

The politics of Covid 19 – access rights and human rights

Description

This post takes a look at the Scottish Government's increasing drive to restrict when and how people – including staff working for the NHS on the frontline – can leave their homes for their own mental and physical health and how this fits with our access rights and human rights.

Shifting “medical” advice

When the corona crisis broke on us, Professor Jason Leitch, Clinical Director of the NHS in Scotland, became something of a media star. His confident messages stood out in contrast to the bumbling messages from his colleagues in England, where it was clear medical leads were simply covering up the UK Government's failure to act in time and the run down of the NHS. The messages he has been trying to promote, however, have changed significantly in the last three or so weeks.

- Just before the lockdown was announced, Professor Leitch was telling people it was fine to play golf, as long as people were careful not to touch the flags. Since then, of course, all our golf courses have been shut down, though in England there is now some talk of opening them up to the public to walk on – like we can do in Scotland under access rights.
- Last Monday, Professor Leitch was on the radio defending the trip his former boss, Dr Catherine Calderwood, took to Fife ([see here](#)), stating that she had observed social distancing at all times.
- At the end of the week on Friday Professor Jason Leitch was on the media again, claiming that “only 30-60 minutes of exercise outside was allowed each day but warned it should not be looked at as recreational” ([see here](#)). He stated “*Can I just emphasise that exercise is exercise, not recreation and not your hobby*” and “*It's not the time to go mountain biking. You need to just use it for 30 or up to 60 minutes from your home to exercise to stay healthy – and then stay at home*” and “*Every time you do it, literally lives are saved.*”

In other words, Professor Leitch's message has changed to “Stay at Home”. Our knowledge about how COVID 19 is transmitted has not changed fundamentally in this same time period. The virus is transmitted by people being too close to each other and touching the same surfaces. This means that in some places, like COVID wards in hospitals, you are perhaps 99.9% likely to catch the virus unless you wear protective equipment but in others, like being out on the hills, there is virtually no risk at all. This truth did not prevent Professor Leitch implying at the end of last week that if you are lucky enough to live in one of our National Parks or the countryside and go for a walk that lasts three hours, rather than one, that “literally” lives will be lost. That, I am afraid, is complete and utter tosh, an abandonment of science.

If you want to understand why Professor Leitch has changed his ground, the statement he made on Friday was at the daily briefing where he was standing alongside Nicola Sturgeon, our First Minister. These utterances are political. Professor Leitch, just like Catherine Calderwood before him, is issuing

advice and guidance NOT on the basis of medical science, but on the basis of what our governments want.

Confirmation of that came just a few hours later in the BBC's UK-wide Ten o'clock news. Sophie Rayworth, in a summary of what you can or cannot do, said:

"You can leave home to exercise once a day, locally, alone or with members of your household. There is no set time limit on this."

This statement, however, is not correct either as the law, as set out in the Coronavirus Health Protection Restrictions Regulations 2020, allows you "to take exercise, either alone or with other members of their household". There is no restriction to once a day. Nor should there be on the basis of what we know about the importance of exercise to physical and mental health: most people get their exercise in doses, whether its children going out to play or older people taking several short walks. If politicians want to limit people to going out for exercise, whether this is to just once a day or just for an hour they need to be able to justify this.

If we set aside the clampdown on travel, there is no justification for our politicians to try and limit the number of times that people who live in rural areas or the edge of towns go out into the countryside for exercise. That's not going to affect the spread of the virus, it's not going to save lives. Scotland has large amounts of open space where its very easy for people to keep 2 metres apart, particularly given our access rights which don't limit people to paths.

Even in towns, however, maintaining physical distancing is not a great problem when out of doors. I stay in Nicola Sturgeon's constituency on the southside of Glasgow. Since the lockdown I have been running every day in Pollok Park. Some days I run – jog is probably a more accurate description! – one hour, sometimes two. I have no idea how long other walkers, runners and cyclists are going out but, what I do know, is that in three weeks I have not had any difficulty in observing the distancing rules. Almost every person I have seen is doing the same yet, instead of respecting this, our governments appear to want to restrict our rights even further and are trying to do this through their medical mouthpieces like Professor Jason Leitch. I have to say I feel sorry for him, the pressure must be immense. The pressure, however, on people who are needlessly being told to stay at home, with all the social and health consequences that has, is even greater.

Unfortunately, people are being made to feel like criminals just for going out for a walk. Nowhere is that greater than in the countryside where roads are being closed, laybys blocked off and keep out signs being erected.

