FEARANN COIMHEARSNACHD NA H-ALBA | COMMUNITY LAND SCOTLAND

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Community Right to Buy Review 2024

Initial call for evidence: Community Land Scotland response

October 2024

Context

Community landownership is at the core of delivering several Scottish Government policy priorities around land reform, repopulation, community wealth building, the wellbeing economy and the Just Transition to Net Zero. However, community landownership is reliant upon a functioning and effective Community Right to Buy (CRtB) system. Unfortunately, Community Land Scotland (CLS) have considerable evidence from our members that CRtB has ceased to function in delivering community ownership as intended.

There is widespread agreement that CRtB has not been functioning as it should for a number of years, as SLC research showed in 2018 and research published by CLS in 2022.[1] As an example, there are currently only 5 CRtB application in the Scottish Land Fund pipeline out of a total of 288 possible acquisitions. As of 2022 258 applications were entered on the register. Of these, 160 applications were accepted and 98 declined. Only 24 applications 15% of accepted applications or 8% of all applications - have resulted in a successful purchase or "activation".[2] The Register of Applications by Community Bodies to Buy Land has seen only 7 applications and 1 successful application. The reasons for the relatively muted engagement with these Rights are explored in sections below. Anecdotally there is evidence that there has been a reduction in the number of enquiries leading to applications – however as figures are not kept for the number of enquiries this is hard to quantify. However, this indicates a significant level of interest in CRtB, but that groups are dissuaded from pursuing the process at some point before submitting an application.

The majority of communities taking ownership of land or assets are doing so through negotiated purchases from the private sector, with a substantial minority (around 40% of SLF applications) occurring through Community Asset Transfer from public bodies. As such the concentration of land in private hands in Scotland is no longer being successfully addressed by CRtB.

The review process

It is disappointing that much needed reforms of CRtB are being considered through an internal Scottish Government Review which will report in December 2025. The opportunities to amend CRtB through the Land Reform Bill or to conduct a thorough, independent review of CRtB have not been taken.

Ideally there should be an external and independent review process with a clear remit, transparency, powers to access government information (or government agreement to provide), and a membership of sufficient independence/expertise. It would be helpful if there was a Scottish Government statement about how the findings of the formal report produced by the review will be implemented.

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[1] 5dd69d73873ae_Community-Ownership-Report-SLC-Recommendations-to-Ministers.pdf (landcommission.gov.scot) and CRtB Research Summary Final (communitylandscotland.org.uk)
[2] CRtB Research Summary Final (communitylandscotland.org.uk)

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An independent review such as this would provide reassurance and prevent any future questions arising about whether there had been robust and independent scrutiny of internal administrative processes and the legal advice within SG which has influenced how statute is being interpreted.

Considering the importance and urgency of the review it would be unfortunate if it was not given a formal status, defined transparency arrangements, a clear remit and governance, and proposed stakeholder engagement during the initial scoping phase or whether a formal report will be published once it concludes.

Key areas for possible reform

CLS have canvassed their membership for feedback on experiences of community right to buy, and this has been added to with the experience of the staff team and research commissioned or undertaken by the organisation. Responses have been kept as high-level and as succinct as possible, with specific members and examples not named due to their wish for anonymity when discussing some of the challenges they've come up against.

CLS have split the evidence on CRtB we have collected into several key themes. These themes address legislative/policy issues as well as the equally important issues of legal, cultural and policy precedent which has developed in the 20 years since the first legislation was introduced.

Part 3, 3a and 5 are discussed as distinct sections due to their relative lack of usage, and the particular challenges that affect each of these rights. The rest of the feedback about thematic issues with CRtB mainly pertain to Part 2 – Register of Interest – which is by far the most used Right. However, the issues around process and precedent identified in relation to Part 2 have relevance for the other Rights, not least around technical issues such as land boundaries, membership criteria and signatures.

The first two themes are legislative and administrative issues. There are some slippages between the two as issues are caused by the legislation being very prescriptive in some areas, very open to interpretation in others and communities being asked for things that aren't in the legislation. This means some aspects of the legislation may not be working due to cumbersome wording within the actual legislation itself, and at other times the issues may sit with how statute has been interpreted. As such the two sections should be taken together as intertwined.

1. **Legislative issues**

General comments

Communities are having to try and use multiple community rights to buy (Part 2, Part 3a, Part 5) to progress their ambitions, in part due to the issues with those specific routes and obstructive or absentee landowners. Multiple attempts, or going through the initial stages of multiple attempts, saps energy and resource and landowners are aware of the lack of successful applications. There could be a case for reducing the existing four rights into either:

- one simplified absolute Right to Buy with compulsory sale to the community
- two simplified Rights to Buy – one absolute and one pre-emptive.

