

Revised draft guidance on temporary closure of core paths

Purpose

1. The attached paper from the Scottish Government (SG) presents revised draft statutory guidance on section 11 orders which refers to the temporary closure of core paths.

Action

2. **Members are invited to discuss and comment on this paper.**

Background

3. Previous discussion at the forum has noted that the temporary closure procedure under section 11 of the Land Reform Act cannot be used to suspend access rights along core paths, because section 7(1) overrides the effect of section 11 orders under section 6(1)(j). This discussion, and previous consultation by SG, has also considered limited technical amendments to the Act which aim to address this issue.
4. The Scottish Government is planning to consult in due course on a revised draft Modification Order accompanied by draft statutory guidance to access authorities under section 27 of the Act. An earlier draft of the guidance was considered at the November 2012 forum meeting.
5. The attached paper presents revised draft guidance for discussion and has been prepared by SG Natural Resources Division.

Mark Wrightham
Secretary

EXTRACT FROM PART 1 LAND REFORM (SCOTLAND) ACT 2003 GUIDANCE FOR LOCAL AUTHORITIES AND NATIONAL PARK AUTHORITIES

Introduction

This guidance on section 11 powers has been revised to provide guidance on the Land Reform (Scotland) Act 2003 (Modification) Order 2013. The amendment to the Land Reform (Scotland) Act 2003 contained in this Modification Order means that core paths can be closed temporarily if specified in a section 11 order.

Section 11 Power to exempt particular areas of land from access rights

The local authority may (whether on application made to them or not) by order under this section made in respect of a particular area of land specified in the order exempt it for a particular purpose specified in the order from the access rights which would otherwise be exercisable in respect of it during such times as may be specified in the order.

Section 11 of the Act enables local authorities, whether on applications from third parties or on their own initiative, by order, to exempt a particular area of land and/or inland water from access rights.

It is likely that the main use of section 11 powers will be to exempt land from access rights for short periods of time in connection with admission to events.

It should be emphasised that, given the duty of local authorities under the Act to uphold access rights, the power to exempt land from access rights under this section of the Act should be used sparingly and applied in respect of the minimum area of land, and for the minimum period necessary, and only when other management arrangements as set out in the Scottish Outdoor Access Code (SOAC) and related guidance have been considered.

Where authorities are in doubt they may seek advice from their local access forum and/or the Scottish Government, although any legal advice should be sought from a local authority's own legal advisors.

There may be a need to exempt the land from access rights for the duration of an event, and possibly periods immediately before and after.

In general the reasons for exemptions under section 11 should be limited to: -

- Allowing admission to a particular event whether by ticket (charged or uncharged) or invitation;
- In the interests of safety and security e.g. these situations could involve competition participants and spectators;

Examples of these above situations, where a section 11 order might be considered include outdoor concerts, village fetes, highland/Commonwealth Games, golf tournaments and car rallies.

- Ensuring the protection of privacy, where the provisions of section 6 of the Act are not deemed sufficient in individual circumstances and the local authority considers the exclusion necessary eg. to ensure privacy during a private wedding – this is likely to be considered appropriate in very few circumstances.

Circumstances where exemption should not usually be considered include: -

- Reasons of land management. The Act provides sufficient exclusions (section 5 ‘The extent of the duty of care owed by an occupier of land to another person....’) and further guidance on the responsible exercise of access rights and responsibilities is provided in the SOAC, in particular paragraphs 3.8 and 3.9.

In addition Forestry Commission Scotland are producing guidance on ‘Managing Access and Forest Operations’ and the Health and Safety Executive have produced the publication ‘Protecting the public: Your next move’ (HSG51) <http://www.hse.gov.uk/pubns/priced/hsg151.pdf>

- Large country houses or estates seeking an extensive exemption for most or all of their estate for privacy;
- An area of land that is already subject to some management measure prohibiting or restricting access, e.g. where an existing byelaw is in place that deals with the issue;
- Where a charge for admission is proposed and the charge is for access only and not for an event.

Core path closures

The intention of core paths is that they are a system of routes sufficient for the purpose of giving the public reasonable access. Access rights must be exercised responsibly on core paths.