Access Rights

12:12 8 Apr

Warning over 'inappropriate' path closures



Highland council says land managers who put up "inappropriate" signs during the coronavirus crisis, claiming paths and other routes are closed, must remove them.

The local authority's access officers say there is no change in the legal rights of people to paths and other areas in towns and the countryside.

BBC News

It was very welcome therefore when last Tuesday Highland Council called for landowners to remove unlawful signs that prevent people exercising access rights ([see here](#)). Unfortunately, the impact of this call is likely to be limited because of the travel ban. First, it's not clear that Access Officers will be allowed to go out and check on such signs without which, under existing procedures, it's not possible to get signs removed. Second, Highland Council has since closed many of its car parks, making it difficult even for local people to go out and take exercise. I will come back to the impact of that in another post, but just like in the towns, people in Highland Villages are increasingly being forced closer together. That is daft.

Two days after Highland Council, the Scottish Government issued its own statement on access rights during the current coronavirus emergency ([see here](#)). While starting with an acknowledgement of the importance of Access Rights, almost all the rest of the content undermined this by statements claiming it's no longer responsible for people to exercise their access rights except in a very limited way:

Claim: *"Staying at home has become the only way of slowing the spread of this virus and giving our NHS the chance to cope and save lives."*

Comment: this is not true, the likelihood of people going out into the countryside for outdoor recreation spreading the virus is tiny.

Claim: *"Under current guidance, it is only permitted to leave your home for specific reasons, including to take exercise, alone or with other members of your household, and no more than once a day."*

Comment: this is totally misleading, guidance is guidance and very different from law (see below). Guidance can suggest you to do something, that is not the same as “permitting” or not permitting something. The LAW says you can go out for exercise and puts no limit on this.

Statement: *“Essential workers, including farmers who are helping to maintain the nation’s food supply and have important animal welfare responsibilities, must be allowed to go about their business without interference or fear of unnecessary exposure to COVID-19”.*

Comment: the Scottish Outdoor Access Code was designed to allow land managers to go about their business and has done so very successfully. All that’s basically needed for that to continue – apart from some limited issues like farm gates (see below) – is for people to maintain a physical distance (2 metres) from farmers like everyone. So why is there any need for the Scottish Government to suggest otherwise? It just leads to more scaremongering.

Claim: *“It is a requirement of the Scottish Outdoor Access Code that we all behave in a responsible way that is considerate of other people. This means that, during the current emergency, everyone should:*

- *Stay local – please do not travel in your car to take exercise; please make use of the paths, open spaces and quiet roads in your own local area”*

Comment: Access rights don’t cover motorised transport but here we have guidance that is allegedly on access rights being misused to try and persuade people NOT to travel by car. Just a couple of weeks ago Jeanne Freeman, the Health Secretary, said it was fine to travel short distances and it is only two weeks since the National Police Chief’s Council (‘NPCC’) and College of Policing (‘CoP’) produced guidance on 31 March that made it clear *“we don’t want the public sanctioned for travelling a reasonable distance to exercise. Road checks on every vehicle is equally disproportionate”.* In England it still appears ok to travel by car to exercise your dog. The Scottish Government’s guidance is constantly shifting and becoming ever more authoritarian.

Statement: *“Farmers and other land managers are entitled, and indeed encouraged, to put up signs when they have pregnant or young livestock in a field”.*

Comment: this is not true, farmers are only entitled to put up signs that are compatible with access rights but as worded, the guidance gives farmers carte blanche to put up whatever signs they want, as has been happening across the country, signs that exclude not just dogs but people. The Scottish Government’s advice is far worse than that issued two days before by Highland Council.

Statement: *“Avoid contact – try to avoid touching surfaces and if possible plan a route that does not require you to open gates”.*

Comment: while sounding helpful, its every hard for many people living adjacent to the countryside to access it without opening gates (and the guidance of course attempts to “ban” people from travelling to places where there may be no gates), so in effect this could result in further blanket access bans. Instead of advising people to avoid gates, the guidance could have recommended that land managers attach hand gel to gates on popular routes or even that people took their own. If people did that, there would be no need to avoid any gate at all.

Unfortunately, nowhere in this Guidance is there any concept that the wide open spaces in the countryside could be playing a key role in relieving all the pressures that are on people in this crisis. I understand why it was necessary to shut down enclosed places where people gather, from football stadiums to workplaces, but to then shut down the one place where it should be really safe for people to go, the countryside, seems to me utter madness. Our government, from top to bottom, has lost all reason.

