

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

Final Report

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

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LIST OF ACRONYMS

CCB	Crofting Community Body
CCRtB	Crofting Community Right to Buy
CLI	Community Land Initiative
CLU	Community Land Unit
CRtB	Community Right to Buy
DCLG	Department for Communities and Local Government
HIE	Highlands and Islands Enterprise
LAF	Local Access Forum
LRPG	Land Reform Policy Group
LRSA	Land Reform (Scotland) Act 2003
NAF	National Access Forum
NFLS	National Forest Land Scheme
ODPM	Office of the Deputy Prime Minister
RCIL	Register of Community Interests in Land
SCAN	Scottish Countryside Access Network
SLF	Scottish Land Fund
SNH	Scottish Natural Heritage
SOAC	Scottish Outdoor Access Code
SRPBA	Scottish Rural Property and Business Association

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

In April 2010 the Centre for Mountain Studies based at Perth College UHI was commissioned by the Scottish Parliamentary Corporate Body on behalf of the Rural Affairs and Environment Committee of the Scottish Parliament to undertake research contributing to post legislative scrutiny of the Land Reform (Scotland) Act 2003. This research has been conducted in partnership with the UHI Centre for Remote and Rural Studies, Rural Analysis Associates and Derek Flynn.

1.2 Aim and Objectives

The research specification for the study notes that the Land Reform (Scotland) Act 2003 (hereafter “LRSA” or “the Act”) is widely recognised as one of the most significant pieces of legislation passed by the Scottish Parliament. It introduced statutory access rights for ‘everyone’ and provides for the community right to buy land and the crofting community right to buy land in specific circumstances.

However, the research specification also states that:

The Rural Affairs and Environment Committee is frequently contacted by stakeholders with concerns about the implementation of the LRSA. The Committee, which has a busy legislative workload over the next 12 months, wishes to make progress in examining those concerns and requires independent research to examine the provisions and criticism surrounding their implementation (SPICe 2010:1).

The aim of the study is therefore to examine implementation of the provisions of the LRSA. In so doing, the research specification identifies particular objectives in relation to the access, community right to buy and crofting community right to buy provisions of the Act. These are as follows:

1.2.1 Access Provisions

- Determine the extent of use of the access provisions of the LRSA;
- Review the evidence of any additional wider impact of the LRSA on recreational access to land;
- Identify both positive and negative views on implementation of the provisions;
- 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.

1.2.2 Community Right to Buy Provisions

- Determine the extent of use of the community right to buy provisions;
- Review the evidence of any additional wider impact of the LRSA on community right to buy (i.e. community land purchases that have taken place outwith the provisions of the Act, but influenced by its existence);
- Identify views on implementation of the community right to buy provisions;
- Examine stakeholders' experiences of community land buyouts outwith the provisions of the Act;
- Identify barriers to greater use of the provisions of the LRSA;
- Identify proposals for change to the provisions themselves or their implementation which could encourage greater use.

1.2.3 Crofting Community Right to Buy Provisions

- Determine the extent of use of the crofting community right to buy provisions;
- Review the evidence of any additional wider impact of the LRSA on crofting right to buy (i.e. crofting land purchases that have taken place outwith the provisions of the Act, but influenced by its existence);
- Identify views on implementation of the crofting community right to buy provisions;
- Examine stakeholders' experiences of crofting land buyouts outwith the provisions of the Act;
- Identify barriers to greater use of the provisions of the LRSA;

- Identify proposals for change to the provisions themselves or their implementation which could encourage greater use.

1.3. The Study in Context

The antecedents of the LRSA lie in a commitment given by the incoming Labour Government in its 1997 General Election manifesto to initiate a study into the system of land ownership and management in Scotland. This led to the establishing of the Land Reform Policy Group (LRPG), chaired by Lord Sewel, in October 1997 with a remit to:

[i]dentify and assess proposals for land reform in rural Scotland, taking account of their cost, legislative and administrative implications and their likely impact on the social and economic development of rural communities and the natural heritage (Land Reform Policy Group 1998).

In *Partnership for Scotland: An Agreement for the First Scottish Parliament* (Scottish Executive 1999) the (then) Scottish Executive committed to legislating according to the recommendations of the LRPG (SPICe 1999). With regard to access rights, community and crofting community ownership these commitments found their legislative manifestation in Parts One, Two and Three of the LRSA respectively.

In their review of the suite of land reform measures precipitated by the work of the LRPG Slee et al (2008: 13) note that:

[i]t is too early in the implementation and development of many of these changes to fully evaluate their long-term, cross-cutting and cumulative impacts.

That observation holds true for the LRSA, the provisions of which have only comparatively recently begun to be implemented. Provisions relating to access rights came into force on 9th February 2005, while provisions relating to the community right to buy and the crofting community right to buy came into force on 15th June 2004. Consequently, it is premature to arrive at a definitive assessment regarding the impacts of these provisions in practice. Partly this is due to the longitudinal element of implementation studies and the often extensive periods of time it takes for a rounded picture of the implementation process to come into focus. Partly too it is due to the challenge of identifying causal relationships between the provisions contained in the LRSA and practice ‘on the ground’, whether in relation to access

rights or community and crofting community purchase of land. This challenge is further exacerbated by the somewhat piecemeal nature of currently available data for analysis across all three areas of interest to this study.

To a significant degree therefore, the analysis which follows offers a snapshot of the LRSA in practice; one which is based largely on the *perceptions* of particular stakeholders in relation to the implementation and impacts of the LRSA's access, community right to buy and crofting community right to buy provisions. The analysis is reinforced by examination of the available academic literature and other data sources relating to these provisions. Whilst it will take more time for a fuller picture of the implementation process to emerge, the current study is nevertheless intended to provide indications of the Act's direction of travel in that regard.

1.5 Structure of the Report

The remainder of the report is structured as follows. Chapter two explains the methodological approach used to meet the aim and objectives of the study. Chapters three, four and five present findings and analysis based on literature review and primary research in relation to access rights, the community right to buy and the crofting community right to buy respectively. Each of these chapters is structured to address the objectives specified in section 1.2 above and all include 'key points' summaries of relevant issues. Finally, chapter six draws overarching conclusions in relation to the implementation of the provisions contained in Parts One, Two and Three of the LRSA.

REFERENCES

Scottish Executive, (1999) *Partnership for Scotland: an agreement for the first Scottish Parliament*.

Scottish Parliament Information Centre (2010) *Post legislative scrutiny of the Land Reform (Scotland) Act 2003 : research specification*.

Scottish Parliament Information Centre (1999) *Land reform white paper*, Research Paper 99/08.

Land Reform Policy Group (1998) *Identifying the problems*. The Scottish Office: Edinburgh.

CHAPTER TWO

METHODOLOGICAL APPROACH

2.1 Introduction

This chapter explains the methodological approach used to meet the objectives of the study and discusses limitations relating to that approach. In examining Parts One, Two and Three of the Act we reviewed relevant academic literature and other secondary sources. We also undertook primary research using qualitative and quantitative methods including surveys and semi-structured face-to-face and telephone interviews with stakeholders.

The research specification stated that the current study should avoid duplicating the literature review relating to access rights, the community right to buy and the crofting community right to buy conducted as part of Slee et al's (2008) study on monitoring and evaluating the effects of land reform on rural Scotland. Consequently, we have revisited that literature only insofar as it has relevance to the objectives of the current study and have complemented that with discussion of literature that was either published subsequent to the Slee et al report or which was omitted from that report.

2.2 Access Rights

2.2.1 Literature Review

There is very little academic literature on the statutory access rights contained in the LRSA. In contrast, there is a substantial amount of non-academic literature and secondary source material of relevance to the access objectives of this study. We have incorporated such material into the discussion in chapter three on the basis of the following criteria:

- Factual accuracy;
- Extent to which it is representative of stakeholder views;
- Extent to which it provides authoritative accounts of particular issues.

As such, the following literature and secondary sources were reviewed and integrated into the analysis on access rights as appropriate:

- Case reports and analysis relating to judicial determinations brought under Part One of the LRSA;
- Annual reports and papers produced by the National Access Forum;
- Local Access Forum minutes;
- Surveys undertaken on behalf of key access stakeholder groups including Scottish Natural Heritage, the Scottish Rural Property and Business Association and the Scottish Countryside Access Network;
- The Annual Scottish Recreation Survey;
- The Scottish Government’s monitoring regime regarding Access Authorities’ progress in implementing provisions relating to Part One of the LRSA;
- Unpublished documentation produced by the Paths for All Partnership;
- Access guidance documentation including the Scottish Outdoor Access Code and Core Paths Plans: a guide to good practice;
- Scottish Government guidance to Local Authorities on Part One of the LRSA.

2.2.2 Primary Research

Primary research for the access rights component of the study was undertaken using a combination of semi-structured face-to-face and telephone interviews and electronically-administered surveys to specific samples of access stakeholders.

Online Surveys

Slee et al (2008) note that the granting of statutory access rights to ‘everyone’ means that the set of potential access-related stakeholders is particularly diffuse. For practical reasons and to ensure analytical rigour the current study therefore defined access-related stakeholder samples with reference to established institutional structures. This was on the basis that these structures contained sufficiently wide representation (individually and in combination) of stakeholders able to contribute authoritative and informed views on issues relating to the objectives of the study. Consequently, the following stakeholders were requested to participate in online surveys in relation to the study’s access objectives:

- **Full and Corresponding Members of the National Access Forum** (incorporating recreation bodies with access rights; land management bodies; public bodies;

education bodies; commercial/tourism bodies; other relevant interests; and professional bodies);

- **All members of Scotland’s 39 Local Access Forums** (incorporating public agencies; land managers; recreational land users; and community interests);
- **Scotland’s 34 Access Authorities;**
- **All members of the Scottish Countryside Access Network** (incorporating Local Authority Access Officers and other access professionals such as Countryside Rangers).

The questionnaires for each sample group contained generic ‘open’ and ‘closed’ questions common to all four surveys covering issues relating to use and impact of the provisions, implementation processes and proposals for change⁶. The questionnaires also contained specific questions relating to respondents’ particular organisational contexts. A draft version of the electronic survey was piloted with two representatives of a public agency and amended in light of comments received before being circulated by email to members of the relevant sample groups.

Survey Distribution and Responses

The Access Authorities questionnaire was circulated by the research team by email to Access Officers within each of the 34 ‘Local Authorities’ as defined in Part One of the LRSA⁷. Due to data protection issues the three other questionnaires were distributed by email on our behalf by third parties⁸. Specifically, the Local Access Forum questionnaire was distributed by Access Officers to all members of the Local Access Forum(s) in their Local Authority areas; the National Access Forum questionnaire was distributed to all corresponding and full members of that forum by the secretary of the Forum⁹; and the Scottish Countryside Access Network survey was distributed by the secretary of that Network.

⁶ A generic version of the questionnaire is contained in appendix 1.

⁷ See section 3.2 of chapter 3 for more detail on Local Authorities within the context of Part One of the LRSA.

⁸ Paper copies of the questionnaires were provided for onward circulation to stakeholders who did not have email addresses.

⁹ We have aggregated the 12 responses received from full members and the 2 responses received from corresponding members of the National Access Forum (NAF) in the quantitative analysis contained in chapter three. Overall 6 NAF respondents were representing ‘recreational’ interests, 2 were representing ‘land management’ interests, 1 was representing ‘educational’ interests, 2 were representing ‘conservation’ interests and one was classified in the category of ‘other’.

Details regarding the number of responses and, where applicable, response rates for each survey are included in **table 2.1**:

Table 2.1: Responses to Online Access Surveys

Survey	Number contacted	Number responded	Response rate ¹⁰
National Access Forum (full members)	24	12	50%
National Access Forum (corresponding members)	73	2	3%
Local Access Forum ¹¹	-	88	-
Access Authorities	34	29 ¹²	85%
SCAN	-	2	-

Semi-Structured Interviews

Semi-structured telephone interviews were undertaken with four representatives of stakeholder organisations who we classified as experts in relation to access rights prior to circulation of the online surveys detailed above. These **access expert** interviewees were classified as such on the basis of their positions within their respective organisations, their experience of access issues and their membership of the National Access Forum. One interviewee represented recreational interests, another represented land management interests and two represented public agencies (one of which has significant land management

¹⁰ It is not possible to calculate a response rate for either the LAF or SCAN surveys as we are not in possession of membership lists for all Local Access Forums or for SCAN.

¹¹ Of the 88 LAF respondents, 15 categorised themselves as ‘public agency’ representatives, 20 as ‘land managers’, 24 as ‘recreational user’ representatives and 9 as ‘community’ representatives. The remaining respondents were either self categorised or categorised by the research team as ‘others’.

¹² In total, 31 responses were received from Access Authorities. 28 of these were from Access Officers working for separate Access Authorities whilst 3 responses were anonymous. All 31 responses are included in the relevant data analysed in chapter 3.

interests). The purpose of these expert interviews was to gather preliminary data of use in addressing the access objectives of the study and to inform the content of the online surveys.

Semi-structured telephone interviews were also undertaken with a **Scottish Government official** responsible for managing outdoor access policy issues and with a representative of the **Paths for All Partnership**.

Semi-structured telephone interviews were undertaken with 12 members of 4 **Local Access Forums (LAFs)**¹³. The purpose of these interviews was to collect further data in relation to issues raised in the literature review and electronic survey returns in relation to Part One of the LRSA.

2.3 Community Right to Buy

2.3.1 Literature Review

A range of other secondary source material has been examined in addition to academic literature relating to the community right to buy. This material includes:

- Guidance documentation published by the Scottish Government and Highlands and Islands Enterprise relating to Part Two of the Act;
- Reports of recent conferences/seminars on community land ownership;
- The Register of Community Interests in Land;
- Documentation held by the Scottish Government's Community Assets Branch;
- Briefing papers written by activists involved in community land initiatives;
- UK Government documentation.

2.3.2 Primary Research

Primary research for the community right to buy component of the study was undertaken using a combination of semi-structured face-to-face and telephone interviews and online surveys to specific samples of community ownership stakeholders.

¹³ 4 members of LAF 1 were interviewed (2 recreational representatives; 1 public agency representative; and 1 community representative); 4 members of LAF 2 were interviewed (2 recreational representatives, 1 public agency representative and 1 land management representative); 3 members of LAF 3 were interviewed (1 public agency representative and 3 recreational representatives); finally 1 member of LAF 4 was interviewed as a representative of recreational interests.

Online Survey

The online survey relating to the community right to buy was aimed at different categories of community group in relation to their engagement with the Act: those that had reached “activation” stage (i.e. attempting to purchase land), those that had registered an interest in land but not activated it, and those that had purchased land outwith the Act.

The survey for each category of group can be viewed using the following links:

www.surveymonkey.com/s/activation_stage_survey

www.surveymonkey.com/s/registration_stage_survey

www.surveymonkey.com/s/purchase_outwith_the_Act_survey

Those groups that had used the Act in some way were selected from records provided by the Scottish Government. The sample for those that had purchased outwith the Act was simply every community group that the Highlands and Islands Enterprise Community Land Unit (CLU) records showed as having successfully acquired land and that the Unit had up to date electronic contact details for (minus all those that we knew (from Government records) had used the Act). In order to comply with data protection standards CLU (rather than the research team) sent the online survey to groups for which they held email addresses that were not publicly available. Sample numbers and response rates are presented in **table 2.3**:

Table 2.3: Community Right to Buy - Online Survey of Community Land Initiatives (CLIs)

Survey	Number in sample	Number contacted ¹⁴	Number responded	Rate
Activation stage (but not purchased, or application pending)	10	8	2	20%
Registration stage (registered or rejected at this stage)	35	18	5	14%
Purchased outwith the Act	137	97	13	10%

Semi-Structured Interviews

Five **land reform experts** were selected for interview from among land reform practitioners, commentators and activists. They were selected to elicit a range of perspectives on issues relating to Part Two of the Act. Collectively these interviewees brought experience as board members of community land initiatives, academics, activists, and legal professionals (sometimes simultaneously) in relation to community land ownership. As with the expert interviews conducted for the access part of the study, the land reform interviews were used both to inform other aspects of the research and as distinct primary data sources. Additional semi-structured interviews were also carried out with members of the Scottish Government’s **Community Assets Branch**, and with members of Highlands and Islands Enterprise’s **Community Land Unit**.

Interviews with community groups were carried out mainly by telephone (two interviews were conducted in person). These interviews covered a range of community group

¹⁴ The “number contacted” is lower than “number in sample” due to lack of electronic contact information for many groups.

experiences with the Act, from successful purchase to rejection at registration stage and also encompassed purchase of land entirely outwith the Act. Interviews are referenced in the text in chapter four by an internal code number – thus “Interview 4”, “Interview 7” etc. In one case, we interviewed two separate individuals from one longstanding group to capture their particular experiences of dealing with different aspects of the Act. These are referenced as interviews “1a” and “1b”. Expert interviews are referenced as “Interview EXP01”, “Interview EXP02” etc.

Table 2.4 shows the breakdown of community land initiatives overall and in our sample. We attempted to interview representatives of all groups who had purchased or were currently purchasing under the Act, and were successful with 7 out of 9 cases (one more group provided detailed feedback via our online survey).

Other groups were selected for interview based on learning from a range of experiences and geographical locations. Thus in the ‘failed to purchase’ category, we selected one group that failed to raise the money, one group that was rejected by Ministers, and one group that discovered their intended land was in fact exempt.

‘Registration’ stage groups were selected from different areas of Scotland. For groups whose application to register had been rejected we selected a sample which included different reasons for rejection. While the category of those who have ‘purchased outwith the Act’ is by far the largest, only a limited number of interviews were conducted with groups in this category, given the focus of this research on the Act rather than land reform more broadly. Overall interviewees were drawn from community groups across Scotland, including the Northern and Western Isles, Highland, Aberdeenshire, Argyll and Bute, the Borders and the central belt.

Table 2.4: Community Right to Buy - Interviews with Community Groups¹⁵

Category	Number in category	Number interviewed
CLI purchased/purchasing under the Act	9	7
CLI reached activation stage but failed to purchase	10	2
Group application to activate under consideration	1	0
CLI registered with the Act	30	3
CLI registration rejected	18	3
CLI registration pending	1	0
CLI purchased outwith the Act	137	3
Total	203	18

2.4 Crofting Community Right to Buy

2.4.1 Literature Review

A range of other secondary source material has been examined in addition to academic literature relating to the crofting community right to buy. This material includes:

- Guidance documentation published by the Scottish Government and Highlands and Islands Enterprise relating to Part Three of the Act;
- Reports of recent conferences/seminars on community ownership as they relate to crofting community ownership;
- Material contained on the websites of community groups involved (or having an interest) in crofting community ownership of land;

¹⁵ We had hoped to complete a further four interviews in relation to Part Two of the Act. One group in the “purchased/purchasing under the Act” category declined to be interviewed, two that failed to register proved uncontactable, and one in the “activated but failed to purchase” category expressed interest, but we were not able to secure an interview with them.

- Documentation held by the Scottish Government’s Community Assets Branch;
- Summaries of Scottish Land Court rulings.

2.4.2 Primary Research

Primary research for the crofting community right to buy component of the study was undertaken using a combination of semi-structured face-to-face and telephone interviews.

Four of the **land reform experts** interviewed in relation to the community right to buy also shared their views on the crofting community right to buy. Interviews with officials from the Scottish Government’s **Community Assets Branch** and with the **Community Land Unit** of Highlands and Islands Enterprise also addressed the crofting community right to buy in addition to the community right to buy.

Separate telephone interviews were also conducted with a representative of the **Galson Trust** and a representative of the **Pairc Trust**, these being the only two crofting community groups which have formally applied to use the crofting community right to buy provisions since the Act came into force.

2.5 Methodological Limitations

There are three main limitations associated with the methodological approach employed in conducting this study which are important to highlight. These are as follows.

2.5.1 Focus on Community Group Perspectives on Community Right to Buy and Crofting Community Right to Buy

An important limitation of the primary data presented in the chapters relating to Parts Two and Three of the LRSA is that it largely represents community group perspectives on relevant issues. Landowners’ views and experiences have been included in the literature review wherever possible, but the surveys and interviews are focussed on community groups. This was our decision, in agreement with the client project manager, partly because community groups are the primary direct beneficiaries of the Act and partly in order to deliver detailed work with the available resources. Future consultations or research by the Parliament may wish to make provision for specific work with landowners and other stakeholders from outwith the community land ownership sector.

2.5.2 Survey Response Rates and Representativeness

Response rates are relatively low for surveys circulated to community groups which either purchased land outwith the LRSA or are at the activation or registration stages of the community right to buy process. Some caution should therefore be exercised as regards the representativeness of views expressed by respondents to these surveys on particular issues.

2.5.3 Contacting Stakeholders

Data protection standards and an absence of contact details in some instances meant that it was not possible to contact some stakeholder groups directly (or at all in the case of some community groups) to request their participation in the study. This was particularly so in relation to Local Access Forum members for the ‘access rights’ element of the study and in relation to community groups purchasing land outwith the LRSA for the ‘community right to buy’ element of the study. This had an adverse impact on the size of the sample frame for the community groups ‘purchasing outwith the Act’ survey and may also have impacted adversely on response rates for the Local Access Forum survey.

In relation to the access rights component of the study, the SCAN survey response rate (2 respondents) is too low to include in the quantitative analysis contained in chapter 3.

REFERENCE

Slee, B., Brown, K., Blackstock, K., Cook, P., Grieve, J. and Moxey, A. (2008) *Monitoring and evaluating the effects of land reform on rural Scotland: a scoping study and impact assessment*, Scottish Government Social Research.

CHAPTER THREE

ACCESS RIGHTS

3.1 Introduction

This chapter examines the statutory access rights contained in Part One of the Land Reform (Scotland) Act 2003. It begins with an overview of these rights before reviewing relevant literature and discussing primary research findings to address the objectives identified in the research specification. These objectives are to:

- Determine the extent of use of the access provisions of the LRSA;
- Review the evidence of any additional wider impact of the LRSA on recreational access to land;
- Identify both positive and negative views on implementation of the provisions;
- 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.

3.2 Overview of Statutory Access Rights

The incoming UK Labour Government's 1997 manifesto commitment to create greater freedoms for the public to enjoy the open countryside forms the backdrop to the establishment of Scotland's statutory access rights contained in Part One of the LRSA. In particular, there was a perceived need to move beyond the provisions of the Countryside (Scotland) Act 1967 to balance the interests of various recreational and land management objectives (Slee et al 2008).

As Mackay (2007) notes, perceived ambiguity regarding the legal position on outdoor access in Scotland was an important factor in motivating development of the legislation. Thus, from one perspective Part One of the LRSA may be viewed as confirmation of access rights enjoyed through assumed and existing common law rights and evolving through custom and practice. Alternatively, the legislation may be considered to be a new and radical measure given the absence of a general right of access; the view taken by the then Scottish Executive,

Scottish Natural Heritage (SNH), the Law Society of Scotland and landowning bodies (Mackay 2007).

Part One of the LRSA provides statutory, non-motorised, access rights to everyone for four purposes. These are:

- to cross land;
- to be on land for recreational purposes;
- to be on land for relevant educational purposes;
- to be on land for commercial purposes where these could be carried out under the right of access in a non-commercial way.

These access rights apply to all land in Scotland (including inland water and above and below the land) apart from exclusions specified in sections 6 and 7 of the Act (Mackay 2007:3).

The Act states that a person has access rights only if they are exercised responsibly. It also introduces a reciprocal obligation of landowners to use and manage their land and otherwise conduct the ownership of it in a way which, as respects access rights, is responsible. The principles of responsible access taking, together with a reciprocal obligation of landowners in relation to land management are therefore fundamental to the implementation of Part One of the Act regarding the regulation and protection of access rights.

In addition to stating the nature and extent of access rights, Part One of the Act makes provision for the drawing up and issuing of a [Scottish Outdoor Access Code](#) (SOAC) by SNH. The Code is intended as a key tool of reference in terms of exercising access rights responsibly and in relation to the reciprocal obligation of landowners. Part One of the Act further places a duty upon SNH and Local Authorities to publicise the Access Code and upon SNH to promote understanding of the Code.

The Act defines Scotland's 32 Councils and 2 National Park Authorities as 'Local Authorities'¹⁶ and provides them with specific statutory duties regarding the regulation and protection of access rights. These include a duty to uphold access rights and a duty to draw

¹⁶ The policy literature and access practitioners use the terms 'Local Authorities' and 'Access Authorities' interchangeably when referring to these organisations and their statutory access duties and powers. Consequently these terms are both used in the text of this report to refer to these organisations in relation to their access duties and powers.

up a plan for a system of paths (“core paths”) sufficient for the purpose of giving the public reasonable access through their area. The Act also provides Local Authorities with powers to exempt particular land from access rights and to make byelaws in relation to land over which access rights are exercisable.

Part One of the Act provides Local Authorities with a variety of enforcement and other powers to be used in support of their duties regarding access and other rights. These powers relate to:

- Remedial action in relation to prohibition signs, obstructions, dangerous impediments etc.;
- Measures for safety, protection, guidance and assistance;
- Acquisition of land to enable or facilitate exercise of access rights;
- Maintaining core paths;
- Delineation by agreement of paths in land in respect of where access rights are exercisable;
- Compulsory powers to delineate paths in land in respect of which access rights are exercisable;
- The appointment of rangers in relation to any land in respect of which access rights are exercisable;
- Power of entry on any land for a purpose connected with the exercise, or proposed exercise of any of the Authority’s functions under Part One of the Act.

The Act also makes provision for Local Authorities to establish new bodies known as Local Access Forums (LAFs)¹⁷ to carry out the following functions:

- a) to advise the local authority and any other person or body consulting the forum on matters having to do with the exercise of access rights, the existence and delineation of rights of way or the drawing up and adoption of a plan for a system of core paths;

¹⁷ There are 39 Local Access Forums in existence. One for each Local Authority as defined within the Act (apart from Highland Council, which has 6 Local Access Forums). Their membership is comprised of representatives of recreational, land management, community and public agency interests.

- b) to offer and, where the offer is accepted, to give assistance to the parties of any dispute about –
- (i) the exercise of access rights;
 - (ii) the existence and delineation of rights of way;
 - (iii) the drawing up and adoption of the plan referred to in paragraph (a) above; or
 - (iv) the use of core paths ([LRSA, s25 \(4\)](#)).

Part One of the Act also contains general and miscellaneous provisions. These relate to:

- Judicial determination of existence and extent of access rights and rights of way;
- Powers to protect natural and cultural heritage etc.;
- Existing byelaws providing for public access to land;
- Application of sections 14 and 15 of Part One to rights of way;
- Interpretation of Part One.

From the above, it can be seen that the combination of access rights contained in Part One of the Act, together with new duties and powers for Local Authorities and SNH in relation to these rights, has significantly transformed the statutory framework for exercising and managing access rights in Scotland.

3.3 Review of Literature on Statutory Access Rights

Key Points:

- There is limited academic literature on Part One of the LRSA;
- The Scottish approach to statutory access rights is underpinned by an enabling rather than enforcement philosophy;
- Research commissioned by SNH suggests that the effects of the legislation and the SOAC on both recreation users and land owners/managers had not been as extensive as initially expected, either in terms of potential benefits for users or potential disruption for managers.

In their scoping study and impact assessment of the effects of land reform on rural Scotland, Slee et al (2008: 33) state:

There is very little academic literature about LRSA in relation to access and a complete absence of peer-reviewed publications based on empirical evidence. That which does exist tends to pre-date or closely post-date the reforms, and hence tends to be speculative or focus on the political context and consultation process leading up to the passing of the Act.

Little has changed in the short time since Slee et al made the above observation. Indeed, of the literature which they discuss, only the work of Mackay (2007) is directly focused on Part One of the LRSA. His analysis identifies differences in both scope and underlying philosophy between the Scottish legislative approach to access rights and that of England and Wales, as enacted in Part One of the Countryside and Rights of Way Act 2000. He writes:

In Scotland, the new approach is almost the inverse to that in England and Wales. A regulatory approach has been avoided and rather than specify on maps where rights exist, the new legislation provides for access to all of Scotland's land, subject only to limited exemptions specified in the Act, and to an obligation on those exercising their new rights to act responsibly. Access rights in Scotland also have a much wider set of purposes than the 2000 Act's limitation to access on foot for open-air recreation (Mackay 2007:2).

