

Community Empowerment Bill Consultation

Response by Community Land Scotland – January 2014

Part 1

Asset Transfer

Q1.

The broad intent of the principles and description of a community body at 1(5) appear well designed. **However**, the use of the term 'company' and the related use of 'articles of association' unless defined to include a Scottish Charitable Incorporated Organisation and other forms of organisation or Trust, will not be inclusive of many organisations that in every other respect would meet the objectives of the definition in 1(5).

The term 'company' might be better dropped and replaced with 'incorporated body', or provision is made for a schedule which set out what would qualify as a 'company' in the terms drafted.

In all circumstances it would appear wise to give a power to Ministers to approve any body which is capable of meeting the terms of 1(5), to allow for cover for organisations with unusual structures from earlier periods of history, or for the evolution of other forms of organisation which, though different in structure, have all the essential attributes sought in 1(5).

The evidence of the Development Trusts Association Scotland and the Community Woodlands Association ought to be given particular weight in these matters as they have particular expertise in land and other transfers to appropriate community bodies.

Q2.

Schedule 1 appears to be a sufficient description, **provided**, it is clear that the listing 'The Scottish Ministers' embraces the Forestry Commission **and** that the description includes the trees as well as the land on which the trees are rooted, as these may be differently vested.

It is noted that cross-border bodies, such as the Ministry of Defence or its agents, or the Crown Estate, are not listed. Provision should be made for cross-border bodies to be included in the Schedule.

Q3.

There is an apparent omission to the current procedures in so far as it appears there is no explicit provision to trigger acknowledgement of receipt of an asset transfer request and from which point the clock starts running on appropriate timescales for a decision under 5(2). Without such a provision no progress to address whether to agree or refuse the request could in effect mean no progress, but also no breach of any provision.

In 5(6), making an offer and concluding a contract could be given a time-frame of 6 months from date of receipt of the request.

In 6(2)(c) an offer time of 6 months would be appropriate.

6(6). The time provision seems appropriate.

Q4.

Agree with the provisions.

Q5.

The appeal arrangements set out at section 8 are appropriate, **except**, that appeals should be allowed on decisions of local authorities **and** a review process of Scottish Ministers decisions should be provided analogous to internal review procedures relating to FOI requests.

In so far as local authorities are concerned, Scottish Ministers have appeal or intervention procedures at their disposal for other local authority decisions and it is not clear why, in principle, the decisions here are so different as to eliminate any appeal. In the interests of proportionality it may be appropriate to create a provision which required the local authority itself to establish an appeal process to be chaired by an independent person of suitable local standing and experience.

Q6.

Relating to Part 1 section 3(4)(c) and 3(4)(d)(i):

A difficulty may arise when an offer is made by a community body which they regard as reasonable, but where the authority takes a different view and, possibly unreasonable view, in the eyes of the community. It might be wise to make provision for circumstances where there is a disagreement, for either party to trigger an independent valuation. The costs of such a valuation to be met by the relevant authority.

Further, and linked to the above, the experience of community bodies is that the normal valuation principles find difficulty in fully recognising the intention of Ministers in empowering communities and in utilising land or building for public good and where they may be currently underused. **We propose** a provision for Ministers to have the power to issue guidance to relevant authorities on what would constitute acceptable valuation principles when valuations are for purposes associated with the provisions of public asset transfers in this Bill.

Relating to 5 3(c). Consideration should be given to widening the listing of whether agreeing to the request would be likely to promote or improve –

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- Equality
 - Community resilience
 - Self determination
 - Community sustainability
 - The realisation of human rights obligations
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Q7.

The policy objective should not be driven by the need to make savings and is unlikely to generate any additional costs, but result in the more productive use of existing assets.

Part 2

Community right to participate in improving outcomes of service delivery

Q8.

The definition as stands would allow for groups which may believe they are involved in the promotion of a public benefit, but for which there is no real test. Any protest group pursuing a sectional interest or specific geographic interest, potentially associated with issues being considered under the planning system, would be able to meet the terms of 'community body' as it stands and it is not clear this is the intention. While a participation request may be refused for such a body, there could be considerable time spent on this before that moment was reached.

To guard against any use of this proposed system, for which provision for participation already exists under the planning system, for example, might be excluded.

However, it would **also** be important to seek to ensure that any community body was able to demonstrate greater credentials to act on behalf of the whole community, or a specific interest within a community, which was representative of that community or interest within that community. To meet these circumstances provision should be made under 11(2) for **open membership** when the matter at hand and for which the community body seeks recognition, is to do with public service delivery for the whole geographic community. Where the matter is one related to a specific interest grouping within the community there should be open membership within that interest group. Further, the community body should be able to **demonstrate that they had made appropriate efforts** to consult and gain the authority of the whole community or the interest within the community they seek to represent, so to do. There are provisions in the Land Reform Act 2003 which may be helpful in establishing the thresholds for what might be regarded as community consent to act.

Q9.

It is not clear why the Public Service Authorities listed does not replicate in full the listing of relevant authorities at Schedule 1. The exclusion of Scottish Ministers from the list would appear to exclude the Forestry Commission and this would not be appropriate. It is also not clear why the Crofting Commission, the British Waterways Board, the Scottish Courts service, and Scottish Water are excluded. They should be included unless there is specific reasoning set out in response to the consultation for not including them.

It is not clear why other public service authorities like the Scottish Human Rights Commission and the Children's Commissioner are not included as they have a direct relationship in the delivery of services to the Scottish people.

Further, the cross-border body the Crown Estate should be included.

Q10.

The provision is widely drawn and that is commendable in the potential it allows for consideration of any potential public authority outcome. The difficulty, if any arises, is that in terms of common understanding of that the provision does actually provide for, it is not necessarily readily understood just how wide-ranging the provision and its potential is. On

the face of it, the delivery of the service by another body is permitted as an improved outcome, although it is not explicitly clear this forms part of the policy intention.

It may be possible to **make the provision at 13(1) more explicit** by inserting something to the effect of “a process to seek to deliver an improved outcome for a community or an interest within a community in any service provided by that authority (, including delivery of that service or part of that service by the community body or some other body [if this is the policy intention]). This process to be known as ...” – (to be inserted between “in” and “an” in line two of 13(1).)

It is further not clear whether the policy intention includes a request by a community body to seek to have an authority exercise a statutory duty it may not be exercising in relation to a specific matter. It would be empowering for a community body to be able to formally request that an authority exercise its powers of, for example, compulsory purchase in relation to specific land and/or buildings, or to issue a wasteland notice, or take actions on a dangerous building, or the like. Further, an authority should not reasonably refuse such a request and if it did, it should be required to set out the reasoning for this within a defined time-scale. If this is intended, the right to request to participate in an outcome improvement may appear a cumbersome process for a comparatively simple request. If this is not the policy intention of this section, then **provision should none the less be made** for such matters elsewhere within the draft Bill.

Otherwise the description appears clear and appropriate.

Q11.

There is an apparent omission to the current procedures in so far as it appears there is no explicit provision to trigger acknowledgement of receipt of a participation request and from which point the clock starts running on appropriate timescales for a decision under 15. Without such a provision no progress to address whether to agree or refuse the request could in effect mean no progress, but also no breach of any provision.

Consideration should be given to widening the listing at 15(3)(c) of whether agreeing to the request would be likely to promote or improve –

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- Equality
 - Community resilience
 - Self determination
 - Community sustainability
 - The realisation of human rights obligations
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Q12.

It is not clear whether it is always necessary, or how to, bring an outcome improvement process to a conclusion, and upon which conclusion a report is then published. On the face of it, the provisions as they stand do not require the process to come to an end. This may be appropriate, or it may not be appropriate, depending on the circumstances. On the one hand the process itself may be of an ongoing and iterative nature creating an ongoing dialogue between the service authority and a particular community or an interest within a community and from which improved service outcomes are derived and reviewed and further improved. On the other hand, the process may be designed to deliver a specific and one off change in service outcome.

It would seem appropriate to establish a **provision** for reporting, notwithstanding the process may not have been completed and there is no particular intention to complete it in the short to medium term, **and** for where a specific outcome is sought but for which no conclusion may be provided in the process.

To further strengthen the process envisaged, **creating a provision for the public service authority to seek agreement** to the report to be published by the community body or, which failing, for the report to include agreed reasons for the report not being agreed by the community body and the public service authority, or for the community body to have the right to include in the report their view of why they could not agree the report.

Q13.

No comment.

Part 3

Common Good

Q14.

Section 22(3). The provision should include the advertising of the list in any newspaper circulating in the area, and the inclusion in a prominent place on their web-site including details of how persons may respond.

An additional provision requiring the commencement of the requirement for the register by an early date and dates by when the registers should be completed by local authorities.

Section 22(5). (5)(a) – this seems an onerous provision in the sense that the authority is bound to be aware of many hundreds, if not thousands of community bodies (unless this has a specific meaning defined elsewhere). Any failure to notify all may result in challenge by having failed to notify any one or some. The provision referred to above may be sufficient to meet the wider need to inform.

Section 24(2). The provision should include the advertising of the decision to dispose of or change the use of the property in any newspaper circulating in the area, and the inclusion in a prominent place on their web-site including details of how persons may respond.

