

PUBLIC ACCESS TO PRIVATE LAND IN SCOTLAND**D L Carey Miller*****SUMMARY**

This article attempts to understand the radical reform of Scottish land law in its provision for a general right of public access to private land introduced in 2003 as part of land reform legislation, an important aspect of the initial agenda of the Scottish Parliament revived in 1999. The right is to recreational access for a limited period and the right to cross land. Access can be taken only on foot or by horse or bicycle.

As a starting point clarification of the misunderstood pre-reform position is attempted. The essential point is that Scots common law does not give civil damages for a simple act of trespass (as English law does) but only a right to obtain removal of the trespasser. Under the reforms the longstanding Scottish position of landowners allowing walkers access to the hills and mountains becomes a legal right.

A critical aspect of the new right is that it is one of responsible access; provided a landowner co-operates with the spirit and system of the Act access can be denied on the basis that it is not being exercised responsibly. But the onus is on the landowner to show that the exercise of the right is not responsible.

Although the right applies to all land a general exception protects the privacy of a domestic dwelling. Early case law suggests that the scope of this limit depends upon particular circumstances although reasonable 'garden ground' is likely to be protected. There are various particular limits such as school land.

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Compliance with the protection of property under the European Convention on Human Rights is discussed. The article emphasises the latitude, open to nations, for limitations to the right of ownership in land in the public interest. The extent of the Scottish access inroad illustrates this. This leads to the conclusion that 'land governance' – the subject of the Potchefstroom Conference at which the paper was initially presented – largely remains a matter for domestic law; the *lex situs* concept is alive and well.

KEYWORDS: Scotland, land law, Scottish common law, public access, walkers, garden ground, trespass