The above comments are worth noting because they highlight that the Scottish approach is largely underpinned by a philosophy of *enabling* rather than *enforcement* of access rights. As will be further discussed later in this chapter such an approach has a significant influence on the way in which key aspects of the implementation process unfold. Warren (2010:277) elaborates on this point, noting:

The access section of the 2003 Act can be described as radical, distinctive and somewhat risky. It is radical because it shifts the balance between public and private interests in land. It is distinctive in that, uniquely, within the United Kingdom, it introduces a Scandinavian-style *allenmannsrett* ('every person's right') which has strong parallels with the long-established access rights in Norway... Its risky nature arises from the fact that it can function effectively only if citizens choose to exercise their new-found rights responsibly. This heavy dependence on civic responsibility rather than regulation is an additional and notable facet of the Act which is radically innovative.

Other academic literature confines the legislation to the margins of more general discussions about outdoor recreation and related issues (see for example Roberts and Simpson, 2003; Morrow, 2005). One exception is the work of Curry and Brown (2010) on differentiating outdoor recreation. They draw on the work of Slee et al (2008) and an ongoing study of access and recreation in the Cairngorms National Park (Brown 2009a 2009b; Brown, Marshall, & Dilley 2008) to state that:

[A] change in access law does not necessarily lead quickly or straightforwardly to a change in recreational practices due to the complexity and dynamics of established cultural norms. What has been identified, however, is an enhanced confidence in taking access – due to the clarification of entitlements and responsibilities enshrined in the Act (2010: 41).

Other academic literature leaves the issue of statutory access rights almost completely untouched. For example, Stockdale and Barker's (2009) article on sustainability and the multifunctional landscape, in which they assess approaches to planning and management in the Cairngorms National Park, surprisingly makes no reference to the LRSA or access legislation. Reed et al's (2009) otherwise expansive paper on the future of uplands in the UK makes fleeting mention of the LRSA in terms of granting formal access to "mountain, moor, heath and down" but the potential impact of the legislation in helping to shape the future of Scottish uplands is not discussed.

These observations are not intended as a criticism of the above literature. Rather, they are made merely to illustrate that in comparison to the intense academic interest that the community right to buy has sparked, Scotland's statutory access rights appear a largely undiscovered country within the academic community.

Non-academic literature yields more fruitful pickings in terms of addressing aspects of recreational access which are linked to the LRSA. Key sources in this regard include the Slee et al (2008) report and a three-year study commissioned by SNH (MVA 2009) to monitor levels of responsible behaviour among recreation users and land owners/managers between 2005 and 2007. SNH has also commissioned a research study on the process of developing Core Paths Plans which has not been completed in time to include discussion of its findings in this report.

Slee et al's (2008: 36-37) findings from engagement with stakeholders from a cross section of National Access Forum members are also worth noting within the context of the current study. They concluded that:

- Stakeholders were generally uncertain as to the actual impacts of access measures. This was partly due to a perception that it was too early to discern any changes or that it was difficult to generalise from their knowledge of particular local instances;
- It was anticipated that access reform would be largely beneficial for access-takers' health but potentially add to stress for land managers in terms of uncertainty, difficulty in monitoring access behaviours and a sense of losing control of one's land and livelihood;
- The lack of robust information on the number and nature of access issues and problems was of central concern to a wide range of stakeholders, given that data's significant role in determining the impact of the LRSA in facilitating greater enjoyment of the countryside without interfering unduly with legitimate land management operations;
- There were concerns regarding clarity of roles and responsibilities in arbitrating access problems. In particular, concerning the relationship between Access Authorities' statutory duty to uphold access rights and the absence of a reciprocal statutory duty to defend land managers' positions, given that access issues involving criminal behaviour are a matter for the police.

MVA's (2009) study of responsible behaviour among recreation users and land owners/managers found that:

- There was a significant increase in awareness of the Scottish Outdoor Access Code between a 2002/03 Baseline Survey and the commissioned study;
- Both recreation users' and land owners/managers' awareness of their key responsibilities as set out in the Code appeared to have improved over time;
- The effects of the legislation and the Code on both recreation users and land owners/managers had not been as extensive as initially expected in the Baseline Survey, in terms of potential benefits for users or potential disruption for managers;

- There had been an improvement in recreation users' perceptions of the behaviour of land owners/managers regarding their access responsibilities. However, outdoor recreation managers' opinions of land managers/owners had remained unchanged;
- There had been an improvement in land owners/managers' perception of the behaviour of recreation users regarding their responsibilities, but the scale of improvement was less than that noted for land managers' behaviour;
- Overall, there was a reported reduction in the problems experienced by both recreation users and land owners/managers;
- The proportion of recreation users that stated that they felt 'very comfortable' when using the countryside had increased to 72% in the 2007 Monitoring Survey, compared to 63% in the 2002/03 Baseline Survey;
- There had been a reported reduction in the percentage of land owners/managers that had incurred costs as a result of access-related problems since the introduction of the Code.

(MVA 2009: p.iii).

The Scottish Rural Property and Business Association (SRPBA) commissioned a study of outdoor access issues relating to its approximately 2000 landholding members between April 2007 and September 2008 (SRPBA undated); albeit it with a very small number (55) of members responding.

The study provides some insight into the range but not the frequency of irresponsible behaviour as classified by responding SRPBA members. It details 155 reported incidents relating to land management of which 105 (68%) were classified by respondents as either irresponsible or criminal behaviour. The most common access activity leading to a report of irresponsible behaviour was dog walking (19 responses), followed by activities linked to hill walking (13 responses), including inappropriate parking (7 responses) and gates being left open (3 responses).

In advance of Scotland's first 'access summit' in November 2009 Access Officers in Scotland, together with other access professional listed on the Scottish Countryside Access Network (SCAN) and Paths for All Partnership databases were surveyed in relation to

monitoring access issues¹⁸. It identified the following ‘behaviour issues’ within the framework of the LRSA as most time consuming for access professionals to deal with:

- Obstructions;
- Dogs;
- Unauthorised motor vehicle use;
- Cattle;
- Privacy, curtilage.

(Scottish Countryside Access Network, undated).

3.4 Extent of Use of the Access Provisions of the LRSA

Key Points:

- It is not possible to evaluate the extent to which access rights are being used by recreational and other access takers due to a lack of available and readily comparable data;
- There has been slippage in some Access Authorities’ progress in drawing up their Core Paths Plans;
- There has been only limited use of enforcement notices by Access Authorities under section 14 and section 15 of Part One of the Act;
- There is currently very little case law in relation to Part One of the Act.

It is not possible to accurately evaluate the extent to which the access rights contained in Part One of the Act are being exercised by recreational and other access-takers due to a lack of available and readily comparable data. However, there is a data set in relation to use of other provisions. This is in the form of the Scottish Government’s monitoring regime to assess the progress and expenditure of Access Authorities in upholding and facilitating access rights, planning a system of core paths and giving the public reasonable access throughout their areas. [Summary data](#) for the period February 9th 2005 to March 31st 2009 provides a useful indication of the extent of use of relevant provisions by Access Authorities in the exercise of their duties and use of their powers. It shows that:

¹⁸ This survey received 16 returns from Access Authorities, 6 from national organisations and 4 from ranger services.

- 695 Local Access Forum meetings were held across Scotland;
- The estimated total length of paths signposted or waymarked was 20,538 km;
- Eight Access Authorities had adopted their core paths plans by 31/03/09¹⁹. The total length of core paths was 4611 km. Of these, 1422 km were signposted or waymarked as of 31/03/09 and 2559 km were maintained by the Access Authorities;
- 184 section 11 exemption Orders (exempting particular land from access rights for under 6 days) were issued. The most common reason for these Orders was for car rallies;
- There were 3 approved section 11 exemption Orders for 6 days or more;
- 24 section 14 Notices (relating to prohibition signs, obstructions, dangerous impediments etc.) were issued to remove obstructions;
- 1 section 13 Notice, was issued to remove a risk of injury;
- There were 56 new path agreements;
- There were 3 judicial determinations made by sheriffs for Access Authority areas under sections 13, 14, 15 (relating to measures for safety, protection, guidance and assistance), and 28 of the Act²⁰.

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

Key Points:

- The Act is widely perceived by stakeholders as having clarified rights and responsibilities in relation to access taking;
- Clarification of rights is perceived to have increased the confidence of recreational stakeholders in taking access and made them more assertive in doing so;
- There are concerns that some access-takers emphasise their rights over their responsibilities when taking access;
- The Scottish Outdoor Access Code is viewed by the majority of stakeholders as providing clear and comprehensive guidance regarding access rights in Scotland;

¹⁹ As of May 2010, 16 Local Authorities had adopted their Core Paths Plans and the two National Parks had been directed to adopt their Plans (Paths for All Partnership, May 5th 2010).

²⁰ Section 28 relates to judicial determination of existence and extent of access rights and rights of way. A search of the Westlaw UK database indicates that there have been 7 judicial determinations to date. These include: Creelman v Argyll and Bute Council; Aviemore Highland Resort Ltd v Cairngorms National Park Authority; Forbes v Fife Council; Tuley v Highland Council; Snowie v Stirling Council; Ross v Stirling Council; and Gloag v Perth and Kinross Council.

- There are mixed views amongst stakeholders as to the extent to which the LRSA has created an effective legislative framework for the regulation and protection of access rights;
- There is no overall consensus amongst stakeholders as to whether the LRSA has assisted in the resolution of local access disputes. However, more stakeholders are of the view that it has done so in relation to disputes between access-takers and land managers than between different access-takers;
- There are mixed views as to whether the LRSA has enabled better integration of access issues in other public policy agendas and programmes in Scotland. A significant majority of Access Authority survey respondents agree that it has done so whilst a slight majority of Local Access Forum and National Access Forum survey respondents also agree.

As noted in chapter one of this report, the relative short time-frame within which the LRSA has been in force makes it difficult to identify and assess the various impacts of its provisions in practice. This is compounded by problems of incomplete and incomparable data for impact assessment and the lack of a baseline against which to undertake such assessment.

The Annual Scottish Recreation Survey managed by SNH provides some data in relation to the levels of outdoor access taking in Scotland. The latest summary annual report (covering the calendar year 2007) found that 80% of the adult population in Scotland claimed to have made at least one trip to the outdoors in the previous 12 months. This equates to approximately 336.7 million visits to the outdoors in Scotland during 2007, a 3% increase on the estimate for 2006 (TNS 2009). However, as others have noted, economic and social factors rather than legislation are more likely to influence the extent to which recreational access is taken (Mackay 2007; Warren 2010).

3.5.1 Research Findings

3.5.1.1 Clarifying Access Rights and Responsibilities

The legal definition of access rights and how they are to be exercised, together with the introduction of reciprocal obligations of landowners, is viewed by research participants as formalising and clarifying access rights and responsibilities where previously there was informality and ambiguity.

The survey response of a ‘recreational users’ representative on the National Access Forum illustrates the significance of the Act in this regard:

There is now a clear framework of management measures which can be taken. E.g. contact local authority, ask for advice from [Local Access Forums], potential use of byelaws, and the signage guidance from SNH and Paths for All. Prior to the Act, there was much uncertainty as to how to resolve any access issues unless they related to a right of way, so both access takers and land managers now understand their responsibilities (National Access Forum survey respondent No. 7).

This view is further supported by data from our surveys of Access Authorities, Local Access Forums and the National Access Forum. **Charts 1 and 2** show responses from the Local Access Forum and Access Authorities surveys in relation to whether the LRSA has made it easier for members of the public to understand where and when they can take access. The majority of **Local Access Forum** respondents (62%) agree that it has. A broadly similar pattern is evident in relation to sectoral responses to the question within the LAF sample group as they relate to ‘public agencies’, ‘recreational users’, ‘community users’ and ‘others’. 50% of responding ‘land managers’ agree with the statement. However, in aggregate, 33% of land manager respondents disagree or strongly disagree that it is easier for members of the public to understand where and when they can take access.

A majority of **Access Authority** respondents (56%) also agree that the Act has clarified where and when access can be taken (with 19% of respondents strongly agreeing). 19% of respondents are undecided whilst 7% disagree. Similarly, **Chart 3** illustrates that the majority of **National Access Forum** respondents are also of the view that the Act has provided clarity for the public in this regard (50% agree and 21% strongly agree).

Charts 1-3: “The LRSA has made it easier for members of the public to understand where and when they can take access”

Chart 1: Local Access Forums (N=78)

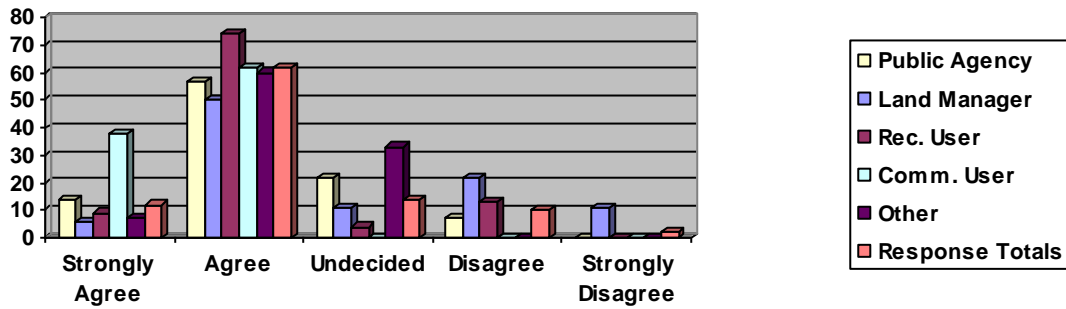


Chart 2: Access Authorities (N=27)

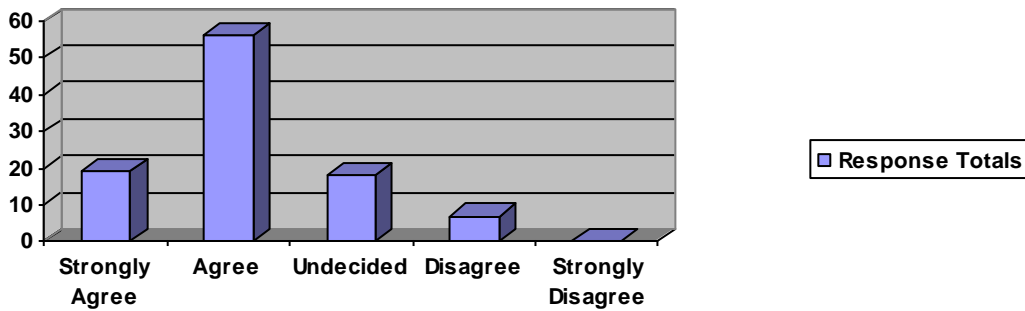
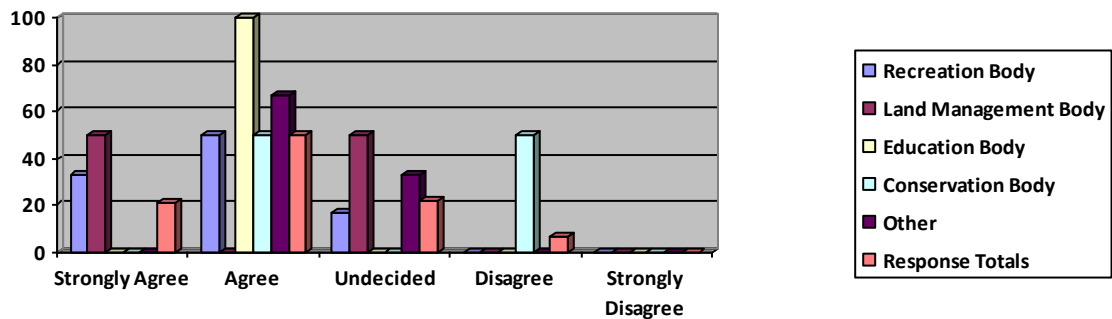


Chart 3: National Access Forum (N=14)



Charts 4, 5 and 6 show responses from the Local Access Forum, Access Authorities and National Access Forum surveys in relation to whether the LRSA has made it easier landowners/managers to understand where and when the public can take access. For the **Local Access Forum** survey, almost two thirds of overall responses (66%) agree with the statement. This consensus of opinion is broadly replicated across the sectoral categories of responses. In aggregate, approximately two thirds of **Access Authority** respondents agree that the Act has made it easier for land managers to understand where and when the public can take access. Similarly the majority of **National Access Forum** survey respondents share this view (46% agree and 31% strongly agree).

Charts 4-6: “The LRSA has made it easier for land owners/managers to understand where and when members of the public can take access”

Chart 4: Local Access Forums (N=78)

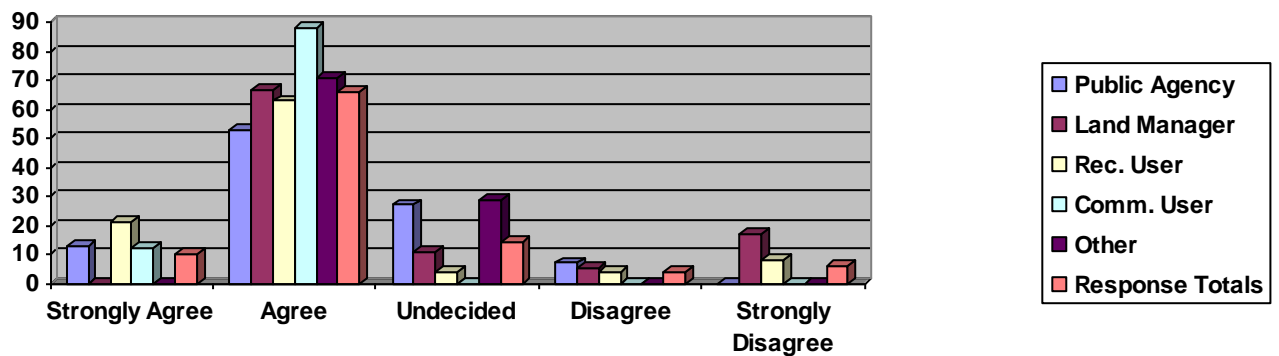


Chart 5: Access Authorities (N=27)

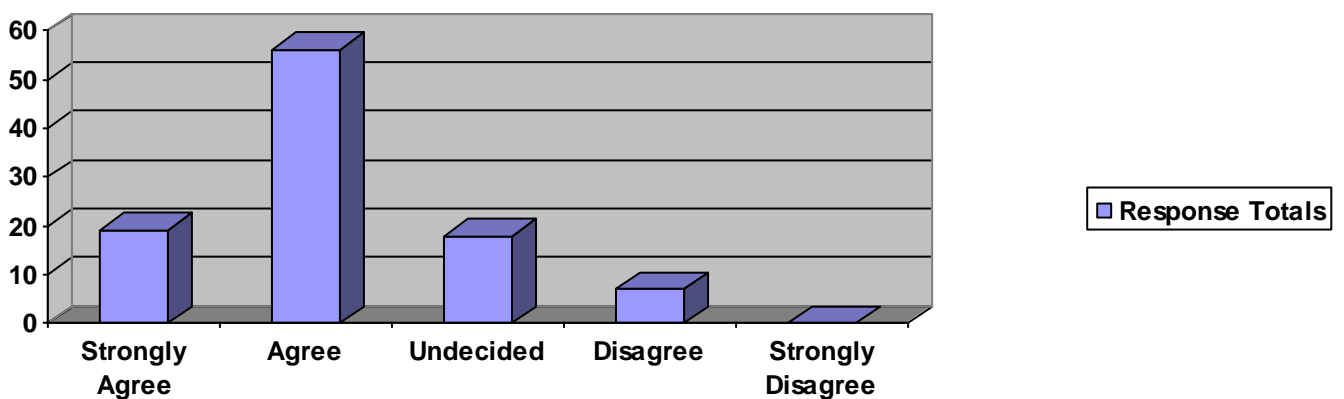
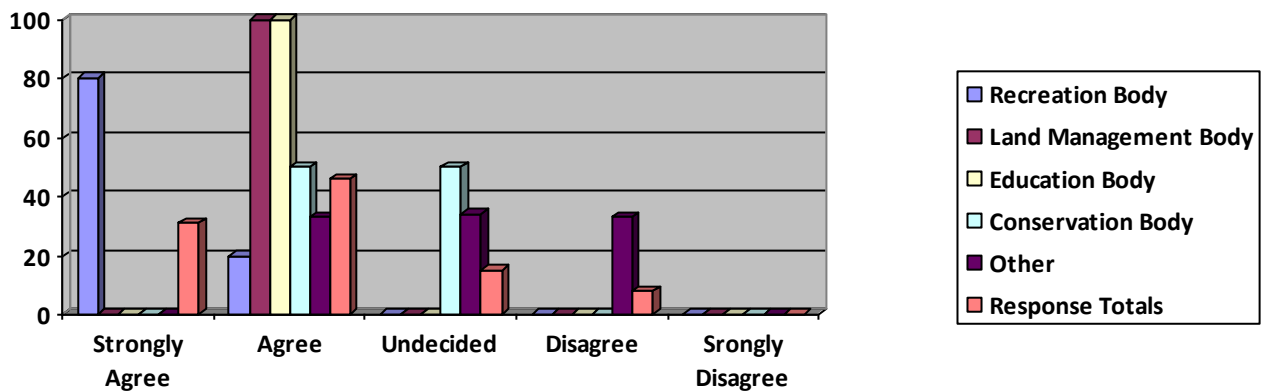


Chart 6: National Access Forum (N=13)



A common theme emerging from the survey data was a perception that the clarification of statutory rights of access has increased the confidence of recreational access takers in relation to exercising their rights and made them more assertive in doing so. Additionally, conferring non-motorised access rights to ‘everyone’ was viewed as:

particularly positive with regard to access-takers other than walkers. [For example] cycling, horse-riding and water access all now have equal rights (National Access Forum survey respondent 7).

The majority of access takers were considered by survey respondents to be exercising their rights responsibly. However concern was expressed that in some instances recreational access takers’ emphasis on their access rights appeared to take precedence over the requirement to exercise these rights responsibly as stated in the Act, thereby skewing the terms of the ‘social contract’ (Mackay 2007) upon which the effectiveness of the legislation hinges. The following comments illustrate the point:

In some cases, more effort is required in getting the "responsible" part of "responsible access" into people's mindset. Many folk understand their rights, but some forget about their responsibilities and the rights of others (be they users or land managers) (Access Authority survey respondent 6).

Too many users consider that they have a right, forgetting their responsibilities and not being courteous towards land owners and managers i.e. walking past a farmer and ignoring them and any reasonable requests (Access Authority survey respondent 25).

The most frequent examples cited by survey respondents related to the control of dogs when taking access and to issues around 'wild' camping (incorporating features such as inappropriate roadside parking, inappropriate fires, littering and anti-social behaviour)²¹. One 'recreational users' representative of a Local Access Forum illustrated tensions in relation to camping in particular:

With the 'right' to camp and walk without permission, I have heard of instances where the traditional courtesy of contacting land managers in advance has been considered unnecessary. This has resulted in several large groups ending up camping overnight in one small area, to nobody's satisfaction. If they had contacted the land manager as they used to do, they would have been aware of the potential overuse, and could have re-routed their groups to provide a better experience for all involved (Local Access Forum survey respondent 41).

Similarly, a public agency Local Access Forum respondent commented:

The whole issue of rights to "Wild Camping" has been and remains contentious; the dramatic increase in car-based, mainly riparian camping has had a significantly negative impact on affected communities and the environment (litter, fires and damage to property as well as serious alcohol fuelled violence and general disorder). Despite [the LRSA] being civil legislation the consequent criminal activity in certain hot spots has been adversely impactful on resources within the police and partners with countryside rangers (Local Access Forum survey respondent 35).

3.5.1.2 The Scottish Outdoor Access Code

The Scottish Outdoor Access Code provides guidance in relation to the responsible exercise and management of access rights. Data from our surveys indicate that the Code is generally viewed positively in terms of its perceived impact in these respects.

²¹ Issues around wild camping and control of dogs have been the focus of awareness raising campaigns coordinated by SNH. The specific issue of control of dogs near ground-nesting birds has been discussed by the National Access Forum (NAF paper, undated).

Chart 7 shows that a clear majority of **Local Access Forum** survey respondents agree that the SOAC provides clear and comprehensive guidance regarding access issues in Scotland (55% agree and 20% strongly agree). This pattern is broadly replicated when the data in relation to sectoral responses is considered. **Chart 8** shows that the vast majority of **Access Authority** survey respondents (83%) agree that the SOAC provides clear and comprehensive guidance regarding access rights. Similarly, **chart 9** shows that, in aggregate, 83% of **National Access Forum** survey respondents view the Code favourably in this regard (58% agree and 25% strongly agree).

CHARTS 7-9: “The Scottish Outdoor Access Code provides clear and comprehensive guidance regarding access rights in Scotland”

Chart 7: Local Access Forums (N=60)

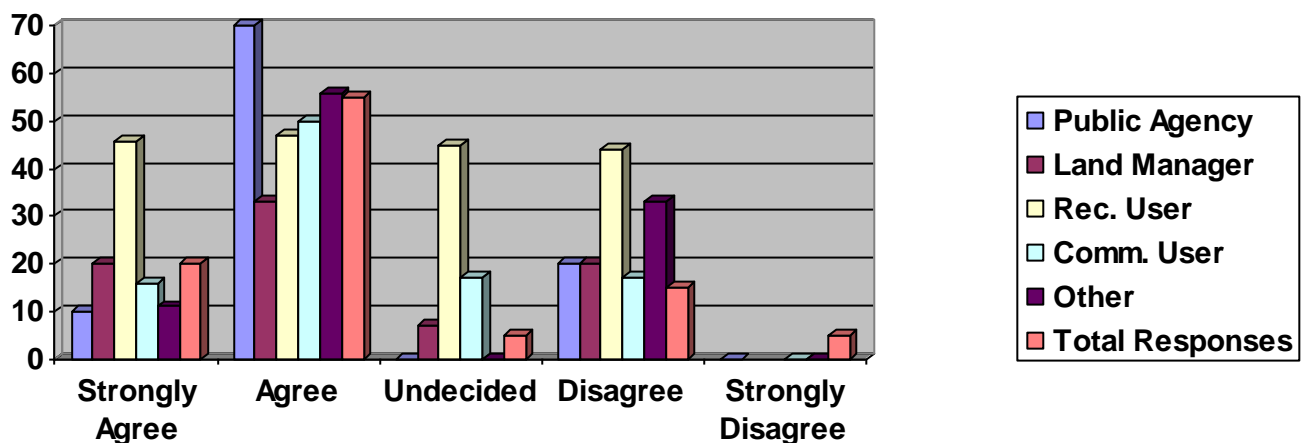


Chart 8: Access Authorities (N=30)

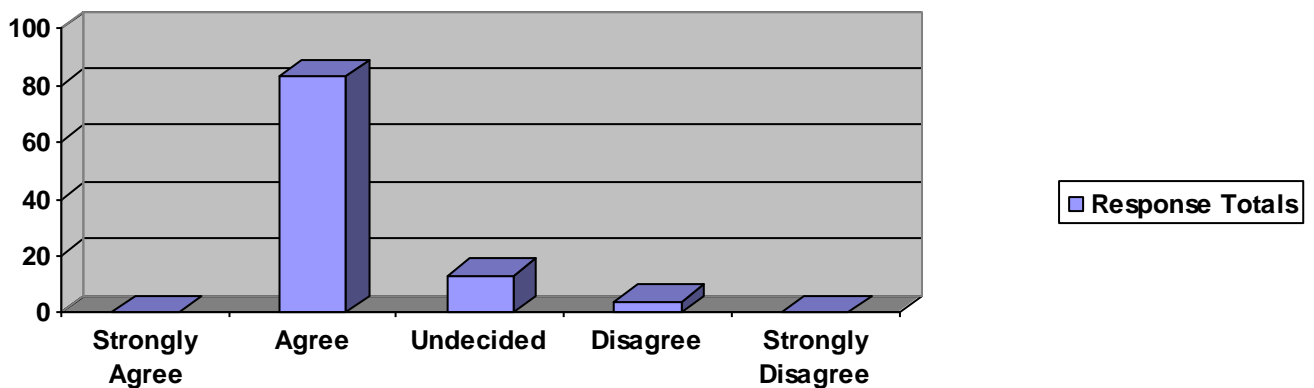
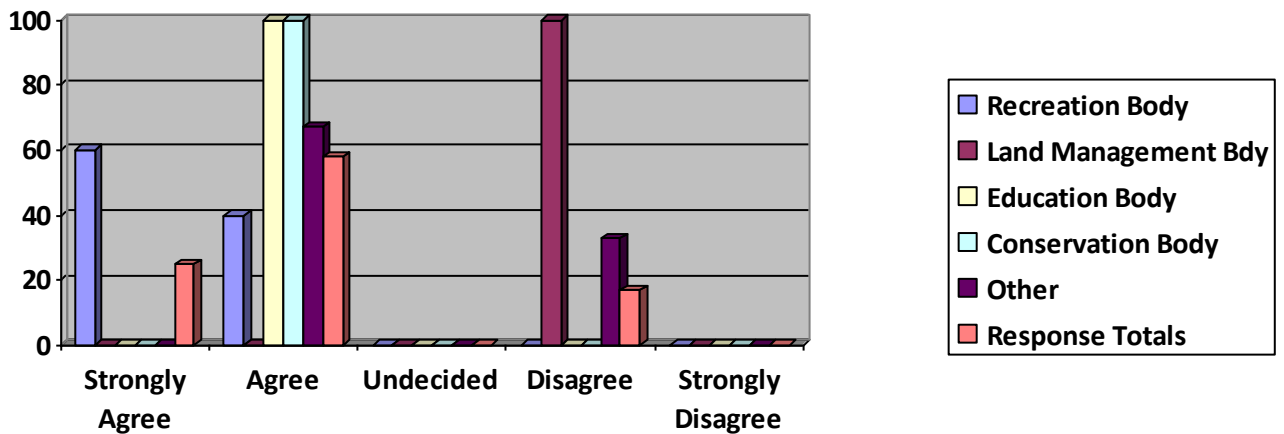


Chart 9: National Access Forum (N=12)



In particular, the statutory requirement for both SNH and Local Authorities to publicise the Code is cited as instrumental in raising awareness of the access rights contained in the Act. One Access Authority survey respondent stated that this:

has made more people aware that new rights exist, even if there is still confusion about where these rights are and what ‘responsible’ means (Access Authority survey respondent 9).

