

Guide to the right to protest in Scotland

Introduction

The Environmental Rights Centre for Scotland (ERCS) aims to increase people's awareness of their environmental rights and to ensure that people can effectively exercise them.

This is a guide to the right to protest in Scotland. The right to protest in Scotland is derived mainly from Article 11 right to freedom of peaceful assembly and to freedom of association with others in the European Convention on Human Rights (ECHR). This guide discusses that right and some of the main laws which affect the right to protest in Scotland.

This is not a comprehensive guide. If you are unclear about your protest rights, get legal advice. ERCS provides free advice to individuals, community groups and organisations on environmental and related planning law – [you can contact us through our website](#).

The right to protest and the ECHR

Article 11 of the ECHR states that:

- 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
- 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

The European Court of Human Rights (ECtHR) explained in *Kudrevičius and Others v. Lithuania* that ‘the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society.’¹ In *Kuznetsov v Russia*, the ECtHR stated that, ‘in view of the essential nature of freedom of assembly and its close relationship with democracy there must be convincing and compelling reasons to justify an interference with this right’.²

The right to freedom of assembly is incorporated into Scots law largely through the Human Rights Act 1998 and the Scotland Act 1998. It is unlawful for public authorities in Scotland (e.g. Police Scotland and local authorities) to act in a way which is incompatible with the right to freedom of assembly.³ Similarly, it is unlawful for members of the Scottish Government to act in a way which is incompatible with the right,⁴ and for the Scottish Parliament to pass a law which would be incompatible.⁵

Scope of the right to protest

The right to freedom of peaceful assembly has a number of features:

- it covers gatherings of people in public and in private,
- it covers static and moving gatherings,
- it includes the right to choose the time, place and modalities of the assembly (subject to certain limits),
- it protects peaceful gatherings only. However, an individual does not lose the right to peaceful assembly as a result of incidents of sporadic violence or other criminal acts committed by others in the course of a gathering, provided that individual remains peaceful.

To ensure that the right can be enjoyed, the state is required to both refrain from applying unreasonable restrictions on the right but also to safeguard it. The state has a positive duty to take appropriate measures to ensure peaceful conduct and public safety at lawful assemblies.

Interference with the right

The right to freedom of peaceful assembly is not an absolute right - the state can lawfully interfere with the right in certain circumstances. However, any interference would only be lawful if it is:

- in accordance with the law,
- necessary in a democratic society, and
- carried out in pursuit of one of the following 'legitimate aims':
 - national security or public safety,
 - the prevention of disorder or crime,

- the protection of health or morals, or
- the protection of the rights and freedoms of others.

Laws which affect the right to protest in Scotland

Protests in Scotland are regulated by numerous laws, including by statute and common law. This section explains some of the main laws which affect protests in Scotland (this is not a comprehensive guide).

The requirement to notify the authorities before holding a public procession

The Civic Government (Scotland) Act 1982 applies to ‘public processions’ – a term which broadly refers to moving gatherings which occur in a public place. The 1982 Act requires organisers of a public procession to provide written notification to the relevant local authority and the police of certain details relating to the procession.⁶

Notification must be given at least 28 days prior to the public procession.⁷ Local authorities have a discretionary power to dispense with the 28 day notification requirement where an explanation is given as to why 28 days’ notice has not been provided.⁸

The local authority can decide to prohibit the procession or impose conditions on it, if certain conditions are met (prohibitions and conditions can be appealed in the relevant sheriff court).⁹

There is no legal requirement to notify the above authorities before a static assembly (i.e. a non-moving gathering) takes place.

Police powers to impose conditions on processions and assemblies

The **Public Order Act 1986** gives the police the power to give directions which impose conditions on a public procession or a ‘public assembly’¹⁰ in certain circumstances, such as where ‘it may result in serious public disorder, serious damage to property or serious disruption to the life of the community’.¹¹ It is a criminal offence to fail to comply with such directions.¹²

The 1986 Act also gives the police the power to take actions to prevent ‘**trespassory assemblies**’ in certain circumstances.

If the police reasonably believe that an assembly of 20 or more persons is intended to be held at a place on land to which the public has no right of access or only a limited right of access, and that other conditions are satisfied such as that it may result in ‘serious disruption to the life of the community’, the police can apply to the relevant local authority for an order prohibiting for a specified period holding all trespassory assemblies in the relevant area.¹³ Local authorities can approve or reject the application from the police.¹⁴

If an order to prevent trespassory assemblies is made, it must not prohibit the holding of assemblies for a period exceeding 4 days or in an area exceeding one represented by a circle with a radius of 5 miles from a specified centre.¹⁵ It is an offence for a person to organise or take part in an assembly which they know has been prohibited under this power.¹⁶

The police can stop a person who they reasonably believe is on the way to an assembly which has been prohibited and direct them not to proceed in the direction of the assembly.¹⁷ It is an offence to fail to comply with such a direction.¹⁸

Threatening and abusive behaviour

The **Criminal Justice and Licensing (Scotland) Act 2010** criminalises ‘**threatening and abusive behaviour**’. Section 38(1) of that Act provides that a person commits an offence where:

- they behave in a threatening or abusive manner,
- the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
- they intend to cause fear or alarm (or are reckless as to whether the behaviour would cause fear or alarm).