Under section 24, **the provision could be further strengthened** to provide for a referendum to determine the disposal of the common good asset, within the former Burgh area or an area defined by the community council boundary within which the disposal is to take place, or exceptionally, a wider community defined where the specific benefits from disposal have wider effect and benefit. In circumstances where a referendum was triggered the local government Boundary Commission could be given the role of determining the community to participate in the referendum.

Provision might also be helpfully made for each local authority to develop a strategic plan for the common good land it holds, with community consent in the areas affected being sought to that plan.

However, more generally, the draft provisions for the common good in this Bill appear modest to say the least. In the context of recent developments in community ownership of assets, the potential of common good land to be managed more locally and put to wider community development use could be significant. It is questionable whether the overall legal framework for common good remains fit for purpose. A dedicated wider review of the

common good issues may be a preferred way of dealing with the issues and modernising the law.

Part 4.

Dangerous Buildings

Q15 and Q16.

No comment.

Chapter 4

Community Right to Buy

Q17.

Extending the right to buy to all parts of Scotland.

We support this proposal.

Extending the Right to Buy - Additional measures.

While the extension of the right to buy referred to immediately above is important it, of itself, is **insufficient** to deal with deficiencies in the Land Reform Act.

The additional measures below are set out in outline here, and are supported by a more detailed description in the Appendices to this submission.

In addition to the geographic extension of the right to buy, **we specifically propose:**

A **new provision** to allow a community body to register a request to purchase land.

That new provision to trigger **new arrangements for** facilitated discussion, mediation, or negotiation, as appropriate, between an owner subject to the request to purchase, and the community body. (See Appendix 2)

A **new provision for a further extended community right to buy** in circumstances where a request to purchase has been registered and the triggered discussion, mediation or negotiation has failed to bring the matter to an agreed conclusion. The right to buy only being capable of being exercised on application to Scottish Ministers and where Ministers confirm the application as being in the public interest and if it furthers sustainable development. (See Appendix 1)

A **new provision** to create a land agency for the purpose of facilitating the above provision for discussions, mediation and negotiation, and related purposes. (See Appendix 2)

We further propose detailed consideration of potential additional new measures, as follows:

A **new provision** to require the approval of Scottish Ministers to the purchase of any substantial areas of land, the threshold to be determined by regulation.

A **new provision** to permit Scottish Ministers to require an inquiry by the land agency into whether the public interest and the furtherance of sustainable development is served by the retention of any specific single land holding in its entirety within its current ownership, with

powers to Scottish Ministers to require all or part of any specific land holding to be disposed of when that was in the public interest.

A new provision for the land agency to register requests to settle land in circumstances to be defined in regulation, with powers to Scottish Ministers to require the disposal of such land by the current owner when Ministers agree allowing such settlement would be in the public interest and further sustainable development.

A new provision for Ministers to have regard in their considerations and actions to the achievement of greater equality and diversity in the ownership of land in Scotland, including through community ownership.

Q 18.

Registrable land. We support Ministers having additional powers in this regard.

Q19 and 20.

Compulsory right for communities to purchase.

The Community Empowerment Bill is predicated on the basis of positive opportunity to fashion a different future. As the Minister's forward makes clear – *“at its heart, community empowerment is about communities taking their own decisions about their futures. It's about communities choosing to grow and become stronger, and to improve things for their families, friends and neighbours in ways that make sense to them, it is a means for communities to take their own actions with access to all the resources available to them to develop their local economies, environments and cultures.”*

Referring to the community right to buy, the consultation document makes the point that *“community ownership of land has had a transformational impact. It has increased community confidence, and allowed communities to realise their aspirations and control their destinies. It can create strong and vibrant and flourishing communities where people want to live. It has helped deliver sustainable development and also sustainable communities.”*

It could readily be added that community ownership offers the opportunity of greater fairness, greater social justice, acts against inequalities, and furthers the realisation of human rights.

None of what is in the consultation paper about the aspirations of the Bill and the success of community ownership or about the specific aspiration for achieving further community ownership (as expressed in the First Minister's target and more widely), and none of what has been achieved to date in community ownership has solely relied on explicit, or indeed implicit, notions of counteracting neglect.

The proposals at paragraphs 71. to 73. are not appropriate as they narrow fundamentally the rationale for community ownership such as to require the consideration of compulsory measures, to be solely based on evidence of neglect. This would be inconsistent with the current Land Reform Act 2003 in that when the question of compulsion over the purchase of land is dealt with in that Act, forcrofting communities, and compulsion in purchase does not depend on the notion of neglect.

So, the proposal to narrow consideration of compulsory measures to one which can only follow from a question of neglect **is wrong in principle.**

Further, when it comes to the question of compulsory purchase in other well established circumstances, for example, in land assembly associated with re-development, the law does not depend upon neglect being shown, but on the opportunity being created weighing more heavily in the balance of what is in the public interest.

Clearly, any question of compulsion in changing land ownership requires to be considered carefully and it requires to take account of various protections in law, and any decision taken, as a matter of principle, requires to be proportionate and reasonable. Any such decisions are challengeable in law and the existing framework of well-established safeguards seen in law are sufficient to protect the interest of all parties. Compulsory transfer of land should only be authorised by Ministers when that is in the public interest, and supports sustainable development. We attach at Appendix A paper which sets out more arguments about the nature of compulsion in land matters which shows that compulsory measures are a long and well-established part of public interest considerations with sufficient safeguards capable of meeting all reasonable concerns.

However and further, we believe **there would be significant difficulties in framing a satisfactory definition of neglect** for this purpose. Indeed, we believe it would not be possible so to do adequately. While, on the face of it, within an urban context, or in relation to a specific building in any other context, it may be possible to describe it as neglected or abandoned, the further you move from that context, the more difficult the definition becomes. So, for many people, and in historic context, the vast majority of the Highlands and Islands might be regarded as neglected when one takes its potential against its current use. Further, when might what an owner might see as benign munificence toward a community drift into forms of actual neglect? Is neglect a physical construct, or could it be by reference to the indifference, the neglect, of an owner toward the aspiration and the social and economic development opportunities seen by the community to help build a sustainable future. More narrowly, in any given instant, what might be regarded as neglect by a community might be regarded as a defensible, specific and the preferred form of land management by another, or at least defensible as a reasonable action given market potential, or whatever. Where it might be arguably clearer that by one definition a piece of land of critical importance to a community may be relatively more neglected or abandoned than another, relative to the land holding as a whole, what is its significance and how would this be defined in terms of the overall `neglect' of the land holding?

So, narrowing any question of compulsion to one of neglect is undesirable in principle and, we believe, impossible in practise to adequately define. The option for a right to buy (compulsorily if necessary) should exist and would be reasonable when protected by existing well-established safeguards which are sufficient to protect all interests.

Q21.

Criteria for registration

Community Land Scotland is not seeking any change to 38(1)

Q22.

Information held in register

No comment.

Q23.

Application form

We are open to changes in the application form, provided any proposed changes are tested and supported by experienced practitioners.

Q24.

Late registration

We strongly support the need for a late registration process to continue.

We do **not** see a justification for a 'significantly greater' level of community support to that otherwise required to register an interest.

Q25 and 26.

Re-registration

The proposal outlined in the consultation is for a re-confirmation process, rather than a re-registration process. In principle we have no objection to this change. However, the key thing is that the burden overall is reduced.

The re-registration provisions are seen as unnecessarily demanding.

There are at least two ways of dealing with this. One simple way would be to lengthen the period over which registration applies and remains in force.

The 5 year period is considered too short, and consideration should be given to extending this to 10 years. This would retain the ability to occasionally test the will of the community on their continuing interest in purchase, while reducing the burden on communities. It must always be remembered that a full ballot of the community would be needed to finally trigger the right to buy provisions, and this is the ultimate safeguard.

A further concern is that re-registration requires replicating the original registration demands, which can be considerable, depending on the size of the community concerned. In addition to extending the timescale, a further way to simplify matters would be to change this requirement to one that is less demanding on the community body, but none-the-less open and transparent and which provides opportunity for a community view.

There would be merit in changing the statutory provisions to establish that once an interest is registered it remains valid until such time as the community may change its mind, and that an occasional and simple opportunity is established to confirm community views. That could be provided for by the community body being required to take a simple advert in a local newspaper (or equivalent mechanism) circulating in the area in which it would be indicated that the community body was under an obligation to review whether it wished to continue to maintain a registration of interest, what its view was, and offering an opportunity for any qualifying residents (on electoral roll) who object to lodge an objection with the Scottish Government. If Ministers judged the objections were independently generated, sufficient in number and in the reasoning given, they would be empowered to ask the community body to re-register demonstrating there was still 10% support.

We recognise there is scope for mischief in this approach from, for example, current landowning interests encouraging objections to be lodged, or from a vociferous minority in the community, and Ministers would have to use their judgement to assess when this might be the case and give weight accordingly to any objections.

Q27 and 28.

Timescale to complete right to buy.

The entire process, from receipt of the notice triggering the right to buy upon the land becoming available for sale to the date of entry to the land and the payment of the price, is to be completed no later than 6 months after receipt of the first notice.

It is considered that this is a very tight timescale, particularly given all the legal and organisational requirements, and the time for some funding bodies to turn round applications for funding. Clearly a balance has to be struck between the desire of public policy to see more community purchases secured, and the ability of a community to conclude all the demanding requirements, without such time being so great as to disadvantage the current owner in selling.

