

LAND REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Land Reform (Scotland) Bill introduced in the Scottish Parliament on 27 November 2001. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 44–EN.

POLICY OBJECTIVES OF THE BILL

2. In preparation for the advent of the Scottish Parliament, the Land Reform Policy Group was set up in October 1997 with the remit:

“to identify 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 on the natural heritage.”

3. The Land Reform Policy Group's final recommendations, published in January 1999, covered a wide spectrum of action. These have been accepted in full by the Scottish Executive, as set out in the Land Reform Action Plan published in August 1999. Overall, what will be delivered will be an integrated programme of action and legislation over the next 4 or 5 years.

4. A key element of that programme is to create new rights of access, of community ownership and of crofting community ownership, as reflected in the Bill.

Access

5. In October 1997 the then Secretary of State asked Scottish Natural Heritage (SNH) to review the legal arrangements for access to the countryside and to advise on the need for change. SNH decided to involve the Access Forum, enlarged to include a wide range of recreational and land management interests, in this task. In December 1998 SNH published its advice, along with the recommendations of the Access Forum, in a document entitled *Access to the Countryside for Open-Air Recreation*. SNH recommended the creation of a right of access for informal recreation and passage, subject to responsible exercise of that right; to protection of the privacy of individuals; to safeguards for the operational needs of land managers; and subject to any necessary constraints for conservation needs. In February 1999 the then Secretary of State

accepted SNH's advice as the basis for drawing up detailed legislative proposals for consideration by the Scottish Parliament.

6. The provisions on access in the Bill reflect much of the SNH advice. The policy aim is to create greater opportunity for people to enjoy the countryside. This will also assist in promoting social inclusion by improving people's health and their quality of life. The Bill creates a right of responsible access to land for recreation and passage, subject to certain exclusions and without prejudice to existing rights of access in relation to land. It provides for a general framework of responsible conduct which applies to those exercising access rights of access and to owners of land in respect of the use of land subject to such rights. Guidance on responsible conduct by those exercising access rights and by the owners of land over which access rights are exercised are set out in the draft Scottish Outdoor Access Code that SNH has prepared in conjunction with the Access Forum. The Bill also gives local authorities new powers and duties to uphold and facilitate responsible access rights, taking advice where appropriate from the local access forum established by the Bill, including byelaw-making powers. In addition, local authorities will be under a duty to plan for and compile a list of core paths sufficient for the purpose of giving the public reasonable access to land and they will be able to delineate new paths where appropriate. Disputes arising from the new access rights can be resolved by agreement, through the local access forum, or can be determined by the sheriff. Throughout the Bill, a balance is struck between the desire of recreational users to enjoy the countryside and the needs of those who live and work in the countryside.

Community ownership

7. The Land Reform Policy Group concluded (and this was widely endorsed) that the objective of land reform is to remove the land-based barriers to the sustainable development of rural communities. To achieve this, there needs to be:

- increased diversity in the way land is owned and used: in other words, more variety in ownership and management arrangements (private, public, partnership, community, not-for-profit) which will decrease the concentration of ownership and management in a limited number of hands, particularly at local level, as the best way of encouraging sustainable rural development; and
- increased community involvement in the way land is owned and used, so that local people are not excluded from decisions which affect their lives and the lives of their communities.

8. Providing communities with a right to buy land will add impetus to the drive for greater diversity and community involvement.

9. Part 2 of the Bill provides a community right to buy land, in which the community can demonstrate an interest, when it is offered for sale. The land can either be land in respect of which the community has a substantial connection, or land nearby such land. The right to buy also includes the right to buy salmon fishings and mineral rights associated with the land. There are 3 separate parts of the proposals: the registration of community interest; exercise of a community right to buy; and appeals and compensation provisions.

10. The Bill will allow community bodies to register an interest in land with which they can demonstrate a substantial connection. To be successful in registering an interest, a community body will have to be constituted in accordance with the requirements of the Bill and demonstrate that the bid has community support and that registration of its interest would be in the public interest. Registration of community interest will be a necessary first step for community bodies which wish to exercise the right to buy. This approach will encourage communities to consider the implications of community ownership before their right to buy arises. It will also ensure that only land in which a community interest has been registered will be subject to the right to buy provisions. Community bodies who have registered an interest in an area of land will have the security of knowing that the land cannot be sold without their interest being taken into account.

11. Once the landowner decides to sell land in which a community interest is registered, there will be a 30-day period during which the community body must decide whether it intends to exercise its right to buy the land. The aim of this is to give the community body an opportunity to consider whether it wishes to exercise its right to buy at that time and allows the landowner to ascertain the community body's intentions.