Another respondent alluded to the longer term goal of cultural change which the Code is designed to address, stating,

I think the SOAC is generally a positive provision of the Act. It will take the public 2 or 3 generations to fully appreciate their rights of access and the nature of their responsibilities (Access Authority survey respondent 29).

Very little appetite was expressed by survey respondents for substantial revision of the Code. However, a number of respondents from each of the survey samples did make suggestions as to how the effectiveness of the Code might be further enhanced. These are set out in subsections 3.7.4 and 3.7.6 of this chapter under the headings of ‘Guidance’ and ‘Education’ respectively.

3.5.1.3 Regulation and Protection of Access Rights

There is some variation in our survey data as regards whether the Act is perceived to have created an effective framework for the regulation and protection of access rights.

Charts 10 and **11** illustrate Local Access Forum and Access Authorities' views in this regard. In aggregate, 51% of overall **Local Access Forum** respondents agree that the legislation has fulfilled this function (39% agree and 12% strongly agree). However, 27% of overall respondents are undecided in this regard and, in aggregate, 22% do not think that the Act has created an effective legislative framework for the regulation and protection of access rights (16% disagree and 6% strongly disagree).

The picture is more mixed at the sectoral level in relation to the **Local Access Forum** survey. In aggregate, the majority of 'recreational user' respondents view the LRSA as effective in this regard (41% agree and 23% strongly agree). The majority of 'community user' respondents are also of this view (63% agree and 13% strongly agree). However, only a minority of 'public agency', 'land manager' and 'other' respondents agree with this view. 29% of 'other' respondents are undecided, a figure which rises to 33% for 'public agency' respondents and to 39% for 'land manager' respondents.

In contrast to the other survey data, a clear majority of aggregated **Access Authority** respondents (68%) agree that Act has created an effective legislative framework for the regulation and protection of access rights. 21% of respondents are undecided whilst 11% disagree.

Chart 12 shows that responses from the **National Access Forum** survey are also wide-ranging. In aggregate 46% of respondents agree that the LRSA has provided an effective legislative framework for regulating and protecting access rights. However, 31% are undecided and 23% disagree.

CHARTS 10-12: “The LRSA has created an effective legislative framework for the regulation and protection of access rights”

Chart 10: Local Access Forums (N=77)

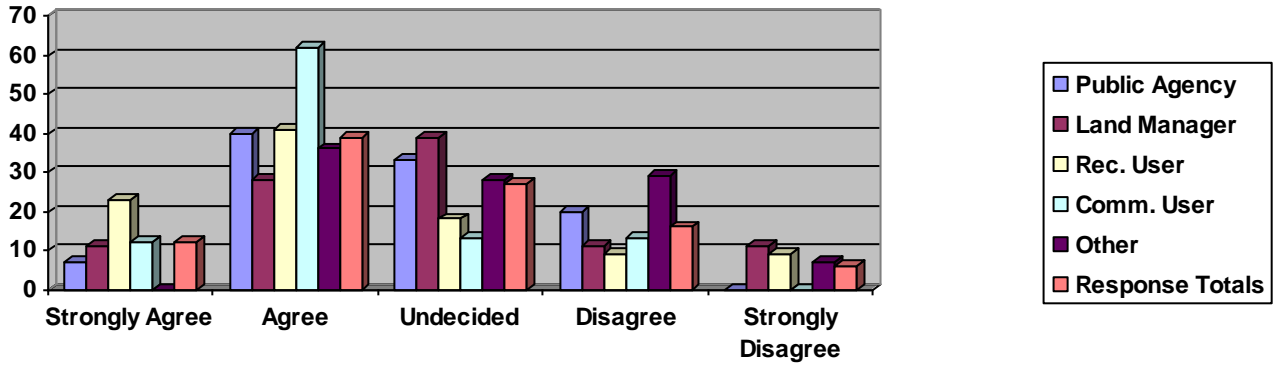


Chart 11: Access Authorities (N=28)

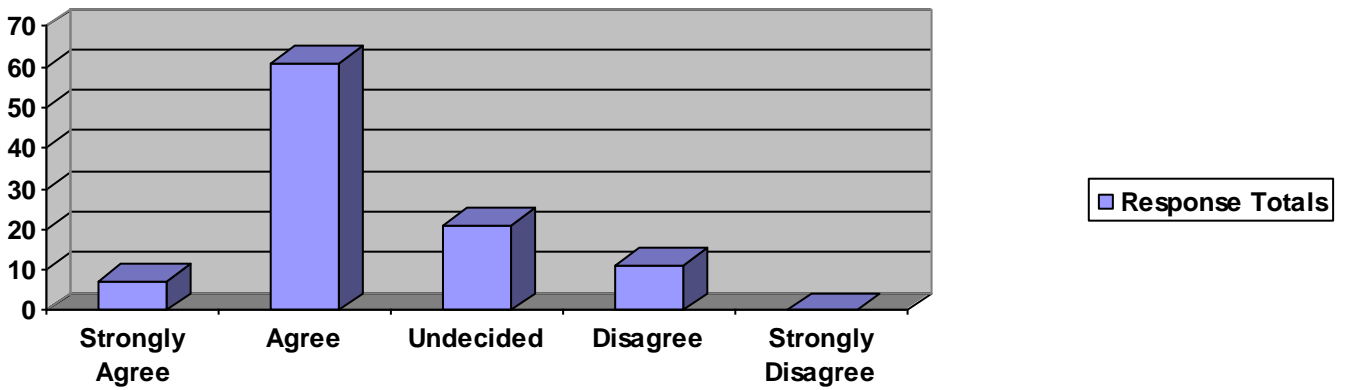
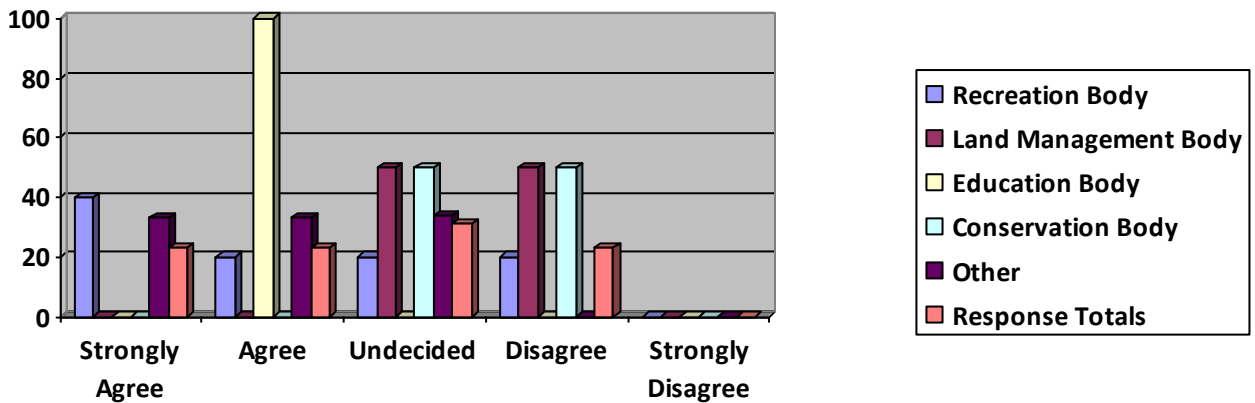


Chart 12: National Access Forum (N=13)



There is also some variation in perceptions as to whether the LRSA has assisted in the resolution of local access disputes between access-takers and land managers. **Chart 13** illustrates that, in aggregate, 58% of overall **Local Access Forum** survey respondents agree that the LRSA has assisted in this regard (50% agree and 8% strongly agree). However, 24% of respondents are undecided and, in aggregate, 19% of respondents are not of that view (10% disagree and 9% strongly disagree).

At the sectoral level, a majority of 'community' respondents (75%) agree that the LRSA has assisted in resolving local disputes between access-takers and land managers. In aggregate 67% of 'recreational user' respondents are of this view (54% agree and 13% strongly agree), as is also the case for 'public agency' respondents (60% agree and 7% strongly agree). In contrast, 50% of aggregated 'land manager' respondents are of this view (39% agree and 11% strongly agree) whilst 28% in aggregate are not of this view (6% disagree and 22% strongly disagree). A sizable minority of 'other' respondents are undecided on the issue whilst, in aggregate, 17% are not of the view that the LRSA has been of assistance (10% disagree and 7% disagree strongly).

Chart 14 shows that the majority of **Access Authority** respondents (61%) agree that the LRSA has assisted in the resolution of local access disputes between access-takers and land managers. However, a significant minority (29%) are undecided in this regard and 7% of respondents disagree.

Responses from the **National Access Forum** survey, illustrated in **Chart 15**, are equivocal as to the effectiveness of the LRSA in this regard. 34% of respondents in aggregate perceived the LRSA to have assisted in resolving local access disputes between access-takers and land managers (23% agree and 8% strongly agree). However, a clear majority of respondents (61%) are undecided.

CHARTS 13-15: “The LRSA has assisted in the resolution of local access disputes between access-takers and land managers”

Chart 13: Local Access Forums (N=80)

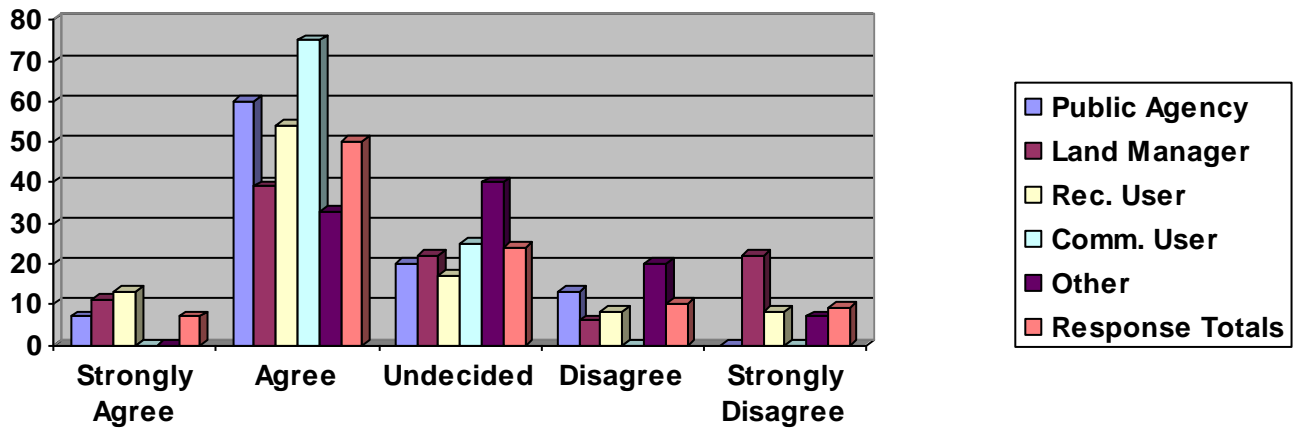


Chart 14: Access Authorities (N=28)

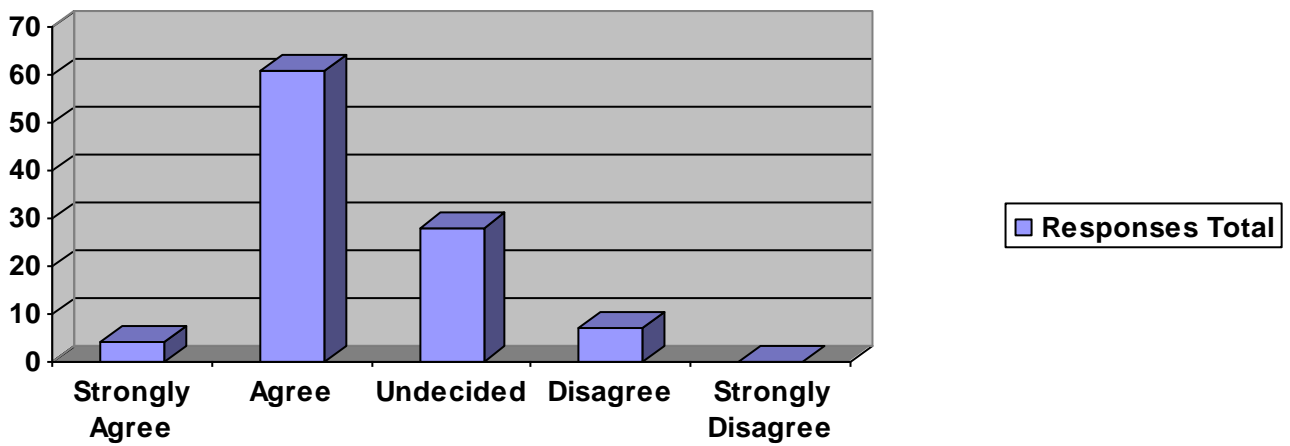
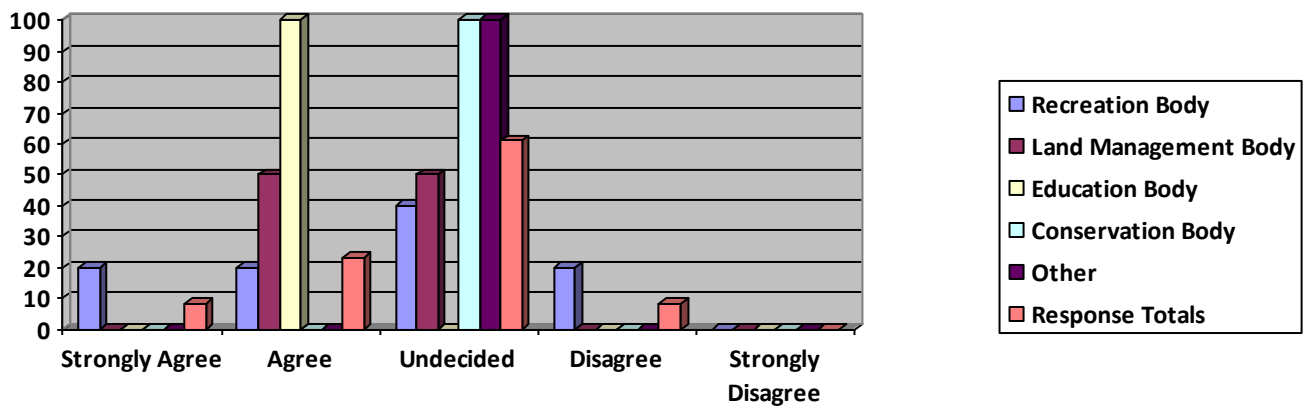


Chart 15: National Access Forum (N=13)



There are some indications of positive impacts resulting from the Act in terms of the relationship between access-takers and land managers. One land manager respondent to the Local Access Forum survey suggested that there is:

better recognition of land management activities [and] better understanding by the public of the interaction between land managers and access-takers (Local Access Forum survey respondent 17).

A LAF public agency respondent also suggested that the Act has to some extent positively changed the relationship between access-takers and land managers:

[The Act] has led to enlightened landowners being far more proactive in assisting responsible access in a way which has minimised the likelihood of irresponsible access (Local Access Forum survey respondent 35).

There is less evidence of consensus in the overall **Local Access Forum** survey data, illustrated in **chart 16**, as to whether the LRSA has assisted in the resolution of local access disputes between different access-takers in comparison to equivalent findings for local dispute resolution between access-takers and land managers. In aggregate 46% of respondents believe that the Act has assisted in the resolution of disputes between different access-takers (42% agree and 4% strongly agree). However, 36% are undecided in this regard and, in aggregate, 18%, do not believe that the Act has assisted in this regard (13% disagree and 5% strongly disagree).

The data is more variable still at the sectoral level. In aggregate, 64% of ‘recreational user’ respondents agree that the LRSA has been of assistance in resolving local access disputes between different access-takers (59% agree and 5% strongly agree). In aggregate, 63% of ‘community user’ respondents share that view (50% agree and 13% strongly agree). In contrast, only a minority of ‘public agency’ respondents are supportive of that view (33% agree and 7% strongly agree). Only 28% of ‘land manager’ respondents agree, with 33% of these respondents being undecided. In aggregate, 39% are not of the view that the LRSA has assisted in resolving local access disputes between different access takers (28% disagree and 11% strongly disagree). A sizable minority of ‘other’ respondents agree that the LRSA has assisted in this regard. However, this is matched by the 40% of respondents who are undecided.

Although **chart 17** shows that an aggregated majority of **Access Authority** respondents (57%) are of the view that the Act has assisted in resolving disputes between different access-takers (50% agree and 7% strongly agree), 32% of respondents are undecided whilst 11% disagree.

Data from the **National Access Forum** survey in **chart 18** indicate that an aggregated minority of 47% of respondents are of the view that the LRSA has assisted in the resolution of access disputes between different access-takers (38% agree and 8% strongly agree). However, 31% of respondents are undecided and 23% disagree.

CHARTS 16-18: “The LRSA has assisted in the resolution of local access disputes between different access- takers”

Chart 16: Local Access Forums (N=78)

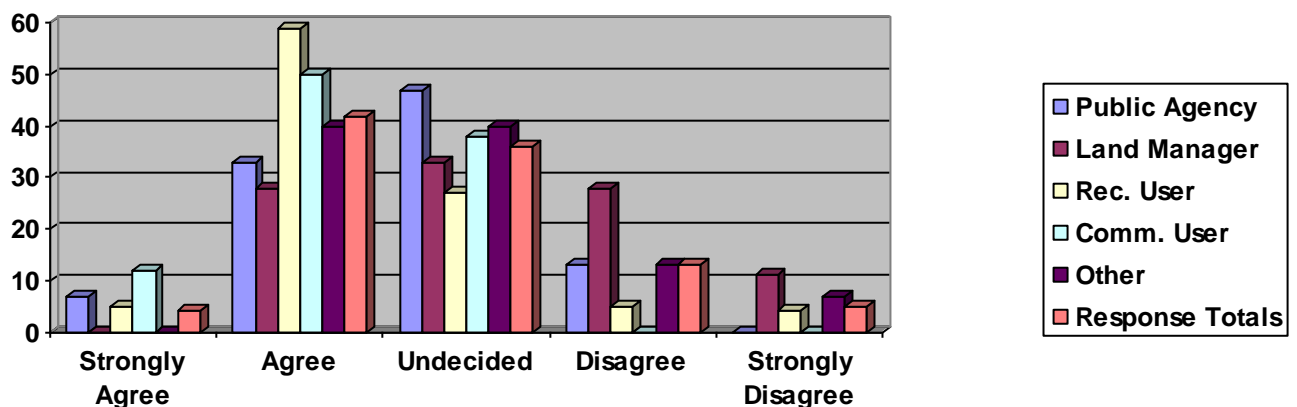


Chart 17: Access Authorities (N=28)

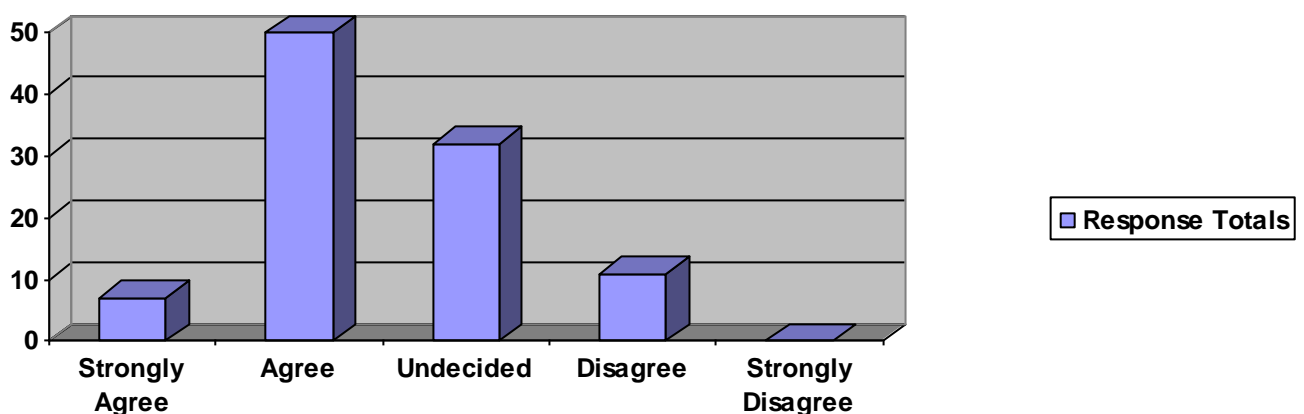
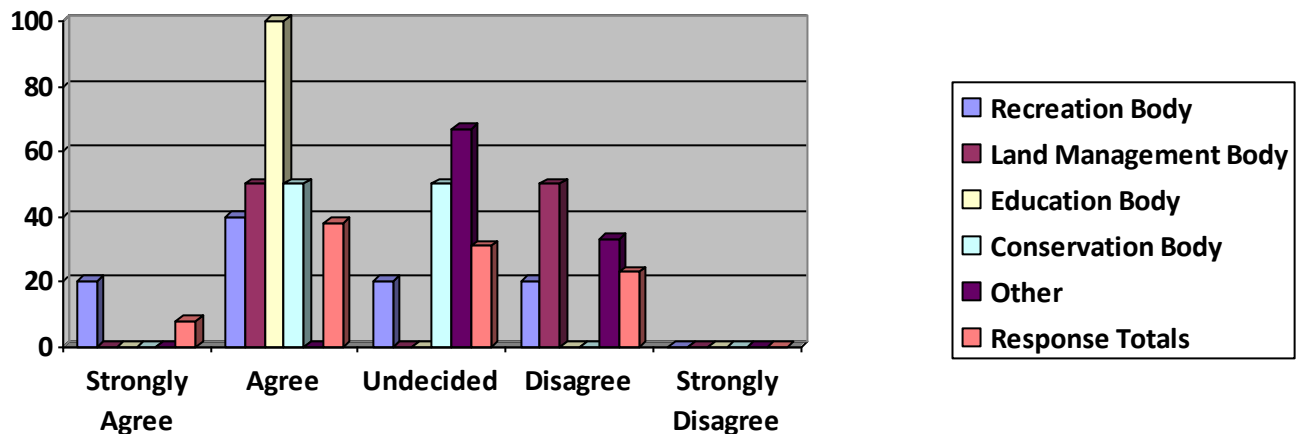


Chart 18: National Access Forum (N=13)



3.5.1.4 Linking Access to Other Public Policy Agendas

Respondents to all three surveys were asked for their views as to whether the LRSA has enabled better integration of access issues within other public policy agendas and programmes in Scotland.

Chart 19 shows that a small majority (53%) of overall respondents to the **Local Access Forum** survey agree that this has occurred. 33% of respondents are undecided and 13% of respondents in aggregate do not consider that the Act has enabled such integration to happen. In terms of sectoral data, 67% of ‘public agency’ respondents agree that it has done. 67% of ‘land managers’ also agree in this regard whilst the equivalent figure for ‘other’ respondents is 53%. In contrast, a minority of ‘recreational user’ respondents (42%) and ‘community user’ respondents (25%) agree that the LRSA has enabled better integration. Significant proportions of ‘recreational users’ (42%), ‘community users’ (63%) and ‘other’ users (33%) are undecided in this regard.

Chart 20 shows that responses to the issue of policy and programme integration are very positive in relation to the **Access Authorities** survey. In aggregate, 90% of respondents view the LRSA to have enabled better integration of access issues within other public policies and programmes (79% agree and 11% strongly agree). However, **chart 21** shows that the findings in relation to the **National Access Forum** survey are less clear cut. In aggregate, 53% of respondents are of the view that the LRSA has enabled better integration (39% agree and 15% strongly agree). However, 38% of respondents are undecided.

CHARTS 19-21: “The LRSA has enabled better integration of access issues with other public policy agendas and programmes in Scotland”

Chart 19: Local Access Forums (N=80)

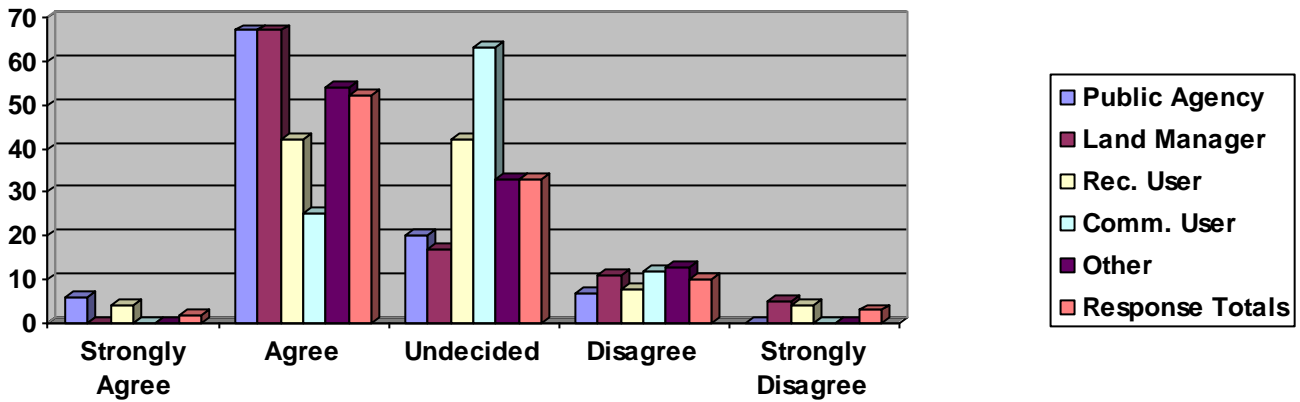


Chart 20: Access Authorities (N=28)

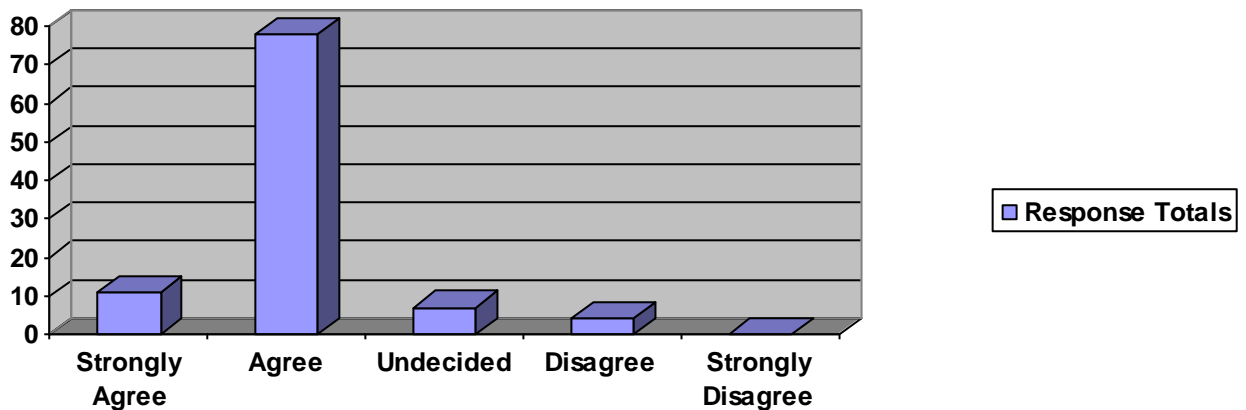
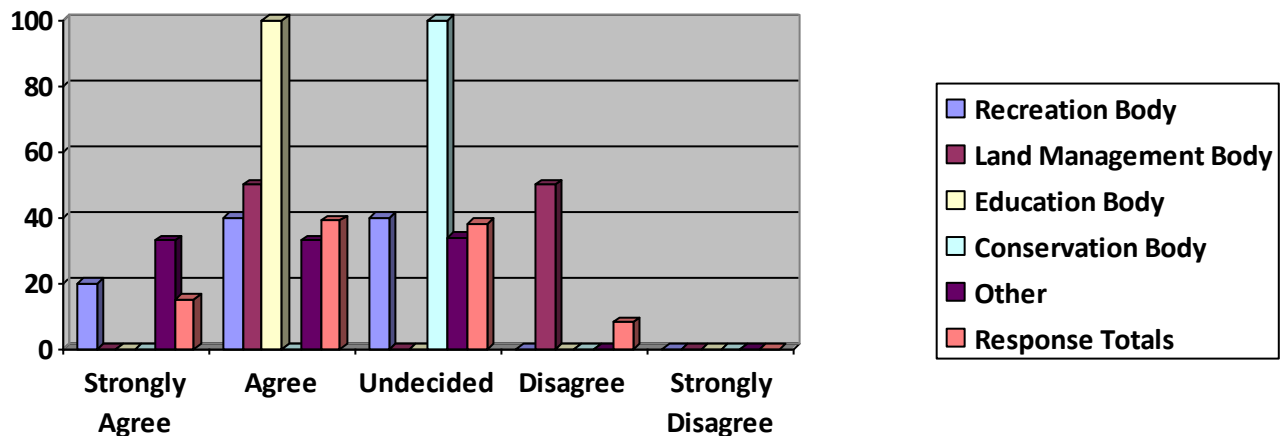


Chart 21: National Access Forum: (N=13)



3.6 Views on the Implementation of the Provisions

Key Points:

- The formal duty on Access Authorities to uphold access rights is viewed by survey respondents as a positive development;
- Enforcement powers are viewed as a tool of last resort for resolving access disputes;
- A perceived lack of definitional clarity regarding issues such as ‘privacy’ and ‘curtilage’²² further mitigates against using formal enforcement powers;
- There is a widely held view that Access Authorities are reluctant to pursue access cases in court due to cost implications in the event of losing the case;
- There is a perceived imbalance between the rights of access-takers and the rights of land managers in favour of the former;
- 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;
- The concentration of Access Authorities’ attention on Core Paths Plans is viewed as having a detrimental effect on addressing more routine access issues;
- There are concerns that Access Authorities’ will have insufficient funding to maintain and manage core paths networks;
- In some instances the process of drawing up of Core Paths Plans appears to have had a detrimental effect on the relationship between land managers and access-takers;
- Local Access Forums are viewed as having made a positive contribution to resolving local access disputes and advising on contentious proposals for core paths. However their overall performance is influenced by factors including resourcing, level of dependency on their Access Authorities for support, membership profile and levels of engagement.