A period of 6 months from receiving the valuation to concluding the purchase would be a more workable timeframe.

Within this timeframe a period of 10 weeks to ballot the community and present the case for community ownership would be more workable and will not disadvantage the landowner.

Q29.

Ballot procedures

The consultation asks if Scottish Ministers should organise the ballot and pay its costs.

At present third parties, such as the local authority, or potentially others, can and have been invited to organise the ballot. There is a timing link between the ballot and the effort the community body may wish to expend in seeking support in the ballot for the outcome they are recommending. This points to the community being in the driving seat for the ballot. However, with difficulties encountered around ballot organisation and access to register of electors there would be merit in making provision for Scottish Ministers to have powers to organise the ballot and this to be triggered by simple request from the community body. If requested, the Scottish Ministers should bear the cost.

Q30.

We have no problem in Scottish Ministers notifying the ballot result to the landowner in the interests of fairness. This should be done at the same time and certainly not before the community body is notified in any ballot organised by the Scottish government.

Q31.

Pro forma for community plans for sustainable development.

We have no difficulty in principle with the development of a pro-forma, provided it was tested with experienced users and advisers and won support.

Q32.

Use of post codes in definition of community.

We agree with the proposal to move away from post-codes as the main means of defining the community to the more flexible approach offered.

The existing discretion to Ministers to accept other forms of description should remain in addition to any specific changes.

Q33.

Other ways to define a community.

The key is to allow flexibility and this could be provided for by means of the use of the different ways set out at paragraph 97 of the consultation or in addition, in such a way as may be agreed in any specific instance where it could be shown none of the other methods on offer were appropriate for the circumstances.

Q34, 35 and 36.

Community body: appropriate legal status

We agree that other legal entities and SCIOS should be able to apply under the provisions. The difficulty is in anticipating all eventualities or applications from community bodies which have particular forms for historic reasons but would in all respects be appropriate bodies to apply. For such circumstances Ministers ought to be free to approve any other form of body they believe to be constituted in an appropriate way.

Q37.

'Forever conditions'

We agree that Ministers should only have to approve changes to articles of association for community bodies that are actively seeking to exercise their right to buy, and not otherwise as at present.

Q38.

Length of registration period

The 5 year period is considered too short, and consideration should be given to extending this to 10 years. This would retain the ability to occasionally test the will of the community on their continuing interest in purchase, while reducing the burden on communities. It must always be remembered that a full ballot of the community would be needed to finally trigger the right to buy provisions, and this is the ultimate safeguard. (see Q25 and 26 too)

Q39.

Valuation of the land – counter representations

We agree with the proposal to allow for counter representations.

Q40.

Deterring landowner withdrawing from sale

The provision of an extended right to buy, even when there was not a willing seller and within the framework suggested in this submission would be the best way to counteract a landowner withdrawing from a sale.

Q41 and 42.

Ballot turnout and flexibility

We firmly believe that the ballot is a vital part of developing a secure and well supported enterprise. Any lessening of the ballot requirements may give rise to genuine difficulties in the long term.

We believe the current flexibility is sufficient to allow the proper exercise of discretion when warranted, without the need to lessen the general requirements.

Q43.

Ballot – extenuating circumstances

We support what is proposed in the consultation as a sensible extension of helpful discretion to Ministers and the community body, if ever needed.

Q44.

RTB Application – need for further information

We see no reason to remove this provision, which is sensible in allowing officials processing applications to clarify any matters that might ease the application process. The time-frame of 7 days seems unduly restrictive, given that the community body is likely to be depending upon a volunteer to respond. A better timescale would be 14 days or 10 working days.

Q45.

Option agreements

We believe it would be helpful to add a provision, as suggested, allowing Ministers to accept an application to register an interest which is subject to an option agreement.

Q46.

Option agreement

We believe a transfer of land under an option agreement should not be able to transfer as exempt land while there is a registered interest in the land. To allow this would provide a set of arrangements that could be put in place by owners in advance of a registration of interest as a specific means to seek get round the provisions of the Act.

Q47.

Prohibition notice

We support the proposed provision that a the prohibition on the owner taking the land to market should apply from the day after the day of issue of the notice, rather than any later date.

Q48.

Public holidays

We agree public holidays should be excluded from statutory timescales to register a community interest in land.

Q49.

“Exempt” Transfer of land

We agree “exempt” transfers should be notified to Scottish Ministers.

Further, we propose that “exempt” transfers should require to be advertised by appropriate means in the area in which the land lies, indicating the date upon which such a transfer is proposed to take effect, and that date shall not be more than one month from the date upon which the advert is placed. Suitable regulations should cover the terms of advertising and what any advert should contain.

Q50.

Changes to address

On the face of it this is a not unreasonable requirement. However, it needs to be remembered that the community body is in all probability a body wholly dependent on voluntary effort, and without a paid secretary or regular legal advice available to it. It is entirely possible that with the offices of office holders changing over periods of time this requirement will not be met, not for any reason of intent not to comply. If any such requirement were to be established, it would only be acceptable if it was clear that any failure to observe this provision would not be a reason of itself to disqualify or render void the status of any registration or application process.

Q51.

Monitoring the Right to Buy

It can be seen how some interests, principally forces for the status quo in land ownership, might seek to have the community right to buy monitored because they are fundamentally opposed to it and may believe that it has to be continually justified and the need for it renewed.

If so, it would be very odd indeed to provide for this in the Community Empowerment Bill in so far as Parliament has already decided to provide the right to buy as they see it as a good thing. Current Government policy does the same, witness the Land Reform Review Group terms of reference and the First Minister’s commitment to doubling the land in community ownership by 2020. In approving the Land Reform Act, Parliament could have provided a review or a sunset clause, but did not do so. So any provision for monitoring of the right to buy in the sense of seeking to provide continued justification for the right to buy would be not be justified and would be strongly opposed by Community Land Scotland.

Further, many or most community purchases of land these days, while undertaken in the context of the Land Reform Act, probably do not use the process of the Act to finally secure purchase, it is a negotiation. It is not clear that once land has changed hands in this way there is any case for Ministers to monitor it any more than monitoring any other land ownership by private individual or conservation charity, or whatever. Indeed, in a technical sense, it would not be clear any such purchase was a ‘right to buy’ purchase.

Any monitoring of the effectiveness of the Act in the sense of whether it technically delivered what Parliament originally sought (this is the current process we are within, in effect) is capable of being undertaken within current arrangements. This would be principally a matter for Governments and Parliament in the sense of post legislative scrutiny. The Rural Affairs Committee of the last parliament commissioned precisely this kind of evaluation into the Land Reform Act. It is not necessary to provide for this in any other way.

In the context of the provision of the right to buy, there is no case for a requirement for any ongoing formal monitoring of the right to buy (Para 133), plenty of other ways exist to do that already.

That said, and referring to para 132, a number of community purchases are supported by the Land Fund, or lottery. In this context it is entirely legitimate for funders to assess the impact of their funding in order to inform future policy and indeed future levels of funding committed for the purpose. There have been such evaluations by the lottery, and HIE have evaluated individual projects. This is valuable activity and it has and can continue as and when needed. Indeed, beyond this, Ministers in their general research programmes assessing the impact of various policies could programme such research as and when they saw fit. The work by SRUC on community ownership within the context of sustainability and resilience, would be another example of this. None of this needs new initiative, or provisions in the CEB.

We have no problem with the various existing arrangements to evaluate interesting social phenomenon or specific funding or policy initiatives, or initiatives that are just intrinsically interesting in finding new approaches to sustainable community development. However, community land ownership should feature equally with other types of land ownership in such work and which may also be in receipt of public support. This is not a matter that should be constrained to 'right to buy' community owners, but should apply equally to, eg, private land owners of forestry, or sporting or agricultural land, or private land for energy generation, etc.

Community Land Scotland would not see any need to provide for monitoring of any kind in provisions in the CEB on land reform as it seems any monitoring that might ever be desired is perfectly capable of being secured under existing powers and provisions, such as those illustrated above. The most that might be provided for of any value might be for Ministers to report Parliament on the number of registrations of interest in land, renewals of registration and the like but, this is all available anyway or could be got by PQ or revealed by inspired PQ if ever necessary.

A case could of course be made for why monitoring of large private land holdings should be on the face of the revised Act, to ensure such holdings were in the public interest.

Land Reform Act 2003 – other important matters not referred to in consultation.

There remain some matters not referred to in the consultation document about Part 2 of the Act, but which it will be important to address.

It is disappointing that, in particular, there is no mention of the Part 3 provisions of the Act, which have proved extremely problematic for groups seeking to use those provisions. Any revisions to the Land Reform Act that did not address these matters could not be regarded to be complete. It is not clear, given these matters have not been covered to date, whether there will be further consultation on them, or whether the consultation as part of the Parliamentary scrutiny of the proposals will constitute that opportunity. Community Land Scotland believe that revision proposals for Part 3 are necessary (and some ideas set out below) and would not want the lack of consultation on these matters at this stage to prevent them being consulted upon and debated as part of the Parliamentary process.

Part 2 – Further issues

Eligibility to register an interest

We suggest extending the eligibility to register an interest to a wider range of community organisations. Any organisation that is constituted and democratically accountable to the local community should be able to register an interest in land assets. It is accepted that an incorporated organisation should be established to progress the purchase should the opportunity arise.