In an urban setting, there are likely to be many potential buildings and pieces of land that have the potential to make valuable community assets. It isn't possible to register a speculative

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interest in all of them so communities normally have to wait until they hear that an asset is likely to be sold before they can start the process. This means that there is usually insufficient time to use the legislation, especially given the 60 days required for an application to be considered once submitted on top of the time necessary to build and evidence community support and to develop a business case -which will usually require information about and access to the property that is often only available/possible once the property is marketed. This is also exacerbated by the fact that the Late Applications mechanism has ceased to function (see section below)

Part 3 of CRtB, the Crofting Right to Buy

This has never been used, although the prospect of its use has helped focus the mind of an owner leading to a sale. The one successful registration resulted in land being acquired through negotiation.

CLS agrees with the position taken by the Scottish Crofting Federation on the challenges facing Crofting Community Right to Buy. The following issues in particular need further attention:

- Difficulty in correctly identifying eligible croft land and getting all the spatial information right. This challenge applies to other CRtB too and can lead to unnecessary rejections when the information is not regularly available. This can be exacerbated in crofting land where fragmentation and inconsistencies in publicly available records make it very challenging for communities to have 100% accuracy.
- It is unclear why the definition of a crofting community in Part 3 is more prescriptive from the outset than for other community rights. The process of defining the community is too onerous and prone to creating errors which can then undermine the entire process.
- The entire process needs to be re-done if a community decides they want to pursue part of a crofting estate rather than the entire holding – meaning that works needs to be duplicated and using up limited resources. This issue is applicable across all of the CRtBs and could be addressed in all rights.
- If the process could be streamlined and simplified – with minor flaws being able to be remedied after submission – crofting CRtB could become a successful means of delivering the benefits of community ownership to wider areas of the crofting counties, including ideally land within the counties but not under existing crofting tenure

Part 3a Right to Buy Abandoned, Neglected or Detrimental Land

This Right has never been successfully used and in the small handful of cases in which Part 3a has been applied for the main threshold of communities displaying that land is 'wholly or mainly' Abandoned and Neglected has not been met. In these cases, the existing landowner has been able to take remedial action once alerted to the application in order to demonstrate that the land is not 'abandoned and neglected'.

The original intention of the legislation, that abandoned and neglected land could be brought back into productive use, has since been brought into questions if existing landowners could claim that it was being 'rewilded'. Some clarity around the definition of abandoned and neglected, as well as the intentionality and need for human intervention in establishing 'rewilding' projects could be helpfully set out in guidance.

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If the intention of the legislation is to change the ownership of landholdings which are not being managed in the public interest and which are being 'abandoned and neglected' then landowner actions to remedy sites ***after*** applications have been submitted and they have been notified should not be considered.

In other cases, CLS have been informed about communities have negotiated with obstructive or absentee landowners about abandoned sites, which have been neglected for several decades. In one case the community told the landowner in good faith about the intention to explore Part 3a to further their ambitions for the land after repeated refusals to engage with the community. This 40-acre site which had been abandoned then saw 0.5 acres being turned into a profit-generating market garden whilst the rest of the site, including historic buildings are left to abandonment. The community group considered after this that Part 3a was unworkable for them, as it placed too much labour onto the community, and that all the landowner needed to do to stop the purchase was to remove harm the community had evidenced in their draft application.

Piecemeal changes to land management and community engagement have been the result of Part 3a to date but is currently not delivering as a means of changing landownership. Lawyers can readily advise landowners as to the limited changes they need to undertake to remove the evidence of harm which communities set out in their application.

Crofting land is ineligible for Part 3a, which seems unwarranted. In theory communities in those circumstances could use the Crofting CRtB, however they should have the choice to exercise any of the rights and not have pre-determined by the nature of the land tenure.

Part 5 – Right to Buy for Further Sustainable Development

Part 5 has experienced some of the same challenges as Part 3a, with limited communities taking the right through to application and concerns over the burden of proof needed to make the case for community ownership versus existing private ownership. In part this is understandable, as an absolute right which results in a forced sale the community must make a compelling case for the public interest. However, they should feel empowered to use these rights. Communities we have spoken to who have not progressed applications felt the burden of proving their plans to be the 'most practical way' of achieving sustainable development as too onerous, with the potential for legal challenge/costs if they want to dispute landowners' claims.

