

POST LEGISLATIVE SCRUTINY OF THE LAND REFORM (SCOTLAND) ACT 2003

EXECUTIVE SUMMARY

SEPTEMBER 2010

**Calum Macleod¹, Tim Brauholtz-Speight², Issie Macphail³,
Derek Flynn, Sarah Allen⁴ and Davie Macleod⁵**



¹ Centre for Mountain Studies, Perth College UHI

² UHI Centre for Remote and Rural Studies

³ UHI Centre for Remote and Rural Studies

⁴ Rural Analysis Associates

⁵ Rural Analysis Associates

1. Introduction

The aim of the study is to examine implementation of the provisions of the Land Reform (Scotland) Act 2003 (LRSA) relating to access rights in Part One of the Act, the community right to buy in Part Two of the Act and the crofting community right to buy in Part Three of the Act. Its objectives are to:

- Determine the extent of use of provisions in Parts One, Two and Three;
- Review the evidence of any additional wider impact of the LRSA on recreational access to land, the community right to buy and the crofting community right to buy;
- Identify views on implementation of the provisions;
- Examine stakeholders' experiences of community land buyouts and crofting land buyouts outwith the provisions of the Act;
- Identify any barriers to greater use of the provisions;
- Identify options for change to the provisions themselves or their implementation which could encourage greater use.

2. Methodological Approach

The study combined reviews of relevant academic and non-academic literature with primary research involving electronically-administered surveys and semi-structured face-to-face and telephone interviews with selected access, community ownership and crofting community ownership stakeholders to address the above objectives.

3. Key Findings for Access Rights

3.1 Extent of Use of the Provisions

It is not possible to quantify the extent to which statutory access rights are being exercised by recreational and other access-takers due to a lack of available and readily comparable data. However, Access Authorities have been active in fulfilling their statutory remits. There has been slippage in some Access Authorities' progress in drawing up their Core Paths Plans as required in Part One of the Act. Access Authorities have made limited use of their enforcement powers under the Act and there is currently very little case law relating to statutory access rights.

3.2 Additional Wider Impact of the LRSA on Recreational Access to Land

Clarification of statutory access rights is viewed as increasing the confidence and assertiveness of access-takers in relation to exercising these rights. However, there are concerns that a minority of access-takers are emphasising their statutory rights over their responsibilities when taking access.

3.3 Views on Implementation of the Access Provisions

There are concerns amongst many stakeholders that Access Authorities are reluctant to pursue court action to resolve access disputes, partly because of the potentially adverse financial implications of losing a case. There is a perception that the legislation has gradually improved relations between access-takers and land managers. Core paths planning is considered to have raised the profile of access issues within Local Authorities and encouraged community engagement and constructive dialogue between stakeholders. However, there are concerns that core paths planning will be a 'missed opportunity' if Access Authorities have insufficient funding to maintain and manage core paths networks.

3.4 Barriers to Greater Use of the Access Provisions

Barriers to greater use of access provisions as they relate to enforcement of access rights are mainly financial and cultural (linked to the Act's enabling ethos). These barriers are arguably exacerbated by the definitional vagueness associated with concepts such as 'privacy' and 'curtilage' in relation to access rights and a perceived reluctance by Access Authorities to test these definitions in court.

3.5 Stakeholders' Proposals for Change

Stakeholders' proposals for change focus on amendments to specific provisions in the Act to make it a duty for Local Authorities to maintain core paths, to enable Access Officers to have specific powers of entry onto land, and to clarify section 14 of Part One (dealing with prohibition signs, obstructions, dangerous impediments etc.). Other proposals focus on funding issues; clearer guidance on particular issues such as control of dogs and wild camping; enforcement and other mechanisms for resolving access disputes; and educational measures such as integrating the highly regarded Scottish Outdoor Access Code into the Curriculum for Excellence at primary and secondary school levels.

4. Key Findings for the Community Right to Buy

4.1 Extent of Use of the Provisions

To date, seven Community Bodies have purchased land using the community right to buy provisions. Two more Community Bodies are currently in the process of doing so and one has an application to purchase under consideration. Ten Community Bodies have reached purchase stage but failed to complete within the timetable set out by the Act. 55 registrations of interest in land remain outstanding.

4.2 Additional Wider Impacts of the LRSA on the Community Right to Buy

Literature suggests that the very existence of the Act may inspire community action towards the control of local assets and make landowners more receptive to local communities' developmental aspirations. Research participants indicated that while the Act had stimulated general awareness of land reform in their community, it had not been directly useful as a bargaining tool with landowners. The extent to which the community right to buy has empowered community groups appears variable. Some groups have disbanded after unsuccessful applications to register interest. However, others have continued to pursue community-based initiatives.

4.3 Views on Implementation of the Community Right to Buy Provisions

Research findings highlighted the complexity of using the community right to buy. Specific issues were raised concerning access to the electoral register, community body definitions, ballot turnout requirements and the definition of 'community'. "Late" registrations are seen as a key "emergency" tool by community groups, and the majority of successful purchases to date have been "late". Scottish Government Community Assets Branch officials were widely commended for their accessibility and responsiveness in dealing with Community Bodies.

4.4 Barriers to Greater Use of the Community Right to Buy Provisions

The legislation's complex and resource-intensive administrative requirements and a lack of available funding to support community purchases of land are viewed as significant barriers to greater use of the provisions. Research findings suggest that reluctance to provoke community conflict and damage relations with locally-based landowners are also significant factors in explaining why groups avoided using the community right to buy to purchase land.