A community organisation should be able to register multiple land holdings (with different owners) in a single registration. It is necessary to do a separate register of interest for each land holding.

Prohibition Order

Land which is the subject of an register of interest can be sold immediately upon the deletion of the prohibition order if the community body's application is rejected by Ministers. The community may have grounds for appeal which will be a fruitless exercise if the land has been sold. NB It should be noted that community bodies are less likely to progress an appeal as few will have resources to meet these costs. It is not normal practice for funding bodies to support costs associated with legal action or other forms of appeal.

The Act should be amended to ensure that following a rejected application, the prohibition order is only lifted once the community has formally confirmed it will not appeal, or once the appeal period has passed.

Requirements for maps and drawings

In registering an interest in land, this must be done in a prescribed form, including by reference to maps and drawings.

In principle, it should remain an indispensable aspect of registering an interest in land, that it is mapped. It is in the extent of the detail that is required, and any referencing of maps within the application that becomes crucially important to community groups with limited resources.

It is vital in this context for the Scottish Government to be as clear in guidance and advice as is possible as to what is specifically required, and to offer advice on the likelihood of acceptability of maps (in draft) prior to formal submission. In all cases the emphasis should be on the simplicity of the requirements for communities consistent with clarity of the extent of the interest in land.

The mapping requirements should in no circumstances be more onerous than required for any other land transaction.

The 30 day confirmation period - Once a piece of land comes on to the market and the registered interest is triggered, the community has 30 days to confirm their intention to exercise their right to buy.

There has been some experience that such a period may fall during important holiday periods, and this can prove challenging. It is considered that making this requirement 30 working days would suitably relax the period.

Sustainable development and the public interest - Ministers cannot grant ultimate approval to the purchase unless they are satisfied that the purchase would further the achievement of sustainable development, and that the purchase is in the public interest.

Community Land Scotland has considered whether there ought to be greater specification as to what constitutes the advancement of sustainable development, or what might be regarded to be in the public interest. Having done so, we have concluded the current tests in this regard and the degree of discretion they offer to Ministers is appropriate. (See appendix ...)

Part 3 – Further Issues

The Crofting Community Right to Buy

The complexity of the requirements of Part 3 of the Act have become notorious and add such complexity to the requirements on communities that they are capable of being largely self-defeating to the principled intentions of Parliament. Some of the requirements have been described as Byzantine. Some of the detail exists in regulation, rather than primary legislation, though the primary legislation sets the tone for the detail in the regulations through provisions that are on the face of the Act.

The overwhelming need is to simplify procedures so that genuine and strong applications cannot be thwarted by legal action on technical grounds.

The procedures which have to be exercised by crofting community bodies under Part 3 in order to exercise their rights to purchase crofting land and related leases on behalf of their communities (i) are extremely complex and time-consuming; (ii) often appear to have no logical or functional rationale; and (iii) risk legal challenge on minor technical grounds.

The issues can best be understood by considering the application form for consent to buy eligible croft land (or the interest of the tenant in related tenanted land), which is prescribed by secondary legislation. It is accepted that a crofting community body should be required to demonstrate: (i) that they are properly constituted and represent the relevant crofting community; (ii) the boundaries of the land or lease they seek to buy; (iii) that the majority in the community (both crofters and the whole community) support the application; and (iv) that it is in the public interest that they should be given permission to buy the land or interest of the tenant.

However, there appears no logical or functional rationale for being required to provide the following:

1. a map and written description showing not only the boundary of the land or lease to be acquired, but also all sewers, pipes, lines, watercourses or other conduits, and fences, dykes, ditches, or other boundaries (Question 4(d)). This goes far beyond what is required in other land or lease transactions, and there seems no functional reason to require this information. It is particularly absurd when the area to be purchased extends to several thousand hectares.
2. a list of all postcodes and OS 1 Km grid squares included in the land or lease area to be purchased (Question 4(c)). Again there seems no reason for this if the boundary is properly defined on a map. If the area concerned extends to several thousand hectares, the list simply opens up scope for a technical challenge if particular postcodes or grid squares are inadvertently omitted.
3. a full list of all those eligible to vote in the ballot, including distances away from the relevant township in the case of absentee crofters (Question 11)). The test should be

evidence that a majority support the application, rather than providing detailed lists which open up the possibility of legal challenge if any error or inconsistency is made.

Community Land Scotland would wish to see such existing requirements being abolished.

In the event that any rationale might be found for retaining any such provisions, then a criterion of proportionality should be explicitly applied to all such provisions so that an application which meets the essential purposes of the Act are not at risk of refusal or legal challenge on minor technical details. For example, an error in one voter issued with a ballot paper should not invalidate the result if there is a large majority in favour, and an error in the listing of one postcode or grid square should not invalidate an application if the boundary of the land or lease to be acquired is clear.

Time limits should be imposed on all stages of the process of application, comment, decision, and appeal, so that a landlord cannot unreasonably delay a decision on an application, or indefinitely hold up implementation of an approved application. The overall timescale should not be dissimilar, overall, to that applying to Part 2, from inception to completion of the process.

Crofting Community Definition

The definition of a crofting community is complex and is centred on the location of residents in relation to the land to be acquired and also includes certain crofting tenants of the land but who reside outwith the boundary of the land in question. Maps in detail need to be prepared to establish who is a member of the crofting community.

The definition of a crofting community in the Crofting Acts is different from that of a crofting community in the Act. The former is a community of crofters which excludes non-crofters, and the latter is a community in a crofting area which includes non-crofters.

The Crofting Community Right to Buy should be amended to allow the crofting community body to determine its own boundaries. We do not see any benefit in crofting community members being defined by their property having a contiguous boundary with the land to be acquired.

The Act might usefully rename a 'crofting community' to a 'crofting area community' to distinguish it from the 'crofting community'.

Generic issues common to both Part 2 and Part 3

Serving notice on landowner

Serving the notice on the landowner if the registration reaches the stage where the intention to register is to be served on the landowner can be problematic. The property that the registration refers to is not adequate service if that property is not the landowners principal residence, even if it is occupied by his paid employees when he is not in residence. It is incumbent on the applicant to trace the landowner(s) main residence so that Scottish Government can serve the document there. Simplify this requirement would be helpful.

Community Definition – Choice to utilise Part 2 or Part 3

It is not possible for a single community body to be established to use both Part 2 and Part 3 of the Act. This is due to the different definition of community in these parts. If a crofting community body is to remain as an entity that is distinct from a community body then the relevant provisions should enable crofting community bodies to be eligible applicants under

the Part 2 provisions. There could be times where a crofting community would prefer to register an interest in land rather than seek to acquire it under Part 3. At present a crofting community would have to opt to establish either a Part 2 compliant company or one that satisfies the requirements of Part 3. The crofting community cannot benefit from both of the LRA's right to buy provisions unless it establishes two community companies. This is unhelpful and unnecessary in our view.

The Act should be amended to allow crofting community bodies as defined under Part 3 to be able to register an interest in land under the Part 2 provisions.

Identifying the landowner

It can be difficult to identify the legal owner of land. Where a community body has taken all reasonable steps to do so a community's aspirations to register an interest or acquire an asset are should not be thwarted by virtue of not being able to identify the legal owner.

Provision should be made for this requirement to be set aside provided it can be shown all reasonable steps that could be taken have been taken.

Access to the Voters Role

Community bodies are not entitled to a copy of the voters roll.

The proposal that the Scottish Government might take responsibility for the organisation of the ballot may overcome this difficulty but this notwithstanding Community bodies should be given a right to the full Voters Roll for the purpose of any ballot they may organise in compliance with the requirements of the Act.

Other

It should be noted that the very act of having to secure a 10% threshold can have the effect of alerting the landowner of an interest in the land, potentially in some circumstances, precipitating the land being put on to the market, at which point the threshold for approval to submit an interest rises under the provision for late registration, if these are maintained.

In such circumstances a helpful change to current provisions would make it clear that the timeline for rules for a timeous registration should apply when the process for securing the 10% approval started when the land had not been advertised as being on the open market, even if it is on the market when the registration application is submitted.

Timeous and late registration - The criteria for late registration of an interest to buy are more onerous than for a timeous application. In practise, most recent purchases that have proceeded have been from late registrations.

It is not clear why a late registration should have more onerous conditions than a timeous one. This could have been conceived as a mechanism simply to encourage timeous applications, which are easier to achieve. However, given that the underlying intention of a timeous and late registration remain the same, to register an interest in land, and given the genuine reluctance of some communities to register an interest (for reasons set out elsewhere in this submission) it does not seem reasonable that the registration requirements should be so different, particularly given the ultimate ballot requirements for a right to buy purchase to be able to proceed.

Community Land Scotland believes it is important to continue to have late registration procedures, but that it should have the same 10% threshold requirements as the timeous registration requirements.

The 30 day confirmation period - Once a piece of land comes on to the market and the registered interest is triggered, the community has 30 days to confirm their intention to exercise their right to buy.

There has been some experience that such a period may fall during important holiday periods, and this can prove challenging. It is considered that making this requirement 30 working days would suitably relax the period.

Turnout and majority in ballot - In order to proceed to purchase the community body must be able to demonstrate that at least half the members of the community have voted in a ballot on the question and the majority of those voting have voted in favour. There are some circumstances where less than 50% have voted in the ballot, but the majority of those voting having voted in favour of purchase can be regarded by Ministers as sufficient.

