RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

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

CORRESPONDENCE FROM THE CONVENER TO THE MINISTER

Implementation of the Land Reform (Scotland) Act 2003

I am writing to you following the Committee's short investigation into the implementation of the Land Reform (Scotland) Act 2003, in particular the provisions on access, the community right to buy, and the crofting community right to buy.

I am sure you will agree that post-legislative scrutiny is important, and that with the Parliament well into its second decade, we have now entered an appropriate period to undertake systematic scrutiny into the impact of the most significant Bills enacted in the early days of the Parliament's existence. The Committee considered that the 2003 Act was an appropriate candidate for its first direct exercise in post-legislative scrutiny, given its legal and indeed symbolic significance as a milestone in the reform of Scottish land law.

As you will be aware, mainly owing to the scheduling of Bills, the Committee lacked sufficient time in its work programme to undertake an in-depth inquiry into the Act. Instead, we decided to commission research from the Centre for Mountain Studies. This is an appropriate point to put on record the Committee's gratitude to the Centre for undertaking this work with diligence and for producing a very clear and thorough report[1] outlining their main conclusions, with which we are in broad agreement.

I am also grateful to you and your officials for giving evidence on 2 March.

I discuss each of the three main aspects of the research identified above in turn.

Access

The Committee largely agrees with your opening comments on 2 March that the enabling approach of the 2003 Act in relation to access appears to be working well, and that there is little desire amongst stakeholders for any significant change.

The report also found that the 2003 Act had helped formalise and clarify access rights, where previously there was informality and ambiguity, which is a positive step. We recognise that some legal ambiguity still remains in relation to the meaning of the key terms "privacy" and "curtilage" largely because of a paucity of cases going to litigation. This can hardly be held against the legislation. We agree with you that, in any case, most walkers have a reasonable idea in practice of what is and is not a private part of someone's property and respect the distinction.

In relation to the suggestion that access authorities might be reluctant to test the definitions of these and other key terms in court, the Committee accepts that this is possible. However, the Committee also accepts that it is difficult to require authorities to take cases to litigation if it considers that the case for doing so is risky. This may

[1] http://www.scottish.parliament.uk/s3/committees/rae/documents/Inquiryplanningsheet.pdf

point to the need for an alternative mechanism, short of litigation, to address concerns over access which are perceived to have been blocked unlawfully, although we accept the point you made in evidence that arbitration requires two willing participants.

The Committee invites the Scottish Government to consider consulting on whether it would be possible to introduce processes other than litigation to settle disputes over access so as to encourage parties to come to the table.

The Committee is reasonably satisfied that the Act has not led to a significant increase in what might be paraphrased as "irresponsible access". Anyone exercising their access rights in an irresponsible manner is by definition not acting in accordance with the 2003 Act. The most that can be said is that, in enabling a cultural change in attitudes towards public access to land, the Act might have inadvertently encouraged some irresponsible behaviour, but even in this respect the evidence is not clear.

There are also those whose behaviour in accessing land might make them a danger to themselves and others (for example through allowing dogs to run amongst cattle during calving time or when calves are at foot). The Committee does not see this as a weakness of the 2003 Act so much as a failure of some people to appreciate the risks inherent in the countryside. In other words, it is more a public safety issue than an access issue. It seems to us that the best approach therefore lies in education and the effective dissemination of relevant information.

The Committee recognises and welcomes the fact that the vast majority of walkers exercise their access rights reasonably, in accordance with the letter and the spirit of the law. Where there are any concerns, the Committee sees local access forums as being the most appropriate places to deal with them in the first instance. We would welcome any further comments from the Scottish Government on this issue.

In relation to the requirement to draw up core path networks, we note that authorities have been moving at very different speeds. The CMS report suggested that resource issues might partly explain this. Written evidence from Ramblers Scotland[2] suggested that authorities in Scotland still lag behind in preparing lowland and urban footpaths to replace those lost over preceding centuries. **The Committee notes that SNH is on the point of publishing a report providing a national overview of core path plans and path provision, and expects that this will be of interest to our successor committee.**

We consider that there is a need for leadership on core path planning at national level. In particular, it is important to provide guidance on the further development of long-distance pathways cutting across authority boundaries, particularly given your evidence suggesting that some councils have interpreted the requirement to produce "core" paths in an over-literal manner, focussing planning on core areas of the authority and neglecting the peripheries.

[2] http://www.scottish.parliament.uk/s3/committees/rae/documents/Ramblersformatted.pdf

We note that some excellent work has been done in recent years, with encouragement from the Scottish Government, in developing long-distance paths but consider it important that the process does not lose momentum. Clearly, councils are under budgetary pressures at the present time and not all may consider core path planning a priority. Nonetheless the core path provisions in the 2003 Act are a statutory requirement, whilst long-distance pathways in particular can help bring in valuable tourist traffic to local areas covered by them.

The Committee invites the Scottish Government to consider how to offer leadership on the development of core path planning networks, including encouraging literal joined-up working between authorities to help create long-distance footpaths across Scotland.