CLS welcome the recent Scottish Government decision in relation to Poets' Neuk in St Andrews and agree that this case may provide an opportunity of 'leading by example'. It is vital that there are established precedents for using Part 5 and Part 3A if they are to be successful avenues for further community ownership. As discussed below in relation to policy intent and legal precedent, it is essential to have examples of how these rights can work to inform both future community applications as well as judicial decisions in case of legal challenge.

In order for this precedent to be established there needs to be clear Government support for these Rights (3A and 5) to be achievable. For this reason, we welcome the decision in regard to Poets' Neuk but also recognise the potentially contentious legal nature of communities being able to demonstrate that their plans are the 'most practical way' of achieving sustainable development, and the corresponding ease with which landowners' and their lawyers may be able to undermine community claims to further sustainable development.

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Crofting land is ineligible for Part 5, which seems unwarranted. In theory communities in those circumstances could use the Crofting CRtB, however they should have the choice to exercise any of the rights and not have pre-determined by the nature of the land tenure.

Section 33 of the Land Reform Act 2003- Land in respect of which community interest may be registered

Why is 'Excluded Land' – such as land being under a tenement e.g. a harbour tenement in the legislation? It is also in the legislation but not in the guidance document, so it is unlikely communities will know about it.

Legislative Changes Required

The existing 2-stage process for Part 2 Rights (registration then activation) should be improved with an initial "preliminary registration stage" to make the Right more accessible and easier for communities to use. Key administrative steps would be done for registration (Stage 1) with substantive tests after trigger (Stage 2). As it is already a 2-stage process, this would not create any new and significant undue legal prejudices.

The simplified preliminary registration stage should last 5 years, but if proceeded to full registration then the registration should last 20 years.

A process for requesting further information for a pending application which does not materially affect the application's purpose should be introduced.

Additional measures of landowner transparency are needed, such as for options agreements, which can be added to the Register of Controlling Interests in Land. Requirements for accurate updates on Land Titles, of landowner contact information and any options to development.

2. **Administrative issues**

General comments

Aspects of the application process appear arbitrary or unnecessarily cumbersome to communities, for example:

- Introducing basic criteria for refusal at the assessment stage which was not included in the application.
- Communities often reach for CRtB in a moment of crisis or when land which has not been on the market for many generations suddenly appears – the legislation is cumbersome and too slow so is rarely functional in these circumstances – especially considering late applications appear to be functionally dead, even though no such advice has been transmitted in guidance.
- Communities are disadvantaged due to the large administrative undertaking required of an application and the relatively slow turnaround times for application processing compared to the quick pace of land sales – especially in lucrative developments such as in the City of Edinburgh
- There are overly stringent burdens on administrative errors outwith community control e.g. inaccurate electoral register/wrong landowners listed
- Support signatures for applications only last 6 months and it takes a considerable amount of time collecting 10-15% of signatures within a designated geographic area.

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This is exacerbated by the fact that the petition list cannot be electronic and requires to be physically maintained. This especially challenging for community bodies covering a large area/population and when most such bodies have few if any paid staff and are reliant on volunteers to collect signatures.

- When a community has had their application refused on a technicality and choose to resubmit an application - it can be hard to resubmit within the 6-month period - which would lead to communities have to petition again, which feels unnecessary for an application that was submitted timeously. The legislation does say that at 34 (2B) Ministers may by regulations amend subsection (2A) so as to substitute for the period of time for the time being specified there a different period of time (not being less than 6 months) - but there should be clarity on when this would be applied.
- Signatures have to be collected from individuals who are on the electoral register for local elections. However electoral registers in libraries are sometimes months out of date, as such there has to be reliance on the signee saying if they are on the correct electoral register, and they may not be on the required electoral register. This creates a significant amount of 'wastage' on the petition list and means usually more than 10% of signatures need to be collected. This is often unrealistically time consuming and seems completely unnecessary if people have already self-certified that they are locally resident and eligible to vote.
- The requirement for a quorum of 10% of members at General Meetings discourages larger organisations from seeking to expand their membership because of the risk of not being able to hold quorate meetings. This issue is exacerbated in large areas with relatively small populations, for example the Isle of Mull, with a population of c.3000 but it takes 1 hour 45 minutes to travel from one end of the island to the other.
- Lack of flexibility within application structures to factor in local context and situation, and therefore the need for malleability outwith proformas and guidance to help ensure positive outcomes. This closely aligns with the policy intent section below. Standardized procedures are necessary, but the interpretation of applications and communication with communities could reflect understanding of realities on the ground (see section on Internal Processes)
- Inconsistencies and differences in expectation between Land Fund and CRtB team, for example the designation of geographic areas and community organisational structures. CRtB and Land Fund applications often happen concurrently, as far as possible the two processes should be aligned to ensure communities are not overly burdened and moreover that they are compliant for both processes.