Given the element of discretion available to Ministers there appears no need to change current requirements.

Some questions have been raised about the ability of an approved community body being entitled to access to registers of electors. Given the requirements of the Act it should be a matter put beyond doubt that Electoral Registrations Officers are required to give such properly constituted bodies access to current registers for the purposes of conducting ballots under the terms of the Act.

Buying the company owning the land

A number of communities for reasons associated with achieving practical progress and to suit the land owner concerned have bought the company that owns the land, together with its assets and liabilities, as the means to acquire land. It is likely this will require happen again.

It will be important to ensure that there are no provisions with the Act that would prevent progress under the Act being made when a community thought it right or expedient to purchase the Company that owns the land as the means to acquire the land itself.

4.2 Strengthening Community Planning

The outline proposals set out at Paragraphs 147 and 151 of the consultation seem appropriate ways of strengthening community planning. It may that in considering the desirability of further strengthening community planning a requirement to seek the agreement of stakeholders to the provisions in the last two bullet points of paragraph 151 and, which failing, to have to set out why that agreement had not been possible to achieve would be appropriate.

4.3 Allotments

No comments.

4.4 Local relief schemes for non-domestic rates

No comments.

Chapter 5

Q70.

We support the proposal.

5.2 Subsidiarity

Q71.

Ministers and local government and relevant public authorities should be placed under a duty to have regard to a principle of subsidiarity in the policies and administrative practises they develop.

Appendix 1

The 'absolute' right to buy for communities, the nature of compulsory measures over land, and the question of the public interest.

A paper by Community Land Scotland

Community Land Scotland has proposed in its evidence to the Land Reform Review Group that the current community right to buy land in Part 2 of the Land Reform (Scotland) Act 2003 (LRA) should be extended to include, as a last resort, circumstances where there is not a willing seller.

This proposal is made with the benefit of the experience of almost ten years of operation of the LRA and identification of a central weakness in its provisions in limiting the right to buy to circumstances only where land becomes available for sale and there is, therefore, a willing seller.

This central weakness in the powers granted under the LRA is holding back potential progress to more community ownership and has the potential to further impede meeting the target for doubling the land in community ownership set by the First Minister.

The proposal to widen the right to buy sits firmly within the context of Scottish Government policy which recognises community ownership as a good thing and having the potential to contribute significantly to social and economic development. The Land Reform Review Group has been established to recommend ways in which more community ownership can be achieved, among wider land reform considerations.

Notwithstanding this context, opponents of the proposal can sometimes convey the sense this is somehow without precedent and outrageous in threatening what can be implied are inalienable rights to hold land by existing owners.

In fact the proposal, if enacted, is not without precedent, it has a parallel already in existence in the LRA for crofting communities, and it sits firmly within the broader context of powers granted by parliaments down many years for land to be compulsorily purchased when that is in the public interest.

Compulsion in the question of changing land ownership and use.

The proposal by Community Land Scotland would extend the potential of compulsion in the question of securing a change of land ownership, but only if discussion, or negotiation or mediation, as appropriate, failed to secure that outcome. (See Appendix 2 for details of process proposed)

Compulsory measure in questions of land ownership are not in any sense new, and what is proposed is simply to extend to wider circumstances provisions that have already been approved by Parliament in the LRA.

Strong legal powers of intervention over land have been established by parliaments over centuries in order to advance what is in the public interest. The measures provided for within the LRA themselves fit firmly within the tradition of this long standing and well-established set of powers.

For example, powers still exist, and were widely used in the early part of the last century, to take land into public ownership for the purpose of creating new agricultural holdings. This is the origin of the crofting and other agricultural land and estates owned by government to this day. An answer to a Parliamentary Question on the issues in 2012 confirmed,

“Most of the estates or holdings were acquired between 1900 and 1939 for lease to smallholders and crofters for land settlement purposes. The acquisition of land took place under the Congested

Districts (Scotland) Act 1897, the Small Landholders (Scotland) Acts 1886 and 1931, the Land Settlement (Scotland) Acts 1919 to 1934 and the Agriculture (Scotland) Act 1948.

The above legislation conferred power on the Board of Agriculture (a forerunner to the Agriculture, Food and Rural Communities Directorate) to acquire land by agreement, purchase, lease, gift and compulsory purchase for occupation and settlement by crofters, cottars, fishermen and returning ex-servicemen. The main aim was to provide, equip and adapt land under favourable conditions and in less-congested districts of Scotland at that time."

These powers still exist.

Further, although seldom (or perhaps never) used, the Act establishing the Highlands and Islands Development Board contained compulsory purchase powers which were justified in Parliament by the then Secretary of State for Scotland on a broad economic and social development premise. He argued you could not separate the land question from the development question and vigorously defended the need for powers of compulsory purchase to Parliament, and secured such powers.

Beyond these examples, local authorities and others have compulsory purchase powers. Between 2009 and 2012 local authorities in Scotland requested or had confirmed the use of compulsory purchase powers on over 50 occasions.

There are of course further compulsory controls on land uses, for example through SSSI or SPA designations, through planning policies, through requirements around timber planting and felling, in relation to environmental controls of rivers and farming practises, and so on.

On the basis of the evidence, any notion that exercising legal power to compulsorily secure a change in land ownership and land use, when that is in the public interest, is in any way unprecedented or outrageous would not stand scrutiny.

In the particular context of the LRA permission to exercise the right to buy (compulsorily) by a crofting community has been granted by Scottish Ministers and has been upheld as lawful in the face of challenge in the courts.

Therefore, extending such powers, provided that served furthering the achievement of sustainable development, and was in the public interest, can be seen and argued as readily fitting within the broader context of already existing and well established powers over land in private ownership.

Is what is being sought an `absolute' right to buy?

Community Land Scotland and others have used the term `absolute right to buy' in this context to convey that the proposal is for more than a right to buy when land becomes available for sale.

In fact, to use the term `absolute right to buy' is a misnomer, as the proposal is for a process that could only operate subject to some clear conditions being met. In this sense it is a provisional right, subject to confirmation.

Stressing that it would be Scottish Ministers making the decision on whether to consent to the exercise of the right to buy, and that in so doing Ministers would have to judge whether the particular acquisition furthered sustainable development and was in the public interest, is to seek to make clear the proposal for an extended right to buy is not a proposition for an unfettered or, as some might have it, unjustifiable or irresponsible right for communities to simply take land from private owners.

The process has to be considered and it has to fit within procedures established by Act of Parliament, it has to be confirmed as being in the public interest, and subject to specific approval by Ministers. As such, the requirements are therefore rooted firmly in our parliamentary democracy and a democratically accountable system of government.

Further, any decision to grant consent to the right to buy by Ministers could be challenged in the courts and in taking any decision Ministers will be mindful of their need to potentially defend their actions in the courts.

In sum, the process proposed is robust and challenging and designed to ensure full and proper consideration of the various and competing interests that may exist.

Creating the conditions for more negotiation.

While the proposed new right to buy is important in its own terms and may be justifiably exercised from time to time, it also has a purpose to seek to create the conditions under which meaningful and focussed discussion, negotiation and mediation, as appropriate, can take place between communities and land owners. (See Appendix 2 for detail of proposed process)

Community Land Scotland believes that advancing the cause of more community ownership is served by encouraging a climate of discussion and negotiation, but that the conditions for this to happen in a serious way require to be created.

It is not by chance that the greatest progress to more community ownership has been happening in the Western Isles where the right to buy even when there is not a willing seller already largely exists. This has created a climate in which negotiations have been happening between owners and the communities which, for the most part, are amicable and have allowed progress.

It should also be recognised that the process envisaged could also result in confirmation that the public interest would not be served by a change of ownership. So there are risks attached to the process for communities as well as opportunities.

Why did the Land Reform (Scotland) Act of 2003 (LRA) not give this wider power?

The LRA was a significant step forward at the time and has certainly changed the nature of the relationship between landowners and crofting communities in particular, and has helped advance community ownership. In this sense it has met part of the original policy intent to *“empower communities, give them real rights, and thus help create a more modern relationship between landowner and community”* – (extract from Policy Memorandum to original Bill 2001).

Community ownership relative to the vast acreage of land in Scotland owned by relatively few large landowning interests, remains modest by any standards. The Scottish Parliament and the Scottish Government has recognised that, with the benefit of experience in operating the LRA, there are a number of matters that could be reformed to bring about improvement and deliver more community ownership. That is part of the rationale for the creation of the Land Reform Review Group.

The Policy Memorandum to the original Land Reform Bill in 2001 set out the considerations at that time about extending the right to buy. It demonstrated an understanding of the argument for the wider right now sought, thus:

“... 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 to the market means that if the landowner never sells communities will never have the right to buy.”

The Policy memorandum then goes on to set out how the Government proposed to proceed and why the 'unlimited' right to buy forcrofting communities did not have wider application.

"..... an unlimited right to buy of this kind would have a major and universal impact on property rights".

The Policy memorandum went on to say, that an unlimited right to buy, *"inevitably (had) 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 Policy Memorandum concludes on these points that, *"The Executive believes that this scale of disruption to the property market, plus the costs of compensation, cannot be justified."*

The Policy Memorandum then goes on to recognise that thecrofting right to buy was an 'unlimited' right to buy and could trigger compensation in order to *"avoid significant ECHR difficulties"*.

