

Written submission from Community Land Scotland

The principal focus of this submission is on Part 4 of the CEB – the amendments to the Land Reform (Scotland) Act 2003 (LRA).

High level summary of CLS evidence – CLS:

- Welcomes Part 4 of the CEB and the proposed simplifications to Part 2 of the Land Reform (Scotland) Act made
 - Welcomes the extension of the Community Right to Buy to all of Scotland
 - None-the-less, there are important omissions, clarifications and measures needed to strengthen this Part of the CEB
- Strongly welcomes the extended Community Right to Buy in Section 48
 - However, there are important clarifications and strengthening of the provisions required if they are to be effective
 - Welcomes the recent indication by the Scottish Government of its intention to use the CEB to also simplify Part 3 of the LRA. Not have done this would have been a serious omission and would have left important inconsistencies between Part 2, Part 3 and Part 3A.

Committee Call for Evidence - Questions

The Committee asked a number of questions and this submission principally addresses question 4 about the specific provisions of the Bill and changes respondents would like to see. Beyond this, CLS considers the Bill will help empower communities by giving them new or improved rights to exercise. The effect of the Land Reform (Scotland) Act 2003, which established community rights to buy land, has been to see a change in the whole climate for community purchases, in the knowledge that rights exist to support community aspirations. Community land owning, along with other asset owning activities through, for example, community woodlands and development trusts, has shown that communities do have the capabilities to do remarkable things, and have the capacity to utilise legal rights to help deliver the regeneration of their communities. This Bill puts in place an enabling framework which should add to the ability of communities to act in positive ways.

By enacting provisions that will empower communities, public sector organisations can benefit by more informed and capable communities acting to deliver sustainable development and help better design the delivery of public services. CLS can see no disadvantages to public bodies from this, even though it is recognised they will have some new obligations.

Part 1 – National Outcomes; and Part 2 – Community Planning

CLS does not have sufficient expertise in these matters to make comment on these provisions.

Part 3 – Participation Requests

CLS regards these provisions as important in strengthening the hand of local communities to seek to be involved and potentially secure improvement in matters

important to the life of their community. These provisions complement other provisions in the CEB designed to strengthen the rights of communities.

Part 4 – Community Right to Buy

Modifications of Part 2 of the Land Reform (Scotland) Act 2003

In principle and for the most part these modifications are welcome as a means to improve the workings of the LRA in light of experience over the decade since its implementation. This experience has shown a number of problems with the LRA and the provisions in the CEB seek to deal with key aspects which have been criticised.

Section 27 – extending the Community Right to Buy to all of Scotland

This is a welcome extension of community rights. There is no reason why communities in the urban realm and in towns of over 10,000 should not enjoy the same rights as smaller rural communities.

Section 28 (3) (c) and (4) (1A) (g) - Provision of Minutes upon request

There are practical matters that would benefit from clarification and/or change in what is proposed. It is not clear whether the minutes are of all meetings; in particular, the question of whether this is intended to include board meetings as well as members meetings; sub-committees; and whether it is 'approved' minutes that are referred to. Further, it appears this provision would apply retrospectively to community bodies and, if that is the case, the implication would be that existing community bodies would have to take steps very quickly to convene members' meetings for the purpose of passing special resolutions to make these alterations to their Articles. Failure to make change may have wider implications arising from 35(2) and (3) of the LRA and could terminate a registration of interest or trigger consideration of compulsory purchase by Ministers. It is not believed this is intended. Perhaps the same policy could be effected by, for example, a requirement for Community Bodies to enact such byelaws or Rules. These provisions do not seem to apply to a Part 3A or Part 3 body, and this would be anomalous.

Section 30 - Period for indicating approval

The proposal for a 6 month limit, before which time Ministers may not take into account certain matters, appears impractical. Registration of a community body can take in excess of 6 months itself in certain circumstances. Important feasibility and other studies which may be put to a community for support may well date back before 6 months. CLS believes Ministers should be free to take account of anything they consider relevant in indicating approval and not be artificially restricted, and this 6 month limit is unhelpful.

Section 31 (4) - Late applications to register an interest in land

This is an issue of very real significance to the future prospects of community ownership. For a variety of legitimate reasons, communities do not think of or register an interest in land as an abstract exercise. For all communities to protect the potential interests of the community through timeous registrations of interest in land, may require registrations of interest in a significant number of areas of land, with little

prospect that they may ever come on to the market. There are considerable administrative implications for a community and for government from any process of 'mass registration' of interests in land by communities, yet the current LRA rather founds on that broad assumption. Experience shows communities are also very reluctant to register an interest in land if they feel that might be interpreted as a hostile act by an owner.

