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Authorised By	Monica Patterson
Designation	Ex Dir - Services for Communities
Date	01/01/13

For Office Use Only:	
Library Reference	13/13
Date Received	18/01/13
Bulletin	Jan13

REPORT TO: Members' Library Service

MEETING DATE:

BY: Executive Director (Services for Communities)

SUBJECT: Call for Evidence to Assist the Work of the Land Reform Review Group

1 PURPOSE

- 1.1 To advise Cabinet that the Land Reform Review Group, set up by the Scottish Government to develop innovative and radical proposals on land reform that will contribute to Scotland's future success, has initially issued a Call for Evidence to various stakeholders and is proposing to hold further consultations during 2013.

2 RECOMMENDATIONS

Members are asked to note the response to the Call for Evidence from the Land Reform Review Group on how land reform can generate and deliver new relationships between land, people, economy and environment in Scotland. The response includes comments on public access rights and the community right to buy.

3 BACKGROUND

- 3.1 The Land Reform (Scotland) Act 2003 was enacted in February 2005. The Act consists of three parts, Access Rights, The Community Right to Buy and The Crofting Community Right to Buy.
- 3.2 The 2003 Act placed various statutory duties and powers on local authorities. Access Officers and other staff in the Landscape and Countryside Division are principally involved in delivering the duties and powers under Part 1 of the Act: Access Rights.
- 3.3 The Land Reform Review Group (LRRG) was set up by the Scottish Government to develop innovative and radical proposals on land reform in Scotland. The LRRG has been given a wide remit, a copy of which is attached as Appendix 1.

- 3.4 The LRRG's work will be taken forward independently of Government. The Group expects to make a first report, outlining proposals that can be implemented relatively promptly, in May 2013. A draft final report will be completed in December 2013. A revised final report will be submitted to Government in April 2014. It is expected by Government that the report will include recommendations as to how further land reform can be promoted and secured.
- 3.5 The LRRG's work and recommendations will have implications for cities and towns as well as for the countryside. To ensure that its reports are as soundly-based as possible, the LRRG has stated that it wishes to draw on the experience and knowledge of a wide range of organisations and individuals.
- 3.6 As its Remit states, the LRRG will identify how land reform will:
- Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;
 - Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient and independent communities which have an even greater stake in their development;
 - Generate, support, promote and deliver new relationships between land, people, economy and environment in Scotland.
- 3.7 One of the LRRG's tasks will be to make suggestions and recommendations as to how the 2003 Act might be amended.
- 3.8 The LRRG has issued a Call for Evidence, inviting recipients to think about how those potentially far-reaching objectives can best be accomplished and to share their views with the LRRG.
- 3.9 The Landscape & Countryside Division has considered the Call for Evidence from the LRRG in light of its experience of the Land Reform (Scotland) Act and its response in relation to public access rights and the community right to buy is set out in Appendix 2.

4 POLICY IMPLICATIONS

- 4.1 None

5 EQUALITIES IMPACT ASSESSMENT

- 5.1 This report is not applicable to the well being of equalities groups and Equality Impact Assessment is not required.

6 RESOURCE IMPLICATIONS

6.1 Financial - None

6.2 Personnel - None

6.3 Other - None

7 BACKGROUND PAPERS

7.1 Land Reform Review Group: Call for Evidence.

7.2 Land Reform Review Group Work Plan and Timetable: Explanatory Notes.

7.3 The Land Reform (Scotland) Act 2003.

AUTHOR'S NAME	Maree Johnston
DESIGNATION	Landscape & Countryside Manager
CONTACT INFO	mareejohnston@eastlothian.gov.uk 01620 827427
DATE	9 January 2013

LAND REFORM REVIEW GROUP - REMIT

The Scottish Government is committed to generating innovative and radical proposals on land reform that will contribute to the success of Scotland for future generations.