3.6.1 Regulation and Protection of Access Rights

Findings discussed in the preceding section suggest that provisions contained in Part One of the Act have clarified the statutory framework for exercising access rights and made access-takers more confident in exercising these rights. However, as the earlier discussion also

²² The enclosed area of land around a dwelling.

illustrates, there is some disagreement amongst respondents across the Local Access Forum, Access Authorities and National Access Forum surveys as to whether the Act has created an effective legislative framework for the regulation and protection of access rights.

The formal duty on Access Authorities to uphold access rights is viewed by survey respondents as a positive development. One Access Authority respondent suggested that:

The duty of Local Authorities to uphold access rights is a very strong bargaining tool where access management and access improvements would be beneficial in ensuring the public's right of access, particularly in areas close to towns/settlements. And the provisions for use of section 14 and section 15 Notices have helped in negotiations for such improvements (Access Authority survey respondent 6).

However, the Scottish Government's monitoring data in relation to Access Authorities' activities records that, in total, only 24 section 14 Notices to remove obstructions were issued by Access Authorities between February 9th 2005 and March 31st 2009. During the same period a single section 15 notice was issued to remove a risk of injury.

The limited use of these formal powers by Access Authorities may be attributed to a number of linked factors. As noted earlier in this chapter, the Scottish legislation is underpinned by an enabling ethos as opposed by the more regulatory approach to the legal framework for managing access rights in England and Wales. Consequently, recourse to statutory notices under sections 14 and 15 of the Act²³ is viewed as a 'last resort' by Access Authorities, to be applied only when efforts at mediation in access disputes have been exhausted.

Perceived grey areas relating to the Act (for example, concerning issues such as 'privacy' and 'curtilage') which lack clear definition and are open to interpretation, are also influential in shaping the level of formality associated with the enforcement process in upholding and protecting access rights. One Access Authority respondent highlighted problems regarding access around domestic property:

Poor definition of the area of land required for the privacy around a domestic property..... has meant that Sherriff Courts have been inconsistent in their approach

²³ Section 14 relates to 'Prohibition signs, obstructions, dangerous impediments etc.'. Section 15 relates to 'Measures for safety, protection, guidance and assistance'.

to lodge houses in particular. The *Creelman v Argyll & Bute Council*²⁴ case cost both parties a considerable sum and may result in the Council being unwilling to defend a similar action in future. As officers trying to advise the public on their access rights it is difficult to give good advice regarding access rights in areas around domestic houses (Access Authority survey respondent 25).

The perceived lack of definitional clarity in relation to aspects of the legislation was also referred to by other survey respondents:

There are grey areas which require further detail, and court cases have so far proved to be a poor way of resolving the intention of the Act. Areas for more examination include wild camping, dogs, and reasons for restricting access (Local Access Forum survey respondent 41).

There is also a widespread perception amongst stakeholders that Access Authorities are reluctant to pursue formal enforcement action on pragmatic grounds. One Local Access Forum survey respondent representing recreational interests, stated:

The [Local Authority] appears to lack any real power to solve disputes over access if the obstructive party remains obstructive. They can solve the easy ones, but steer shy of anything difficult, since they do not appear to view court action as an option (Local Access Forum survey respondent 41).

Another 'recreational user' respondent to the National Access Forum survey echoed these points:

We have growing concerns that Local Authorities are becoming reticent about using their powers to remove obstructions because they are afraid that a costly court case may ensue. Similarly, some authorities seem to have a hierarchy of how they respond to issues, only taking action if a core path or right of way is affected, but giving less

²⁴ Mr and Mrs Creelman successfully appealed a section 14 Notice served on them by Argyll & Bute Council requiring them to remove a sign that said 'Private Road. No Access Without Permission' at one end of a track through their ground, and also to remove barbed wire at the other end of the track. The Sheriff ruled in favour of Mr and Mrs Creelman and found that the whole area of their land was excluded from access rights as access-taking on the track would interfere with the reasonable privacy of people occupying two houses close to the track. For a full report of the case see: http://www.scotcourts.gov.uk/opinions/b12_08_.html.

prominence to issues of more general access rights or paths without special status. If people see that nothing is being done about access issues then it leads to a lack of confidence for access-takers and a feeling from landowners that they can get away with not facilitating access (National Access Forum survey respondent 7).

The adverse impact of court cases on Access Authorities' financial resources was also cited as an important factor by another 'recreational' respondent from the Local Access Forum Survey:

Local Authorities are reluctant to start court proceedings against landowners who violate the provision of access because of the costs. Even if they win the case, [Local Authorities] don't get their expenses paid in full, so they tend not to start proceedings in the first place. With the present "squeeze" of expenditure, they'll be even less willing to do this in future, allowing unscrupulous landowners to inhibit access without restraint (Local Access Forum survey respondent 28).

Potentially negative impacts of an access court case in terms of pressure on resources (financial and staff time), together with the risk of unfavourable outcomes in terms of sheriffs' rulings do appear to be important factors in explaining an apparent reluctance on the part of Access Authorities to pursue formal enforcement proceedings. The following comments from Access Authority respondents illustrate their concerns:

[The] Glog²⁵, Tuley²⁶ and the Snowie²⁷ case law judgements have not provided the clarity needed to allow fully effective implementation.... [T]he outcome of the Glog

²⁵ Mrs Anne Glog initiated a case under section 28 of Part One of the LRSA claiming exclusion from access rights for all land within the perimeter of security fences surrounding her property at Kinfauns Castle. The case was defended by Perth and Kinross Council and the Ramblers Association. The sheriff ruled in favour of Mrs Glog on the basis of his interpretation of the amount of land to be excluded from access rights under section 6 of the Act for the privacy and enjoyment of people living in the house (Scotways 2007: http://www.scotways.com/index.php?option=com_content&view=article&id=207:glog-court-case-decision&catid=37:court-cases&Itemid=70).

²⁶ Mr and Mrs Tuley were served with a section 14 Notice by Highland Council to remove barriers preventing horse riders from gaining access along a track in Feddanhill Wood near Fortrose. Although a Sheriff Court ruling found in favour of Highland Council, the Tuleys appealed and the ruling was overturned by the Court of Session. See <http://www.scotcourts.gov.uk/opinions/2009CSIH31A.html> for full details of the decision.

²⁷ Mr and Mrs Snowie were served with a section 14 Notice by Stirling Council to unlock a gate at the western side of their residence, Boquhan House, to permit the exercise of access rights through it. Mr and Mrs Snowie appealed the Notice and asked that the entire 70 acres of the house's grounds be exempted from access rights to enable them to have reasonable measures of privacy and to ensure that their enjoyment of the house was not unreasonably disturbed. The sheriff dismissed the appeal against the Notice requiring the gate to be unlocked and ruled that 15 acres of the grounds be excluded from the exercise of access rights (Scotways: 2008

case, where the Local Authority and the Ramblers were faced with a sizeable bill for legal expenses, means it is realised that pursuing a landowner into the courts is not likely to happen (Access Authority survey respondent 30);

Legal decisions have gone against Access Authorities, reducing the chance of others taking the 'risk'. Cost of court action is still high and, given financial pressures, a disincentive to taking action (Access Authority survey respondent 18);

The costs associated with defending Notices issued under section 14 (Prohibitions signs, obstructions, dangerous impediments, etc.) of the Act are potentially prohibitive and detrimental to the overall implementation of the Act as resources may require to be diverted from other activities (Access Authority survey respondent 28).

Concern was also expressed regarding perceived imbalances in the legislation in terms of the rights of access-takers and those of land managers. The following comments from an Access Authority survey respondent are indicative of concerns in this regard:

Ss.13, 14 & 23 of the Act [sic] introduce specific provisions to allow Access Authorities to deal with land managers who are acting in contravention of the Act. No reciprocal provisions were included for non-compliant access takers who, for example, damage crops, leave gates open and have dogs that are not under proper control. One reason such provisions were not included was because they would be impossible to police, however, their absence creates an imbalance in the Act which implies that users may act with impunity, in spite of the serious management problems their actions may cause. Land managers are advised that they may ask recalcitrant individuals to desist from their actions and if they refuse, may be asked to leave the land. However, if individuals refuse to comply there is absolutely no comeback for the land manager. Furthermore, Access Authorities have a duty to take action to uphold the rights of access-takers, but not reciprocal duty to uphold the rights of land managers. Most Access Officers do try to assist land managers where they are the victim of repeated problems, but without a clear legal process to follow, this is always secondary to [other] duties (Access Authority survey respondent 9).

http://www.scotways.com/index.php?option=com_content&view=article&id=53:snowie-court-case-scotways-summary&catid=37:court-cases&Itemid=70).

3.6.2 Core Paths Plans

A number of survey respondents commented on the process of developing Core Paths Plans. Evidence from our surveys indicates that the process of developing these plans has helped to raise the profile of access issues within Local Authorities at departmental level. In some instances it also appears to have encouraged community engagement and constructive dialogue between different stakeholders with the mechanism of Local Access Forums being highlighted as important in this regard.

Respondents from all three surveys considered that the absence of a statutory duty for Local Authorities to maintain Core Paths, in tandem with a challenging financial climate for the public sector, undermines the scope for effectively implementing Core Paths Plans in practice. One Local Access Forum survey respondent commented:

The Act only asked Local Authorities to *plan* the Core Path network. The amount of money they have available for creating (and maintaining) these paths is so limited that it will be decades before these paths come into existence (Local Access Forum survey respondent 28).

Others also referred to the lack of funding available to implement Core Paths Plans. One Access Authority respondent commented:

The Core Paths Plan has been adopted but there is, quite literally, no funding to implement anything (Access Authority survey respondent 1).

A Local Access Forum respondent was similarly downbeat in relation to funding for Core Paths Plan implementation:

[Access Authority] has almost zero resources for the implementation of the Core Paths Plan (Local Access Forum survey respondent 72).

Other Local Access Forum survey respondents pointed to the negative influence which resource constraints appeared to have exerted on some Access Authorities' approaches to the process of developing Core Paths Plans. One 'public agency' representative stated:

Concern about the resources available for implementation has encouraged a rather minimal approach by a small number of Access Authorities – and this concern may be compounded by the lack of a statutory duty on Access Authorities to implement (as distinct from developing) core path plans (Local Access Forum survey respondent, 81).

A Local Access Forum survey respondent representing ‘land management’ interests offered this vignette of the process in their area:

The initial Core Paths Planning process was compromised by lack of funding, short time scales and unrealistic sets of constraints. This resulted in a fragmented Core Plan. Paths identified by communities as being essential to the Plan for their community were ignored by the council because it would involve impossible installation/upgrading costs. Only existing hardcore paths (estate roads/forestry roads etc) and quiet roads were identified, thus alleviating the [Access Authority] of an unrealistic cost and maintenance burden which had to be completed, again, within an unrealistic time scale (Local Access Forum survey respondent 37).

In some instances, the Core Paths planning process appears to have had counter-productive effects in relation to the management of access rights, at least in the short term. This has been particularly so as regards the relationships between access-takers and some landowners. The following comments from three Access Authority survey respondents are illustrative of these issues:

Many land owners were OK about people walking on their land. As soon as paths were designated as core paths they felt they had lost control on their land and have either resisted core path designation or become resentful of people walking on their land, expecting them to stick to core paths (Access Authority survey respondent 5).

The Core Paths planning process brought to light a number of issues where land managers had been happy with the low-level access being taken, but were not at all keen for this to be formalised or recognised through designation of routes as core paths. This led to a number of objections to our core paths plan. The end result is the same for users (they can still take access, etc.) but we are finding in some cases it is more difficult to promote some routes, even though they have had long-standing

public use, and in some cases, had been on the Council's maintenance programme. A little frustrating that what should have been a positive thing soured relations with some land managers (Access Authority survey respondent 6).

[The duty to create a core paths plan] has often led to disputes where there were none before due to fear of the unknown impact which a core path will have on a land manager or rural resident. The timescale and sheer scale of the task has led to bureaucratic processes being pushed through where tact and diplomacy over a longer period of time would have prevailed (Access Authority survey respondent 19).

The staffing resources which Access Authorities have had to devote to preparing and submitting their Core Paths Plans have also been highlighted as having a displacement effect on Authorities' capacity to deal with more routine access management issues. As one public agency representative on a Local Access Forum Survey noted:

In general, Access Authority resources have so far been largely directed to core paths planning and there is consequently a backlog of long-standing access issues (most of which pre-date the LRSA) which remain to be addressed - the most visible of which is widespread inappropriate signage (Local Access Forum survey respondent 88).

3.6.3 Local Access Forums

As noted earlier, Local Access Forums have statutorily defined advisory roles in relation to the exercise of access rights, the existence and delineation of rights of way and the drawing up and adoption of core paths plans. They can also offer to give assistance to the parties to any dispute about the exercise of access rights, the existence and delineation of rights of way, drawing up and adopting core paths plans, and the use of core paths.

Evidence from all three surveys, telephone interviews with Local Access Forum Members and expert interviews suggests that the performance of Local Access Forums varies in regard to the above roles. Some LAFs appear highly engaged in terms of their roles whilst others are less so. A National Access Forum survey respondent highlighted factors which they considered significant as determining the effectiveness or otherwise of LAFs:

[T]he reality is that the[LAFs'] performance is only as good as the people who attend; the support given by local access staff, and the political support that officers get from

above [from] senior council staff as well as councillors. It has to be said also that some areas don't have huge problems to resolve and may have limited business. Others are busy and working well. (National Access Forum survey respondent 8).

The wide range of stakeholders (encompassing 'recreational', 'community', 'land management' and 'public agency' representatives) involved as members of LAFs is also viewed as instrumental in ensuring the effectiveness of Forums in contributing to particular aspects of access management. As one public agency LAF member noted:

Without question Access Fora have been an excellent means of resolving the wide variety of access issues that had been anticipated upon the introduction of the Act. Whilst the irresponsible car based "Wild Camping" has greatly increased the irony is that in those areas most affected it also acted as a catalyst for very good partnerships between pertinent agencies and communities that are making a difference (East Loch Lomond provides one of the best examples) (Local Access Forum survey respondent 35).

Other respondents also commented upon the valuable role played by LAFs in encouraging dialogue between different stakeholders and helping Access Authorities to resolve disputes without recourse to formal enforcement procedures:

The duty to establish Local Access Forums has been helpful in that it has provided a formal sounding board for Local Authorities and given stakeholder groups a more formal voice. In some cases, depending on the capacity of the LAF, they have been able to help resolve conflicts over access by de-personalising the problem (Access Authority survey respondent 9);

The statutory obligation to establish a Local Access Forum placed on Local Authorities by section 25 (1) of the Act has had a positive impact on the exercise of access rights by creating advisory bodies with balanced representation from the various interest groups (landowners, access users, agencies and communities) involved in outdoor access. This has generated better understanding between the various interest groups of their respective needs, improved general perceptions and increased educational activities. It has also increased respect between the various

interest groups which is beneficial in promoting responsible access and the Code (Access Authority survey respondent 28).

Access Authority survey respondents also identified a number of issues which have a detrimental impact upon the effectiveness of their particular Local Access Forums in contributing to implementation of the Act. These include:

- Under-representation of interests from particular sectors ('land managers' and 'recreational users' were cited in two specific cases);
- Lack of 'ownership' of Forums by their memberships;
- Difficulties in recruiting and retaining members;
- Dependence on particular members to form LAF sub-groups;
- Dependence on Access Authorities for budget.

3.7 Proposals for Change

The research specification for this study requires the identification of options for change to the provisions contained in Part One of the LRSA, or to their implementation, which could encourage greater use. Accordingly we list below a range of proposals for change made by stakeholders who participated in the access rights component of the research. These are grouped under the headings of: '*changes to specific provisions*'; '*funding*'; '*court cases*'; '*guidance*'; '*enforcement*'; '*education*'; and '*other*'.

3.7.1 Changes to Specific Provisions

- Make it a duty for Local Authorities to maintain core paths;
- Provide Access Officers with the same 'power of entry' to any land as given to 'Rangers' under [section 24 \(3\)](#) of the Act;
- Amend [section 14\(1\)\(a\)](#) which states that land managers should not put up signs, etc. "for the purpose or for the main purpose of preventing or deterring" access. This is very difficult to prove as land managers may claim other purposes for the obstruction and therefore the Access Authority may not be able to act to remove the obstruction;
- [Section 26 \(power of entry\)](#) should be extended to allow Access Officers to go onto the land without owner's permission;

- Clarification of [section 14 \(Prohibition signs, obstructions, dangerous impediments etc.\)](#) to allow Access Authorities to ask for barriers to be removed on obstructions that pre-dated the legislation coming into effect.

3.7.2 Funding

- Make specific funding available for the implementation of core paths [plans];
- Provide Access Authorities with a budget for legal costs in the eventuality that they lose a court case;
- The Scottish Rural Development Programme should pay the full cost of access promotion applications rather than part of such applications.

3.7.3 Court Cases

- Cap the level of costs associated with court cases;
- Give the Scottish Outdoor Access Code evidential status in court cases.

3.7.4 Guidance

- The Scottish Government should provide specific guidance to Sherriff Courts, Access Forums and Local Authorities on how to judge 'privacy' to help avoid costly litigation;
- Provide more specific notices to advise the public of their obligations on responsible access to farmland;
- Define "under control" dogs;
- A clearer definition of wild camping and advising that "car boot" camping is not an access right;
- Guidance for commercial operators using access rights should be strengthened from "suggest" consult with land managers to "you should" consult with land managers;
- Better guidance on wild camping that specifically excludes people who have not travelled at least one mile on foot, cycle, or horse before camping. When camping close to houses or on grazing land the need to gain permission should also be emphasised. There should also be a statement that people should not wild camp close to a business operating a campsite;

- More clarity and guidance on fires regarding what is and is not appropriate under the Act;
- More clarity and guidance on dogs in general. Include the need to dispose of dog waste responsibly;
- Improved guidance on the disposal of toilet waste when out of doors for all environments/ situations;
- Better guidance for sea kayakers camping on beaches in crofting areas where they should contact local crofters out of courtesy;
- A clearer definition of what a privacy zone is and some general guidelines on definition and extent;
- Clearer definitions of ‘reasonable’ and ‘responsible’;
- Case studies of issues that have been resolved - possibly with CDs available to the public;
- Update the Scottish Outdoor Access Code to take account of recent access case law and also include input from practitioners using the code to try and resolve access management issues.

3.7.5 Enforcement

- Instruction to planning authorities to insist on access rights being maintained when granting planning permission, apart from in the immediate area of construction. Enforcement action should be taken when wind-farm developers ignore or breach such conditions;
- Suspension of land managers' entitlement to public funding delivered through the Scottish Rural Development Programme where land managers are obstructing Local Authorities in the implementation of the access legislation;
- Establishment of a land use arbitration panel as a mechanism of first recourse for land managers wishing to challenge the action of the Access Authority;
- Make local [access] agreements enforceable, rather than voluntary;

3.7.8 Education

- Link the Scottish Outdoor Access Code into the National Curriculum and ensure that it is at the forefront of all outdoor education/skills building instruction;
- More widespread education of people as to the contents of the Scottish Outdoor Access Code;
- The influence of the Scottish Outdoor Access Code might be further enhanced through the development of educational materials; for example, directly linked to the Curriculum for Excellence for both Primary and Secondary Schools. This could also be linked to other Scottish Government and national initiatives such as Walking, Cycling and Safer Streets and the Green Travel agenda.

3.7.9 Other

- Establish a Local Access Forum Group to share good practice and information across the forums.

REFERENCES

- Brown, K.M. (2009a, August 26–28) *'Just because I can take my bike there doesn't mean I should': Some key tensions in outdoor recreation citizenship*. Paper presented at RGS-IBG Annual Geographers Meeting, Manchester.
- Brown, K.M. (2009b, September 3) *The role of culture in exercising access rights*. Paper presented at Rural Law – Land Reform in Scotland: 10 Years of a Scottish Parliament, Aberdeen.
- Brown, K.M., Marshall, K. and Dilley, R. (2008, April) *Claiming rights to rural space through off-road cycling*. Paper presented at the annual conference of the Association of American Geographers, Boston.
- Curry, N. and Brown, K. (2010) *Differentiating outdoor recreation: evidence drawn from national surveys in Scotland*. *Journal of Policy Research in Tourism, Leisure and Events*, 2: 1, 29- 50.
- Mackay, J.W. (2007) *New legislation for outdoor access: a review of Part 1 of the Land Reform (Scotland) Act 2003*. *Scottish Affairs*, 59, 1-29.
- Morrow, S. (2005) *Continuity and change: the planning and management of long distance walking routes in Scotland*. *Managing Leisure*, 10, 237-250.
- MVA Consultancy (2009) *Monitoring responsible behaviour- recreational users and land owners/managers 2005-2007*. Scottish Natural Heritage: Inverness. F05AA602.
- National Access Forum (undated) *Dogs and ground-nesting birds: key issues and options*.
- Paths for All Partnership (2010) *Core paths plans update*.
- Reed, M.S. et al (2009) *The future of the uplands*. *Land Use Policy*, 26S1, 204-216.

Roberts L. and Simpson, F. (2003) *Encouraging responsible access to the countryside*, in Hall, D., Roberts, L. and Mitchell, M. (eds.) *New Directions in Rural Tourism*, Ashgate: Aldershot, 67-79.

Scottish Countryside Access Network (undated) *Scottish Countryside Access Network – Access Summit*, November 2009.

Scottish Rural Property and Business Association (undated) *CKD Galbraith sponsored outdoor access survey: initial analysis*.

Slee, B., Brown, K., Blackstock, K., Cook, P., Grieve, J. and Moxey, A. (2008) *Monitoring and evaluating the effects of land reform on rural Scotland: a scoping study and impact assessment*, Scottish Government Social Research.

Stockdale, A. and Barker, A. (2009) *Sustainability and the multifunctional landscape: an assessment of approaches to planning and management in the Cairngorms National Park*. *Land Use Policy*, vol. 26. 479-492.

TNS (2009) *Scottish recreation survey: annual summary report 2007*. Scottish Natural Heritage Commissioned Report No.321 (ROAME No. F02AA614/6).

Warren, C. (2010) *Managing Scotland's environment* (2nd Edition). Edinburgh: Edinburgh University Press.

CHAPTER FOUR

THE COMMUNITY RIGHT TO BUY

4.1 Introduction

This chapter examines the community right to buy provisions contained in Part Two of the Land Reform (Scotland) Act 2003. It begins with an overview of the community right to buy before reviewing relevant literature and discussing primary research findings to address the objectives identified in the research specification. These objectives are to:

- Determine the extent of use of the community right to buy provisions;
- Review the evidence of any additional wider impact of the LRSA on the community right to buy;
- Identify views on implementation of the community right to buy provisions;
- Identify barriers to greater use of the provisions of the LRSA;
- Examine stakeholders' experiences of community land buyouts outwith the provisions of the Act;
- Identify proposals for change to the provisions themselves or their implementation which could encourage greater use.

4.2 Overview of the Community Right to Buy

Part Two of the LRSA came into force on 15th June 2004. It provides Community Bodies representing rural areas in Scotland with under 10,000 head of population with the opportunity to register an interest in and buy registered land when it is offered for sale. The Act also allows Community Bodies to place registrations on salmon fishings and mineral rights (other than oil, coal, gas, gold or silver) and other assets such as buildings. Importantly, the pre-emptive right to buy the land requires a willing seller. Unlike the crofting community right to buy contained in Part Three of the Act, the community right to buy does not involve an obligation on the part of a landowner to sell land registered under the Act (Scottish Government 2009a).

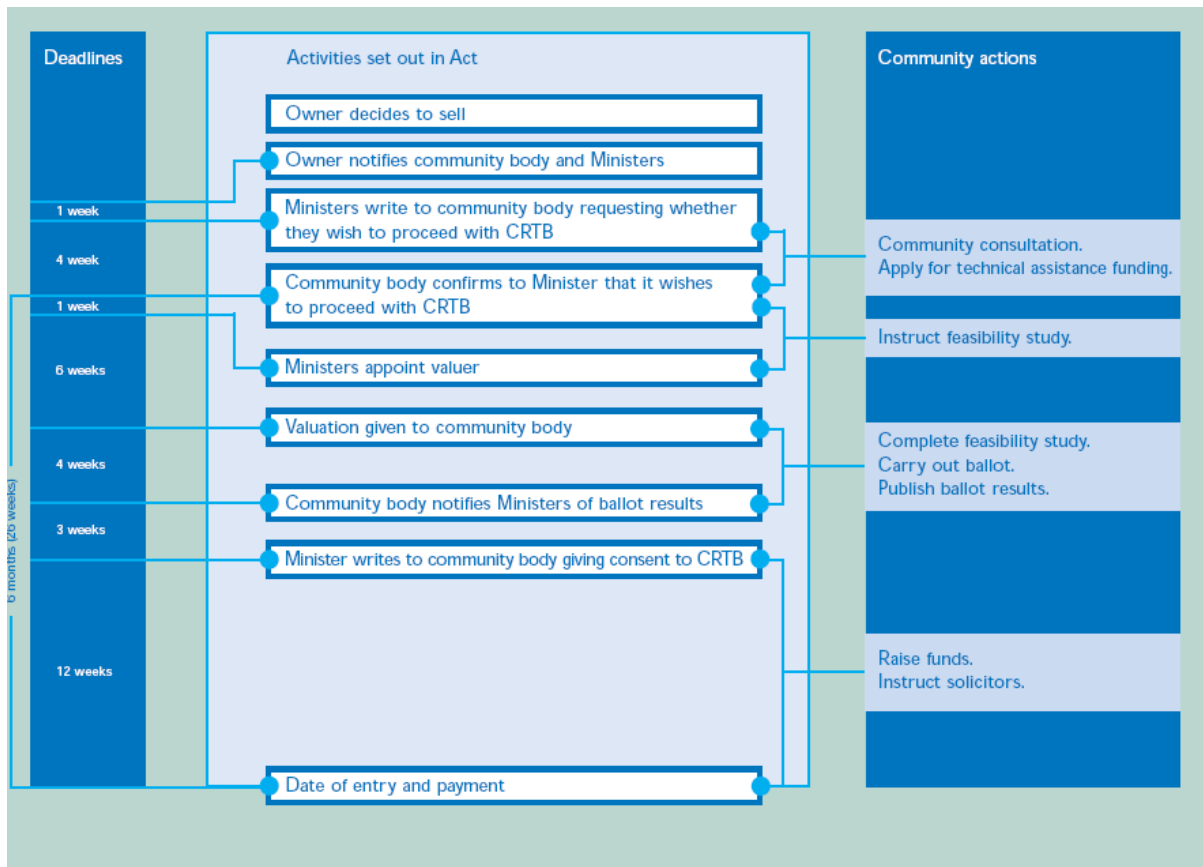
Applications for registration of an interest in land are envisaged within the Act and associated guidance issued by the Scottish Government as normally being made before the owner has taken steps to offer the land in question for sale; these are termed “timeous” applications. In exceptional circumstances “late” applications to register an interest are also permitted, although these are subject to additional assessment criteria²⁸. Such applications occur after the owner has taken steps to offer the land for sale. The Community Body’s interest is entered in the [Register of Community Interests in Land](#) (RCIL) if application for registration is approved.