12. The purpose of the right to buy provisions is to enable local communities to buy land as and when it comes to be sold. The Bill creates an opportunity: it is up to communities themselves whether they choose to take it. To have their right to buy approved, community bodies will have to be properly constituted; be representative of the local community; have majority community support for the purchase; have plans for the land that are compatible with its sustainable development; and demonstrate that purchase would be in the public interest.

13. The Bill provides Ministers with the power to make an order which will define registrable land. It is proposed that such an order will define excluded urban settlements, that is settlements which have a population of over 3,000. Pages 62-64 of the February 2001 consultation paper listed the settlements which are likely to be excluded when this threshold is applied. Detailed maps and updated lists of settlements will be produced in due course to support the order.

14. The intention is that where land is purported to be sold in breach of the provisions of Part 2 of the Bill, there will be an additional community right to buy from the owner, which can be conferred by Ministers. This will operate immediately, and will be available for up to 10 years after the date when the land should have been offered for sale to the community body.

Crofting community ownership

15. These provisions also derive from the work of the Land Reform Policy Group. That Group's recommendations for action proposed legislation to give all crofting communities who create a properly constituted crofting trust a right to have ownership of their croft land transferred to that trust on fair financial terms. They envisaged that this legislation would aim to give all other crofting communities the same basic rights to acquire their croft land as were already available to the Secretary of State's (now the Scottish Ministers') croft tenants through the provisions of the Transfer of Crofting Estates (Scotland) Act 1997. They additionally proposed that the new legislation must also address the need to ensure that the landlord is properly compensated, deal with associated property rights (such as minerals, sporting rights and

the position of sporting tenants) and liabilities, and cater for impacts on associated properties and residual properties.

16. The policy aim is to remove barriers to sustainable rural development by empowering crofting communities. The Bill will enable crofting community bodies to buy the land at any time, not just as and when it comes to be sold. The Bill enables them to buy all the land which the crofters use including the mineral rights on and under the land, the salmon fishing exercisable from that land and, in certain tightly controlled circumstances, some additional land which adjoins the croft land. The croft land which can be purchased includes the inbye land of crofts plus land such as common grazings over which crofting rights are exercised. It does however, exclude owner occupied crofts. The Bill allows purchase of all or part of the croft land and in particular the crofting community body may exclude mineral rights and salmon fishings from the purchase and, with the agreement of the owner, can lease back the sporting rights to the former owner following purchase.

17. To have their right to buy approved, crofting community bodies will have to meet a range of criteria as follows:

- They will have to be properly constituted; and demonstrate that they are representative of the crofting community.
- They will be required to conduct a ballot to establish that the crofting community as a whole, and the croft tenants, support the application to exercise the right to buy.
- They must demonstrate that they have plans for the land that are compatible with its sustainable development and with the sustainable development of the crofting community which they represent.
- They must demonstrate that purchase would be in the public interest.
- They must pay a fair price which will include compensation to the landowner for disturbance and depreciation of other land.
- They must compensate the landowner and other relevant parties for costs they necessarily incurred in responding to and dealing with the application, including all relevant conveyancing costs.

18. The Bill provides that a crofting community body may purchase additional land either with the consent of the landowner or, if that consent is not given, if the Scottish Land Court concludes that certain criteria are met and, in particular, that the purchase of the additional land is essential to the sustainable development of the crofting community. There is also provision in the Bill to allow the landowner to request the inclusion of additional land and to allow issues arising in connection with the application to be tested in the Scottish Land Court before any application is approved. In addition, an appeal mechanism is available to allow the parties to challenge a decision by the Scottish Ministers to approve or reject a right to buy application.

ALTERNATIVE APPROACHES

Access

19. The creation of a right of access to land is designed to give members of the public the confidence that the countryside is theirs to enjoy so long as they conduct themselves in a responsible manner. In practice the public already enjoys relatively unrestricted access to Scotland's hills and mountains. However, in lowland areas there is greater uncertainty in the minds of many as to where they may legitimately go. Although many enjoy going to the hills, many others would prefer to walk, cycle and ride in less challenging areas nearer to their homes. The Executive believes that the uncertainty attached to the existing legal framework discourages Scots and visitors alike from enjoying Scotland's countryside to the full, and that a new approach is needed.