The relationship between the land and the people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country. The structure of land ownership is a defining factor in that relationship: it can facilitate and promote development, but it can also hinder it. In recent years, various approaches to land reform, not least the expansion of community ownership, have contributed positively to a more successful Scotland by assisting in the reduction of barriers to sustainable development, by strengthening communities and by giving them a greater stake in their future. The various strands of land reform that exist in Scotland provide a firm foundation for further developments.

The Government has therefore established a Land Reform Review Group. The Group will identify how land reform will:

- Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;
- Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;
- Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland;

In making these inquiries, the Group will bear in mind:

- the sustainability of its proposals for reform, including their economic impact;
- the importance of good stewardship and governance of land;
- the relationship between urban and rural concerns and opportunities;
- the relationship between local and national interests.

The Group will:

- be provided with a Secretariat;
- have access to Ministers, special advisers, and officials (including legal advisers) throughout the Scottish Government, including its agencies;
- commission independent research, as appropriate;
- agree, at the outset, a work plan with Ministers.

The Group will:

- seek representations from, and consult with, organisations (private, public and voluntary sector) and individuals with an involvement or

interest in land ownership, farming, crofting, forestry, the natural heritage, social and affordable housing, planning, economic and community development, and with others as appropriate;

- draw on the advice of the Advisers appointed to it;
- make its own independent assessment of this advice and of the varying (and possibly conflicting) views put to it.

The Group will make:

- Interim Reports to Ministers on such improvements as the Group considers can readily and speedily be made to existing legislative and other means of bringing about land reform;
- a draft Final Report to Ministers by December 2013.

It is expected by the Government that the Group's Final Report will include:

- recommendations as to how, by legislative and other means, further land reform can be promoted and secured;
- an indicative analysis of the economic, social and environmental impact and sustainability of its proposals
- indication of how the impact of the recommendations on land reform might be measured, monitored and otherwise assessed.

Response from East Lothian Council to the Call for Evidence to assist the work of the Land Reform Review Group

The Land Reform (Scotland) Act 2003 – Part 1

No significant changes are suggested for the Land Reform (Scotland) Act 2003 (the Act). It is felt that it is generally working well, but there are a number of minor changes that could be made to clarify particular sections. It is considered that, as importantly, the Guidance to Local Authorities and National Park Authorities (the Guidance) should be updated and improved and similarly the Scottish Outdoor Access Code (the Code) needs clarification and revisions.

When considering the case law it would appear that the Code has no legal status and very little consideration is given to what is contained within the Code. It is therefore felt that the Act should be revised to clarify what is meant in various sections, or the status of the Code should be changed to ensure it is considered in any future legal case.

The suggestions below are areas where we consider clarification is required. This could be done by changes to the wording of the Act itself, the Code or the Guidance.

Section 1

(1) Everyone has the statutory rights established by this Part of this Act.

Section 9 of the Act states what conduct is excluded from access rights, from which one can deduce conduct that is included, such as walking, horse-riding and cycling. Consideration needs to be given to what activities *are* included, though. For instance, is it practical to include carriage driving and therefore require that landowners take this into consideration when managing their land? That would mean that gates would have to be up to six feet wide and remain unlocked.

(1) (1) (b) the right to cross land.

When considering the right to cross a golf course, does this mean that someone can only cross that course if there is a clear exit at the other side? Do they have to cross by the shortest route? If the course is contained by a fence, then can they cross from one side to the other and then return to the point they started? Many golf courses we have dealt with consider that if there is a fence around the course then people would have no right to cross it because there is no exit at the other side. Clarification is required.

(3)(c) for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit.

The concern here is the cumulative effect of a commercial activity on a landowner. It is accepted that anyone exercising their access rights should act responsibly and consider the impact they may have, but setting up a riding livery can have a big impact on the surrounding paths. It is individuals who will be riding their horses, but at a far greater concentration than if the riding livery was not located there. Similar issues could occur if there was an outdoor activity centre located close to a shooting estate, or water sports facility close to a river or other water body. Consideration needs to be given to the potential impacts of a commercial activity and if contributions should be made for the upkeep of paths or rectification of any damage caused.