Human Rights and our liberties to go outdoors

The advice from the Scottish Government on access rights is also NOT proportionate in terms of Human Rights. Everyone who is concerned about the current assault on civil liberties should read the Briefing to Chair of the UK’s Joint (House of Commons and House of Lords) Committee on Human Rights([see here](#)). Below I consider the implications of that briefing for our rights to leave wherever we are living to go outdoors, whether in the town or countryside.

“This lockdown is the most significant and blanket interference with individual liberty in modern times. Such extreme measures can only be considered lawful, justified, necessary and proportionate if (1) the threat from disease and death remains sufficiently significant to justify such extraordinary measures; (2) the measures only interfere with human rights and civil liberties to the extent necessary; (3) the measures are enforced in a clear, reasonable and balanced manner; (4) enforcement is authorised, and does not go beyond what is prohibited, by law.”

And,

“The ‘lockdown’ restriction (Regulation 6) allows for people to leave their homes provided they have a “reasonable excuse”. There is a non-exhaustive list of what could be a reasonable excuse. In order to be proportionate, “reasonable excuse” must be interpreted broadly and in the way that least infringes with the right to private and family life and other civil liberties.”

So are the current measures being taken to restrict people to their houses being done in a way that least infringes on civil liberties? Clearly not. We have thousands of hectares of Scotland devoid of people, places where people could go quite safely, but are being denied from doing so because of the lockdown. The Human Rights Committee Briefing highlights these concerns:

“It is difficult to understand why a blanket “once per day” restriction on exercise might be considered necessary and proportionate, particularly given that these are blanket measure applying to many different situations.”

And,

“Additionally, it may be necessary specifically to consider what measures are proportionate to facilitate reasonable exercise for those living in crowded cities without ready access to outdoor spaces, where the policing and health risk challenges are very different from those living in rural or less populated areas”

Note, what is proportionate should vary from area to area (remember this is in a UK context and generally there is far more space in Scotland than London) and also how the Human Rights Committee assumes that government should be facilitating exercise, not preventing it.

The Briefing to the Human Rights Committee also emphasises the importance of the rule of law:

“It is crucial that enforcement authorities are clear on the law. Otherwise there are real risks in respect of the rule of law and potentially also Article 7 ECHR (no punishment without law).”

“There are a number of different sources of information, in particular: (i) the Regulations which set out the law; (ii) Government guidance that is intended to try to explain the Regulations, for example to give examples of what might be a “reasonable excuse”; and (ii) Government advice that has no relation to the Regulations (or to criminal law) but suggests recommended best practice or behaviour. All of these differ in material respects and have become confused. Not least as the Government and police seem at different times to refer to all three as the “rules” even though only one of these three is legally binding law.”

This is important, the Scottish Government's Guidance on Access Rights is NOT law and confirms it should never have said that exercise was “permitted” only once a day. The Government is making up the law as it goes along – as is evident by its attempts to impose ever-shifting guidance. On the importance of the rule of law see [here](#).

“The regulations for England, Northern Ireland and Scotland allow for a person to leave the house for a “reasonable excuse”, which explicitly includes for taking exercise. However, there is no limit on the number of times a person can take exercise. Confusingly, the Welsh regulations do specify that individuals can only take exercise “no more than once a day”. Moreover, it is arguable that the correct approach in dealing with what appears to be a small minority of people creating a public health risk, is to take action to enforce the rules in respect of those people and/or areas which pose a threat, rather than putting in place unduly restrictive rules for all.

This supports what I have been arguing on parkswatch. Instead of trying to impose blanket restrictions on physical activity or on people driving or even cycling out to the countryside, whether to take exercise or simply sit in the sun, the presumption in Scotland should be that people can take responsibility for themselves in the outdoors just as happens under access rights (no-one wants to get ill). Where pressure points and potential health risks are identified, responsibility for dealing with this should be devolved to local areas along with the presumption that it is the role of our public authorities to facilitate rather than prevent access. The police would then have a back-up rule enforcing the physical distancing rules where these are being deliberately flouted.

For this to happen, the Scottish Government needs to take a fresh start. However, difficult to admit a volte face, it will need to do so eventually if we are to find any way out of corona crisis. If the Scottish

Government cannot find a way to trust people going for a walk in the countryside without increasing health risks, it is NEVER going to be able to trust anyone going back to work.

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