Communities tend only to engage with the need to register an interest in land when they become aware the land may be available for sale and this can happen often quite unexpectedly, thus triggering the need to consider a late registration of interest in the land. It is not unreasonable that communities behave in this way.

On the face of it, it is not clear why the proposed changes, which replace the need for a community to show "good reasons" why they did not apply timeously, with a new provision to show they had undertaken, sufficiently in advance, "such relevant work as Ministers consider reasonable was carried out, etc", are any less onerous than the original provision, if this is what is intended (Section 31 (4) & (9)(6)). The new provision may well make the opportunity for a late registration more difficult than it already is, and this would not assist any objective of greater community ownership that was in the public interest.

It would be best to accept late registration as the likely norm and of itself need not be justified by any prior action or lack of action, and instead rest on the other existing tests for late registration and which are already demanding;

- first, in showing significantly greater support for within the community than for a timeous application
- and second, that registering the interest would be strongly indicative that it is in the public interest

These provisions will continue and seem sufficient in themselves, without the new provisions, but with the deletion of the current need to "show good reasons".

Additionally and more pro-actively it might be possible to make provisions that where Ministers were notified by a land owner that they had an interest in selling their land, Ministers would take steps (through existing government agencies) to seek to establish whether a community had an interest in buying the land.

Section 37 51A (6) - Information for balloter.

It is not clear why the balloter would require this information to conduct the ballot, nor why, if that were justified, it would need to be separately supplied, when it forms part of the application process.

Significant omission from Part 2 LRA revisions

There is one significant omission from the potential amendments to Part 2 of the LRA regarding re-registration of an interest in land after 5 years. The current re-registration provisions are seen as demanding and unnecessary.

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. Further, re-registration requires replicating the original registration demands, which can be considerable. A further way to simplify matters would be to change this requirement to one that is less demanding, while still open and transparent and providing opportunity for a community and landowner view. These points are supported in the final report of the independent Land Reform Review Group (Section 17.1 – 9 & 10)

The latter suggestion could be achieved through a registered interest remaining valid, with an occasional and simple procedure being adopted to confirm community views if there were no material changes in circumstances. For example, the community body could be required to take an advert in a local newspaper indicating that the community body was under an obligation to re-register its interest in land, what its view was, and offering an opportunity for any qualifying residents (on the electoral roll) to lodge an objection with the Scottish Government.

Section 31(4)(aa)(iii), appears unnecessary and restricting.

Section 31 (5) (3A) (b); Section 37 51A (5); Section 38 (6). Section 39 (1) (4) (5) (7) (9); and Section 42 - Time Limits

The 7 day limits set above appear potentially tight for all circumstances and providing some latitude for a different time, if that was ever considered appropriate, might be helpful to all parties.

Schedule 5 - repeals the word `substantial, and this is welcome. However, when it came to any question of the settlement or re-settlement of once cleared land, it may be difficult still to demonstrate a contemporary connection to the land, and this matter ought to be provided for by a separate permissive provision.

Section 48 Part 3A - extending the community right to buy “abandoned or neglected land”

CLS strongly supports the introduction of this new power extending the community right to buy. This is viewed by CLS as a last resort power. This proposal responds to a weakness in the current LRA that, even if it were in the public interest, there is no means for a community to acquire land unless it came on to the open market. The new provision means this matter can now be considered.

The challenge of this part of the CEB is to find the right balance between granting this welcome extended right, and setting tests for the exercise of the right so high that they would not, for all practical purposes, be possible to meet. CLS believes that the significant qualifications on the new right probably makes it impossible to be exercised in practise. There are a number of ways in which the provisions in the CEB could be helpfully clarified and strengthened, and the balance in this regard improved, while still meeting all ECHR requirements. It would only be with important amendment to what is proposed that the cause of community land owning would be likely to be advanced by these provisions.

The Explanatory Notes and the Policy Memorandum make it clear that, respectively, the land in question, to be eligible, is wholly or mainly abandoned or neglected “for the purpose of the sustainable development of that land” and “in order to further the achievement of sustainable development”.