Section 2

(1) A person has access rights only if they are exercised responsibly.

This section of the Act goes on to describe how to determine if access rights are being exercised responsibly, but there is no reference to what happens to someone who is considered not to be exercising their rights responsibly. Who enforces this and what are the penalties? Can someone lose their access rights if they are not being responsible? If so, for how long, for what area and for what activity? What is the offence if someone is not exercising their access rights responsibly? How can this be practically managed on the ground?

Section 9

Conduct excluded from access rights

(f) being on or crossing land in or with a motorised vehicle or vessel (other than a vehicle or vessel which has been constructed or adapted for use by a person who has a disability and which is being used by such a person.

Should the definition of such a vehicle or vessel be tightened up? As it stands cars with minor modifications could be driven onto land by someone who has a disability, but who is perfectly capable of entering that land without the vehicle. For instance does a car with a steering aid count? And can that car be used to transport a number of passengers onto private land?

(g) being, for any of the purposes set out in section 1(3) above, on land which is a golf course.

General access rights do not apply to golf courses. There is only a right to cross a golf course. Why should this be? Should people not be allowed general access rights on a golf course as long as they are acting responsibly? This could include conducting a plant survey when the course is not in use. Many golf courses have very large areas of rough where people could go without interfering with the game and where people could be in less danger than on land neighbouring a golf course.

The boundaries of golf courses need to be better defined. Many clubs own or manage adjacent land, but it is not always clear where the edge of the golf course is.

Section 10

The Scottish Outdoor Access Code

The legal status of the Code needs to be considered. The Act required Scottish Natural Heritage to draw up the Code and it states that the Code will “*come into operation*” on a date fixed by Ministers. However, it appears that the Code has no legal status and it has not been taken into account during much of the recent case law. The code is mentioned in Section 2 and Section 3 of the Act, which gives the impression that it should be considered when deciding if access rights are being exercised responsibly or if land is being managed in accordance with access rights. The Act should state the purpose of the Code and how it should be used when legal challenges are made and what its precise legal status is.

(8) Scottish Natural Heritage shall keep the Access Code under review and may modify it from time to time.

The Code was written prior to February 2005 and is therefore almost eight years old. The Act only came into effect once the Code had come into operation and there are many aspects of the Code that now need to be updated in light of case law and implementing the legislation.

Section 11

Power to exempt particular land from access rights

Provision should be made under this section for access authorities to have the power to temporarily close core paths and rights of way in the same way that they can exempt an area of land from access rights.

Better Guidance is needed for this section of the Act, including acceptable timescales and reasons for exemption of access rights to be necessary.

Access authorities should be given the power to temporarily exempt areas of land from some or all types of access rights for particular reasons. For instance, if an area is known to be used by ground-nesting birds or if a path has just been re-surfaced and would be damaged by horses using it.

Section 13

Duty of local authority to uphold access rights

It would appear that access authorities seem to be reluctant to commit to any legal action in light of the recent case law. Of the few cases that have gone forward under the Act, many of the rulings have been different from what had been expected. Without clearer legislation and guidance, access authorities will

not risk entering into lengthy and costly legal cases. This will undermine the powers for access authorities to uphold access rights. Could a cap in legal costs be considered?

Section 14

Prohibition signs, obstructions, dangerous impediments etc

(1) The owner of land in respect of which access rights are exercisable shall not, for the purpose or for the main purpose of preventing or deterring any person entitled to exercise these rights from doing so...

It would seem that if a landowner puts up a fence or locks a gate, etc, and claims that the main purpose is something other than to prevent access rights, then they can get away with it. It may be difficult to prove otherwise, but this seems to be a bit of a loophole.