This both recognised potential difficulties with ECHR while recognising too that these were not insurmountable. The Policy Memorandum then went on to explain, *"The effect (of granting the unlimited right to buy incrofting communities) on the property market, and the compensation costs, while potentially substantial, are both inherently constrained by the extent ofcrofting land, and the generally low value per hectare of that land."* Given the constraints this gave rise to, the government indicated it was proposing to proceed with the 'unlimited' right to buy forcrofting communities.

It is worth examining the arguments set out in the original policy memorandum in the light of what then transpired and the experience gained since this early thinking was set out.

First. This represents the policy thinking prior to the passage of the Bill through Parliament with all the debate that generates and the refinements and changes introduced to the Bill to meet the concerns and interests of Parliament and as the policy thinking develops further.

Second. The ECHR concern set out is not one of principle, but one related to potential cost. The experience of a court challenge to Minister's decisions, within the terms of the LRA, has confirmed that ECHR, provided it is accounted for in the consideration of decisions by Ministers, is not a block to the exercise of the 'unlimited' right to buy established forcrofting communities.

It should also be remembered that while ECHR has particular legislative obligations within the UK, the UK, and Scottish Ministers within the Scotland Act, have duties to observe and promote other human rights obligations. (See later note)

Third. Looking at the cost question, the original Policy Memorandum certainly implied that the creation of an 'unlimited' right to buy would result in significant claims for compensation.

In principle, this does not follow, nor in practise has it been shown to be the case, even within thecrofting areas where such a right does exist.

The question of compensation that a landowner could claim for their costs involved in the process of the right to buy which was then not proceeded with, or their costs involved in the lead up to a decision which did not confirm the right to buy, would be likely to be minimal compared to the costs of the land itself.

Beyond this, there is no necessary or automatic link to the granting of consent to exercise the right to buy and compensation to be borne by the state.

In practise, the right, if consented to by Ministers, could still only be exercised if the community concerned could raise the necessary finance for the purchase. The consent certainly triggers a need to raise the necessary finance to meet the independent valuation if the right to buy is to be exercised and the community body would be free to approach the land fund, or Big Lottery, or make requests to others, including government, for the necessary funding. However, it does not necessarily follow that they are bound to be granted that funding.

Further, the experience of the areas where this 'unlimited' right to buy has existed in the past decade, has not given rise to substantial compensation, even in the terms of the lower land values in such areas. It has been shown that communities proceed with caution and maturity and with a firm eye on their potential ability to raise the necessary finance. There is no automatic assumption cash will be available and when financial help is requested, from whatever source. Any call for funds has to be considered by the bodies concerned against the available cash, with no expectation they are bound in all circumstances to grant support.

Community Land Scotland has made clear in its original submission of evidence to the Land Reform Review Group that it does not believe it is credible to seek unlimited funding, but rather that the vehicle for funding might be principally the Land Fund, and it is recognised that this is bound to be cash limited to reflect the financial circumstances of the day.

It does not appear to follow, therefore, that the availability of an 'unlimited' right to buy necessarily incurs unlimited calls for finance on the public purse.

Fourth. The further concern in granting the 'unlimited' right to buy beyond the crofting counties concerned the 'major' and 'universal' impact this would have on property rights.

In principle, however, it is not clear that the impact envisaged from this 'unlimited' right would be any different to the impact from the powers that already exist in other statute and held by government or its agencies or local authorities in the question of compulsory purchase.

Again, in practise, where this 'unlimited' right has been available over the past decade, it does not seem to have had any discernible impact on the property market.

Fifth. The term 'unlimited' when used in conjunction with the right to buy in the Policy Memorandum is also worthy of closer examination in the light of what Parliament eventually approved (subsequent to the Policy Memorandum) and current proposals to extend the power.

The right to buy, as described above, or the proposal for an extension of the right cannot be said to be 'unlimited' as it is conditioned in a number of respects:

- It is, and would be under proposals for an extended right to buy, be dependent on a community body (or crofting community body) being approved.
- It would depend upon a successful registration of interest, or under the proposals for an extended power, the successful registration of a request to purchase.
- An application under the proposals to exercise the right to buy could only take place following using best endeavours to negotiate an acquisition.

- It would then depend upon the action furthering sustainable development.
- It would have to be in the public interest.
- Scottish Ministers would have to satisfy themselves that it met all the necessary conditions.

This is far from being an 'unlimited' right.

In the light of practical experience of the actual provisions approved by Parliament in the LRA, the fears set out in the original policy memorandum are not borne out.

The question of the public interest in an extended right to buy.

Stressing that decisions to consent to the exercise of the proposed right to buy has to be in the public interest, has given rise to the questions – what is in the public interest? Should be some sort of definition of what constitutes the public interest?

Making clear that any acquisition of land under an extended right to buy has to be in the public interest is not in any way new or novel it simply repeats provisions in the current LRA in respect of the crofting communities right to buy which can already occur when there is not a willing seller of the land, providing it, among other technical qualifying considerations, is in the public interest.

It is also important to recognise that there is more than one reference to the public interest being met in the LRA. For example, in provisions relating to (Part 2) registration of an interest in land, such a registration is only accepted if it is in the public interest and the final purchase similarly must be in the public interest.

What appears in the LRA in respect of the public interest is, of course, not without precedent. Statute is littered with references to the public interest, and seldom will this have a specific definition. This is deliberate for potentially two sets of reasons.

First, it is in the nature of legislation drafted and approved at a particular moment in time that it is not capable of anticipating every circumstance or eventuality in ways that can necessarily be defined to accommodate all current and future circumstances. So, Ministers, accountable to our democratically accountable Parliament, are afforded a wide level of discretion to consider and judge what is in the public interest. This is done in the full knowledge that they can be held accountable for their actions by Parliament and/or potentially have their decisions challenged in the courts.

Second, the question of what is in the public interest is fundamentally caught up in what governments are elected to do. It is the essence of governments, and therefore Ministers, to determine what is in the public interest. Indeed, within the everyday business of being a Minister and exercising discretion, Ministers could not knowingly do anything they did not believe was in the public interest. So, it is within the very nature of democratic parliamentary democracies that Ministers have a good measure of discretion to take decisions in what they judge to be the public interest, and are held to account for those decisions.

Of course, Ministers also have to act reasonably and cannot or should not do anything that any reasonable person would regard as obviously unreasonable. They have to think of this is any

decisions they take and whether they have acted reasonably or not could be a matter for court challenge.

Ministers' decisions have now been challenged in the courts in relation to the LRA. This is illustrated below in relation to a decision taken under Part 3 of the LRA in respect of the Pairc Crofters Ltd being given consent to exercise their right to buy when the landowner concerned was not a willing seller and this decision challenged their rights under ECHR:

Court of Session, Opinion of the Lord President [Lord Gill] in the cause of Pairc Crofters Ltd and Pairc Renewables Ltd against the Scottish Ministers, 19 December 2012.

"I conclude therefore that when Ministers decide where the overall public interest lies, the central consideration will be that of balancing the harm to the landowner against the benefit of the proposal to the wider public, most notably in relation to strengthening the crofting economy. When they make that decision, the weight to be given to the landowner's interests is pre-eminently a matter for them. On that point, the landowner's entitlement to compensation may be a material consideration. A1P1 requires only that any assessment of the public interest should not be manifestly unreasonable."

Note: A1P1 relates to the ECHR article

This sets out that the Court is satisfied that Ministers decisions in this matter are pre-eminently matters for them, provided they do not act manifestly unreasonably.

Statutory bodies such as local authorities also have significant levels of discretion within their statutory responsibilities to make decisions in what they deem to be the public interest locally. Interestingly, however, when it comes to the compulsory purchase of land their decisions generally require the approval of Ministers as the 'confirming authority'.

"In deciding whether or not to confirm a compulsory purchase order, the Scottish Ministers will consider each case on its merits considering whether the acquisition of the property by compulsory means is proportionate and in the public interest weighing the balance of the public interest against the private rights of the owner and those affected.

In doing so the Scottish Ministers take into account all relevant factors, including the purposes for which the land is being acquired, the criteria in the legislation enabling the compulsory acquisition and any objections to the order." Source Answer to Parliamentary Question (S4W – 17483)

The answer to this Parliamentary Question reveals the sort of considerations Ministers require to take into account and the latitude they have to make their decision.

In stressing that it must be in the public interest that consent to a community body to purchase land when there is not a willing seller, Community Land Scotland is proposing an approach that is already well established in the arrangements for the governance of our country and already provided for in the LRA.

The fact that what is in the public interest is not specifically defined in the LRA, or in much of statute generally, is normal and beneficial to all parties concerned in so far as it does not unduly fetter the discretion of Ministers to act in the particular circumstances of any given case at any particular time.

Ministers must consider each case on its merits, must act reasonably and proportionately, must weigh different factors in the balance, and will be accountable for their decisions to Parliament and may have to defend them in the courts.

There are sufficient safeguards for all parties through the accountabilities and the ability of aggrieved parties to go to the courts to challenge decisions.