The Act specifies conditions for the type of Community Body that is eligible to use the community right to buy provisions and specifies what information must be contained in applications to register and activate the right to buy. Key elements in this regard are that Community Bodies must be companies limited by guarantee with a compliant Memorandum and Articles of Association. They must also provide a definition of the community, using either the postcode unit or units that cover it. Community Bodies must be able to demonstrate the support of at least 10% of the community for the application to register interest in land and provide details of the land to which the application applies (including maps as appropriate). They must further demonstrate that their registration and exercise of their community right to buy is in the public interest and consistent or compatible with furthering the achievement of sustainable development.

The second stage of the process is “activation” of a Right to Buy, which is triggered when the land comes on the market. In the case of a “late” registration, when the land is already on the market, the activation stage begins immediately after the registration is approved. However, in the case of timeous registrations the activation stage cannot begin until the land comes on to the market. The Community Body must apply to re-register its interest in the land if it has not come onto the market five years after registration. **Figure 4.1** shows the timescale, process and associated community actions involved in activating the community right to buy.

²⁸ These criteria include satisfying Ministers that there are good reasons why the application is not timeous; that there is a significantly greater level of support within the community than the 10% minimum required for a timeous application; and that there is a strong indication that the registration would be in the public interest (Scottish Government 2009a).

Figure 4.1: Activating the Community Right to Buy



Source: Highlands and Islands Enterprise. [The Community Right to Buy: your questions answered.](#)

4.2.1 Administration and Support

Administration and case-work relating to the community right to buy is undertaken by the **Community Assets Branch**²⁹ located within the Scottish Government’s Rural Directorate. The Branch’s key functions include:

- Providing advice to Scottish Ministers to assist them in deciding whether to approve applications by groups to exercise the community right to buy;
- Providing impartial advice to all interested parties (including community groups and landowners);
- Undertaking case-work in relation to community bodies’ applications to register interests in land and activate the community right to buy;

²⁹ The Branch also undertakes equivalent functions in relation to the crofting community right to buy.

- Undertaking policy development work in the area of community assets.

The **Community Land Unit** (CLU) established by Highlands and Islands Enterprise (HIE) in 1997 does not have statutory responsibilities with regard to the Act. However, CLU has played a significant role in the growth of the community land sector in Scotland since its establishment. CLU staff have advised well over 100 community groups regarding the acquisition and development of assets and helped to source funding for many groups.

CLU aims to increase the role of communities in the ownership and management of land and land assets, and the sustainable management of these resources for the benefit of the community. Its objectives include:

- To promote community-led land purchase or management initiatives, including management agreements and other partnership arrangements with existing owners;
- To provide advice and support for community land initiatives, incorporating the exchange of best practice;
- To build capacity in community land initiatives and further their sustainability;
- To contribute to the research and development of policies related to community land initiatives.

As such, the CLU has been an important component of the support infrastructure for groups engaging in the community purchase of land, whether that has occurred within or outwith the confines of Part Two of the LRSA.

4.3 Extent of Use of the Community Right to Buy Provisions

Key Points

- To date, 7 Community Bodies have purchased land using the community right to buy provisions. 2 more Community Bodies are currently in the process of doing so and 1 has an application to purchase under consideration;
- 10 Community Bodies have got to purchase stage but failed to complete within the timetable set out by the Act;
- 55 registrations of interest in land remain outstanding;
- About two thirds of the applications to register an interest in land are accepted;

- A wide range of locations and land types are represented in the registrations; from crofting and sporting estates to a residential retirement park;
- Geographically, registrations cover 21 of the 33 counties of Scotland illustrating that interest in the community right to buy goes well beyond the North West Highlands and Islands with which it is popularly associated.

4.3.1 Research Findings

At the time of writing, data on the Register of Community Interests in Land indicate that 120 applications have been made to register a community interest in land by 68 community groups. Of these, 55 applications are registered, 1 is pending approval as a registration, 55 have been deleted, and 9 have been activated (one of the 55 registrations is currently under consideration for activation).

However, these simple categories do not tell the whole story. For example, “deleted” applications may have been withdrawn by the Community Body at an early stage, or have gone all the way to attempted purchase of land but failed to do so for some reason. Applications may also have been registered, but expired at the end of five years when the group failed to renew them. **Tables 4.2** and **4.3** present further details of individual registrations and of different Community Bodies on the register.

Table 4.2: Entries on the Register of Community Interests in Land relating to the Community Right to Buy

Status of application	Sub-category	Applications	Community Bodies ³⁰
All applications		120	68
Deleted at registration stage	Withdrawn at registration stage	14	11
	Rejected at registration stage	26	18
	Registration expired	4	3
Registered	Registered but not yet activated	50	30
	Registered, activation aborted	4	1
	Pending approval	1	1
Reached activation stage	Successful – purchase complete	7	7
	Approved – purchase in progress	2	2
	Unsuccessful - deleted	11	10
	Pending approval	1	1

Sources: Scottish Government Community Assets Branch 2010, and Register of Community Interests in Land, August 11th 2010.

³⁰ The ‘Community Bodies’ column does not add up to 68 because some of these organisations have multiple entries on the register.

Table 4.3: Community Bodies attempting to Activate a Registered Community Interest in Land

Total number of Community Bodies which have attempted activation		21
<i>Community Bodies that have successfully purchased within the Act</i>		9
Purchase within the Act completed	Assynt Foundation Benbecula Leisure and Sport Bute Community Land Company Comrie Development Trust Crossgates Community Woodland Neilston Development Trust Silverburn Community	7
Purchase approved, funded and imminent	Camuscross and Duisdale Initiative South Lochaber Community Company	2
<i>Community Bodies with activations in progress</i>		1
	Machrihanish Airbase Community Company	
<i>Community Bodies that were unsuccessful within the Act but successful outwith the Act</i>		2
Couldn't fund purchase within timescale but concluded purchase soon afterwards outwith the Act	Newburgh Community Trust	1
Group withdrew and part-purchased outwith the Act	Boddam Development Trust	1
<i>Community Bodies whose attempts to purchase were unsuccessful</i>		9
Couldn't fund purchase within timescale – registration deleted	Benbecula Golf Course Community Company Coldingham Sands Community Company Mundole Futures Newtonhill Trust Salen Development Community Company Urras Bhaile Na Cille	6
Competing with another group – registration deleted	Coigeach Community Company (Assynt Foundation purchase approved)	1
Land discovered to be ineligible – registration deleted	Fairlie Land Acquisition Company	1
Landowner withdrew from sale – activation aborted but community interest still registered	Lochwinnoch Community Buyout Group	1

Sources: Scottish Government Community Assets Branch 2010, and Register of Community Interests in Land, August 5th 2010.

A wide range of locations and land types are represented in the registrations; from crofting and sporting estates (e.g. the Assynt Foundation) to former airbases (Comrie Development

Trust, Machrihanish Airbase Community Company) and even a residential retirement park (Willow Wood Community Company). Geographically they cover 21 of the 33 counties of Scotland, showing that the Act has been taken up far beyond the North West Highlands and Islands with which it is popularly associated.

The Register itself provides little information on the Ministerial reasoning and other factors behind the activation or non-activation of these applications. Many entries have no documents available online (especially entries from some years ago), and where there does appear to be documentation, many of the Register's web links are broken.

However, a variety of sources (Scottish Government internal records, media and community body websites) shed light on reasons for the non-activation – whether failed activation, deletion or just dormancy - of many of the community registrations of interest in land. These include:

- the land not coming on the market (many cases);
- community bodies withdrawing for various reasons, including to pursue negotiations outwith the Act (e.g. Boddam Development Trust);
- land being withdrawn from the market once a late registration was accepted, as in the case of Lochwinnoch Community Buyout Group (Sprinks 2007) or Willow Wood Community Company (Willow Wood 2008);
- rejection of applications because reasons for being “late” were judged insufficient (e.g. Tweedsmuir Community Company, Walkerburn Community Development Trust);
- applications judged as flawed in mapping (e.g. Seton Fields Community Company);
- applications judged as flawed regarding compliance with the Memorandum and Articles of Association requirements in the Act (e.g. Ballater Royal Deeside Ltd);
- applications judged as flawed on multiple counts (e.g. Edenshead Friends).

To date, there has been only one case of multiple Community Bodies applying to register interest in the same land³¹. This occurred in relation to land in Assynt. Fewer than half (69

³¹ Section 55 of the Act states that while more than one Community Body may register an interest in the same land only one may buy it. The section sets out procedures for dealing with multiple applications to buy.

out of 144) of Community Bodies approved for eligibility by the Scottish Government to use Part Two of the Act have done so. Some of these Community Bodies are known to have purchased land outwith the Act (e.g. Anagach Woods Trust). However, there is little readily available data against which to track the activities of the majority of these organisations in relation to land purchase.

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

Key Points

- Literature suggests that the very existence of the Act may inspire community action towards the control of local assets and stimulate greater attentiveness to local community needs by landowners;
- Research participants indicated that while the Act had often 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. Others have continued to pursue community-based initiatives.

4.4.1 Literature Review

Slee et al (2008: 95) suggest that Part Two of the LRSA may have had various indirect effects on community land ownership. These range from providing community groups with a bargaining tool in purchase negotiations with landowners to encouraging a climate of greater receptiveness to community involvement in land management from private, public and third sector landowners. However, they caution that quantifying the wider impact of Part Two of the Act is difficult as there is no comprehensive list of community land initiatives. Consequently it is difficult to measure whether overall activity has increased. Slee et al go on to state that identifying causal effects on community ownership which can be attributed to the Act is complex due to the plethora of other factors which impinge on key actors' decisions in that regard (Slee et al 2008: 96).

We concur with these views. Any assessment of the impacts of Part Two of the Act must be mindful of data limitations and the complexity of causal relationships. Notwithstanding

these important caveats, the literature and the current study's primary research findings do suggest some general wider impacts of the Act in relation to community ownership.

Reflecting on lessons for community-based land reform from the Scottish experience, Bryden and Geisler note:

community based land reform permeated Scotland's political climate well before the 2003 land reform act (2007: 29).

However, the process of consulting for and preparing the 2003 legislation is viewed by some academics as having contributed towards recalibrating the dynamics of land ownership in Scotland. For example, McKee and Warren (unpublished) contend that the Act has accelerated the trend towards diversification of landownership. They state:

In addition to private and public ownership, land is now owned by a diverse range of conservation charities, community groups and environmental NGOs, often entering into multi-stakeholder partnership arrangements (McKee and Warren: 30).

Mackee and Warren go on to argue that the Act has significantly shifted power away from private landowners and towards communities. Thus, while there may be limited uptake of the community right to buy, they contend that "the stage has been re-set" (McKee and Warren: 30). Moreover, they note private landowners beginning to engage differently with communities under the shadow of the LRSA:

Thus, for example, in 2009, the owner of Tarbert Estate on the Isle of Jura went into partnership with local crofters, becoming joint owners of the common grazings and inbye land. Potentially, such a partnership approach could begin to heal the historic fracture between private landowners and estate communities created by the Clearances, and could help to counteract the fear and distrust which the [LRSA] has engendered amongst landowners (McKee and Warren: 31).

Other sources point to impacts in relation to the dynamics of community groups themselves which may be attributable to the LRSA. For example, the Quirk Review of community assets for England and Wales asserted in its discussion of the Act that:

the opportunity for community organisations to register an interest in a particular asset can be empowering in itself (DCLG 2007: 23).

The wider impact of the legislation remains unclear in other important respects. When the Act initially came into force, even a deleted registration of interest was reported by landowners and estate agents as reducing buyer interest in the affected land (and thus presumably lowering the price) (Carpenter 2005). However, land and estate agents (although perhaps having a vested interest in talking up prices) suggest that prices for Highland estates are “robust” and that “demand for Scottish rural estates will outstrip supply this year” (CKD Galbraith 2010). Figures show a steady rise in Scottish farmland prices over the period since the Act has been in force (Savills 2009, Knight Frank 2010) and the international market for Scottish rural property is said to be strong (Hollidge 2010).

4.4.2 Research Findings

Our primary research findings broadly reflect the perceived impacts of the Act in relation to the land reform agenda generally which are identified in the literature. However, the perceived impacts on ‘landowner-community’ relations and community group empowerment are rather more mixed.

7 of the 13 respondents to our survey of community groups which had purchased land outwith the Act agreed that the legislation had raised awareness of land issues. Other research participants also reported that the wider political process building up to the Act had been helpful:

Having land reform on the agenda created a good bargaining environment. Not just the Act but the broader debates and discussions. It was a good climate. Estates did not want to appear unreasonable against that wider background (Interview 3).

This view was also reinforced by other participants. One interviewee saw the Act as “a positive development in terms of raising the profile of community ownership” (Interview 2). Another reported that neighbouring landowners had paid attention to their group when the issue of potential future use of the Act was raised, although the landowner appeared largely ignorant of what the Act actually involved (Interview 5). Similarly, an expert interviewee also felt that the Act had made a positive impact on landowner attitudes to communities, and

in particular that it had helped community-minded landowners work with communities without “being castigated by other private estate owners” (Expert interview EXP02).

Such views of enhanced ‘community group-landowner’ relations as a result of the Act were not universal however. Survey respondents representing groups which had purchased land outwith the Act were unanimous in saying that the legislation had not helped their negotiations. Indeed, we found several cases where community groups felt that the impact of the Act was to render relations with local landowners more difficult.

Some interviewees contrasted the period before the Act came into force with the impact of the Act itself. One commented that:

[T]he Act has raised expectations that aren’t fulfilled” (Interview 3).

Another expert interviewee felt that in practice the Act was a rather minor part of the land reform picture and that public funding had played a much more important role in promoting community land ownership (Expert interview EXP03).

The picture regarding the catalytic impact or otherwise of the Act on community groups’ appears variable. Some groups formed to use the Act have disbanded after their applications have not been successful. In such cases there is a perception that the work done by the community and their advisors has come to nothing (Interview 6). However, others have fared better. Some groups that failed in their attempts to use the Act have survived and are now engaged in other projects – including community asset schemes – and do not appear unduly discouraged by difficulties encountered when using the Act (Interviews 14, 16).

4.5 Views on Implementation of the Community Right to Buy Provisions

Key Points

- Literature on the implementation of the Act focuses on how complex it is to use and on difficulties for community groups in complying with its timescales;
- Our research also highlighted the burden of work and demands on volunteer time involved in using the Act. However, it may be that community groups experience this differently according to the human and financial resources available to them;

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

4.5.1 Literature Review

A recurring theme in the literature on the community right to buy relates to the time-consuming and complex nature of implementing the provisions in practice. 22 out of 33 respondents in a recent survey of community land initiatives (CLIs) identified the perceived excessive length and bureaucracy associated with the community right to buy process as a "key issue facing the community land sector at present". Respondents also largely endorsed the statement that "[t]here is very little support available to aspiring and new community landowning groups now" (Bryan and Campbell 2010: 30).

These findings are reinforced in community group responses to the Scottish Government's consultation on procedures for renewal of a registration of community interest in land in which the initial registration process was described as "demanding and resource intensive..." (Scottish Government 2009b: 5).

There is little literature presenting landowners' views of the implementation of the Act. However, a briefing by CKD Galbraith, issued shortly after Part Two of the Act came into force, criticised Part Two for compelling "both vendors and purchasing community bodies [to] endure significant uncertainty and anxiety while the right to buy process unfolds" and called for lessons to be learned "if sales to community organisations are to become more straightforward" (CKD Galbraith 2005).

The Caledonia Centre has published three briefing papers written by local activists from community land initiatives which provide firsthand accounts of their experiences of using the Act (Farr 2007; Gallacher 2007; Marland 2007). These briefings collectively highlight:

- the complexities of the legislation and the work required to comply with it;

- the frustration of community groups at the perceived slow pace of government processing of applications to register an interest in land;
- the impact of the slow pace of processing applications on community groups' efforts to register interest in the land before it was sold by existing landowners.

These briefings also report Community Bodies' varying relationships with officials in Government. Marland (2007) is negative about the (then) Scottish Executive's engagement with the Seton Fields Community Company's application which was eventually rejected. In contrast, Gallacher, a member of the Neilston Development Trust which successfully used the community right to buy, notes that:

despite having to administer a system that clearly had significant flaws, [Scottish Government] officers were unfailingly helpful and even-handed during the whole process, a difficult role given their obligation to deal with both sides fairly (Gallacher 2007: 9).

Wightman's "Two Year Review" (2007) of the operation of the LRSA was also considered by Slee et al (2008). Wightman suggests that the Act has been found to be too complex in operation and that preparation of an application to register a community interest in land is unduly difficult. He makes specific reference to the detailed requirements regarding structure and definition of eligible community bodies and to the mapping requirements associated with the community right to buy. Wightman further contends that there is excessive scope for Ministerial discretion in the Act's implementation and that the scope and vagueness of sections of the Act, particularly in relation to sustainable development criteria, make it almost impossible to administer.

Pillai (2010) has recently examined the implementation of sustainable development provisions contained in Part Two of the Act. She concludes that despite the community right to buy carrying clear legal obligations in relation to sustainable development:

successive Scottish governments have not done enough to clarify the role of [sustainable development] in the decision making process. The guidance does nothing to contribute to a definition and gives wide discretion to the Ministers in shaping sustainable communities....The [Community Right to Buy] guidance lacks any overt mechanism for requiring integration of the three pillars [of sustainable

development] and suggests that economic or social benefits alone are sufficient. This might raise concerns if communities seek to focus on these objectives at the expense of the environment (2010: 904).

4.5.2 Research Findings

Participants in this study also expressed views on specific aspects of the implementation process which have been highlighted in the literature.

4.5.2.1 Complexity and Workload

Some Community Bodies appear to have found the work involved in completing an application to register an interest in land to be a heavy burden. Comments about the “unbelievable amount of work” (Interview 5) involved in an application, or “challenges getting the information” (Interview 2) were not uncommon. Another interviewee said that “the group took some 9 months downtime to literally recover from the process of using the Act” (Interview 7); this from a Body that described the process as merely “straightforward but time consuming”. However, not all Community Bodies suggested that the process was particularly onerous.

One important factor in determining Community Bodies’ experience of the workload involved in using the community right to buy relates to the skills-set already available within the organisation. Thus, the representative of one Community Body who described using the Act as “fairly straightforward” also noted that:

the group are very lucky in that they have a range of able and talented individuals they can call on including company directors and accountants which helped with the formation of the community body and associated audit requirements (Interview 8).

Conversely, those organisations with limited capacity and resources to call upon inevitably find the process of application more challenging. One survey respondent noted that:

this area is not awash with any specialist skills (respondent 1, ‘activation stage’ survey).

Similarly, a Community Body representative referred to strains caused by:

a very heavy workload...[which] falls on a few volunteers with no financial help (Interview 10).

4.5.2.2 Timescales and Deadlines

Timescales and deadlines associated with the community right to buy also appear to have presented community groups with particular implementation challenges. These include:

- Organising a ballot within 28 days of receiving the valuation. In some cases this period fell over Christmas holidays. One interviewee told of the ballot having to be held in the middle of the summer holidays – affecting both volunteer availability and voter turnout. The difficulties of getting publicity out and mobilising voters in larger communities were also highlighted as significant issues.
- Securing funding within the 6 months from confirmation of intention to proceed. Groups felt that it was not possible to secure funding without knowing the valuation of the land. Thus it was possible that up to 7 weeks could be lost from this period before an application for funding could be submitted. Many respondents considered this a “very tight” timescale, as funding bodies generally take 4 to 6 months to process applications³².
- Time pressures were also a factor in late registrations, with cases where a prohibition on a sale came through “the day before auction” (Interview 15), or groups reported racing to complete an application before a property was sold (Interview 4).
- Other actors (e.g. Scottish Government officials or land valuers) being late in fulfilling their duties, reducing the time available to Community Bodies to complete their parts of the process.

4.5.2.3 Defining Community Boundaries and Membership

Research participants generally felt that this aspect of the Act worked quite well. For example, one said that the postcode boundaries used for the Act fitted how their community worked in practice better than their community council area (Interview 18); Another said that the “membership structure” was “very manageable” (Interview 14). However, some Community Bodies did experience problems in setting the geographical boundaries of the community, or in determining the size of the community. In what appears to be a unique case,

³² For example, the recently announced BIG Lottery Growing Community Assets fund allows 4 months for making a decision on a fully-costed “stage two” application.

one Community Body disagreed with Community Assets Branch staff as to how wide an area constituted their community. The organisation eventually adopted the wider definition recommended by officials, and this appears to be working in practice. Another interviewee felt that their community of only a couple of hundred people was too small to take on ownership of a substantial asset (as had been their intention) (Interview 6). Lack of capacity and local politics within a very small community were raised as difficulties, and the question of whether the definition of community could be extended to include non-residents with substantial connections to the place was raised. Capacity issues were also alluded to by another research participant who commented that:

determining boundaries without the funding to use professionals.. [is] too high a hurdle for volunteer Communities Bodies and support is required (respondent 2, 'activation stage' survey).

4.5.2.4 Ballots

Community Bodies have experienced some confusion and difficulties in the running of community ballots as part of the process of activating a Right to Buy. Some interviewees felt that the minimum turnout requirements were too high in larger communities (Interview 4, Interview 12) and effectively meant that a non-vote for any reason became a vote against land purchase. One respondent reported that community members opposed to land purchase were actively encouraging people not to vote, as the most effective means of stopping an activation of the Act (Interview 4). The interviewee felt that those opposed to the purchase knew that they were not the majority but hoped that their deliberate abstention, coupled with the apathy of others, would be enough to stop a purchase under the Act.

However, it should also be noted that there was strong support among Community Bodies for the principle of holding a ballot, and most (though not all) supported some level of minimum turnout requirement. One interviewee noted that the demonstration of community support achieved through conducting a rigorous ballot was very useful to their organisation because “no-one can say that the community don't support what we're doing” (Interview 5).

4.5.2.5 Electoral Registers

There seems to be particular confusion around obtaining a copy of the “full” electoral register for the purposes of running a community ballot and for checking signatures on the petition in support of registering a community interest in land. More than one Community Body had organised a ballot of people on the basis of the “edited” electoral register, only to discover that this would exclude some within the community. This could cause community conflict and also open up the ballot result to legal challenge. Comments about the difficulties of gaining access to the “full” register were widespread. In several cases Community Bodies only obtained a copy of the full register through individual contacts in local councils and/or a discreet “bending” of the rules to allow registers to be photocopied.

4.5.2.6 Public Interest and Sustainability

There was widespread support from research participants that, in principle, Community Bodies should make the case for there being a public interest in their acquisition of land and demonstrate that their plans were consistent with sustainable development. Representatives of Community Bodies reported few problems in meeting these criteria. However, one survey respondent considered it difficult to know what was expected in relation to sustainable development. Another viewed it as impossible to demonstrate sustainability without knowing the acquisition price for the land, thus making this requirement something of a barrier.

The strongest criticisms were that the Act was actually too weak in relation to sustainable development. One interviewee commented that:

[t]he Act doesn’t go far enough to promote meaningful community engagement (Interview 12).

Another Community Body interviewee considered it “too easy” to demonstrate sustainable development based on “best case scenarios” produced by consultants. They further perceived there to be:

a dangerous overreliance on economic sustainability and an undervaluing of social sustainability in this system” (Interview 1b).

4.5.2.7 Late Registration

Seven of the nine successful purchases using the community right to buy have been late registrations. In some cases a late registration allowed a group to block an imminent sale and gain time to organise an attempt to acquire the asset. In other cases, a timeous registration was under preparation when the Community Body found that the land was on the market. The representative of one Community Body recounted how their timeous application became a late one when a member rang the local estate agents and asked to be informed when the land in question was to be put up for sale with the result that the land was rushed on to the market (Interview 18). This illustrates the difficult local politics that can surround timeous registrations, although the interviewee from this Community Body commented that:

[I]t was not a problem of the process. It was our fault for not getting the application in (Interview 18).

However, several interviewees questioned why late registrations should be subject to stricter criteria than timeous registrations, suggesting that communities were often reluctant to invoke legislation against a local landowner without the stimulus of land going on the market. Indeed, one went so far as to argue that:

treating late registrations as exceptions is the major flaw in the Act... [T]he current view - that communities will proactively register an interest in land when it is not for sale - is either naïve, or suggests that the Act is not genuinely designed to encourage community ownership (Interview 4).

4.5.2.8 Role of Scottish Government

As the above discussion illustrates, Community Bodies have reservations about various aspects associated with the process of implementing the community right to buy provisions. However, the Community Assets Branch is generally viewed favourably as regards its role in administering that process and undertaking related case-work. Indeed, Community Bodies participating in this study have been almost unanimous in their praise for the helpfulness of Scottish Government officials, one describing them as “much better than standard civil servants” (Interview 1b).

Officials' speed of response to enquiries, together with their willingness to spend time explaining the legislation and its practicalities and provide feedback on initial drafts of applications, were all features commended by Community Bodies. In particular, site visits by Community Assets Branch officials were viewed by Community Bodies as very helpful in enabling them to better understand how the Act might apply in their case, and in improving communications with officials. Community Assets Branch officials also noted the importance of visits in case-work with both communities and landowners (Scottish Government interview).

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

Key Points

- The literature suggests that lack of awareness of the legislation, complex and resource-intensive administrative requirements and lack of available funding are significant barriers to greater use of the provisions;
- These issues are broadly reflected in our primary research findings;
- Our primary research also suggests that reluctance to provoke community conflict and damage relations with locally-based land owners, is a significant factor in explaining why community groups avoided using the community right to buy to purchase land.

Many of the specific issues identified in the preceding section as problematic for Community Bodies in relation to aspects of the implementation process may also be viewed as barriers to greater use of the community right to buy provisions. Indeed they are echoed and amplified in both the literature and our primary research findings discussed below.

4.6.1 Literature Review

Recent research on Community Land Initiatives highlighted the drying up of funding support for capital and asset purchases as the most pressing issue facing the community land sector (Bryan and Campbell 2010: 30). This issue was also identified as significant by participants in a community land conference organised by The Highland Council in March 2010 (The Highland Council 2010).

Wightman (2007) suggests that barriers to uptake of the Act's provisions include a lack of awareness of it, little apparent benefit from using the Act, obstacles to progressing the idea of registration within a community and:

difficulties posed by forcing a community consensus approach upon communities (when alternatives such as community businesses and co-ops might represent better ways forward) (Wightman 2007: 5).

Similar and related barriers have been identified elsewhere. A 2006 report on community assets for the then Office of the Deputy Prime Minister commented adversely on centralisation of decision-making, restrictions on community body structure, the lack of awareness of opportunities afforded by the Act and the restriction of the Act to rural areas (ODPM 2006: 41-43). It concluded that:

The complexity of the Land Reform (Scotland) Act 2003 is a major disincentive to community groups and illustrates the need for any England-wide proposals to be much simpler while including the necessary safeguards (ODPM 2006: 42).

The Scottish Government's report on its consultation with community groups and landowners on renewal of registrations contains several comments suggesting that having to effectively repeat the registration process every five years would be felt by many community groups as a barrier to using the Act. Such a process was described as "alarming", "disheartening and unnecessarily prohibitive" and "just... one more hurdle" (quotations from various Community Bodies in Scottish Government 2009b: 5).

It has been suggested that the unwieldiness of the Act and associated barriers to greater use may in part be intentional and that:

the legislation is primarily intended to encourage negotiated sale rather than to actually be used (SQW 2005: 46).

This view is given credence by the original guidance associated with the Act³³, where the section offering advice to communities concludes:

³³ This guidance was updated in 2009 (Scottish Government 2009a), and this wording very slightly modified.