(1) (a) put up any sign or notice

It would appear from the wording of the Act and the Guidance that this section refers to obstructions that have been put in place post-implementation of the Act. Is there any power for access authorities to take action against such obstructions that were implemented pre-adoption of the Act?

Section 17

Core paths plan

It has been noted that there is some inconsistency among the core paths plans adopted across Scotland. For instance some authorities have included roads as core paths while other authorities have chosen not to do so. If core paths are going to appear on Ordnance Survey maps then this will be confusing and could have serious safety implications.

(2)(d) other routes, waterways or other means by which persons may cross land.

The Guidance indicates that any new path included in the core paths plan should be available for its intended use as a core path reasonably soon after adoption. It suggests that this would be within one to two years. During the consultation process many new routes were proposed by access authorities at a time when funding was more easily obtained. Because of the lengthy adoption process, often including a local inquiry, it has been some years since such routes were included in the plans and very often access authority budgets have been severely cut. At a recent Scottish Outdoor Access Network event all of the access officers present said that they thought it unlikely that they would be able to implement these paths in the short-term. Many authorities are considering the wisdom of building any new paths when they are struggling to maintain those that they already have.

Section 18 – (Guidance)

Core paths plan: further procedure

(1) If an objection is made and not withdrawn, the local authority shall not adopt the plan unless ministers direct them to do so.

Although the majority of access authorities have gone through the procedures and adopted their core paths plan, this section of the Act may be relevant during the review process, or if a core path is added to a core paths plan. Early in the process, many access authorities attempted to resolve objections by negotiating with the objector and amending their plan after the consultation period. Access authorities who were a little later in the process learned that there is no provision for them to amend the plan at that stage and they passed all objectors to the Scottish Government's Reporters Unit for a local inquiry. On page 50 of the Guidance the first paragraph says that access authorities should enter into dialogue to find suitable resolutions to objections. This section of the guidance should be amended. Similarly the last line of the second paragraph reads "It will not address the matter of individual paths." This sentence appears to be erroneous.

Section 19 – (Guidance)

Power to maintain core paths etc.

The local authority may do anything which they consider appropriate for the purposes of –

(a) maintaining a core path;

Further guidance is needed on the definition of maintenance. It may be generally accepted that maintenance will return a path to its former state, but does that go as far as to rebuild a long-lost historic bridge, re-surface an old carriage route or upgrade the surface of a path?

Section 20 – (Guidance)

Review and amendment of core paths plans

The Guidance suggests that core paths plans should be reviewed simultaneously with local plans. However, this may not be practical or necessary. The consultation process for each plan may be different and an objection to one may hold up the other. Access authorities should regularly be reviewing their core paths plans given the potential for routes to change through development or erosion, etc. Given the relatively simple process to delete or divert a core path, this should be done as and when necessary, rather than waiting for a review. The core paths plan should be considered as supplementary guidance to the local development plan.

Further guidance is needed for the review process. What does this involve? Is it a repeat of the initial consultation process, or can it just be an in-house review?

Section 24

Rangers

(1) The local authority may appoint persons to act as rangers in relation to any land in respect of which access rights are exercisable.

The wording of this section needs to be amended so that it includes any staff appointed by the access authority and not just rangers. As it stands access officers have to ask permission before entering land where access rights apply. There may be occasions where other staff from the access authority have to enter that land. Possibly Section 24 and 26 can be combined.

Section 25

Local access forums

Are there wider functions for local access forums? The wording of the Act seems a little biased towards the recreational user and reference should be made to helping promote responsible access.

Section 27

Guidance

Part 1 Land Reform (Scotland) Act 2003 Guidance for Local Authorities and National Park Authorities was published in February 2005, which coincided with the enactment of the Act. Since then experience has shown that there is a need for this Guidance to be revised and expanded, particularly in light of the legal challenges made under the Act.

Any review of the Guidance should involve a consultation with the 34 access authorities and organisations such as the Scottish Outdoor Access Network, to gain experience from those who have been working with the legislation for more than seven years.

