below, affected by this Part of the Act or by its operation."* The question as to whether there is a higher duty of care as a result of an approach being made for access to the owner rather than access being taken without the knowledge of the owner is addressed below.
13. The Occupiers Liability (Scotland) Act 1960 provides a clear obligation on owners to provide a duty of care to anyone on their premises. The extent of this duty of care has been interpreted through case law over the last 46 years and can be summarised as follows. The owner will owe a duty of care if he/she reasonably could have foreseen that harm would be caused to a person on the property because of the occupier's act or omission. Where the hazards are obvious courts have generally taken a very robust line and indicated that a reasonable person should have seen the hazard and associated risk and therefore there is no obligation to draw further attention to the risk. Where the risk or hazard is less obvious there is a clear need to draw this to the attention to the visitor. It would therefore appear that there is no higher obligation with regard to the duty of care placed on owners where they have been contacted in advance of the proposed visit. The estates have rightly drawn attention to specific land management operations that may be less obvious to visitors such as a shoot taking place, but they also have to

consider access takers who have not made contact in advance. Again, section 5 of the Code provides clear guidance for a wide range of land management operations. The Code also provides further succour to land managers as one of the 3 key principles on which the Code is based is **“take responsibility for your own actions.”**

## Conclusions

14. In preparing a response to the concerns raised by individuals, a thorough check of the Land Reform (Scotland) Act, Scottish Outdoor Access Code and Occupiers Liability Act has been undertaken. These point us to the following conclusions:-

- The use of the word “permission” is not appropriate for land managers to use as the general rights of access do not require land management permission;
- The Code provides sufficient guidance for land managers in relation to the management of access and it is therefore inappropriate to impose additional conditions.
- Seeking public liability insurance from groups should be viewed as a deterrent to access and will therefore be interpreted by the National Park Authority as irresponsible behaviour on the part of the land manager;
- Alerting the public to potential hazards and risks is good practice provided the advice is consistent with that given in the Scottish Outdoor Access Code; and
- There is no additional or greater duty of care placed on owners where contact is made in advance of the visit. The duty of care for all visitors to land remains the same.

15. The issues described above require to be taken seriously. Consequently where such matters are raised with the Cairngorms National Park Authority we will write to the land manager in line with paragraph 14. If there are repeated instances on a land management unit we will move towards more formal procedures.

16. **Advice is sought from the Forum on the issues raised in this paper and the proposed way of working described in paragraphs 14 and 15.**

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