20. It has been argued that although it is perfectly reasonable to create a right of access to open country, there is no need to extend the right of access to enclosed land. Some farmers consider that the inclusion of enclosed land within the right will undermine their ability to manage their land and threaten their economic viability. The Executive considers that these concerns are misplaced. The creation of a right of access to all land will give people the confidence which they lack at present to go out and enjoy the countryside. The inclusion of enclosed land will also enhance the opportunities for people in lowland areas to enjoy their local countryside. The Executive does not believe that responsible access over enclosed land will interfere with the ability of farmers to manage their land. Farm steadings and land where crops are growing will be excluded from the right of access. In addition, each local authority will be required to establish a system of core paths. The Executive anticipates that, particularly in agricultural areas, most people will choose to exercise the right of access on core paths. Core paths will, therefore, provide an important means of managing access, particularly in areas where demand for access is greatest.

Community ownership

21. Community ownership is not the only mechanism being pursued under the Land Reform Action Plan programme for securing community involvement in land. Community ownership is still comparatively rare, though there have been several developments in the past 5 years. Even with a community right to buy in place, it seems likely that many communities will prefer to pursue some form of community involvement short of outright ownership. But the Executive believes that it is important that communities should have the choice.

22. What happens at present is that community ownership usually comes about as a result of the landowner voluntarily selling to the community. This will undoubtedly continue. It might be argued that this is sufficient, and that right to buy legislation is not required. The Executive however believes that a community right to buy is the essential core of land reform, and necessary to empower communities, give them real rights, and thus help create a more modern relationship between landowner and community. The key is to strike the right balance between private rights and community rights. The aim is to empower those communities that are interested in community ownership without imposing significant new burdens when there is no community interest.

23. On the other hand, it might be argued that there should be a right for a community to buy land at any time, not just when the owner decided to sell. Limiting the right to buy to circumstances when the land comes on the market means that if the landowner never sells communities will never have the right to buy. However, an unlimited right to buy of this kind would have a major and universal impact on property rights, inevitably with implications of ECHR difficulties unless suitably compensated for. The cost of the necessary compensation would be very significant, either for funding agencies such as the Land Fund or for the Executive itself. The Executive believes that this scale of disruption to the property market, plus the costs of compensation, cannot be justified.

Crofting community ownership

24. The proposals for a crofting community right to buy build upon existing right to buy arrangements for individual crofters and create rights for other crofting communities similar to those enjoyed by crofting communities whose landlord was the Secretary of State (now the Scottish Ministers). It might therefore be argued that new legislation is unnecessary. But, although it is theoretically possible for a crofting community to use the existing right to buy provisions for individual crofters in existing legislation as a means of achieving community control of croft land, this would be cumbersome, risky and costly, with no certainty of success. There is a great likelihood that such an approach would lead to an unsatisfactory solution suiting neither the community nor the landowner. Hence the need for modern arrangements to enable crofting communities to buy their croft land in concert.

25. The crofting community right to buy is of course an unlimited right to buy. It can be exercised at any time, not just when the land comes up for sale. As indicated above, this means that the property market could be affected, and that suitable compensation arrangements are necessary in order to avoid significant ECHR difficulties. The effect on the property market, and the compensation costs, while potentially substantial, are both inherently constrained by the extent of crofting land, and the generally low value per hectare of that land. These two factors mean that the potential disruption and compensation costs of a crofting community right to buy are much less than the potential compensation costs of a general community right to buy. The Executive believes that giving crofting communities but not other communities an unlimited right to buy is justified by the greater need to support such crofting communities, which are located in the most fragile areas where the potential for a bad landlord to do real harm to the community is greatest.

26. It is not envisaged that the crofting community right to buy will be frequently exercised. It is very apparent that where crofting communities have a good relationship with their landlord there is little inclination on the part of the communities to take on the not inconsiderable burdens of ownership. The crofting community right to buy requires serious commitment from the crofting community to the ownership and management of land as a community asset and is likely to prove to be a costly and complex process. Without needing to be exercised it is expected that its very existence will achieve two important objectives. First, it is likely to create a climate in which landowners will willingly sell land to crofting communities by agreement. Secondly, it will encourage landowners who have monopoly ownership of land in crofting areas to work with and maintain good relations with that community.

CONSULTATION

Access

27. In October 1997 the then Secretary of State for Scotland, asked Scottish Natural Heritage (SNH) to advise on changes necessary in the legislation relating to access to give effect to the Manifesto commitment to provide greater freedom for people to enjoy the countryside. In preparing its advice, he asked SNH to consult with interested parties.