This offence is very similar to the common law offence of ‘breach of the peace’.¹⁹ It is a defence to show that the behaviour was reasonable in the circumstances.²⁰

It is a very broad offence which could include a variety of conduct. It applies to ‘behaviour of any kind including, in particular, things said or otherwise communicated as well as things done’,²¹ meaning that spoken or written words could be enough. Either a single act or a course of conduct could amount to an offence.²²

Aggravated trespass

It is often commonly stated that there is no law of trespass in Scotland, but this is incorrect.²³ Members of the public in Scotland enjoy broad land access rights under the Land Reform (Scotland) Act 2003. However, the criminal offence of trespass remains on the statute books.²⁴ A landowner can also raise civil proceedings to obtain an ‘interdict’ against a trespasser in certain circumstances.²⁵

The **Criminal Justice and Public Order Act 1994** criminalises ‘aggravated trespass’.²⁶ It applies only to ‘land in the open air’ (i.e. outside). Aggravated trespass occurs where a person trespasses on such land, and in relation to any lawful activity which persons are engaging in or are about to engage in on that land, does anything which is intended to:

- intimidate those persons or any of them so as to deter them from engaging in that activity,
- obstruct that activity, or
- disrupt that activity.

A person will not be committing aggravated trespass if they are exercising their land access rights under the Land Reform (Scotland) Act 2003.²⁷ For a guide to Land Access rights in Scotland, see the [Scottish Outdoor Access Code](#).

If the police reasonably believe that a person is committing, has committed or intends to commit the offence of aggravated trespass, they have the power to direct that person to leave the land.²⁸ It is an offence for a person who knows that they have been given such as direction to fail to leave the land as soon as practicable, and to re-enter the land within a three month period from the date of the direction.²⁹

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Other useful resources³⁰

Scottish Activist Legal Project, [‘Guide to Activism, Scottish Law and the Police’](#) (2021).

Scottish Human Rights Commission, [‘The Right to Freedom of Peaceful Assembly: Article 11 of the European Convention on Human Rights’](#) (2020).

European Court of Human Rights, [‘Guide on Article 11 of the European Convention on Human Rights’](#) (2021).

References

- ¹ *Kudrevičius and Others v. Lithuania*, no. 37553/05, paragraph 91.
- ² *Sergey Kuznetsov v. Russia*, no. 10877/04, paragraph 39.
- ³ Human Rights Act 1998, Section 6(1).
- ⁴ Scotland Act 1998, Section 57(2).
- ⁵ Scotland Act 1998, Section 29.
- ⁶ Section 62(1). The details which Section 62(3) requires must be given are (a) the date and time when the procession is to be held; (b) its route; (c) the number of persons likely to take part in it; (d) the arrangements for its control being made by the person proposing to hold it; (e) the name and address of the person proposing to hold it.
- ⁷ Section 62(2). Local authorities have a discretionary power to dispense with the 28-day notification requirement where an explanation is provided as to why 28 days' notice has not been given.
- ⁸ Section 62(4).
- ⁹ Section 63.
- ¹⁰ A public assembly is defined in Section 16 as, "an assembly of 2 or more persons in a public place which is wholly or partly open to the air".
- ¹¹ Sections 12(1)(a) and 14(1)(a).
- ¹² Sections 12(4), 12(5), 14(4) and 14(5).
- ¹³ Section 14A(1).
- ¹⁴ Section 14A(2).
- ¹⁵ Section 14A(6).
- ¹⁶ Sections 14B(1) and 14B(2).
- ¹⁷ Section 14C(1).
- ¹⁸ Section 14C(3).
- ¹⁹ Breach of the peace was defined in *Smith v Donnelly* (2002) JC 65 as, "conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community...conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable people".
- ²⁰ Section 38(2).
- ²¹ Section 38(3)(a).
- ²² Section 38(3)(b).
- ²³ See Lord Turnbull's discussion in *Scottish Parliament Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, at paragraphs 31 to 36.
- ²⁴ Trespass (Scotland) Act 1865, Section 3.
- ²⁵ An interdict is a court order which prohibits certain conduct. See S Robinson (1994), *The Law of Interdict*, 2nd Edition, Butterworths, chapter 7.
- ²⁶ Section 68.
- ²⁷ Section 68(1A).
- ²⁸ Section 69(1).
- ²⁹ Section 69(3).
- ³⁰ ERCS is not responsible for the accuracy of any external documents.