Section 34 – community bodies

There is a difference with minimum member requirements between asset transfer and CRtB – 10 Members for CRtB and 20 for Asset Transfer. Some groups set up to require a minimum of 10 then can't use Asset Transfer. It does say in the constitute templates that communities can choose a higher number than ten, but it would make more sense for these figures to be aligned.

There is potential to examine if the requirement to have 75% of your members living in your geographic community is proportionate. This can cause issues with Community Share Offers but may not warrant changing.

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The electoral register and eligibility to vote cause confusion:

- Members that get counted in petition list etc must be *entitled to vote, at a local government election, in a polling district which includes that postcode unit or those postcode unit* – some people are entitled to vote but not at local government elections.
- Unclear whether communities need to look at the full electoral register which is often to be found in the local library or George IV bridge and is often out of date. There is no requirement to do this in the legislation, but the CRTB application form does ask for *Total number of members of the community* and the guidance says communities should provide *evidence of the total number of eligible voters within their defined community (from the full Electoral Register for their defined community)*.
- It is not within the legislation that communities have to go and check the register to prove eligible voters, however every group that CLS colleagues in Glasgow have worked with have been asked to do so. To look at the full register, you are required to be accompanied, and time slots are often as little as 15 minutes - which does not allow enough time for extensive checks without multiple visits.

Section 36 Register of Community Interests in Land

The number of appendices on RCIL entries is getting longer and longer as time goes by, showing that communities are being asked for more evidence now even though the law hasn't changed since 2016. What is the rationale for this?

If communities are asked for business plans at an early stage of application to CRtB it can be challenging as they cannot apply to the Scottish Land Fund without a reasonable chance of purchase, usually within one year.

Section 37 - Registration of interest in land

Options Agreements – these are only specifically mentioned in the Act in regard to late applications (39a), but existing precedent shows that land that has an option agreement in place is excluded, including for a timeous application. What is the reason for this? Similarly, there is no current register of Options Agreements, although the Scottish Land Commission has flagged this as an issue.

The boundaries of the land need to be prescriptively precise. There should be a margin of error which factors in errors and inconsistencies in the land register and the difficulty of accessing some information. Applicants have to walk around and do a description of the land, and this is written in a way in the application form which makes it very difficult. Furthermore, on some sites it is not possible to do a 'walk round'.

Standard securities against the land – the need to contact the person with the standard security is understandable but they can be difficult for communities to reach. Standard securities should be on the title but if the land isn't on the Register this is problematic. The ability to advertise for any standard securities related to the land for two weeks is useful but groups are not informed about this. Furthermore, there should be an electronic alternative or some easier alternative to placing the advert for two consecutive weeks in a newspaper. Newspapers are fleeting and what the definition of a 'local newspaper' is needs clarifying.

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Timescales - the commitment to respond within 63 days to applications (under sub section 17) is not always met.

Section 38 – Criteria for registration

The definition of 'sustainable development' is not tightly defined which is beneficial but further guidance could be helpful as communities can be confused by this and think it relates to Sustainable Development Goals.

Connectedly there now appears to be a desire for communities to set out economic, environmental and social benefits in applications – is this a new development?

38 (1) Connection to the Land – there have been two successful legal cases on this point (see Malcolm Combe's paper in footnotes). Issues of interpretation of the statute here around the phrase 'connection' and what constitutes a substantial enough 'connection' to exercise land rights, open to interpretation by the Sheriff as Government have not set down clear guidance.

1 (d) no definition of public interest – and we know that public interest is defined differently in different pieces of SG legislation. A reclarification of the Public Interest criteria informing decisions would be beneficial. Specific guidance on how communities can understand the Public Interest would be helpful, as has been done by the KLTR in their Ownerless Property Scheme (opts-guidance-1-march-2024.pdf (kltr.gov.uk))

(2A) petition lists go out of date within six months – this is not long enough and would be better if it was a year. Communities should not have to redo the petition list when they re-register, this is a significant amount of work. Electronic petition lists should be developed to avoid the resource intensive nature of physical lists and re-doing them.

This raises a particular inclusion issue too as only high-capacity groups are likely be able to re-do petition lists. This can be compounded by Scottish Government not responding on time this will knock the timelines out.

Section 39 Late applications

59 late applications have been entered on the register, of which 26 were accepted (44%). Late applications have generally decreased over time, apart from a large number of applications in 2017 (likely reflecting the new availability of the right to urban groups). Overall, 11 late applications have been activated (18% of late applications, but 45% of activated applications), all from 2017 or earlier. This indicates that, prior to 2017, late applications were a deliverable community land purchase route. Since 2017 this has changed.