Core paths should not automatically be closed as part of a wider areal closure. Core path closure should only be considered where the access authority deems / agrees it would be irresponsible to allow members of the public to use them in view of the particular circumstances.

The Modification Order provides for the temporary closure of core paths whether they constitute the whole or part of the area covered by a section 11 order. In all cases where a core path is to be closed by a section 11 order this should be specified in the description within the order. If core paths are not specified within the order, this has the effect that they remain open.

The Modification Order does not change any of the circumstances outlined above in relation to the use of section 11 orders. When making section 11 orders for less than 6 days on core paths, the access authority should ensure that information is recorded on the circumstances of the closure, and evidence that the closure is for the minimum duration and area necessary.

Alternative routes

When considering making an order local authorities should have regard to whether or not alternative routes exist or can be provided to facilitate access over or around land affected by such an order.

When a core path is to be temporarily closed by a section 11 order, alternative arrangements to the core path should be organised if possible e.g. a well signed substitute route. As far as possible, alternative arrangements should be provided for all the same types of access that the core path is used for (e.g. if the core path is suitable for cycling and horse-riding, the alternative route should also be suitable for cycling and horse-riding).

Local authority process

Local authorities should treat cases on an individual basis. They are best placed to weigh such issues as the impact of responsible access on the viability of the enterprise; the importance of the enterprise to the local economy; and the loss to the public of exempting the land from access rights. It is likely that only in a very few circumstances is an order likely to be considered appropriate.

In many cases the land manager or promoter will have produced a general risk assessment for the upcoming temporary situation/event. The risk assessment will primarily be produced for the benefit of staff and contractors but if relevant will also consider impacts on local public access rights and risk to the public associated with those impacts. Where possible, this risk assessment will be provided to the local authority to help to justify the section 11 closure.

Local authorities are best placed to issue their own guidance on practical issues such as timing. There is no time limit set for how long in advance an application should be submitted to their local authority for exemptions under section 11. For larger events where dates are set well beforehand, and for longer-term exemptions, then there should be scope for making an application well in advance. For smaller events and short-term exemptions, an application nearer to the date of the requested exemption may be acceptable.

Longer-term exemptions (six days or more)

Consultation requirements

Where a proposed order would exclude land from access rights for 6 days or longer, the formal consultation requirements set down in section 11(2) shown below must be adhered to. Clearly, when there is a requirement to consult on a draft Order, then applications will have to be submitted in time to allow for this.

(2) Before making an order under this section which would have effect for a period of six or more days, the local authority shall—

- (a) consult the owner of the land to which it would relate, the local access forum established by them and such other persons as they think appropriate; and*
- (b) give public notice of the intended purpose and effect of the proposed order,*

inviting objections to be sent to them within such reasonable time as is specified in the notice; and shall consider any such objections and any other representations made to them.

Any order having effect for 6 days or longer requires to be confirmed by the Scottish Ministers.

Ministerial consideration

In order to consider any order which would have effect for six days or more, the Scottish Ministers will require the following information:

- Clear identification of the area of land affected;
- The date and times of operation of the order;
- Details of the consultation undertaken and copies provided of all objections and representations received;
- The purpose and effect of the order with details of the requirement for the order e.g. where a charge is to be levied for admission, it is likely that there would be problems administering an admission charge without the order;
- The demand for access in the area affected by the proposed order and details of the alternative access arrangements that will be provided. If suitable alternative arrangements for core paths are not provided, details of the reasons that they cannot be put in place.

In particular when considering an application for any longer-term exemption which would involve closure of a core path, Ministers will wish to be satisfied that suitable alternative arrangements for access will be in place, or that no alternative arrangements are practicable.

Once an order is confirmed the local authority will be informed by letter from the Scottish Government.

Repeated Closures

It is also important to note that if repeated section 11 orders for under 6 days on the same area of land are requested and total 6 days or more, the procedure for closures of 6 days or more would apply.

Information about closures

After confirming any section 11 order, the closure should be notified to the public using for example signage on site, signs on access roads and paths into a site, marshalling, the local authority website, local press, or through community councils. In the case of core paths closures, early notice is essential. Any signage on site should be removed promptly after the event.

A series of model orders are provided as annexes to this section of the guidance. These can be adapted to suit for either an order with duration of less than 6 days or of 6 days or more.