- SNH looked to the Access Forum, expanded to include representation from all relevant, to provide input to this exercise.
- In early 1998 SNH also issued an open invitation to contribute to the debate, to which some 200 responses were received.
- By the end of 1998, the Access Forum had achieved considerable consensus on the principles of a new approach to access in Scotland. SNH largely endorsed the views of the Access Forum in its own advice to government at the end of 1998. This advice, along with the recommendations of the Access Forum, was published in a document entitled *Access to the Countryside for Open Air Recreation*.
- On 2 February 1999, the then Secretary of State announced that the UK Government accepted SNH's advice as the basis for drawing up detailed legislative proposals for consideration by the Scottish Parliament. He asked SNH, in consultation with the Access Forum, to give further consideration to the detail of the proposals and draft a Scottish Outdoor Access Code.

Community ownership

28. The proposals on community ownership have resulted from an unprecedented level of consultation over the past four years. The Land Reform Policy Group recognised the need to consult extensively on what should be done.

- In February 1998 the Group issued a first consultation paper on identifying the problems and opportunities which land reform should address. 6,750 copies were issued, and 364 responses were received.
- Then in September the Group issued a second consultation paper on identifying the solutions; assessing possible options for action in terms of what would be achieved by the proposed change; the legislative implications; the administrative implications; and the cost. A summary version was also made available. 5,000 copies of the full version and 13,400 copies of the summary version were issued, and 846 responses were received to this second consultation phase.
- Throughout the consultation process, written responses were supplemented by contributions made in the course of 14 local seminars held throughout Scotland (attended by some 330 people in all), 7 expert seminars on specialist issues, and a wide range of bilateral meetings with relevant representative bodies and individuals.
- All of this informed the Group's final recommendations, published in January 1999. 16,000 copies were issued, and a copy sent to all who had previously commented. The further comments received (though this was not a consultation paper) were also taken into account.

29. In the period from January 1999 to the establishment of the Scottish Parliament, policy development was informed by further bilateral meetings with relevant representative bodies and individuals. In addition, three consultation papers on specific issues were put to the Consultative Panel on Landownership, consisting of all individuals and organisations that had expressed an interest in participating in the development process. Two expert seminars were also held on specific issues.

30. Following the establishment of the Scottish Parliament and the creation of the Scottish Executive, the White Paper *Land Reform – Proposals for Legislation* was issued on 8 July 1999. 14,800 copies were issued, and a copy sent to all who had previously commented. 550 written responses were received, and in addition, 13 seminars were held throughout rural Scotland over the summer. In all, around 440 people attended these seminars.

31. The land reform website (www.scotland.gsi.gov.uk/landreform) was launched on 6 August 1999, and it has provided a further means for the public to learn about and comment on the proposals. There have also been 3 expert seminars on specialist issues, and a wide range of further bilateral meetings with relevant representative bodies and individuals.

Crofting community ownership

32. The proposals on crofting community ownership were also included in the Land Reform Policy Group consultation over the past two years. They were not included in the Land Reform White Paper, but at the White Paper launch, the Deputy Minister for Justice indicated that Ministers were looking for a way to include a crofting community right to buy in the Bill.

33. A separate consultation paper on how such a right might operate in practice was issued to members of the Crofting Consultative Panel. The Panel members include the main organisations representing crofters, crofting landlords and land management professionals together with a range of expert individuals. In addition the paper was made available on request to anyone else who expressed an interest in seeing it. 15 responses were received, and these have informed both the decision to include these provisions in the Bill, and the policy development of the Bill.

The draft Bill

34. The draft Land Reform (Scotland) Bill was published in February 2001, and was subject to an extended 18-week consultation period (due to the Foot & Mouth crisis), ending on 30 June. About 13,000 copies were distributed, and over 3,500 responses were received, more than 80% relating solely to access. Some 380 respondents commented on the community right to buy, and though many restated views they had expressed earlier, there was a substantial degree of support for the principle of community ownership. There were 529 responses which made observations on aspects of Part 3 of the Bill. Of these there were 347 which were solely concerned with lodging an objection to the proposition that a crofting community body should have the right to purchase salmon fishings. All the responses were considered and the observations made have informed the development of policy, with the result that significant changes have been made to the final version of the Bill.