This guidance demonstrates that community purchase of land under Part Two of the Act is no easy option, and requires both commitment and patience. You may therefore wish to consider buying the land by agreement, without the use of the legislation (Scottish Government 2004: 23).

4.6.2 Research Findings

In addition to the issues of complexity and challenging timescales discussed in the preceding section, research participants also identified lack of promotion of the Act, lack of funding support for community buy-outs and the dynamics of community-landowner relations as barriers to greater use of the provisions.

4.6.2.1 Promotion of the Act

Several research participants expressed concerns that there was little effort undertaken by the Scottish Government or Highlands and Islands Enterprise to promote uptake of the Act. There had been general publicity during the run up to the adoption of the Act by Parliament, and some stakeholders recalled ‘roadshows’ conducted by Scottish Government officials to explain the Act which had been helpful. However, there was a perception that little of this sort of work is happening now with a consequent detrimental impact on community groups’ understanding of the Act. Expert interviewees also suggested that HIE’s Community Land Unit is currently much less proactive in promoting community ownership than they were in the “early days”. There was also a related perception amongst research participants that landowners lacked understanding, or even any prior awareness, of Part Two of the Act. Participants suggested that proactive efforts be made to explain the scope and limits of the community right to buy to landowners.

4.6.2.2 Funding Support

The current study is focussed on the legislation rather than on funding schemes for land reform. However, the availability of funding to support community ownership is inevitably an important determinant of the extent to which the community right to buy provisions are used in practice. One interviewee commented that “the Act is nonsense unless the money is there” (Interview 1b) and many similar views were expressed. Another participant

commented that the demise of the Scottish Land Fund³⁴ had far more negative impacts on their group's work than their difficulties with the Part Two registration process (Interview 18). The necessity for some post-transfer financial support to sustainably develop newly acquired assets was also raised, particularly by interviewees from groups that had acquired land some years ago. Interviewees ruefully advised that other groups should "avoid having assets and no capital to run them!" (Interview 1b), or spoke of "running on empty" since acquisition (Interview 12).

4.6.2.3 Community-Landowner Relations

Representatives of several groups cited reluctance to provoke antagonism from local landowners, or conflict within the community, as motivations for not using the community right to buy provisions. In particular, there was a wish to avoid being seen as "having your eye on someone else's property" (Interview 20).

In some cases, fears of damaging relations with landowners had been realised, with the mere suggestion of altering a community group's constitution to make it eligible to register an interest in land in the future being enough to provoke "a major over-reaction and a real paranoia regarding the [group name] motives" (respondent 1, 'Purchase outwith the Act' survey), or an AGM being "stormed by a 'mob' of farmers" (Interview 20). Other interviewees cited hostility from local landowners, related to an actual application to register an interest, as causing various local community difficulties (Interview 18); or described registering an interest as "a forceful intervention" (Interview 12). One interviewee felt that the expropriative powers of Part Three of the Act were sometimes confused with the more limited "right of first refusal" of Part Two (Interview 18).

Another survey respondent (from a group that had avoided using the Act) suggested that:

happiness in using it depends how remote the landowner feels to the community (absentee or state body possibly). A community would be reluctant to use the Act against a local farmer who has been previously friendly and co-operative for example. Even if a landowner near the community is unfriendly and unco-operative, using the

³⁴ The Scottish Land Fund was closed in 2006. Subsequently, funding was available for community purchase through the BIG Lottery's *Growing Community Assets* Fund. However, funding from this source was not ring-fenced for the purposes of community land purchase.

Act against them can lead to a lifetime of obstruction and pettiness which is unproductive (respondent 12, 'Purchase outwith the Act' survey).

Analysis of the RCIL shows that 77% of entries relate to privately-owned land. It is not possible from the information in the Register to determine how many of these are absentees. However, it is clear that all of the successful activations of the community right to buy to date have been on land owned by absentees – either a public body (6 cases) or an absentee private owner (3 cases). In general, 3% of all entries relating to private land have been successfully activated, compared to 33% of entries relating to land owned by public bodies.

4.7 Stakeholders' Experiences of Community Land Acquisition outwith the Act

Key Points

- 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 community right to buy provisions of the LRSA;
- Our research found that in general community groups feel that not using the Act gives them greater flexibility and makes relations with landowners easier;
- However, one group felt that using the Act would have secured them a better deal from the landowner than they achieved by negotiating outwith the Act.

4.7.1 Literature Review

The literature on community land acquisition is concerned with the benefits of community land ownership rather than with a comparison of the procedures for acquisition and management within and outwith the Act. However, evaluations of the Scottish Land Fund (SLF) and the Community Land Unit (CLU) by the consultancy company SQW (SQW 2007, 2005 respectively) include surveys of a substantial number of CLIs (90 responses from 141 projects in the CLU evaluation and 20 case studies out of 86 projects in the Scottish Land Fund report). These evaluations suggest that funding applications, whether to the SLF or elsewhere, were complex and that many community groups would have struggled to progress their projects without external support in accessing funding and setting up legal structures. Moreover, acquisition and management of land and development projects is intrinsically challenging and demands technical expertise in various fields (e.g. legal, agriculture,

business, community development). The general picture that emerges from these reports is that land acquisitions outwith the Act, while not simple, were somewhat quicker and easier to undertake than acquisitions using the Act.

4.7.2 Research Findings

Research participants appear to view other mechanisms for securing community ownership as less complex than the community right to buy process. In particular, the [National Forest Land Scheme](#) was commended by some community group interviewees for being more straightforward to use and featuring more generous timescales, leaving it better attuned to the realities of community organising and getting large scale funding packages approved.

Community groups which acquired land outwith the Act have pursued this route partly because it meant less risk of conflict within the community. One survey respondent commented that not using the Act had meant that:

we have been able to purchase a piece of land without resorting to "aggressive" assertion of our rights. This is beneficial for community relations with local landowners (respondent 2, 'Purchase outwith the Act' survey).

Another representative of a community group which had acquired several assets outwith the Act described the delicate local politics involved in long-term community development in a rural area with large landowners present, noting that they were:

lucky at one level to have that negotiating capacity which not every community has in their area (Interview 3).

However, negotiation outwith the Act was not universally recommended. The representative of one community group that acquired land before the Act came into force commented that if their purchase:

had happened today it would have prevented the owner from cherry picking those parts of [placename] that were the most profitable assets and retaining them in their ownership. In order for community ownership and associated social enterprises to work this must be prevented in future (respondent 6, 'Purchase outwith the Act' survey).

4.8 Proposals for Change

Key Points

- Proposals for change focus mainly on specific issues relating to the implementation of the community right to buy;
- More general proposals are also made in relation to promoting the Act and making funding available to support community purchase and ownership of land.

The proposals for change set out below are drawn from the existing literature and suggestions made by participants in the current study.

4.8.1 Proposals for Change Contained in the Literature

The proceedings of recent conferences on land reform include proposals for change in relation to the community right to buy provisions of the Act. For example, the report of the *'Land Reform Rights to Buy –Where to Now?'* conference organised by The Highland Council in March 2010 concluded that:

the process must be made more straight-forward and cheaper to encourage many more community and crofting groups to use the Community Right to Buy legislation (Highland Council 2010: iii).

That conference also identified a need to raise awareness of the Act amongst community stakeholders “as one of a number of possible options towards community ownership of land” (Highland Council 2010: 24).

It was further suggested that the Community Land Unit could play a key role in both promoting success stories and feeding strategic information to potential users of the Act (for example, relating to land coming on to the market) (Highland Council 2010: 24).

A Community Woodlands Association organised event in 2008 called for greater flexibility regarding the structure of community bodies and the definition of communities. There was also a view that more promotion was needed to encourage timeous registrations of interest, and that there was a:

need to improve information – both on guidance for applicants but also wider. There is a clear need to communicate the distinction between crofters’ right to buy and the right of community bodies to register an interest in land (Bryan 2008).

Wightman (2007:18) also calls for simplification of the process of implementing the community right to buy and in defining ‘communities’. His specific proposals for change include:

- Extending eligible land to incorporate all of Scotland by including urban settlements of over 10,000 population;
- Eliminating most of the areas of Ministerial discretion in relation to the community right to buy;
- Making the formation of a community body more flexible and simplifying how communities are defined (line on a map rather than complex postcodes);
- Removing the requirement to make separate applications for each parcel of land held in separate ownership;
- Transferring administration of the Act to Communities Scotland in the short term and in the longer term to local government;
- Converting late registration procedures to a simple pre-emption right;
- Redrafting the appeal provisions to make clear that the substance of Ministerial decisions can be challenged in the Sheriff Court (Wightman 2007: 18).

Marland (2007:8) concludes her overview of the Seton Fields Community Company’s attempts to register an interest in local land with suggestions for change that include the establishment of a Community Land Unit for the South of Scotland, legal assistance for Community Bodies, and the prohibition on sales of land under application to be extended to include the 21 day appeal timetable.

4.8.2 Proposals for Change from Research Participants

Research participants also made a number of proposals in relation to implementation of the community right to buy provisions designed to encourage greater use of these provisions. Some of these proposals relate to specific aspects implementation process whilst others address wider issues of funding support and advice to community groups. They are as follows.

4.8.2.1 Process Issues

- The requirements for Community Body Memorandum and Articles of Association should be compatible with those recognised by the Office of the Scottish Charity Regulator;
- Access to the full electoral register for the purposes of the Act (checking community support petitions and organising community ballots) should be further clarified and made more straightforward in practice;
- Community Bodies should be provided with more time and flexibility to meet their obligations when using the community right to buy provisions. For example, by commencing the 6 month time-period for concluding a sale when an application to purchase is approved rather than when an application is initially made;
- ‘Late’ registrations should not be subject to stricter criteria than ‘timeous’ registrations of interest in land;
- There should be greater flexibility regarding the structures recognised as a Community Body for the purposes of using the Act. This is identified as a particular issue when an existing community group wishes to use the legislation and has to be restructured to meet the requirements of the Act;
- The turn-out requirement for a community ballot should be reduced from the current figure of 50% as this is viewed as too high and unrealistic in larger communities;
- The time-period for renewal of registrations should be extended from 5 years to between 10 and 30 years as the current time-frame is viewed by research participants as excessively onerous and a barrier to using the Act;
- The definition of community members should be widened beyond the electoral register to include non-residents with a significant personal stake in the community. For example, to include all those who pay council tax in an area;
- The geographical scope of Part Two of the Act should be extended to cover urban areas whilst maintaining a 10,000 person limit on the size of defined communities.

4.8.2.2 Support Issues

- There should be greater emphasis placed on publicity and promotion in relation to the community right to buy. For example, through the widespread distribution of simple publicity material or by undertaking Community Assets Branch “roadshows”;
- A “plain English” explanation of the implications of the right to buy should be included in the initial letter from the Scottish Government to landowners notifying them of a community application to register interest in land;
- Provision of dedicated support (similar to that provided by the Community Land Unit in the Highlands and Islands) should be made available for community asset ownership across Scotland;
- Legal aid should be provided to Community Bodies as necessary to assist them in concluding purchases of land;
- In addition to more funding being made available for community land ownership, a more co-ordinated ‘one-stop shop’ approach to providing advice on funding sources should be developed;
- There should be greater harmonisation of public funding bodies’ criteria in relation to funding awards and reporting requirements.

REFERENCES

- Bryan, A. (2008) Unpublished notes of workshop discussions at “*Next Steps for Land Reform*”, Community Woodlands Association event, 25th April 2008, Abriachan.
- Bryan, A. and Campbell, L. (2010) *Community land organisation feasibility study: final report*, report to the Community Landowners Working Group by Aigas Associates and Campbell Consulting.
- Bryden, J. and Geisler, C. (2007) *Community-based land reform: lessons from Scotland*, Land Use Policy, 24, 24-34.
- Carpenter, J. (2005) *The battle to buy*, Regeneration and Renewal, November 11th 2005 [on-line] <<http://www.regen.net/news/527097/>> [accessed on April 27th, 2010].
- CKD Galbraith (2005) *Land reform and the impact of the community right to buy*, news briefing from 9th August 2005 [on-line] <<http://www.ckdgalbraith.co.uk/land-reform-and-impact-of-community-right-to-buy>> [accessed on August 10th, 2010].
- CKD Galbraith (2010) *A year of opportunity in the sporting estates market*, report of comments by William Jackson at Spring Briefing, 26th March 2010, [on-line] <<http://www.ckdgalbraith.co.uk/a-year-of-opportunity-in-the-sporting-estates-market>> [accessed on August 10th, 2010].
- Department for Communities and Local Government (2007) *Making assets work: the Quirk review of community management and ownership of public assets*, DCLG May 2007, London: Crown copyright.
- Farr, J. (2007) *Kinghorn Loch Case Study*, Inverness: Caledonia Centre for Social Development.
- Gallacher, P. (2007) *Neilston Case Study*, Inverness: Caledonia Centre for Social Development.
- Highland Council (2010) Conference Report of “*Land reform rights to buy – where to now?*”, 23rd March 2010, Inverness.

Highlands and Islands Enterprise (2004) *The Community Right to Buy: your questions answered*. Inverness.

Holledge, R. (2010) *Scotland offers deluxe haven to the rest of Britain*, New York Times, June 24th 2010, [on-line]
<http://www.nytimes.com/2010/06/25/greathomesanddestinations/25iht-rescot.html?_r=1>
[accessed on 10th August, 2010].

Knight Frank (2010) *Scotland review: regional property market focus*, Edinburgh: Knight Frank Scotland.

Marland, A. (2007) *Seton Fields Case Study*, Inverness: Caledonia Centre for Social Development.

McKee, A. and Warren, C. (unpublished) *The Scottish revolution? evaluating the impacts of post-devolution land reform*.

Office of the Deputy Prime Minister (2006) *Communities taking control: final report of the cross-sector work group on community ownership and management of assets*, London: Crown copyright.

Pillai, A. (2010) *Sustainable rural communities? A legal perspective on the community right to buy*, Land Use Policy, 27, 895-905.

Registers of Scotland (2010) *Register of community interest in land*, Scottish Government.

Savills (2009) *Agricultural land market survey*, Savills Research.

Scottish Government (2004) *Land Reform (Scotland) Act Part 2 – community right to buy: guidance*, Edinburgh: Scottish Government.

Scottish Government (2009a) *Part Two of the Land Reform (Scotland) Act 2003 – community right to buy: guidance*. Edinburgh: Scottish Government.

Scottish Government (2009b) *Land Reform (Scotland) Act 2003 – re-registration of a community interest in land: analysis of responses on the form of the re-registration application form*.

Slee, B., Brown, K., Blackstock, K., Cook, P., Grieve, J. and Moxey, A. (2008) *Monitoring and evaluating the effects of land reform on rural Scotland: a scoping study and impact assessment*, Scottish Government Social Research.

Sprinks, J. (2007) *Scottish group loses factory bid*, Regeneration and Renewal, 7th September 2007 [on-line] < <http://www.regen.net/news/ByDiscipline/Business/736389/Scottish-group-loses-factory-bid/> > [accessed on April 27th, 2010].

SQW (2005) *Evaluation of the Community Land Unit - a final report to Highlands and Islands Enterprise*, Edinburgh: SQW Ltd.

SQW (2007) *Scottish Land Fund Evaluation: Final Report*, Edinburgh: SQW Ltd.

Wightman, A. (2007) *Land Reform (Scotland) Act 2003 (Part 2 the community right to buy): a two year review*, Caledonia Briefing No. 6, Inverness: Caledonia Centre for Social Development.

Willow Wood West Lothian Community Company (2008) *Disappointing news*, 29th October 2008 entry on Willow Wood website [on-line] <<http://www.willowwoodwestlothian.co.uk/news.asp?intent=viewstory&newsid=12035>> [accessed on April 28th, 2010].

CHAPTER FIVE

THE CROFTING COMMUNITY RIGHT TO BUY

5.1 Introduction

This chapter examines the crofting community right to buy provisions contained in Part Three of the Land Reform (Scotland) Act 2003. It begins with an overview of the crofting community right to buy (CCRtB) before reviewing relevant literature and discussing primary research findings to address the objectives for this part of the study as identified in the research specification. These objectives are to:

- Determine the extent of use of the crofting community right to buy provisions;
- Review the evidence of any additional wider impact of the LRSA on crofting right to buy;
- Identify views on implementation of the crofting right to buy provisions;
- identify barriers to greater use of the crofting community right to buy provisions of the LRSA;
- Examine stakeholders' experiences of crofting land buyouts outwith the provisions of the Act;
- Identify proposals for change to the provisions themselves or their implementation which could encourage greater use.

5.2 Overview of the Crofting Community Right to Buy

Key Points

- The crofting community right to buy is an expropriative measure in that its use does not require the consent of the landowner to sell eligible land to an eligible Crofting Community Body;
- The crofting community right to buy is envisaged as a mechanism to be used by Crofting Community Bodies only as a “fall-back position” in the event of failure to secure a negotiated sale with the landowner outwith the Act;

- The process for activating the crofting community right to buy is more complex and lengthy than the equivalent process for activating the community right to buy.

Part Three of the LRSA came into force on 15th June 2004. It is designed to enable a Crofting Community Body (CCB), representing an identified crofting community, to purchase eligible land under crofting tenure³⁵ which is associated with that crofting community. The CCB may also acquire salmon fishings and mineral rights (other than mineral rights to oil, coal, gas, gold or silver). The latter can be bought at the time of purchase or up to five years afterwards. Associated sporting rights may also be bought at the time of purchasing the croft land or up to a year afterwards.

If the sporting and/or mineral rights are leased at the time of sale, the CCB can register to buy the lease at the same time as the main sale or within five years. This is legally possible specifically because Part Three of the LRSA enables the acquisition on 'eligible croft land' of 'the landlord's interest' in its entirety. This also includes the right to acquire interposed leases providing the legal right to a third party to undertake particular economic development on that land and derive financial gain from that activity.

Subject to the owner's consent or the permission of the Scottish Land Court a sale using the crofting community right to buy may also include 'eligible additional land' which is contiguous to the relevant croft land, and under the same ownership, but not necessarily under crofting tenure. Purchase of any 'eligible additional land' excludes sporting and mineral rights (Highlands and Islands Enterprise 2004; Scottish Government 2009).

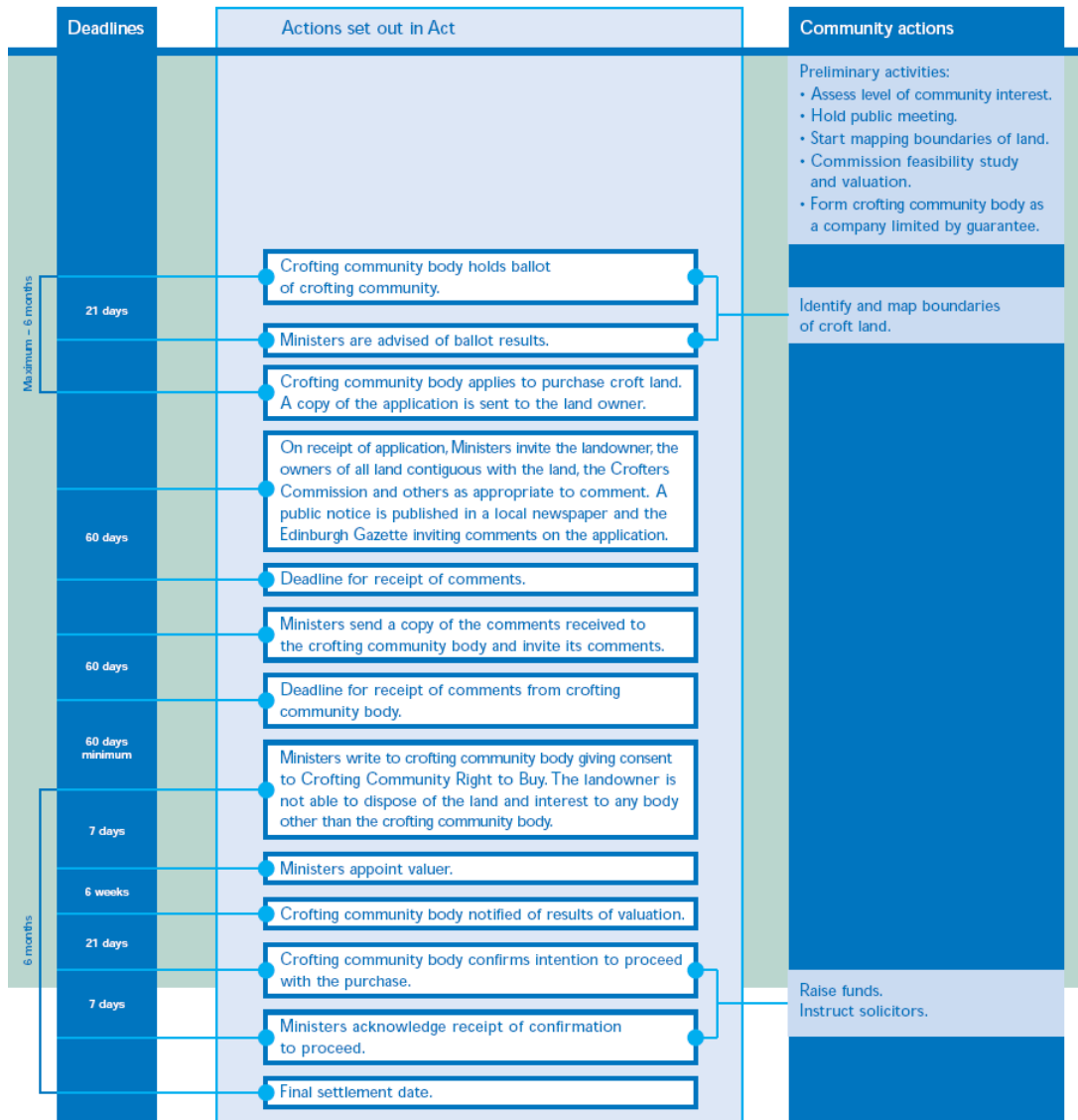
As discussed in chapter two, the community right to buy provides Community Bodies with a pre-emptive right of purchase if a landowner is willing to sell the land in question. In contrast, the crofting community right to buy is an expropriative measure in that its use does

³⁵ Land under crofting tenure is generally described as being located in 'The Crofting Counties'. Initially the Crofters Acts were applied only to crofting parishes in the counties of Argyll, Inverness, Ross and Cromarty, Sutherland, Caithness, Orkney and Shetland. The Crofting Reform etc. (Scotland) Act 2007 extended the geographic area covered by crofting legislation. This makes provision for the creation of new crofts and new common grazings within that extended geographic area which includes the whole of the Highland Council area; Moray; the parishes of Kingarth, North Bute and Rothesay in Argyll and Bute; and the islands of Arran (including Holy Island and Pladda), Great Cumbrae and Little Cumbrae in North Ayrshire. Hence a buyout under Part Three of the LRSA is, in principle, possible on land under crofting tenure in these geographic areas.

not require the consent of the landowner to sell eligible land to an eligible Crofting Community Body. As such, the crofting community right to buy is akin to a compulsory purchase. Therefore, as guidance issued by the Scottish Government makes clear, it is a mechanism to be used by CCBs only as a “fall-back position” in the event of failure to secure a negotiated sale with the landowner outwith the Act (Scottish Government 2009: 3).

The Scottish Government’s guidance also states that the crofting community right to buy process is “both complex and demanding” (Scottish Government 2009: 3). This is illustrated in **figure 5.1** which shows the timescale, process and associated crofting community actions involved in activating the crofting community right to buy.

Figure 5.1: Activating the Crofting Community Right to Buy



Source: Highlands and Islands Enterprise. [The Crofting Community Right to Buy: your questions answered.](#)

As **figure 5.1** shows, the process for activating the crofting community right to buy is more complex and lengthy than the equivalent process for activating the community right to buy. In particular, there are key differences in relation to the composition of the [crofting] community body, definitions of ‘community’ and balloting and mapping requirements. These are briefly discussed below.

5.2.1 The Crofting Community Body

The Crofting Community Body (CCB), in the form of a company limited by guarantee, is the vehicle which must be used if the right to buy is to be invoked.³⁶ The CCB needs to identify two main groups in its community:

- (1) the croft tenants and
- (2) the other township or community residents.

This is so that they can meet the statutory requirements for conducting the CCB's ballot in the Crofting Community Right to Buy (Ballot) (Scotland) Regulations 2004. The majority of the CCB must be members of the crofting community (as defined in The Act) and they must have control of the company³⁷ (MacAskill 2004: 112).

Scottish Government guidance (2009) suggests a number of steps to identify the two groups of members of a crofting community. These are shown in **figure 5.2**. As the Act does not define "resident", CCBs are invited to proceed on an inclusive basis. Thus:

- any person living in a house in the crofting community for a period rather than continuously, should still be regarded as being resident;
- any person who is not a UK national can register to vote in local government elections, and if registered, should not be debarred from being considered a member of the crofting community for the purposes of membership of the CCB and the ballot.

³⁶ LRSA (s.71(1))

³⁷ LRSA (s.71(1)(d) and (e)).

Figure 5.2: Identifying the Crofting Community

CROFTERS

Obtain list of tenanted crofts are from the Crofters Commission. Measured in a direct line, do tenants of the township crofts or shares live within 16km of the township?

NO
↓

Exclude

YES
↓

Are the tenants entered on the current local government elections voters roll in the polling district in which the township lies?

NO

Are the tenants entered in the local government elections voters roll in the polling district where they live?

NO

Exclude

YES

OTHER TOWNSHIP RESIDENTS

Are they resident in houses or on crofts contiguous to crofts sharing in the common grazing?

YES
↓

Are the residents in these houses entered in the local government elections voters roll of the polling district in which the township lies?

YES

Include

NO
↓

← **YES**

Are these houses on or contiguous to the common grazings?

NO

Exclude

Draw up list of eligible tenants and other residents.

Source: Scottish Government 2009: 13.

5.2.2 Balloting ‘the Crofting Community’

For a Part Three application one ballot will suffice. However, unlike Part Two ballots, there are two different counts:

The first count must demonstrate that a simple majority of votes are in favour of the purchase. The second count must show that the majority of votes of crofters, who are tenants on the land concerned, are in favour (Highlands and Islands Enterprise 2004).

These two different counts highlight an additional layer of complexity in terms of gaining the support of crofters and the wider membership of the ‘crofting community’ as defined in the Act when choosing to pursue the crofting community right to buy.

5.2.3 Mapping the Crofting Community and Boundaries of Land

The application form requires the crofting community to be identified by marking on a map those individual households of members of the resident crofting community. This requirement is in addition to a map or maps showing the location and boundaries of the land itself. [Section 73\(5\)](#) of the Act requires that:

Such an application shall be made in the prescribed form and shall include or be accompanied by information of the prescribed kind including information (provided, where appropriate, by or by reference to maps or drawings) about—

- (a) the location and boundaries of the land or sporting interests in respect of which the right to buy is sought to be exercised (the “subjects of the application”);
- (b) all—
 - i. rights and interests in the subjects of the application;
 - ii. sewers, pipes, lines, watercourses or other conduits and fences, dykes, ditches or other boundaries in or on the land, known to the applicant body or the existence of which it is, on reasonably diligent inquiry, capable of ascertaining;

- (c) whether the crofting community body proposes to exclude from the eligible croft land which it proposes to buy—
- i. salmon fishings in inland waters within or contiguous to; or
 - ii. mineral rights in,
the land;

As discussed later in this chapter, the above requirements place significant demands upon Crofting Community Bodies aspiring to use the crofting community right to buy. As such, they represent important but not exclusive barriers to greater use of the provisions.

5.3 Current Extent of Use of the Crofting Community Right to Buy Provisions

Key Points

- Current use of the crofting community right to buy provisions is very limited. Only the Galson Trust and the Pairc Trust, both of which are located in the Isle of Lewis, have ever applied 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 purchase was concluded outwith the Act;
- In the case of the Pairc Trust, the landlord has explored a range of legal means to avoid or delay sale. The case is still unresolved and awaiting a Court of Session hearing in October 2010.

To date, there have been two applications under Part Three (by the Galson Trust and the Pairc Trust, both located in the Isle of Lewis). In the case of the Galson Trust, registration brought the landowner's representative to the negotiating table and, although the registration was 'active', the transfer of ownership was a negotiated private sale outwith the Act. In the case of the Pairc Trust, the landlord is exploring a range of legal means to avoid or delay sale. Both the Galson Trust's and the Pairc Trust's use of the crofting community right to buy is discussed in the next section.

The limited use of Part Three of the Act is in line with Slee at al's comments that:

The experience to date appears to be consistent with [Land Reform Policy Group] expectations: it is doubtful whether many communities will exercise a right to bring

land into community ownership. However there is general support, even from some crofting landlords, for the view that legislation should be available although it is unlikely to be much used (Slee et al 2008: 109).