Late Applications have not been successfully used since 2017 and are in practice no longer being accepted. As we understand it, the 'late application' process now interprets it as only applicable when a community body is already in possession of a Section 34 letter and actively working on a CRtB application. The current guidance does not indicate this change in precedent/procedure, why have the boundaries for eligibility moved? Often communities are not actively pursuing an application prior to sale to maintain good relations with the existing landowner. Late Application process needs to reflect this reality.

As such it appears as if though internal bureaucratic processes have stopped Late Applications functioning, rather than issues in the legislation. The problems with interpretation of the statute

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may be due to this section (F4(aa)(iii) - *(iii)by the community body making the application or by another person with a view to the application being made by the community body)*. Although relevant work was carried out, it was not with the intention of making a CRtB application (because the community were negotiating with the landowner). This essentially means that a community have to have been working on a timeous application no matter what other work they may have done to pursue their interest in the land.

3. Internal processes and practical issues

Communities have identified a number of issues not linked to specific areas of the legislation but more closely connected to established informal precedent and cultural change. These issues may be hard to quantify but they are having very damaging impacts upon the perception of CRtB and the willingness of communities to engage with the process:

- Clarity over how submissions from landowners and communities are assessed so there is an understanding of what language and criteria will most impact decision making. There is a perceived awareness that the Scottish Government is wary of legal challenge and understand that legal challenge will more often than not come from landowners.
- Those responsible for decision making on CRtB should visit more sites and particular cases as much as possible to get a sense of what is happening on the ground in communities and in the areas on which they are making decisions. This has been a noted change over the past few years which has impacted on a sense of connection between the Community Land Team (CLT) and communities of place. CLS think that the CLT should be resourced to visit complex sites – a useful investment for both local communities and the CLT.
- CRtB applications have become seen as 'aggressive' moves by communities who want to antagonise landowners, rather than communities being proactive and wanting to start a positive discussion. This is compounded by some legal decisions – see section 4.
- There is a lack of knowledge of the internal legal advice which the Community Land Team receive when making decisions on CRtB. This, alongside CRtB's recent faltering, has led to the conclusion that legal advice is becoming more conservative and is resulting in less successful applications and activations.

There could be clearer alignment between CRtB, and other land based statutory processes such as Local Place Plans and Community Action Plans, as well as the Land Fund. These processes often ask for similar information but either framed differently or with different requirements, this results in communities using up limited resources to produce multiple applications rather than these different mechanisms being more closely aligned with similar or the same requirements e.g. around business plans/petitioning/governance structures/geographic boundaries etc. This connects to a point raised earlier about alignment between CRtB and Land Fund and Community Asset Transfer processes.

4. Policy intention and legal precedent

Community Rights to Buy will only be effective when there is a clear policy intention from Scottish Government that they are pursuing further community ownership and diversified landownership more generally. This will require meaningful land reform legislation alongside

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simplified and robust CRtB measures which sees a significant number of successful applications resulting in community ownership to provide the courts with evidence of the Scottish Government and Parliament's intentions.

At the heart of CRtB is a tension between the public interest and Article 1 of Protocol 1 (A1P1), the protection of property under ECHR. However, A1P1 is not an absolute right. Parliament and Government can interfere with that right in particular circumstances which are balanced and justifiable. These circumstances are determined by an assessment of the public interest. Courts are led by what Parliament and Government set out as public interest considerations as well as existing precedent.[3] Until Scotland has a clear policy intention from the Government alongside established precedent in favour of community ownership, courts will find in favour of landowners, the existing precedent.

As an example of this, CRtB registrations have being challenged in court and cases are being settled in favour of the landowner - for example over CRtB registration being seen as 'market blight' or Sheriff's deeming communities to not have a substantial enough connection t0 the land.

CLS commissioned research from Dr Malcolm Combe into the appeals process within Part 2 of the 2003 Act. The findings showed that in cases in which communities have appealed against a Ministers' decision not to accept their application to register a community of interest in land, or that registration of a community interest in land has been challenged by a landowner, the sheriffs have found against the community in each case. This does not build confidence in the legislative and legal process which is supposed to be empowering communities to purchase land and assets.[4]

One potential outcome could be to make the avenues for landowners to challenge applications on minor/spurious complaints should be minimised by making compliance for community bodies more straightforward.

[3] These remarks are taken from discussions with Prof Katie Boyle, Professor of Human Rights, University of Strathclyde, 20/08/2024

[4] An Analysis of Part 2 of the Land Reform (Scotland) Act 2003 Using Case Law Relating to the Community Right to Buy - Strathprints