35. A copy of the responses to the consultation (other than those given in confidence) has been placed in the Scottish Executive Library, and a further copy is in the Parliament's Information Centre. The Scottish Executive has also prepared a paper summarising the responses and the action taken to amend the draft Bill, which will be widely available and will also be placed in the Scottish Executive Library and the Parliament's Information Centre.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

36. The Bill's provisions are not discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation. Part 1 of the Bill provides a right of responsible access for everyone to land and inland water for recreation and passage. The Bill includes a duty on local authorities to establish a system of core paths in their areas. In planning the paths, local authorities will require to consider the needs of everyone, including disabled people. There are no equal opportunities implications for the community rights to buy in Parts 2 and 3 as all landowners will be treated equally, irrespective of their gender, race, disability, etc. Likewise, there are no equal opportunity issues in connection with community membership. The Bill specifies how communities can be defined and does so on the basis of geographical location. An example of equal opportunities being addressed by this legislation is contained in section 38(2)(a), which defines a transfer of land as if it were to a spouse.

37. Details of consultation are set out above and no difficulties have been raised in relation to equal opportunities since consultation on the legislative proposals began in 1999. Various methods of consultation have been employed, and members of the general public and organisations were equally encouraged to participate. All responses received have been considered in preparing the Bill for introduction in the Parliament. No difficulties were raised in relation to equal opportunities issues.

38. To further provide equal opportunities for all, written guidance will be made available in support of the legislation. Officials from the Scottish Executive, local authorities, Highlands and Islands Enterprise's Community Land Unit and the Scottish Land Fund will also provide advice for their respective areas as required, for example, with the completion of forms.

Human rights

39. The potential impact of the European Convention on Human Rights has been well to the forefront in developing the Bill. The key relevant elements on access are article 6, which provides for a process of impartial determination of civil rights, article 8, which provides for respect for the individual's right to enjoy reasonable private enjoyment of his property, due respect to his private or family life and his home, and article 1, Protocol 1, which protects the individual's right to property from unwarranted interference. The Executive is satisfied that the provisions in the Bill relating to access are compatible with the Convention.

40. For community ownership and crofting community ownership, the key relevant elements are article 1, Protocol 1, which sets out the right to peaceful enjoyment of property, and to a lesser extent article 6, which provides the right to hearing by an independent tribunal. The

Executive is satisfied that the provisions in the Bill on community ownership and crofting community ownership are compliant with the Convention.

Island communities

41. The provisions on access are designed to benefit the whole of Scotland. They do not discriminate for or against island communities. The provisions on community ownership are aimed at benefiting rural communities, including islands communities. In the light of past experience, it seems likely that island communities will be particularly likely to use the provisions in the Bill to secure their future. The provisions on crofting community ownership are aimed at benefiting crofting communities, which are predominantly island communities.

Local government

42. The provisions on access will give new powers to local authorities in respect of the provision and management of access, and the creation, maintenance and management of core path networks. The powers and functions of local authorities will not be directly affected by the community ownership or crofting community ownership provisions. But local authorities for rural areas have previously made it clear that they would welcome legislation of the kind proposed because it would empower communities in their areas, and assist in the continued survival and growth of such communities.

Sustainable development

43. The provisions on access are designed to promote sustainable development by raising awareness among ordinary people of the value of the natural environment by encouraging them to enjoy the countryside. The provisions on community ownership and crofting community ownership are aimed at underpinning sustainable rural development by creating new opportunities for rural and crofting communities respectively. To have their right to buy approved, both sets of community bodies must have plans for the land that are compatible with the sustainable development of the local community and of the land which they purchase.

Business cost compliance

44. The provisions on access are intended to minimise compliance costs on individuals and businesses. In framing the Bill, the Executive's aim has been to strike a balance between the desire of recreational interests for greater access and the need of individuals who make their living from the countryside to continue to do so. The provisions on community ownership and crofting community ownership are intended to minimise compliance costs on individuals and businesses. Landowners will be affected only where there is a specific and demonstrable community interest. To minimise bureaucracy, standard forms will be provided at every stage. A draft Regulatory Impact Assessment for the Bill will be issued for comment shortly after the Bill is introduced.

This document relates to the Land Reform (Scotland) Bill (SP Bill 44) as introduced in the Scottish Parliament on 27 November 2001

LAND REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

© Copyright The Scottish Parliamentary Corporate Body 2001

EDINBURGH: THE STATIONERY OFFICE

Printed in the United Kingdom by The Stationery Office Limited

£2.30

Applications for reproduction should be made in writing to the Copyright Unit, Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ. Fax 01603 723000.

Produced and published in Scotland on behalf of the Scottish Parliament by
The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliament publications.

ISBN 0-33-820269-2



9 780338 202697