The Scottish Parliament having already agreed that the public interest is not specifically defined in the LRA, and what is being sought by Community Land Scotland is simply to widen the circumstances in which the right to buy when there is not a willing seller, Community Land Scotland does not believe there is any merit in or need to seek to further define the public interest. This is a matter best left to Ministers, as currently established within the LRA.

Community Land Scotland
October 2013

Note 1: Some may regard that these public interest decisions could be equally well made by democratically elected local authorities and that too much roots back to Ministers. This may be the case but Community Land Scotland has only considered this matter in the context of currently well-established policies in relation to the purchase of land when there is not a willing seller, not in the context of wider principled arguments for reform to change where such decisions can be legitimately taken.

Note 2: The International Covenant on Economic, Social and Cultural Rights

Article 2

Each State undertakes to take steps especially through economic and technical, to the maximum of their available resources, with a view to achieving progressively the realization of the rights recognized in the present covenant by all means, including particularly the adoption of legislative measures.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living.

2. (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources

Appendix 2

A Scottish Land Agency

A paper by Community Land Scotland

The idea of a Scottish Land Agency has emerged from the work of the Land Reform Review Group and in particular from evidence submitted to that group by Community Land Scotland, among others, who advocated the idea of such an Agency to facilitate discussions and negotiations between landowners and community bodies interested in acquiring land in the ownership of those landowners.

The policy context is one where the Scottish Government has made clear it believes community ownership has a great deal to offer in social and economic development and it wants to see more of it. Specifically, the First Minister has set a target to double the amount of land in community ownership by 2020. The proposed Scottish Land Agency could make a significant contribution to creating the conditions for this and any subsequent targets to be met.

The idea of a 'land agency' has attracted considerable interest, not least from the Scottish Government with the Minister, Mr Paul Wheelhouse MSP, making it clear to Parliament that the further work of the Land Reform Review Group – “will also look at whether a land agency could unlock community ownership for a wider range of communities We welcome that as an area for further exploration”. The First Minister in his contribution to the Community Land Scotland conference also made clear the ideas Community Land Scotland were advancing would be looked at by the Land Reform Review Group.

The concept of a 'land agency' in the question of land reforms is not new, there are a number of international examples where such agencies exist to help manage the practical discussions and negotiations between parties in a context where there are clear indigenous land rights driving changes in land ownership and control. Notwithstanding the clear rights that exist, it is recognised that the process of change can be assisted by an agency charged with helping discussions, negotiations and the processes around change.

Closer to home, there are historic examples of analogous arrangements in Ireland with the Irish Land Commission from the 1880's onward and in Scotland through the work consequent on the Land Settlement (Scotland) Act 1919 which assisted the process of change in land ownership patterns.

In a more contemporary context the official guidance issued by the Scottish Government about current right to buy land suggests communities might be better to seek to negotiate a settlement to their aspiration to acquire land rather than use the terms of the Land Reform (Scotland) Act 2003.

Further, it is known that Highlands and Islands Enterprise, in performing their wider support role for communities seeking to purchase land have on occasion, quite informally and without specific powers to do so, facilitated negotiated approaches to transferring land into community ownership. HIE regularly advise communities to seek to purchase by negotiation, if that is at all possible, rather than using the formal processes of the Act.

Further still, within the experience of Community Land Scotland members, negotiated approaches to land acquisition have delivered desired outcomes in a constructive fashion. This has happened within the context of crofting communities which could otherwise seek to exercise their absolute rights to buy under Part 3 of the Land Reform (Scotland) Act 2003, were a negotiated agreement not possible.

Experienced practitioners in the field believe it makes more sense and it is more constructive, to seek to achieve progress by means of a mix of discussion, negotiation and mediation, against the backdrop of a necessary and clear legal framework of community rights. Indeed, it is felt that in some key instances, had the proposals that are outlined below existed over the last two decades then not only would more progress have been made to greater levels of community ownership, but it could have been made more easily and with mutual benefits for all parties concerned.

Even where there has been or still exists significant relationship difficulties between a community and a landowner, it appears it is felt preferable by all parties to seek to make progress through a mix of discussion, negotiation and mediation.

So, a key consideration in the further development of policy has become the exploration of what arrangements it might be possible to construct to best facilitate communities and owners to be able to get into serious dialogue and negotiation about the future ownership of particular areas of land.

The First Minister's target of achieving a further 500,000 acres of land in community ownership by 2020, assuming this is not met through only the disposal of government owned land, adds impetus to the need to secure arrangements that will allow those further community purchases within those timescales.

Could relying on current ad-hoc and voluntary arrangements provide for sufficient progress?

Before moving to consider what might be possible in order to add maximum value in bringing about more change through negotiation, it is important to consider, given there is experience of some progress being achieved by purely voluntary means, whether there is a need to make more official a process of facilitating discussions, negotiation and mediation, as appropriate, with a Scottish Land Agency taking the key role.

It would have to be said that the approach to date in respect of seeking negotiated settlements has been ad hoc and random. In the view of Community Land Scotland the advice that has been given by Scottish Government and HIE officials has been correct in seeking to encourage negotiated approaches, but it has depended thereafter almost entirely on the inclination of owners or the particular commitment or skill of a community body. Neither the Scottish Government or HIE officials has specific powers to assist any negotiations encouraged, beyond the advice to try to negotiate. The degree to which suggestions of negotiation are made or are assisted will depend to a large extent on the experience, expertise, confidence and inclinations of individuals, together with interpretation by institutions of their role, and this will inevitably vary from time to time and as personalities change.

In the context of a target and drive toward more community ownership, it would appear too much a matter of chance, too much a matter dependent on the dispositions of particular individuals at given moments of time, to be left to such ad hoc possibilities. It does seem only right to strengthen the ability for negotiated acquisitions of land by communities to be achieved as a matter of deliberate policy, drawing on experience to date and applying the lessons of that experience.

There is a further significant consideration to be taken into account. It is well understood that there has been a reluctance on the part of a number of communities to register an interest in land arising from real concern that to do so might, or would, be interpreted by the landowner as a hostile act signalling discontent with their land management. Given the numerous ways in which that might then condition the behaviour of the landowner toward tenants of various types in their attitudes to

land uses and priorities individuals and the community may wish to see progressed, and which will in all probability depend upon the goodwill of the owner, the tendency, when there is any doubt the owners attitude might be adversely affected, is not to register the interest.

Community Land Scotland believes that giving greater confidence to register an interest in land or, potentially in future a request to purchase land, will be crucially important. The proposal for a Scottish Land Agency may help give that confidence as it provides for the community a third party, with appropriate legislative recognition, duties and powers, which is there specifically to sit between or alongside, as appropriate, the community body and the landowner to facilitate and regulate interactions between the landowner and the community. From the community point of view, and for that matter the landowner, they would be joining a regulated process of interaction, if they wish that support. This opportunity is not specifically provided for currently.

Giving more certainty to the opportunities afforded through discussions, negotiation and mediation and adding strength and authority to any such processes has everything to commend it and points to providing for it in the law that governs community right to buy land. The Scottish Land Agency would become the practical vehicle for facilitating the process.

What might a Scottish Land Agency be charged to do?

Before considering the detail of what a Scottish Land Agency would be charged to do it is important to set it in the context of the wider policy proposals community Land Scotland has advanced.

The concept sits within a context where Community Land Scotland is advancing arguments to extend the right to buy. This right to buy could be exercised, as in the case of crofting communities currently, even when there is not a willing seller and with the clear safeguard that any such purchase would have to further the achievement of sustainable development and be in the public interest, with the public interest being determined by Scottish Ministers.

While the proposed new right to buy is important in its own terms and may be justifiably exercised from time to time, it also has a very clear purpose in seeking to create the climate and conditions under which meaningful and focussed discussion, negotiation and mediation, as appropriate, can take place between communities and land owners to advance the acquisition of land by communities, without resort to the exercise of the right to buy. It is within the context of this widened right to buy that the proposed Scottish Land Agency would come into its own.

Building on the current provisions to register an interest in land, Community Land Scotland proposes there should be a further and new provision for a community body to be able to register a request to purchase land. Once registered, the Scottish Land Agency would be under specific duties and have appropriate powers to act to establish an interest from the landowner in entering in discussions with the community body, which failing, to advise the community body of further steps they could seek to take to request to exercise their right to buy.

It would also seem appropriate to provide landowners with an opportunity to register an interest to sell their land to a community body for circumstances where that might be appropriate to their planning of their future land interests. In doing so they would trigger actions to seek to ascertain whether a community interest in purchase existed.

Greater detail of the proposed function, duties and powers for the Scottish Land Agency are set out below:

The community right to buy

A community body which has registered a request to purchase shall have an absolute right to buy land upon application to Scottish Ministers providing:

- there has been a failure to secure the purchase of the land through the arrangements set out in (the Scottish Land Agency process description below), and
- the purchase was consistent with furthering the achievement of sustainable development, and
- the purchase is in the public interest, and
- at an open market value set independently

The absolute right to buy may only be exercised with the consent of Scottish Ministers.

This would be subject to the appeal mechanisms as per existing provisions in Land Reform (Scotland) Act 2003.