However, the provisions at Section 48 - 97C (1) do not make explicit that sustainable development connection. The provision appears to stand alone with the considerations solely about the physical condition of the land, not about the social and economic development of the place, the classic two pillars of sustainable development in addition to environmental considerations (See Lord Malcolm in the *Pairc Crofters Ltd and Another v Scottish Ministers* 2012 CSIH 96 at Para 112).

The everyday interpretations of “abandoned” and “neglected” do not link with the issue of the land’s lack of, or potential or need for, sustainable development, and there is therefore a risk that, even if subsection (2) of section 97C was used to bring in these issue as prescribed matters to which Ministers must have regard in determining whether land was eligible, that could be the subject of challenge on the grounds that the linkage between the concepts was not sufficiently warranted or reasonably envisaged by the statutory provisions, or was stretching the normal interpretation of the primary tests set out in subsection (1).

This matter could be clarified and the CEB strengthened by making it clear – within subsection (1) or via a further subsection within section 97C itself - that the land in question, to be eligible land, could be regarded as wholly or mainly abandoned or neglected, or otherwise in need of sustained development, when having regard to the sustainable development of that land. This would be one approach to seek to make clear the concepts of abandonment or neglect of land were related to sustainable development and not solely constrained to its physical condition, use or occupation. This would be consistent with policy as set out in the Policy Memorandum, and the agreed and statutorily required Scottish Land Use Strategy which stresses the use of land for community well-being contributing to a more prosperous and successful nation. Even with this improvement, the requirement to show land was wholly or mainly abandoned or neglected still sets a very considerable hurdle to be overcome. This clarification would need to apply equally to 48 97G (6) (b) and 97G (10) (c).

Any amendments along such lines above would, CLS believe, be compatible with ECHR A1P1 which requires that the interference in individual ownership rights must be - provided for by law; to pursue a legitimate aim; and the means of doing so must be proportionate to achieving that aim; and must achieve a fair balance between the demands of the community and the requirement of the protection of the individual’s rights. All these tests would be met as the matter would be provided for in law; would pursue the policy purpose of furthering sustainable development; would be proportionate [see *Pairc* case and Lord Gill, paras 36 and 40]

In the case of urban areas and particular sites within such areas, it may be possible to argue that a particular site or building had been abandoned or neglected (in the normal sense of those words) by pointing to its physical condition or the absence of occupation or use, and it is probably why these provisions are in the CEB. They still remain very high, or impossible, hurdles for a community to clear.

However, when considered in the rural context and over the potentially extensive areas of land of the sort that communities have acquired by voluntary agreement in recent years, it is difficult to see how a successful case could be made that land (except in the very narrow circumstances of a building, for example) had been abandoned. The sort of defences that an owner might put up can readily be seen; the abandonment being a deliberate act of land management for conservation purposes for example, or the appearance of abandonment is simply a function of the market conditions for development not being sufficient and there being an intention to use the land, or to take some small and immediate action which would have the effect of showing the land had not been abandoned.

Similar arguments can be made about the question of whether land is wholly or mainly neglected. Had these provisions existed at the time of the initial struggles by the islanders of Eigg, for example, to secure the island into community ownership, would they have been effective in securing that outcome (the 'Eigg Test')? Even with these provisions, this may still have been an impossible case to successfully argue. This might be marginally helped by the addition of "or significantly" to "wholly or mainly" in the definition at 97C(1).

Further, however, tying this Part 3A route to community ownership of land solely to the concept of abandonment or neglect, is too limiting. Community ownership of land is not only potentially motivated by questions of abandonment or neglect, it is principally motivated by communities considering barriers to the sustainable development of their place.

The objectives in the Policy Memorandum make clear the purpose of this part of the CEB is to remove barriers to the sustainable development of land. Wider human rights considerations also point to more positive justifications to promote change in the human condition toward achieving more adequate standards of living and the continuous improvement of living conditions, of the sort sought in the International Covenant on Economic, Social and Cultural Rights (ICESCR)(Article 2, Subsection 1). The ICESCR sets out that signatory states should, to the maximum of its available resources, seek to progressively achieve the full realization of the ICESCR by all appropriate means, including particularly the adoption of legislative measures. The Scotland Act 1998, Schedule 5, Paragraph 7 (2) makes clear that Scottish Ministers may take actions, inter alia, "observing and implementing international obligations". With ICESCR having been ratified by the UK Government, it is brought within the terms of the Scotland Act 1998 and as such, not reserved for this purpose. Ministers are empowered and encouraged by these various provisions to take actions that would further improvement in the human condition.