Section 32

Interpretation of Part 1

Whether it be in this section of the Act, or the Code, or the Guidance, better definitions are required for a number of terms, such as “recreational activity”, “wild camping”, “responsible”, “dogs under proper control”, “customary access” (particularly through privacy or curtilage zones).

Other comments

Many routes in the hills naturally descend valleys, passing through farm steadings. Very often there is no alternative route around the steading and access rights do not apply to steadings. It is proposed that in such circumstances, landowners should be obliged to install and promote a path around the steading to allow people to continue their journey.

There is no mention of the National Access Forum in the Act or Guidance. As the National Access Forum produces guidance notes for various aspects of the legislation, should it not have some proper remit or legal status?

Further guidance would be appreciated about urban access. Many towns in Scotland have pends or footways connecting streets and there have been a lot of recent planning applications to install gates to prevent anti-social behaviour. It is unclear what legislation is appropriate for stopping up public access on such routes, or if this is possible. There seems to be a bit of conflict between the Land Reform (Scotland) Act, rights of way legislation and roads legislation. Clearer guidance is needed to help access authorities' deal with requests to gate such routes.

The Land Reform (Scotland) Act 2003 – Part 2

In 2012 East Lothian Council supported the community purchase of land known as Seton Fields. The Community Company had made an unsuccessful bid to purchase neighbouring land a few years earlier. Despite the latest bid being extremely well managed by dedicated volunteers, and receiving an overwhelming and unprecedented level of public support, it too was unsuccessful.

The community company faced various problems in developing their bid, notably population size, time, a prescribed system and land prices. These are described below, along with suggestions to address the issues.

Seton Fields Community Company represented over 8,000 people in three distinct communities. The number of people concerned meant that a greater proportion of time had to be spent on the various requirements of the Right to Buy process. The ballot, for example, could not be organised in-house, requiring additional funding and time to organise. Consultations took longer, to ensure that each community was regarded equally. Business plans became more complex as a greater range of views were expressed.

It may be that smaller communities are better able to meet the various deadlines and targets built into the Right to Buy process. Put another way, there is, perhaps, an inherent bias in the process that favours smaller populations.

- The Right to Buy process should recognise the difficulties faced by larger populations and offer a more relaxed timescale, for example for populations larger than 5,000.

Good quality agricultural land close to cities command land values considerably higher than elsewhere in Scotland. The land at Seton Fields, for example, was valued at about £8000 per acre, giving a valuation for two fields of £875,000. Although this was a fair valuation it presented severe difficulties in raising the required funds.

The Right to Buy is an all-or-nothing process, where the community must purchase the entire parcel of land for sale, if they have registered an interest. The Seton Fields Community Company had to buy both fields that were for sale, even though their plans could have delivered on one field only. Successful funding would have been much more likely at Seton Fields if the Community Company could have elected to purchase one field, costing around half the total valuation.

- The Right to Buy process should be more flexible, allowing communities to buy sensible portions of land, if that suits their circumstances at the time of purchase.

The Right to Buy process is tortuous and intimidating and undoubtedly will discourage some local communities from registering an interest. Their genuine concerns about local countryside, therefore, will not be addressed. Equally, since the Seton Fields were not purchased by the community the nature conservation and access benefits of their proposal have not developed. The land reform process seeks to increase public involvement in countryside management but in many instances the benefits will not be delivered.

The basic aspiration of Seton Fields communities, however, could have been delivered without the need for the Right to Buy, had the landowner been willing to negotiate. Landowners are very often reluctant to encourage public access or give up land for habitat work and so some form of legislative support would help communities with negotiations. A formal arbitration process should be considered, such that communities can negotiate with landowners, supported by Land Reform legislation, to gain some local benefits without the need for land purchase.

- Consider establishing a 'Right to Influence' as well as a Right to Buy.