4.5 Stakeholders' Experiences of Community Land Acquisition outwith the Act

The literature and our primary research findings indicate that mechanisms such as the National Forest Land Scheme are viewed as less complex to use than the LRSA's community right to buy provisions. Our research found that, in general, community groups believe that they have greater flexibility in purchase negotiations and more amicable relationships with landowners if purchases can be concluded outwith the Act.

4.6 Stakeholders' Proposals for Change

Proposals for change mainly focus on specific issues relating to the implementation of the community right to buy. They include more time and flexibility for Community Bodies to meet their obligations under the community right to buy provisions, similar criteria for late registrations as for timeous registrations and a wider definition of community membership. More general proposals are also made in relation to further promoting the Act and making funding available to support community purchase and ownership of land.

5. Key Findings for the Crofting Community Right to Buy

5.1 Extent of Use of the Provisions

Current use of the crofting community right to buy is very limited. Only the Galson Trust and the Pairc Trust, both located in the Isle of Lewis, have registered to use these provisions. In the case of the Galson Trust, registration brought the landowner's representative to the negotiating table and, although the registration was 'active', the sale was negotiated privately. In the case of the Pairc Trust, the landlord has systematically explored a range of legal means to avoid or delay sale. The case is still unresolved and awaiting a Court of Session hearing.

5.2 Views on Implementation of the Crofting Community Right to Buy Provisions

To date, the crofting community right to buy has never been implemented to the point where a crofting community body has used it to purchase eligible land and associated rights. However, it is viewed as extremely onerous, complex and resource-intensive by commentators and the two community groups with experience of formally engaging with Part Three of the Act.

5.3 Barriers to Greater Use of the Crofting Community Right to Buy Provisions

The complexity of the crofting community right to buy process, together with concerns that it may be unworkable in practice represent the key barriers to greater use of the provisions. More generally, changes to the funding environment and support sources for community land ownership are also viewed as barriers in this regard. There are also potential tensions between the crofting community right to buy and recent reforms to crofting law and policy, in terms of individual versus community ownership, which may further preclude use of the provisions in practice.

5.4 Additional Wider Impacts of the LRSA on the Crofting Community Right to Buy

Six community groups have purchased land under crofting tenure, either immediately prior to the passing of the LRSA or thereafter. A number of these groups cite the Act in general, and the crofting community right to buy in particular, as significant in helping to bring about a successful conclusion to purchase negotiations with the relevant landowner.

5.5 Stakeholder's Experiences of Crofting Land Buyouts outwith the Act

All of the community purchases of land under crofting tenure since 2002 have occurred in the islands (the Small Isles, the Western Isles and Skye). Despite differing significantly in scale and scope, all of these initiatives share a focus on utilising local assets to maximise opportunities for sustainable development in the communities in which land is under community ownership. In all of these instances, the purchase process has had a less protracted timescale and been characterised by more amicable negotiations than experienced in the one case where an application to exercise the crofting community right to buy is currently being pursued.

5.6 Stakeholders' Proposals for Change

Proposals for change mainly relate to reducing the onerous nature of the mapping requirements when applying to exercise the crofting community right to buy and enabling more flexibility in the definition of a Crofting Community Body and crofting community. More generally, it is proposed that the Register of the Crofting Community Right to Buy should be made available on-line so that relevant documents and registrations can be easily accessed. There are also calls to make further funding available to assist in achieving crofting community buyouts using the Act and outwith the legislation.

6. Conclusions

6.1 Access Rights

For the most part the enabling ethos underpinning the statutory access rights contained in the LRSA appears to be working well. The Act has clarified access rights and responsibilities and while our primary research findings suggest some concern regarding seemingly emboldened access-takers placing emphasis on their rights over an appreciation of their responsibilities, on the whole such behaviour appears to be a minority activity. There remain 'hotspot' access issues such as irresponsible wild camping, fire-lighting and perceived inadequate control of dogs, particularly near livestock or wildlife habitats. However, as a number of research participants pointed out, these issues pre-date the introduction of statutory access rights. There appears to be relatively little appetite amongst access stakeholders for significant changes to specific provisions in the Act or in relation to the Scottish Outdoor Access Code.

6.2 The Community Right to Buy

The community right to buy was seen as the centre-piece of the LRSA in the period prior to its enactment. Arguably that perception remains despite the fact that it has had little direct use in purchasing land or other assets for community ownership. There was widespread support amongst community groups participating in this research project for the community right to buy, and its democratising ethos of aiming to place land in community as opposed to private ownership when the opportunity arose was commended. Simplification of administrative processes is favoured by many research participants. More generally, calls for greater promotion of the community right to buy, together with more accessible funding to support community purchase and ownership are a constant refrain from within the community land ownership sector.

6.3 The Crofting Community Right to Buy

Many of the above observations in relation to the community right to buy are equally applicable to the crofting community right to buy. In particular the administrative challenges confronting a Crofting Community Body wishing to use Part Three of the LRSA make the crofting community right to buy an even more daunting process to embark upon than the community right to buy. All the more so given that its use risks an accelerating deterioration in 'crofting community-landowner' relations.

7. Concluding Observations

The research findings contained in this report indicate that there is widespread support amongst many stakeholders within Scotland for the objectives of the LRSA as they pertain to statutory access rights, community land ownership and crofting community land ownership. Findings from this study also raise fundamental questions which are of relevance to the community right to buy and crofting community right to buy provisions in particular. Specifically, what is the Act for in these regards? Is it to be the catalyst for directly facilitating community and crofting community ownership in line with the original vision of the Land Reform Policy Group? Or is it intended to have an indirect influence on these ambitions? If it is to be the former, there is merit in considering whether amendments to the legislation might better equip it to fulfil this role. More generally, further political consideration might also usefully be given to how community land ownership can be effectively resourced and otherwise supported outwith the auspices of the LRSA.