The Community Right to Buy and the Crofting Community Right to Buy

The Committee notes that the purpose of the provisions on the right to buy were also ultimately about cultural change; about empowering communities in rural Scotland to take ownership (in the widest sense) of local assets and use them for the common good. The fact that the legislation requires communities to come together in order to make use of the right to buy provisions was seen, in itself, one of the strengths of the legislation.

The main concern uncovered in the report and in the evidence-taking is simply that these laudable aspirations have been to some extent confounded by the perceived complexity of the process, described in your own evidence as “convoluted and arcane”. Similar general comments could be made in the context of the crofting community right to buy, in relation to which you succinctly summarised the problem as being that the legislation is requiring community groups to behave like bureaucracies.

In other words, an issue perceived as one of the strengths of the legislation when it was agreed – that local communities would be the drivers of change – has not worked as well in practice as was hoped, largely because of the intricacy of the process.

For the Committee the solution is emphatically not to take away the power of initiative from communities and hand it to bureaucracies, but rather to learn from experience so as to make the process less onerous, whilst no less robust in terms of ECHR compliance.

In this connection, it is important to note that, despite the Act’s shortcomings, there are a number of success stories involving communities forming groups to take ownership of community land and assets, whether directly under the Act itself or in the shadow of its provisions. We are particularly pleased to note progress made in the Western Isles, where well over half of the land area is now community-owned. Whether or not directly inspired by the Act, this is part of the “cultural change” intended by the Parliament when the 2003 Act was agreed to. The key challenge is not to allow this momentum towards increased community ownership, which the report identifies as faltering, to run out completely.

The Committee is clear that solving the main problems identified in the report is not simply a matter of improving the administration of both sets of right to buy provisions in the 2003 Act. There are parts of the Act itself that need to be amended. We are interested to note that this was also your view when you appeared before the Committee, and that you indicated that there was likely to be a Government review in the near future. We hope this work will be taken forward by the next administration. We also hope, and expect, that there would be extensive consultation with stakeholders as part of it.

We suggest that the proposed review should include consideration of the following matters:

- *time-frames;* The report identified concerns that the time-frames set out in the legislation can be over-burdensome and the committee noted with interest that this was a viewpoint with which you had considerable sympathy. The Committee sees this as a key issue for the future success of the legislation;

- *mapping;* in relation to the crofting community right to buy, the Committee considers a re-examination on the requirements in relation to hostile buy-outs as another key issue. In an effort to ensure ECHR compliance, the pendulum might have swung too far, making the current law extremely difficult for crofting communities to adhere to. Particular consideration should be given to the onerous mapping requirements set out in the Act;

- *covert or semi-covert sales*; there is a need to devise an improved approach under the Act for situations where land unexpectedly comes onto the market or where sales do not take place on an open market;

- *definition of "community body*"; The Committee was again interested to note that in your own evidence you saw this as an issue that required further consideration, and your linking of the issue to late registration;

- *re-registration of a community interest*. Despite the best efforts of Government officials, there is a clear perception that the process is more bureaucratic than it needs to be. (The Committee does accept, though, that as part of the re-registration process, there should be a requirement to demonstrate an ongoing interest, given the fact that circumstances on the ground, and indeed communities themselves, can change over time.);

- *identifying the owner.* If a community body, despite taking all reasonable steps to contact the owner, is unable to do so, this should not be allowed to frustrate the process, otherwise this creates a perverse incentive not to cooperate. The Committee notes that, under such circumstances, bodies such as the Registers of Scotland and the Rural Payments Inspections Directorate are highly likely to hold information that may be of benefit to a community body, and suggests that the review investigate how this could be utilised;

- *promoting the right to buy outside the highlands and islands*; more broadly, the research has helped uncover that there is a requirement for ongoing work to inform communities about the right to buy. This applies particularly outside of

the highlands and islands or in small towns, where people may not be aware that the Act potentially applies to them. The community right to buy needs to be seen as a right belonging to small towns and rural communities across the whole of Scotland and applying not just to land but to under-used local assets that the community can put to purposeful use;

- *role of enabling bodies*. A closely related issue identified in the report is that Highlands and Islands Enterprise was seen as a "champion" for communities seeking to make use of right to buy provisions. Communities outside of the area covered by HIE do not have this support. We suggest that the review consider whether another body such as Scottish Enterprise could take on this role. Another option would be for HIE, which has the necessary expertise in-house, to take over this role for the whole of Scotland. (We understand that this is precedented in some other areas of HIE's work.)

With the deadline for the dissolution of Parliament fast approaching, I realise that it may not be possible for you to send a reply to the points raised in this letter within the available time. I am also aware that even if you do reply it will not be this Committee that considers it. If you are unable to reply, I would be grateful if your officials could ensure that the successor committee to the RAE Committee receives a response after the election. It will be for that Committee to decide whether and how to take matters forward.

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Convener