Slee et al (2008) point to the complexity and resource-heavy nature of implementation as a deterrent to crofting communities' use of the Part Three provisions. They further note that the Part Three rights apply to whole estates, which tend to have heterogeneous population and land tenure arrangements thereby complicating community organising. In contrast, they argue that communities have greater flexibility to define their own boundaries under Part Two of the Act.

As well as the onerous nature of exercising the crofting community right to buy, other factors have also been suggested as possibly contributing to low take-up. Writing before the Act was passed, MacPhail (2003) notes that some crofting groups were wary of the suggestion in the draft Bill that crofting community land initiatives would be:

forced to adopt a structure which includes non-crofters and that in some instances this will not be the most effective approach and might indeed be a hindrance (MacPhail 2003: 17).

Concerns regarding the relationship between crofters and non-crofters within the context of Part Three of the Act were a feature of the debate on the Draft Land Reform Bill in 2001. At the time, the then Scottish Crofters Union (now Scottish Crofters Federation) issued a press release stating:

We believe that the definitions of 'crofting community' and 'crofting township' used in the draft bill could in some cases mean that the crofters themselves will in fact not have the right to determine the ownership of their own land, nor ensure its management in the best interests of crofting. The broad definition used could mean that the crofters' voice would in fact be a minority within the 'crofting community body'. With the proposed more general right to buy not being pre-emptive, there could well be pressure in some areas for broader community interest to use the crofting right to buy for their own ends, over the heads of the crofters (Scottish Crofters Union Press Release 22/02/01).

In considering the relative disengagement of crofting communities in community land control since the LRSA came into force, Brown (2008: 346) suggests that:

in general, crofters prefer to remain tenants of common grazings and not to embrace common ownership. This lack of interest in common rights is mirrored in the low take-up of the Crofting Community Right to Buy.

She explains this preference both in terms of crofters' existing security of tenure and a lack of active crofting and community solidarity in some areas. However, she contrasts the Highland mainland with more active crofting areas in the islands; a distinction also drawn by Brown and Slee (2002) in comparing active and moribund common grazings committees in crofting areas.

5.4 Views on Implementation of the Crofting Right to Buy Provisions

Key Points

- Using the crofting community right to buy provisions is viewed by community groups and other stakeholders as a complex and resource intensive process;
- The crofting community right to buy mapping requirements are viewed as being in excess of the normal standards required for an estate sale;
- The Pairc Trust has not yet successfully completed the process of exercising the crofting community right to buy 5 years after its initial application was submitted to the Scottish Government for approval.

This section examines the Galson and Pairc Trusts' experience of using the crofting community right to buy provisions and also considers the views of other stakeholders on the implementation process.

5.4.1 The Galson Trust

The Galson Estate comprises 22,662 hectares on the west side of Lewis and runs northwards to include Ness and The Butt of Lewis. It is home to some 3,000 people scattered across 22 townships and 3 Community Council areas.

The Galson Trust prepared and submitted an application under Part Three in 2004 after attempts at an amicable negotiated sale of the estate were rebuffed by the landowners. The experience of the Trust provides a unique case-study in terms of using the crofting community right to buy provisions as a leverage mechanism to secure community land ownership. As a member of the Trust's Board noted:

We didn't use [the crofting community right to buy] in the event. We didn't have to invoke it although we went as far as submitting an application, so the word 'lever' is very pertinent. At a very early stage we carried out a referendum which showed that the local support was there to proceed with a Part Three application, to go forward with a purchase irrespective of where the landlord stood. We did that as soon as our Trust was established. We made it a priority to request a 'round the table' meeting with the landlords and we put our cards on the table. We explained that the referendum was done and the extent of support for taking an application forward. But we said that it was preferable to take it forward as an amicable arrangement and not invoke the Act if at all possible (Interview 17).

The complexities of Part Three of the Act had an early influence on how the Galson Trust chose to proceed:

[W]e decided at an early stage [with] our Part 3 application [that], because of the mapping requirements particularly, we couldn't go for the inbye³⁸ ground. It became clear that mapping that was an almost impossible task. So we settled on a staged process by going for the common grazings³⁹ in the first instance. [We] then planned to tackle the inbye later. A large chunk of the common grazings had been leased to AMEC. The landowners had set up an 'arms-length' company to whom they had leased the land and that company had leased land to AMEC; an interposed lease. So it was not entirely straightforward (Interview 17).

The Trust embarked upon a dual strategy to secure its objectives with preparation of a Part Three application proceeding in tandem with amicable meetings with the landlord. As the Trust's representative noted, the process of preparing the application and representing the

³⁸ 'Inbye' is the croft tenant's individual parcel of ground in relation to their croft tenancy.

³⁹ 'Common grazings' are areas of land used for rough grazing.

group in negotiations with the landlords was onerous and exhausting for Trust Members participating in these roles:

Preparation of the Part Three application was a hugely onerous task. Two or three of our group undertook that and it was completed and submitted, but [we] also kept moving along with amicable meetings with the landlord. After our second meeting with the landlords they appointed a land agent to act on their behalf and expected [the Trust] to do a similar thing but [named individuals] continued to act on behalf of the group. It was extremely nerve wracking and extremely time consuming (Interview 17).

However, progress towards a sale continued with the Part Three application remaining as one of the Trust's tools in the negotiation process:

Then things started moving. Our Part Three application was accepted by Ministers. We began to make progress with the landlords' agent. But right up to when the deal was signed we had our Part Three application the table... [I]t remained a live application and hence continued to provide us with that lever. I don't know if we would have had the energy at that stage to pick up Part Three if the amicable talks had failed. We would have needed new hands round the table because it was exhausting (Interview 17).

The Galson Trust assumed control of the estate on 12th January 2007. The full process from setting up a CCB to acquiring title to the land took three years to complete.

5.4.2 The Pairc Trust

The Pairc Estate, owned by Pairc Crofters Ltd, comprises of 10,846 hectares and is home to circa 400 people located in 12 townships on the south- east side of the Isle of Lewis. In 2003 the Pairc Trust was formed with a view to investigating the scope for undertaking a community purchase of the estate via amicable negotiations. This was in response to proposals by the landlord and Southern and Scottish Electricity (SSE) for wind farm development on the estate.

In 2005 the Trust lodged an application with the Scottish Government to purchase the common grazings part of the estate following advice from the Community Land Unit as to

the tight timescales and detailed mapping requirements associated with a full estate buyout using the crofting community right to buy provisions. Leases given by Pairc Crofters Ltd to Pairc Renewables Ltd and a subsequent lease to Scottish and Southern Energy Ltd led the then Scottish Executive to seek legal clarification as to what the Crofting Community Body could buy in this regard. The Press summary of the subsequent Scottish Land Court ruling in 2007 stated that:

The Court [paras 138-152] held that the purpose and effect of the 2003 Act was simply to put the crofting community body in place of the previous proprietor as owner of the land in question and that they therefore took the land not only with all the rights but also subject to all the burdens attached to it, just as it had been held by the previous owner (Scottish Land Court Press Summary:2).

The press summary of the ruling further noted that:

the Court also rejected [paras 153-166] an argument by Pairc Crofters Limited that the lochs and watercourses on a common grazings are not “eligible croft land” within the meaning of the 2003 Act and cannot, therefore, be bought as part of a community buy-out. Such an interpretation, the Court said, was at odds with how the term “common grazing” was commonly understood and would lead to results unlikely to have been intended by Parliament [para 157] (Scottish Land Court Press Summary: 2).

Following the Scottish Land Court’s ruling that interposed leases should come under the terms of any sale the landowner offered to enter into amicable negotiations over a sale to Pairc Trust. This offer was accepted by the Trust. As in the case of the Galson Estate buyout, the Part Three application was retained by the Pairc Trust as a ‘fall back’ option.

In view of the delays with the application process caused by the Scottish Government seeking a ruling on interposed leases from the Scottish Land Court, Pairc Trust decided to hold a second ballot in 2009 under the terms and conditions of LRSA to verify on-going commitment to pursuing the crofting community right to buy. This ballot had a 75% turnout and a 69% ‘Yes’ vote and was dually acknowledged as conforming with section 75 of the Land Reform (Scotland) Act 2003 and the Crofting Community Right to Buy (Ballot) (Scotland) Regulations 2004 by The Rural Communities Division on behalf of Scottish

Ministers on 21st December 2009⁴⁰. The Ministers hence started the ‘clock ticking’ in terms of due process on 17th March 2010.

Paire Trust again sought to buy the landowners interest, including mineral and sporting rights and interposed leases, and submitted two new applications to purchase under the terms of the LRSA. Under normal timescales that would have led to approval or rejection of the application on 16th May 2010. However the landowner has lodged a legal challenge at the Court of Session concerning an alleged breach of his human rights. The Court of Session was due to consider the case in July 2010 but this has now been delayed till October 2010. Consequently, the outcome of the Paire Trust’s efforts to exercise the crofting community right to buy remains unresolved.

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

Key Points

- Concerns that the crofting community right to buy provisions may be unworkable in practice, allied to their function as a ‘fall-back position’ of last resort arguably represent the key barriers to their greater use;
- Other identified barriers include complex and onerous mapping requirements, insufficient awareness and promotion of the provisions, lack of funding support and advice, and a perceived lack of fit between the crofting community right to buy and other recent reforms of crofting legislation and policy.

The experiences of the Galson Trust and especially the Paire Trust are unlikely to have other crofting community bodies clamouring to use the crofting community right to buy. Indeed, concerns that the provisions may be unworkable in practice – allied to their function as a ‘fall-back position’ of last resort – arguably represent the key barriers to their greater use.

Further barriers relate primarily to the complexity of mapping requirements and more general issues relating to awareness and promotion of the crofting community right to buy, availability of funding support and advice and the fit between Part Three of the LRSA with other crofting legislation and policy. These issues are discussed below.

⁴⁰ Letter received by Paire Trust - http://www.pairetrust.co.uk/paire_ballot.pdf

5.5.1 Mapping Requirements

Available literature and our primary research findings indicate that the demands regarding mapping and associated information for activating the crofting community right to buy are not only very difficult to deal with but also go beyond that which is actually needed for a legally competent land sale. Moreover, a number of participants noted the different and much more straightforward requirement for maps, plans or drawings accompanying the registration of an interest in a community right to buy (Interviews EXP01; EXP05; 1a; 13; 17).

There are particular issues to note relating to the following mapping requirements under the crofting community right to buy:

- **“(i) all rights and interests in the subjects of the application”**; - this information might or might not be available to the landowner, who may resist providing it to the crofting community body in any case;
- **“(ii) all sewers, pipes, lines, watercourses or other conduits and fences, dykes, ditches or other boundaries in or on the land, known to the applicant body or the existence of which it is, on reasonably diligent inquiry, capable of ascertaining”** – this is beyond the level and quality of information normally required for an estate sale.

It is not known what might constitute ‘reasonably diligent’ but it is known that the real cost of mapping Pairc or Galson or any other such estate would be more than the sale price itself (Interviews EXP01; EXP05; 17; Highland Council Conference Report 2010: 19 and 23). Indeed landowners and land agents were aware in advance of the Act that mapping inbye ground is often prohibitively expensive and impossibly complicated – even at a far lower standard. As one interviewee noted:

Even before the Act - for the sale of North Assynt, the Vesteyes excluded the Achmelvich inbye because it was impossible to map. It is too complicated to establish title (Interview 1a).

Another interviewee also commented on the complexities of the mapping process for the Community Trusts which have formally engaged with Part Three of the Act:

Crofting community right to buy is the only possibility over crofting land. That means you have to take the estate and then map it like a moth eaten blanket – every house; BT exchange; garden; the footprint of a foghorn on The Butt of Lewis; the 1839 Free Church which has not got title. All the 19th century dusty deeds. And one mistake – one inch on your map that is not crofting land - and the Ministers shall be entitled to disregard your application (Interview EXP07).

The complexity of the mapping process was also highlighted at the Highland Council Conference in March 2010. There John Randall, Vice-Chair of the Pairc Trust, stated:

[M]any of the provisions in Part 3, for example the detailed mapping requirements and the need to describe features like dykes, ditches and watercourses, have no apparent purpose and certainly go well beyond what is normally required for a private sale. Major simplification is required in this area (Highland Council 2010: 19).

At the same Conference Simon Fraser reported that:

The Act requires the mapping of every household, boundary, ditch, pipe, sewer etc and definition of the land itself. This extreme level of detail would cost potentially more to produce than the cost of buying the land. And, once the application had been submitted, the detail could not be amended, but could be challenged (Highland Council 2010: 23).

5.5.2 Awareness and Promotion of the Crofting Community Right to Buy

In addition to the above barriers, some research participants were of the view that the crofting community right to buy has not been promoted to a broad range of existing organisations such as community councils and the general public. As one interviewee noted:

[N]o leaflets; no roadshows, no adverts, no outreach, no extension work (Interview EXP07).

Within the context of awareness raising and sharing information in relation to Part Three it is worth also noting that the details of past applications to exercise the crofting community right

to buy are not available on-line⁴¹. At present, a personal enquiry to The Crofters Commission is necessary and the documents pertaining to Part Three registrations are not yet digitised. This does little to assist in promoting transparency and accessibility for Crofting Community Bodies seeking guidance in relation to initiating a Part Three application.

5.5.3 Funding Support and Advice

A number of research participants highlighted the reduction in available ring-fenced public funding in support of community ownership and, by extension, crofting community ownership as a further barrier to implementing Part Three of the Act. There was also a perception that the level of support available from the Community Land Unit was not as high as it had been previously.

Changes in funding regimes since closure of the Scottish Land Fund in 2006 and a perceived reduction in the levels of support which the Community Land Unit could offer the community ownership sector as a whole were considered barriers to development of the community land ownership sector generally and crofting community ownership in particular. Such changes were also viewed as a threat to the sustainability of existing community groups which had purchased land. In particular, the need for revenue funding for development staff at the outset was deemed to be fundamental to delivering on the sustainable development potential of community ownership and the huge investment of voluntary time.

The following comments reflect respondents' views regarding the changed funding and support environment:

Early on people were flying by seat of their pants and there was money for early development. Now there's nothing available for anything (Interview EXP05);

CLU has changed. It is not so proactive now but equally CLU is in a difficult position between those who want it to take a useful enabling and supporting role and those who suggest that public agency staff and civil servants cannot appropriately hand-hold and make decisions on registrations and funding applications (Interview EXP07);

⁴¹ The Crofters Commission, which is defined as The Keeper of The Crofting Community Right To Buy Register, is currently reviewing its processes and as part of that review will decide on an appropriate approach to make this material more readily available.

The ‘old guard’ were lucky. The support was there; finance was there. You could phone up Auchertyre and say “we’ve got this problem and this idea” and they would say, “just go and do it”. It worked. Then came the sea-change; people don’t get that any more (Interview EXP01).

5.5.4 Fit with other Crofting Legislation and Policy

Other research has noted difficulties in drawing together different strands of rural policy to generate synergy (Miller et al 2009; Slee et al 2009; Moxey et al 2009). Within the context of crofting, an apparent failure by Government to address the issue of where crofting fits within the contemporary strategic context of rural sustainable development within the Highlands and Islands has also been noted (Macleod and Busby 2010).

This theme of policy disconnection was highlighted by participants in the current study, with a suggestion that debate and action regarding land reform and the LRSA have proceeded in relative isolation from developments in crofting legislation. One respondent commented:

It is also noticeable that different kinds of land-related legislation are treated as though they don’t affect each other at all. As the West Highland Free Press has noted in terms of the Croft Reform Bill – the determination of government via that Bill to encourage more owner occupation of crofts is arguably bizarre when set alongside the simultaneous encouragement of the community and crofting community right to buy. The biggest buyout in South Uist is all under crofting tenure and this land was all brought into community ownership with a lot of public money. Government can simultaneously - on the same piece of ground - be promoting individual ownership and community ownership! (Interview EXP03).

5.5.4.1 Croft Tenancies and Community Ownership

Consideration of the features of a croft tenancy helps to further illustrate the complex dynamics of individual versus community ownership within a crofting context.

A standard croft tenancy consists of two key parts – the tenant’s individual parcel of ground which across the whole of the ‘Crofting Counties’ averages 5 hectares in size but can in fact vary from 1 hectare or less to 20 hectares or substantially more. This individual parcel is ‘the inbye’ for that croft and in general each croft will have its own parcel of inbye ground –

though in some cases that inbye ground might be in several little, scattered parcels and might even still include strip shares or runrig.

The other component of the tenancy is the grazings share. If the share is amongst 20 crofts with one grazings share per croft and a common grazings of 1,000 hectares then the individual croft tenant's grazings share is 1/20 or 50 hectares. Where a croft tenant has purchased her/his inbye that tenant will have become 'the owner occupier' of the inbye ground but will still be treated as the tenant of the grazings share.

As the Galson Trust discovered when exploring use of the crofting community right to buy, and as other research participants have also noted, it is impractical to consider a Part Three application on inbye ground. Therefore, by voting 'Yes' to a Part Three action the croft tenants are in effective agreeing – should the action be successful – to have two landlords. One of those landlords is the new Crofting Community Body who will be landlord of the common grazings only and the croft tenant will have a voting right as a member of that body. The other landlord will be landlord of the inbye only.

The prospect of multiple landlords has been known to cause alarm among croft tenants in the past (MacAskill 1999: 40; MacPhail 2002: 261). It is often assumed that the croft tenant will need to pay two rents to two separate landlords but in fact in law the croft tenant should be expected to continue paying one rent to the landlord of the inbye and it is up to the two landlords to make arrangements for rental due on the common grazings to be passed from the landlord of the inbye to the landlord of the common grazings⁴². It should be noted therefore that the new CCB landlord needs to negotiate this with the landlord of the inbye ground.

5.5.4.2 Closure of the 'Whitbread v. MacDonald' Loophole

The Crofting Reform (Scotland) Act 2010, and related provisions, has closed the 'Whitbread v. MacDonald' loophole which was discovered in 1992 and which served the Assynt Crofters Trust well in their buy-out negotiations and campaign. This approach actually requires all croft tenants to apply for contiguous apportionments in advance of such a transfer and does not allow for transfer of mineral and sporting rights since it is done under the 1976 Act. The 2010 Act makes this option for 'breaking the market' a thing of the past by closing the

⁴² Flyn and Agnew – 2010 – personal communication.

‘loophole’ As a number of research participants noted, a powerful and proven bargaining option is therefore removed from crofting bodies seeking to achieve a land buyout.

These technical factors, together with differing perspectives as to what constitutes the crofting community therefore have the potential to further impede use of the crofting community right to buy.

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

Key Points

- Community groups undertaking crofting community buyouts outwith the LRSA perceive the legislation to have been a useful lever in terms of ensuring a successful conclusion to negotiations;
- The CCRtB appears to have had little impact on the land market.

The points noted in chapter four regarding difficulties associated with tracking and measuring the wider impact of the LRSA on community ownership are equally applicable to crofting community ownership. 6 community groups have purchased land under crofting tenure either immediately prior to the passing of the LRSA or thereafter. These groups include:

- The North Harris Trust;
- Kingsburgh Forest Trust;
- Colonsay Community Development Company;
- Stòras Uibhist;
- The West Harris Trust;
- The Galson Trust.

As discussed in the next section of this chapter, a number of these groups consider the Act in general, and the crofting community right to buy in particular, to have been significant in helping to bring about a successful conclusion to purchase negotiations with the relevant landowner.

5.6.1 ‘Community Group – Landowner’ Relations

The idea that Part Three of the Act has had an important indirect impact on the ‘landowner-community group’ relationship was alluded to in the comments of one interviewee for this study:

The Crofting Community Right to Buy is interesting. It is the only really radical bit of the entire legislation. It is a signal. As a means to changing the world the crofting right to buy is far more radical because it can be used whether the landlord wants to sell or not. But it hasn’t been used because it is only likely to be used if something like Assynt happened where a sudden threat by one or several disinterested landlords might emerge. Now there is an instantaneous way of dealing with that (Interview EXP03).

The idea that the crofting community right to buy offers an ‘instantaneous’ way of dealing with issues has to be set within the context of the Paice Trust’s experience of attempting to exercise that right. Moreover, while the crofting community right to buy has been acknowledged by interviewees as having acted as a catalyst or lever to help facilitate buyouts, negotiated sales outwith the Act are in their view more achievable and/or preferable if at all possible.

5.6.2 Impacts on the Land Market

Research participants felt that there has been no noticeable impact of Part Three of the LRSA on the land market, although there might be on a ‘crofting only’ estate. However, these estates do not tend to come on to the market very frequently. It is not known whether estate agents would share this view on impacts to date but the evidence presented by Watson (2006) regarding the marketing of Balnacoil Estate in Sutherland in 2006 indicates a very different view. In that article representatives of Strutt & Parker and The Crofters Commission expressed the view that a two-tier land market is emerging and that estates with no croft tenants have a far greater value because there is no-one available to exercise ‘a right to buy’.

5.7 Stakeholders' Experiences of Crofting Land Buyouts Outwith the Act

Key Points

- 6 community purchases of land under crofting tenure have occurred either immediately prior to the LRSA coming into force or thereafter;
- All of these buyouts have occurred in The Small Isles, The Western Isles and Skye;
- In 2010 The Transfer of Crofting Estates (Scotland) Act 1997 was used for the first time to purchase croft land;
- Groups undertaking these crofting community buyouts are strongly focused on adopting an inclusive approach to community ownership and maximising local assets in pursuit of the sustainable development of their communities.

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. A further notable feature is the inclusive approach – incorporating crofter and wider community interests – which underpins developmental initiatives undertaken as a result of these community purchases of land. In all of these instances, the purchase process has had a less protracted timescale and been characterised by more amicable relations than experienced in the one case where an application to exercise the crofting community right to buy is being pursued. Here we provide brief summaries of 5 of these community purchases (the exception being that relating to the Galson Estate discussed earlier).

5.7.1 North Harris Trust

The North Harris Trust purchased the 22,257 hectares North Harris Estate in 2002. The imminent arrival of the LRSA was credited by a research participant associated with the Trust as having eased the way towards the 2002 purchase. Exploration of collective simultaneous transfer of all croft land to the new community body, via the *Whitbread v MacDonald* loophole, was used by the Trust as a bargaining tactic to encourage a sale.

The legal structure chosen for the community group was a company limited by guarantee with open membership for all full-time residents. Care was taken in creating the committee structure to ensure good geographical coverage and an appropriate voice for the croft tenants (Reid 2003: 8).

In 2006 the North Harris Trust bought the Loch Seaforth Estate thereby adding 3,035 hectares to the land under community ownership. Today North Harris has 130 crofts in 17 townships. The Trust manages income from a fish farm lease and employs a full-time development officer and a part-time administrator. The Trust is currently focusing on eight main projects:

- **Whaling station** – stabilisation and renovation of important built heritage;
- **Property** – affordable housing development for 8 units, 3 affordable self-build plots plus office accommodation for the group with a social housing flat in the same building;
- **North Harris Trading Co Limited** – renewable energy projects such as a 150kw wind turbine which will be connected to The National Grid in 2012; development of zero-carbon business units locally; micro-hydro scheme and support for a range of other green projects;
- **Leases** – income generation from communications and aquaculture leases;
- **Land management** – maintenance and repair of 36 miles of paths and footbridges;
- **Crofting development** – through project-based support for crofting activity;
- **Deer herd** – stalking, culling, deer management and re-establishment of the local Deer Management Group to achieve shared management with neighbouring landowners;
- **Land release** – 14 plots released for affordable housing⁴³.

5.7.2 Kingsburgh Forest Trust

Local residents and crofters in Kingsburgh have created a community woodland organisation which owns and manages 178 hectares located on Glenhinnisdal and Glenuachdarach in Trotternish on the Isle of Skye. The impetus for creation of this group was Forest Enterprise's desire to dispose of that ground to a private buyer. The croft tenants were pivotal in opposing this initiative:

⁴³ North Harris Trust website - <http://www.north-harris.org/projects.htm>

Kingsburgh Common Grazings Committee objected to this move and began a campaign to acquire the plantations, jointly called Kingsburgh Forest, on behalf of the local community. This campaign proved successful and in 2003 the Trust purchased the 178 hectares of woodland from Forest Enterprise with the aid of grants from the Scottish Land Fund and the Community Land Unit⁴⁴.

About 100 hectares is ground formerly owned by Forest Enterprise. The remaining ground (78 hectares) was also owned by Forest Enterprise but was in crofting tenure as common grazings. It was decrofted out of the Kingsburgh Common Grazings in 2003 to help create this land-based asset for the wider community. The key activities currently are planting, replanting and firewood processing for local use.

5.7.3 Colonsay Community Development Company

In 2004 the Colonsay Community Development Company began exploring the idea of buying ground on the Ardfin Estate on Jura to create crofts to help attract new families to the island. During 2007 the group sought agreement from their membership to change their structure to one which would fit with the needs of LRSA. It was reported in the Annual General Meeting Minute for that year that this agreement had not been secured⁴⁵, highlighting how difficult it can be for existing groups to use the LRSA. This group therefore proceeded in its efforts to purchase land for community ownership outwith LRSA.

The necessary ground – 80 hectares - was bought using Scottish Land Fund finance and five bareland crofts were created⁴⁶. In 2008 the five crofts were advertised for letting and applications were invited. Work on letting the crofts and organising full planning permission for certain of the crofts is on-going⁴⁷.

5.7.4 Stòras Uibhist

Stòras Uibhist has a population of 2,700 and 850 croft tenants on 37,635 hectares. In 2007 the community purchase of the estate was concluded through negotiations with the 15 strong partnership which had owned the estate for many years. Stòras Uibhist had threatened to use the Part Three route to secure the estate but proceeded instead via negotiations outwith the

⁴⁴ Kingsburgh Forest Trust website - <http://www.kft-skye.org.uk/about.html>

⁴⁵ <http://www.colonsay.org.uk/CCDC%20Agenda.htm>

⁴⁶ A bareland croft is a croft with no house or other building situated on it.

⁴⁷ <http://www.colonsay.org.uk/CCDCMins230310.htm>

Act. As with both the Galson and Pairc Trusts, in the case of the Stòras Uibhist mapping was a problematic issue when considering the use of Part Three of the LRSA. As one of this study's interviewee's noted:

The printed search sheets show 190 pages of minutes. There are 2,000 transactions in the 20th century alone. You have to go through every one; and order deeds from the National Archives and hope they are useable. Any mistake is fatal (Interview EXP05).

Stòras Uibhist's key current areas of activity are:

- Coastal protection through use of sand-trapping;
- Managing and letting Grogarry Lodge;
- Pursuing a renewables development focused on production of 6.9MW of energy for the National Grid;
- Developing Askernish Golf Course;
- Letting commercial sites and leases (including 6 quarries) and creating access to land for development;
- Creating plans for a new harbour redevelopment at Lochboisdale;
- Factoring the crofting estate.

5.7.5 The West Harris Trust

The West Harris Estate, previously owned by the Scottish Government Rural Payments and Inspections Directorate, comprises 6,578 hectares with 52 crofts in 4 townships and a population of 123 people. In 2007 the West Harris Trust began considering a community buyout and discussed using the LRSA. However, the Trust opted instead to use The Transfer of Crofting Estates (Scotland) Act 1997; the first time that this legislation has been used.

A representative of the Trust stated:

The Trust had considered using Part Two (and if necessary Part Three of LRSA) but legal advice was to avoid it if possible as it is too complicated and onerous. By comparison, the 1997 Act is considered to be a relatively straightforward process (Interview 19).

A Steering Group was created in 2007 and a feasibility study was carried out in 2008. In January 2010 it was announced that the sale had been completed at a price of £59,000. This is a relatively short timescale for completion in comparison to the experience of the Paicr Trust in using Part Three of the LRSA. However, The Transfer of Crofting Estates (Scotland) Act 1997 is demanding in other ways. This route also requires a ballot which in the West Harris case resulted in a turnout of 90%, with 76% of participants in favour of the buyout. Under this ballot system a failure to vote is counted as a 'NO' vote, which is not the case with the LRSA.

The Trust will identify 10 house sites within the area and these will be made available for sale at affordable prices for families wishing to move into the area to live and work.

5.8 Proposals for Change

Research participants made a number of proposals in relation to implementation of the crofting community right to buy provisions designed to encourage greater use of these provisions. As with proposals detailed in chapter four regarding the community right to buy, some of these relate to specific aspects of the implementation process. Others address wider issues of funding support and advice for community groups.