The creation of the Scottish Land Agency

A Scottish Land Agency is to be established for the purpose of:

- a) facilitating acquisition of land by community bodies
- b) registering interests in land by community bodies
- c) registering requests to purchase land by community bodies
- d) registering interests in land by crofting community bodies
- e) seeking to foster constructive relationships between a community body and a landowner in matters concerning the acquisition of land by a community body
- f) administering applications to Scottish Ministers for consent to exercise the community and crofting community right to buy
- g) advising community groups considering registering an interest in land or a request to purchase land on all necessary matters in order to register an interests in land or a request to purchase
- h) purchasing and holding land for subsequent acquisition by a community body [and for use in the establishment of agricultural holdings?], including by compulsory purchase when deemed necessary and subject to the approval of Scottish Ministers
- i) promoting or making arrangements to promote awareness among communities of the legislation and processes to support communities seeking to acquire land
- j) advising Scottish Ministers on land ownership issues when requested to do so by Scottish Ministers
- k) [receiving registrations for the re-settling of land?]
- l) [inquiring into circumstances where a monopoly of land ownership may be damaging to the public interest and where necessary exercising powers to ensure a new community and/or more diverse private ownership?]

Duties of the Scottish Land Agency:

- To register interests in land by community bodies. [As per current requirements]

- To send approved registrations to the Keeper.
- To inform landowners of any interest registered in land in their ownership by a community body.
- To register a request or requests to purchase land by a community body. [As per current arrangements for registering an interest in land]
- To send approved registrations to the Keeper.
- To inform landowners of any registered request to purchase land in their ownership by an approved community body.
- To seek to establish with a landowner in whose land a request to purchase has been registered whether they have an interest in entering any of voluntary discussions, negotiation and mediation, as appropriate, with the community body which has registered a request to purchase land in their ownership with a view to the community body acquiring the land.
- When requested to do so by the landowner to make arrangements to facilitate any of voluntary discussions, negotiations and mediation, as appropriate, between the community body and landowner who has been notified of an interest in land made by the community body.
- When requested to do so by the community body or landowner, to seek to make arrangements to facilitate any of discussions, negotiations and mediation, as appropriate, between a community body the landowner who has been notified of a request to purchase land in their ownership made by the community body.
- To register any interest to dispose of land by a landowner following notification from the landowner indicating a willingness to dispose of land by sale, gift or any other means to a community body.
- To seek to establish by such means as they consider appropriate whether a community interest to acquire land may exist when a landowner registers an interest to dispose of land to a community body.
- To seek to facilitate any of discussions, negotiations and mediation, as appropriate, between a landowner and a community body or informal discussions with community representatives the Scottish Land Agency is satisfied are sufficiently representative of any community interest prior or subsequent to when a community body may be registered as such.
- To serve a notice on any landowner where they have failed to respond to requests regarding their interest to enter voluntary discussions or to enter negotiations or mediation requested by the community body requiring them within a period of 30 days following the serving of the notice to notify the Scottish Land Agency that they are not prepared to enter discussions with the community body.
- Where a landowner has indicated an interest in entering any of discussions, negotiation and or mediation but in the view of the Scottish Land Agency has not used best endeavours to commence or participate in such discussions, negotiations or mediation, deem the landowner to have declared they are unwilling to seek to conclude any arrangement for the acquisition of the land in question by the community body and shall advise the landowner and community body of that decision in writing and advise the community body on their rights and the procedures it would be necessary to follow to trigger consideration of consent by Scottish Ministers of an application for consent to exercise their right to buy.

- Where a landowner under any of the procedures set out above confirm they are not prepared to dispose of all or any part of their land subject to a registered request to purchase by an approved community body, advise the community body of that decision in writing and advise the community body on their rights and the procedures it would be necessary to follow to trigger consideration of consent by Scottish Ministers of an application to exercise their right to buy.
- Where a landowner fails to respond to the procedure above within a 30 day period, deem the landowner to have declared they are unwilling to enter any of discussions, negotiations or mediation and the Scottish Land Agency shall advise the landowner and community body accordingly and advise the community body on their rights and the procedures it would be necessary to follow to trigger consideration of consent by Scottish Ministers of an application to exercise their right to buy.
- To pass to Scottish Ministers for decision any application for consent to exercise the right to buy by a community body where the possibility of an agreement to acquire land has been ended in accordance with the procedures above, together with any advice requested by Scottish Ministers pertaining to the application.
- To advise Scottish Ministers on any matters referred to it by Scottish Ministers.
- To promote awareness by communities and landowners of the provisions and procedures to support community ownership of land.
- To make arrangements to liaise closely with any organisations or public bodies which have responsibilities for supporting community organisations with the acquisition of land.
- [when requested to do so by Scottish Ministers or otherwise, to inquire into circumstances where a monopoly of land ownership in their view may be damaging to the public interest and where necessary exercising powers to ensure a new community and/or more diverse private ownership?]
- [when requested to do so in respect of any land wishing to settle in that land, to consider whether the public interest would be served by any such settlement, and to make arrangements to facilitate discussions, negotiations and mediation, as appropriate with the landowner?]

Scottish Ministers may, after such consultation as they regard is necessary and by order, amend the purposes for which the Scottish Land Agency is established, its specific duties and powers.

Duties on landowners and community bodies:

- Duty on landowners to co-operate with the Scottish Land Agency on any reasonable requests for information.
- Duty on registered community bodies to co-operate with Scottish Land Agency on any reasonable requests for information.
- Duty on landowner and community body must use their best endeavours to reach an agreement, when it has been agreed to enter discussions, negotiation and mediation, as appropriate.
- Ministers given powers to issue guidance on nature of information which may be sought.

Powers of the Scottish Land Agency:

- When requested to do so by a landowner in whose land an interest has been registered to seek to make arrangements to facilitate any of discussions, negotiations and mediation, as appropriate, between a community body the landowner
- To require information of landowners concerning the land in which an approved community body has expressed an interest, or a request to purchase.
- To enter land for the purpose of inspecting and mapping land subject to a request to purchase.
- To advise communities in developing plans for the economic, social or environmental use of land.
- To advise communities on public interest issues in seeking to exercise their right to buy.
- To join in arrangements with others to achieve their objectives.
- To compulsorily purchase land and hold land for subsequent acquisition and/or to create new agricultural holdings for lease or purchase
- To direct landowners to put land on the open market for sale when a change of ownership is in the public interest, subject to the approval of Scottish Ministers.
- To secure independent valuations of land as necessary
- To give grants and loans.
- To take such action in the Courts as may be necessary to have altered the terms of any trust or other arrangement that prevent current owners from disposing of all or any part of land for which that trust or other arrangement is the owner.
- Make maps
- Issue such directions to landowners and community bodies as they consider necessary to fulfil their functions.
- Compulsory purchase land, subject to the approval of Scottish Ministers, where the purchase of that land is in the public interest, is directed to furthering the achievement of sustainable development, and where in the view of the Scottish Land Agency they judge there is a reasonable prospect of disposing of the land to a community body within a reasonable time period.

Same ballot procedures as currently exist (as may be amended) to be able to proceed.

Scottish Ministers to have powers to issue guidance in respect of any matter concerning above provisions and to make regulations in respect any matter concerning above provision.

[Note: Depending on policy developments elsewhere within government and more widely, it is not difficult to see how the purpose, duties and powers of any Scottish Land Agency could be framed to play a role in any tenants right to buy in respect of agricultural holdings.]

Would the process of facilitated discussions, negotiation and mediation work without the extended right to buy?

Without the ultimate right to buy there would be little or no reason for a land owner to come to the table for discussions or negotiations. This might be particularly the case in those circumstances where the relationships between the community and the owner were less than optimal, where there were disagreements on land future use, and it was these factors giving rise to the desire for a

community purchase. In such circumstances, it is only the existence of an ultimate right to buy which might give rise to the owner being prepared to contemplate the acquisition of some or all of their land by the community that would provide the impetus to enter discussions and potentially negotiations or mediation. In such circumstances relationships between the parties might be strained and this is where the proposed Scottish Land Agency could play a particularly strong role.

In short, without the ultimate understanding of the landowner that the community, without their co-operation, can seek to have their right to buy confirmed through an application to Scottish Ministers, there is little reason to believe that they would routinely come to the table for discussions.

Conversely, it is only through the existence of such a right to buy (which of course is not guaranteed to be approved by a Minister) that the chance of negotiated settlements becomes in any way likely. The purpose of the extended right to buy envisaged is to create the conditions for such negotiations as the preferred way of proceeding, rather than the exercise of the powers as a the only or first option. It is in exactly such circumstances that the Scottish Land Agency could be at its most valuable.

These latter circumstances have been experienced now on a number of occasions in the Western Isles where the fact that the crofting community could use their rights under Part 3 of the Land Reform (Scotland) Act 2003 to seek to exercise their right to buy has brought about negotiated progress toward more community ownership.

A Scottish Land Agency with the functions above would come into its own in circumstances where there is the stronger right to buy, even when there was not a willing seller.

Status of the Scottish Land Agency

Community Land Scotland's preference is to see the Scottish Land Agency established as a Non Departmental Public Body (NDPB), sitting apart from Government with a clear set of legislative provisions defining its overall function, its specific duties and powers and its own governance arrangements. This would provide it with a clear status and authority.

It is recognised, however, that within a climate of reluctance to establish new NDPBs there are other possible arrangements.

Whatever the detailed arrangements that are preferred, it is important to establish the necessary clarity on duties and powers to enable the task envisaged to be carried out effectively within or beyond government.

Community Land Scotland
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