5.8.1 Process Issues

- Allow mapping errors in applications to be corrected and applications resubmitted;
- Make the definition of the Crofting Community Body more flexible;
- The Crofting Reform (Scotland) Act 2010 extends the distance for the duty of residence for both tenant crofters and owner-occupier crofters from 16km to 32km. The relevant provisions of Part Three of the LRSA should be adjusted accordingly;
- Reinstate late registrations to use Part Three of the Act;
- Extend the application of Part Three to include the seabed to facilitate off-shore renewables developments.

5.8.2 Support Issues

- Develop guidance and suitable proformas for use by crofting community landowners in order to help them use depersonalised, even-handed systems in their duties as landlords;
- Facilitate better alignment of government departments to enable asset transfer simply and cheaply;
- Establish a programme within Scottish Government solely related to the disposal of the Crofting Estates;
- Create a revolving Land Fund so that funds revolve via long term loans which encourage financial sustainability for each group and the whole sector.

REFERENCES

- Brown, A. (2008) *Crofter forestry, land reform and the ideology of community*, Social Legal Studies, vol. 17, 333-349.
- Brown, K. M. and Slee, B. (2002) *Saliency and its implications for common-pool resource management in Scotland: a tragedy of a different kind?*, paper presented to the International Association for the Study of Common Property (IASCP) 2002 Conference entitled “The Commons in an Age of Globalisation”, 17-21 June 2002, Victoria Falls, Zimbabwe.
- Colonsay Community Company (2008) *Minutes of Meetings* [on-line]
<[file://localhost/Colonsay Community Company \(2010\) Minute of Meeting %5Bon-line%5D](file://localhost/Colonsay%20Community%20Company%20(2010)%20Minute%20of%20Meeting%20-%20on-line%20-%20http://www.colonsay.org.uk/CCDCMins230310.htm)
<<http://www.colonsay.org.uk/CCDCMins230310.htm>> %5BAugust 15, 2010%5D>
[accessed on August 15th, 2010].
- Colonsay Community Company (2010) *Minute of Meeting* [on-line]
<<http://www.colonsay.org.uk/CCDCMins230310.htm>> [accessed on August 15th, 2010].
- Highland Council (2010) Conference Report of “*Land reform rights to buy – where to now?*”, 23rd March 2010, Inverness.
- Highlands and Islands Enterprise (2004) *Part 3 of the Land Reform (Scotland) Act 2003 - The Crofting Community Right to Buy – your questions answered* Inverness [on-line]
<<http://www.hie.co.uk/Downloads/CLU-General/-/holding-area/crofting-right-to-buy-0604.pdf>> [accessed on July 14th, 2010].
- MacAskill, J. (2004) The Crofting Community Right to Buy in the Land Reform (Scotland) Act 2003. *Scottish Affairs*, (49). [on-line] <[http://www.scottishaffairs.org/backiss/2004.html - autumn](http://www.scottishaffairs.org/backiss/2004.html-autumn)> [accessed on August 20th, 2010].
- MacAskill, J. (1999) *We have won the land*, Stornoway: Acair.
- Macleod, C. and Busby, N.E. (2010) *Realigning function and place in the crofting communities of the future*, *Scottish Affairs* (71), Spring, 63-77.
- MacPhail, I. (2003) *Community land ownership and land tenure: overview report* Department of Geography and Topographic Science, University of Glasgow and ARC.

MacPhail, I. (2002) *Land, crofting and the Assynt Crofters Trust: a post-colonial geography?* PhD Thesis. University of Wales: Lampeter.

Miller, D. et al (2009) *Changing land use in rural Scotland - drivers and decision-making*, Rural Land Use Study: Research Finding No. 8. [on-line]
<<http://www.scotland.gov.uk/Publications/2009/11/05143002/0>> [accessed on July 15th, 2010].

Moxey, A. et al (2009) *The role of the public sector in realising the benefits of Scotland's rural land*, Rural Land Use Study: Research Finding No. 10. [on-line]
<<http://www.scotland.gov.uk/Publications/2009/11/05143134/0>> [accessed on July 15th, 2010].

Reid, D. (ed) (2003) *The next generation*, Report of the 'Fling in the Fank' Conference, Stoer, North Assynt, 28 – 30th August 2003.
<<http://www.caledonia.org.uk/socialland/case.htm>> [accessed on July 15th, 2010].

Scottish Crofters Union Press Release, 22nd February 2001.

Scottish Government (2009) *Crofting Community Right to Buy under Part 3 of the Land Reform (Scotland) Act 2003*. Edinburgh: Scottish Government.

Scottish Land Court Decision (2007) *Scottish Ministers v Pairc Trust Limited and Others* 2007 SLCR 166. Edinburgh: Explanatory summary for press use.
<<http://www.semantise.com/~mwtlewis/Store/MWT%20Home%20page/Land%20Court%20Summary.pdf>> [accessed on August 21st, 2010].

Scottish Ministers (2009) *The Crofting Community Right to Buy (Scotland) Regulations 2004 – Pairc Trust Ballot Results*. [on-line] <http://www.pairctrust.co.uk/pairc_ballot.pdf> [accessed on July 20th, 2010].

Slee, B., Brown, K., Blackstock, K., Cook, P., Grieve, J. and Moxey, A. (2008) *Monitoring and evaluating the effects of land reform on rural Scotland: a scoping study and impact assessment*, Scottish Government Social Research.

Slee, B. et al (2009) *Realising the potential contributions of Scotland's rural land to delivering sustainable economic growth*, Rural Land Use Study Project 2 Research Findings No. 9 [on-line] <<http://www.scotland.gov.uk/Publications/2009/11/05143048/0>> [accessed on July 15th, 2010].

Watson, J. (2006) *Spirit of Clearances lives on in estate's £2.5m price tag*, Scotland on Sunday 26th February 2006.

CHAPTER SIX

CONCLUSIONS

6.1 Introduction

The aim of this final chapter is to bring together the analytical strands of the preceding discussion to draw conclusions in relation to the aim and objectives set out in the research specification for the study. The chapter first considers the research findings and discussion in relation to access rights before going on to reflect upon implementation of the community right to buy and crofting community right to buy provisions. Finally, we make some overarching observations in relation to the LRSA.

6.2 Access Rights

The Scottish approach to the exercise and management of access rights differs significantly from the formal enforcement-orientated model enshrined in the Countryside and Rights of Way Act 2000 in England and Wales, whereby such rights are specified on maps and underpinned by a range of statutory procedures for the closure of access land by owners and public bodies (Mackay 2010). In contrast, the exercise of statutory access rights in Scotland is founded on a sense of civic responsibility (Warren 2010) in which the LRSA may be viewed as more as an enabling rather than enforcement mechanism in relation to these rights. At the heart of this approach lie interpretations of what constitutes ‘reasonable’ or ‘unreasonable’ behaviour, aspects of which are guided in large part by the contents of the Scottish Outdoor Access Code, associated guidance developed by various stakeholder groups and promotional campaigns co-ordinated by SNH.

For the most part this enabling approach 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. In addition to the current study’s findings, data sources such as the Scottish Recreational Survey suggest that much of outdoor recreational access-taking occurs with

relatively few problems encountered; a finding which is further reinforced by SNH's survey of responsible behaviour among recreational access takers and land managers (TNS 2009).

There remain 'hotspot' access issues such as irresponsible wild camping, fire-lighting and the perceived inadequate control of dogs, particularly near livestock or wildlife habitats. However, as a number of research participants pointed out, such issues pre-date the introduction of statutory access rights. In the words of one survey respondent:

For issues that are amenable to management, we would argue that access rights are part of the 'solution' rather than part of the 'problem', as the LRSA now provides a clear framework to address practical issues through the network of local Access Officers and LAFs (Local Access Forum survey respondent 81).

The informal and enabling ethos of the LRSA is further demonstrated by consideration of those of its provisions whose use it is possible to track in the implementation process. Considerable investment has been devoted to developing the administrative and physical infrastructure of outdoor access in the period since the LRSA came into force. This investment has supported the work of Local Access Forums –established by Access Authorities as one of their duties under the Act – and contributed to paths signage and waymarking of a significant order.

Substantial resources have also been devoted to the drawing up of Core Paths Plans by Access Authorities. That has been a challenging and time-consuming process for a number of these Authorities and in some instances continues to be. Misgivings have been expressed in some quarters that certain Access Authorities had lacked ambition in developing their plans and that the process has been time-consuming, unsettled previously cordial relations between access-takers and some landowners and diverted Access Authorities' attention and resources away from the routine but nevertheless important work of upholding access rights. That said, many participants in the current study view Core Paths Planning as a positive process which has brought different stakeholders together and promoted dialogue and co-operation; thanks in no small part to the role of Local Access Forums in brokering such dialogue. However, there remains a concern expressed by many research participants that the currently challenging financial climate for the Scottish public sector means that the opportunities for encouraging more outdoor access through Core Paths Networks will slip away if funding for their maintenance dries up.

Financial and other considerations also appear to play their part in shaping Access Authorities' appetite for pursuing formal enforcement action to uphold access rights. As previously noted, formal Notices issued under section 14 of the Act are viewed by these Authorities as a tool last resort in attempting to resolve access disputes after which the next stage in the process is the initiation of court proceedings to achieve a judicial determination. Yet definitional vagueness associated with concepts such as privacy, together with what one survey respondent described as 'counter intuitive' judgements by sheriffs which have gone against Access Authorities, have made these organisations wary of adding to the currently limited access case law that exists in relation to the LRSA. In its absence, much emphasis will continue to be placed upon the pursuit of good practice in taking and managing statutory access rights, supported by the administrative structures created by the LRSA and the highly regarded Scottish Outdoor Access Code.

There appears to be relatively little appetite amongst access stakeholders for significant change to specific provisions contained within Part One of the Act. Such changes that were proposed came almost exclusively from Access Authorities who pointed out what they viewed as either anomalies or weaknesses in the Act in terms of enabling them to undertake particular duties or exercise particular powers. Chief amongst these were the proposals to make it a duty rather than a power for Local Authorities to maintain core paths and to give Access Officers the same power of entry to any land as given to 'Rangers' under section 24 (3) of the Act. Other proposals for change, perhaps unsurprisingly, related to financial considerations ranging from funding for defending or pursuing court cases to additional resources for maintaining core paths. In addition, a number of stakeholders made it clear that they would welcome definitional clarity in relation to particular issues such as 'wild camping', 'dogs under control' and 'privacy'. On a related theme there is clear demand for updated guidance in relation to a variety of issues as detailed in section 3.7 of chapter three.

6.3 Community Right to Buy

The community right to buy dominates the academic literature in comparison to either access rights or the crofting community right to buy. It was to a large extent 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.

Nevertheless, the majority of research participants in this study have something positive to say about the Community Right to Buy. For some, the Act has enabled them to buy land or other assets. Even where this has not happened, there was a view that, despite being a challenging process, the community right to buy was welcomed as it enabled exertion of at least “some control over the future of a valuable local asset” (Interview 10). Indeed, there was widespread support among community groups participating in this research 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.

Research participants within the community ownership sector were also highly complementary in relation to the professionalism of civil servants with whom they dealt in the Scottish Government’s Community Assets Branch. All stressed these civil servants’ helpfulness and the important role they play in making the Act work.

Notwithstanding the above positive views, it remains the case that most community groups’ experience of the Act has been confined to going through attempted or actual registration of an interest to purchase land, with no clear results in terms of gaining land or assets. This has been a somewhat frustrating experience for many of these groups.

There is little doubt that the Act can be challenging to use for community groups. The chief difficulties relate to administrative compliance and local politics. The operational context of the group in terms of resources available to it, together with the dynamics of local community and landowner relations are key considerations for community group engagement with the Act. This perhaps partially explains why those groups that have successfully used the Act have all done so on land owned by public bodies (six groups) or absentee private landowners (three groups), rather than by locally-based landowners.

Comments about the administrative complexity and unwieldiness of the Act in the policy and academic literature have been echoed in the responses of many of the community groups we spoke to. Of course, it is important to note that not *all* groups found it a very heavy burden, and comments ranged from “an unbelievable amount of work” (Interview 5) to “straightforward but time-consuming” (Interview 7) or even “no bother” (Interview 14).

Some groups that avoided using the Act had partly done so because the process was felt to be “daunting” or involved unnecessary administration, while others stated that this was not a

problem for them. However, it is interesting to observe that groups that have experience of other public schemes (e.g. the National Forest Land Scheme) tend to see the Act as carrying a particularly heavy administrative burden. It is also important to remember that while the term “community group” may suggest a certain amateurism to some, many of these groups count business, land management and legal professionals among their members. Their descriptions of the Act as “bizarrely complex... a poor style of legislation” (Interview 3) or “a very difficult Act to find your way around” (Interview 4) therefore raise the question as to whether the Act might be made simpler to use without sacrificing rigour or safeguards.

Aside from the challenges thrown up by the administrative processes of the community right to buy and the need to manage potential conflict with landowners, much depends on the human and financial resources available to a group as regards whether they will engage with the Act. What skills do the active members have? How much time have they got? How much money can they raise quickly to fund the process of application and/or activation within the timescales? These are all questions which, if answered in the negative, have the capacity to present significant barriers to using the community right to buy through to a successful purchase of land. This is in addition to the obvious point that the land has to come on to the market in the first place.

Funding is a key determinant of use of the Act; both in terms of simple availability and in relation to the impact of funding bodies’ timescales on the capacity of groups to activate their community right to buy. Many research participants suggest lengthening timescales to fit with funding body requirements.

The impact of using the Act on local community politics appears considerable. On the one hand, groups told of collecting names for the petition of support in secret, or of an application to register an interest becoming a “late” application when someone let slip to the landowner that such an application was in preparation. The landowner put the land on the market post haste and the application failed under the strict “late” criteria. Other groups were convinced that avoiding such potential sources of friction was a priority for them and they were therefore not interested in using the Act. Regardless of how much power it does or does not confer on communities, it is indeed “a forceful intervention” (Interview 12).

It does appear that an uncooperative landowner can make it very difficult for a community group to use the Act. A registration does not in itself compel a landowner to do anything.

Some groups expressed great frustration at having gone through the registration process but still being powerless to prevent what they see as the waste of local assets or opportunities, especially regarding derelict or run down local facilities. Moreover, a landowner determined to fight the process can stretch community group energy or funds in some cases. There are anti-avoidance and unreasonable behaviour provisions in the Act, but groups seem reluctant to use these. The two main hurdles appear to be proving that the landowner's primary intent was to frustrate the spirit of the Act (rather than anything else), and the risk of the land simply being withdrawn from the market after a group has put time and money into trying to use the legislation.

As some research participants recognised, stakeholders' views on whether any of the proposals for change gathered in this research should be implemented will depend on what they think the purpose of the community right to buy should be. So, for example, one research participant with a self-styled "political motivation" feels that Part Two of the Act has had a "disappointing impact" (Interview 1a). But while few dispute that the Act is challenging for community groups to use (indeed, the official guidance says this), the question of whether it is *too* challenging is a not an unreasonable one. It is with this in mind that another research participant called above all for any parliamentary scrutiny or review of the Act to "address the difficult policy questions openly" (Interview 4).

6.4 Crofting Community Right to Buy

Many of the observations made in relation to the community right to buy are equally applicable to the crofting community right to buy. Indeed, the challenges associated with the definition of the 'crofting community', mapping of the land to be purchased and balloting of the community make it an even more daunting process to embark upon than that of the community right to buy. Moreover the expropriative nature of the crofting right to buy provisions means that efforts to use them risk an accelerated deterioration in crofting community group-landowner relations.

For these reasons the crofting community right to buy had only very limited use to date. Instead, it has inhabited the margins of negotiations between crofting community groups and landowners where it exists as a mechanism of last resort to be called upon if and when the prospects of amicably negotiated transfer of land outwith the Act have dimmed or been extinguished. As a consequence, Part Three of the Act's most significant impact has

arguably been to help create a negotiating environment which encourages crofting community ownership without recourse to the CCRtB provisions. In this context the legislation has variously functioned as a lever, threat and catalyst for engineering crofting community ownership depending on local circumstances. The Galson Trust's experience of using the Act provides the most direct evidence of this phenomenon since the LRSA's enactment. It is, however, echoed indirectly by the experience of community organisations which have taken control of croft land outwith the Act, the majority of which are geographically concentrated in the Western Isles.

As the experience of the Galson Trust also illustrates, using Part Three of the Act is a resource intensive and exhausting undertaking for a Crofting Community Body. Moreover, particular barriers which have been identified by research participants act as powerful disincentives for greater take-up of the crofting community right to buy. As noted above, these include the complexity of defining the crofting community, the significant difficulties of mapping the land to the standards specified by the Act which are above the norm for estate sales and the potential negative impacts that registration can have on local community relations, particularly with existing landowners. A disjointed policy environment, in which the emphasis on crofter owner-occupation within recent reforms to crofting law seems to run contrary to the wider, place-based ambitions of crofting communities, represents a further obstacle to use of the provisions. Equally significant barriers relate to a changed and arguably diminished funding and support environment for community land ownership within Scotland's public sector

It is the ongoing dispute between the Pairc Trust and the owner of the Pairc Estate in the Isle of Lewis which may yet expose a potentially fatal weakness in the crofting community right to buy provisions. Namely, their inability to prevent a resistant landlord with sufficient capital to find legal means to delay and ultimately avoid any kind of purchase using Part Three of the LRSA. The outcome of the Pairc Trust's efforts to wrest ownership from the landlord by using the legislation will therefore go a long way to determining whether the crofting community right to buy can be successfully implemented in practice.

6.5 Concluding Observations

The framework of statutory access rights, community right to buy and crofting community right to buy provisions contained in the Land Reform (Scotland) Act 2003 has seen the legislation held up as a touchstone for progressive land reform, stimulating interest from stakeholders and policymakers from elsewhere, eager to learn lessons from the Scottish legislative experience which may have wider application⁴⁸.

There is little doubt from the research findings contained in this report that there is widespread support amongst many stakeholders within Scotland for the objectives of the LRSA as they pertain to statutory access rights, community ownership and crofting community ownership. As this study has also demonstrated, the implementation of these objectives, far from being straightforward, is complex and convoluted. This will come as little surprise to policymakers, practitioners, academics and other stakeholders with an interest in land reform.

Findings from this study also raise fundamental questions which are of relevance to the community right to buy and the crofting community right to buy provisions of the LRSA 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.

⁴⁸ See for example: 'The Community Right to Buy: Learning Lessons from the Scottish Experience', to be hosted by the Joseph Rowntree Foundation in October 2010 as part of its Community Assert seminar series. <http://www.jrf.org.uk/sites/files/jrf/community-assets-seminars.pdf>

See also, the evidence session held in Edinburgh in March 2009 by the National Assembly for Wales Petitions Committee in relation to Part One of the LRSA. http://www.assemblywales.org/bus-home/bus-committees/bus-committees-other-committees/bus-committees-third-pc-home/pet3_listofinquiries/canoeing_inquiry.htm

REFERENCES

Mackay, J.W. (2007) *New legislation for outdoor access: a review of Part 1 of the Land Reform (Scotland) Act 2003*. Scottish Affairs, 59, 1-29.

TNS (2009) *Scottish recreation survey: annual summary report 2007*. Scottish Natural Heritage Commissioned Report No.321 (ROAME No. F02AA614/6).

Warren, C. (2010) *Managing Scotland's environment* (2nd Edition). Edinburgh: Edinburgh University Press.

APPENDICES

APPENDIX 1: GENERIC ACCESS STAKEHOLDER QUESTIONNAIRE
POST-LEGISLATIVE SCRUTINY OF THE LAND REFORM (SCOTLAND) ACT
2003

ACCESS SURVEY

Thank you for taking the time to complete this survey. It is comprised of the following sections and should take you between 30-40 minutes to complete.

1. Respondent's Details
2. Impacts of Part One of the Act
3. The Scottish Outdoor Access Code
4. Local Authorities' Duties and Powers & the Role of Local Access Forums
5. Core Path Networks
6. Barriers to Implementing Part One of the Act
7. Proposals for Change
8. Further Comments

SECTION 1: RESPONDENT'S DETAILS

1. Name of Respondent
2. Your Organisation
3. Your designation within the Organisation

SECTION 2: IMPACTS OF PART ONE OF THE ACT

In this section we are interested in your views regarding the impacts of Part One of the Land Reform (Scotland) Act 2003 (hereafter "LRSA") as they relate to the exercise and management of access in Scotland in comparison to the situation prior to enactment of the legislation.

4. Please indicate the extent to which you agree or disagree with the following statements regarding Part One of the LRSA by clicking on the relevant category for each statement.

Part One of the LRSA has:

- a) **Led to an increase in the number of people taking access in Scotland**

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
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- b) **Made it easier for land owners/managers to manage access rights in Scotland**

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
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c) Made it easier for members of the public to understand where and when they can take access

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
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d) Made it easier for land owners/managers to understand where and when members of the public can take access

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
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e) Created an effective legislative framework for the regulation and protection of access rights

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
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f) Assisted in the resolution of local access disputes between access-takers and land managers

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
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g) Assisted in the resolution of local access disputes between different access-takers

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
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h) Enabled better integration of access issues within other public policy agendas and programmes in Scotland

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
-----------------------	--------------	------------------	-----------------	--------------------------

5a) Do you consider that **specific provisions** contained in Part One of the Act have had particularly **positive** impacts on the **exercise** of access rights in Scotland?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If **'YES'**, please use the space below to identify these provisions and what you consider their **positive** impacts to be.

6a) Do you consider that **specific provisions** contained in Part One of the Act have had particularly **negative** impacts on the **exercise** of access rights in Scotland?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If **'YES'**, please use the space below to identify these provisions and what you consider their **negative** impacts to be.

7a) Do you consider **specific provisions** contained in Part One of the Act to have had particularly **positive** impacts on the **management** of access rights in Scotland?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If **'YES'** please use the space below to identify these provisions and what do you consider their **positive** impacts to be?

8a) Do you consider **specific provisions** contained in Part One of the Act to have had particularly **negative** impacts on the **management** of access rights in Scotland?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If **'YES'**, please use the space below to identify these provisions and what do you consider their **negative** impacts to be?

9) Please indicate whether you think implementation of Part One of the Act has made a positive or negative contribution in relation to each of the following elements of sustainable development in Scotland by ticking the appropriate category:

	Positive	Negative	Don't Know
Improving health and wellbeing			
Protecting environmental resources			
Stimulating economic growth			
Promoting social inclusion			

SECTION 3: THE SCOTTISH OUTDOOR ACCESS CODE

10) Please indicate the extent to which you agree with the following statement by ticking the relevant category.

“The Scottish Outdoor Access Code provides clear and comprehensive guidance regarding access rights in Scotland”.

<i>Strongly agree</i>	<i>Agree</i>	<i>Undecided</i>	<i>Disagree</i>	<i>Strongly disagree</i>
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11) How might the influence of the Scottish Outdoor Access Code be further enhanced in relation to the taking and management of access in Scotland?

SECTION 4: LOCAL AUTHORITIES' DUTIES AND POWERS & THE ROLE OF LOCAL ACCESS FORUMS

In this section we are interested in your views regarding the effectiveness of your Local Authority in relation to fulfilling its statutory duties and exercising its powers under Part One of the LRSA. We are also interested in your views regarding whether specific provisions relating to your Local Authority's duties and/or powers should be changed, either in terms of their focus or implementation. We would also like your views regarding the effectiveness of your Local Access Forum in fulfilling its main responsibilities.

12) To what extent do you consider that your Local Authority has been effective in fulfilling its duty to uphold access rights?

<i>Very effective</i>	<i>Quite effective</i>	<i>Undecided</i>	<i>Not very effective</i>	<i>Not at all effective</i>
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13a) Are there changes to the **focus** of specific provisions relating to Local Authorities' duties and/or powers which you would suggest in relation to Part One of the Act?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If 'YES', please use this space to identify these provisions and your suggested changes regarding their focus.

14a) Are there changes to the **implementation** of specific provisions relating to Local Authorities' duties and/or powers which you would suggest in relation to Part One of the Act?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If 'YES', please use this space to identify these provisions and your suggested changes regarding their implementation.

15) Overall, how effective do you feel your **Local Access Forum** has been in fulfilling its main responsibilities?

<i>Very effective</i>	<i>Quite effective</i>	<i>Undecided</i>	<i>Not very effective</i>	<i>Not at all effective</i>
-----------------------	------------------------	------------------	---------------------------	-----------------------------

16) Please use the space below to make any suggestions as to how your **Local Access Forum** could function more effectively in relation to fulfilling its remit.

SECTION 5: CORE PATH NETWORKS

In this section we are interested in your views as to positive and negative factors which have influenced development and management of a core path network in your Local Authority area.

17a) Are there particular factors which currently exert a **positive** influence on the development of a core path network in your local authority area?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If 'YES', please use this space to explain what these positive factors are.

18a) Are there particular factors which currently exert a **negative** influence on the development of a core path network in your local authority area?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If **'YES'**, please use this space to explain what these negative factors are.

c) Please use the space below to make any suggestions as to how these negative factors might be resolved.

19a) Are there particular factors which currently exert a **positive** influence on the management of a core path network in your local authority area?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If **'YES'**, please use this space to explain what these positive factors are.

20a) Are there particular factors which currently exert a **negative** influence on the management of a core path network in your local authority area?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If **'YES'**, please use this space to explain what these negative factors are.

c) Please use the space below to make any suggestions as to how these negative factors might be resolved.

SECTION 6 : BARRIERS TO IMPLEMENTING PART ONE OF THE ACT

21a) Do you consider there to be **general barriers** to the implementation of Part One of the LRSA?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If **'YES'**, please use this space to explain what these general barriers are.

22a) Do you consider there to be barriers to the implementation of **specific provisions** contained in Part One of the Act?

YES/NO/DON'T KNOW (*Please select as appropriate*)

b) If 'YES', please use the space below to identify these specific provisions and the barriers to their implementation.

c) Please use the space below to make suggestions as to how such barriers to implementation might be overcome.

SECTION 7: PROPOSALS FOR CHANGE

In this section we are interested in your suggestions regarding changes to the focus and/or implementation of provisions contained in Part One of the Act **other than changes which you may have already suggested when completing earlier sections of this survey.**

23) Please use the space below to suggest any changes to the focus of specific provisions contained in Part One of the Act.

24) Please use the space below to suggest any changes to the implementation of specific provisions contained in Part One of the Act.

SECTION 8: FURTHER COMMENTS

25) Please use this space to make any further comments.

THANK YOU FOR TAKING THE TIME TO COMPLETE THIS SURVEY

APPENDIX 2: INTERVIEW SCHEDULE FOR COMMUNITY GROUPS WHICH HAVE ACTIVATED THEIR INTEREST

Groups that have activated their interest

Interview schedule

Introduction

This interview is part of a research project undertaken for the Scottish Parliament's Rural Affairs and Environment Committee by a team of researchers from the University of the Highlands and Islands, Rural Analysis Associates and Derek Flyn.

We are interviewing a number of community groups to get their perspectives on the Land Reform Act.

First, we will go through the stages of the process of registering a community interest in a piece of land. Then we will ask about when the interest is "triggered" and your group attempted to buy/bought land. We would like to hear about your experience of the Act – what was good and what was not so good.

Then we will ask for your views about the wider impact of the Act, and any suggestions you may have about changing it.

But we will start with the experience of using it.

Can I start by confirming your name and role/designation in the group?

1. Registering an interest

Firstly, what led you to use the Land Reform Act?

Prompts/look out for – motivation, knowledge, key people...

What was the process of registering an interest in land like? What was good, what was not so good?

Prompts/look out for

- a. Prescriptions for type of community body
- b. Definition of community and interest in land
- c. Sustainable development and public interest conditions
- d. Landowners – identification and role in the process
- e. Provisions relating to late applications (if applicable)
- f. Provisions relating to renewal of registration (if applicable)
- g. Timescales set out for community groups and officials to fulfil the requirement of the Act
- h. Is there any other aspect of the Act, or the way it was implemented, that had a major impact on your group?
- i. Finally, how would you sum up your experience of using the Act?

2. Triggering/activating an interest

Moving on from registering an interest, to the process of directly trying to buy land, how was that?

- a. Community ballot
- b. Securing funding
- c. timescales
- d. Communications with Scottish Government
- e. Any other aspects that were important?

3. Use of the Act – standout points

Can I ask you:

- a. Did any of the provisions or implementation of the Act present a barrier to your group's use of the Act?
- Which ones/in what ways?
- b. Did using the Act have positive impacts on your group's work?
- c. Did using the Act have negative impacts on your group's work?

4. General impact of the Act

What impact do you think the Act has had:

- a. On community landownership
- b. On relations between communities and landowners
- c. Anything else?

5. Suggestions for change

Do you think that either the provisions of the Act itself, or the way that it is implemented, should change in any way?

If so, what changes would you like to see?

- a. Provisions – e.g. mapping, timescales,
- b. Implementation – e.g. running ballots, communications