In all, the Bill could therefore be significantly strengthened with the addition of further criterion to the effect that eligible land could include land, for example, *the ownership of which by a community body would be conducive to furthering sustainable development (and in pursuance of objectives of the International Covenant on Economic, Social and Cultural Rights); or, (when having due regard to International Covenant on Economic, Social and Cultural Rights) the ownership of which by a community body would be conducive to furthering sustainable development and the public interest.* These are initial ideas of potential ways to clarify and strengthen the CEB.

CLS recognise that part of the Scottish Government's reasoning in these matters is likely to be in relation to ECHR considerations and the rights of existing owners. CLS believes potential strengthening provisions, such as from the concepts above, would not threaten ECHR compliance, given their nature and given the provisions and procedures elsewhere in this part of the CEB which, in the view of CLS, addresses the principles of human rights law round due process. Further, CLS notes that the existing provisions in the LRA, and which have withstood Court challenge on ECHR Article 1 Protocol 1, do not require any notion of abandonment or neglect of land in order for it to be eligible land, so it is not clear why this would now be required. (See Lord Gill's judgement in the case of *Pairc Crofters Ltd and Another v The Scottish Ministers* 2012 CSIH 96)

It is further not clear whether, even if it were possible to identify some parts of a land holding in which a case could be mounted that they were either wholly or mainly (and possibly 'or significantly') abandoned or neglected, it is only those parts which could be eligible land, or whether it could be argued that the entire land holding was abandoned or neglected by virtue of those parts being abandoned or neglected. This matter needs further clarification.

As noted above, the Bill makes clear that (97C(2)) Ministers must have regard to prescribed matters in relation to what is eligible land. This makes the Regulations here absolutely critical to the interpretation of this provision and it would be vital to see these draft regulations before a final judgement could be made on the provisions or amended provisions themselves.

Lastly, with regard to 97C, it is not clear why *bonna vacantia* land is excluded from being eligible land, particularly when related to the need to identify ownership of land which, for reasons set out above, may not always be possible and potentially therefore rendering it *bonna vacantia*.

Further still, 97H (c) requires that Ministers must not consent to an application to buy by a community body unless they are satisfied – “that, if the owner of the land were to remain as its owner, that ownership would be inconsistent with furthering the achievement of sustainable development in relation to the land.” It is difficult to see how this could ever be proved, it appears to require proof of a negative as distinct from proof of a probability and it goes much further than would be required in order to achieve a “fair balance” required by ECHR A1P1. This appears a very high and most probably an impossible hurdle to be overcome and unnecessary to meet ECHR requirements; it implies that, even if a community was able to show that the land was mainly neglected for the purpose of its sustainable development, and this was not in the public interest, if that owner could show that, none-the-less, their continuing ownership was not of itself “inconsistent” with some level of sustainable development, then the community's application must be refused.

Under the provisions, the Ministers already have to satisfy themselves that:

- The land is eligible land, ie, it is wholly or mainly (and possibly 'or significantly') neglected
- Purchase by the community body is in the public interest
- Purchase by the community body would be consistent with the achievement of sustainable development in relation to the land

Given these tests, and the fact that there is no equivalent of this requirement in Part 3 of the LRA, which was held to be compatible with ECHR A1P1 in the *Pairc* case, it appears unnecessary to have this further requirement. There is a strong case for deleting it entirely, which failing, it would be essential to clarify it to the effect that, *the ownership of which by the current owner would be inconsistent with (or not conducive to) the public interest when having regard to its potential for contributing to the sustainable development of that land*. There is potential here too of linking this consideration to *having due regard to (or, in pursuance of the objectives of) the International Covenant on Economic, Social and Cultural Rights*.

It would be further helpful to clarify here and throughout Part 3A that in referring to “the sustainable development of that land” that the term “that land” refers to the place and community of that place and not just some physical condition of the land.

Further revisions to Part 3A

Clarifying that the date when it is to be determined that land is eligible land is the date of the application for consent. There appears no provision to this effect, although it may be argued that it is implied. In the absence of some provision, there could be arguments about this.

It may be worth considering the merits of providing whether or not a minimum period has to elapse before land is to be regarded as wholly or mainly (and possibly ‘or significantly’) abandoned or neglected and, if so, what is it and whether that period can be, or commence, before the date of commencement of Part 3A .

97H (d) requires that the owner of land is accurately identified. However, even if reasonable steps are taken to ascertain the ownership, this may not always be possible and may indeed be the root of why the land is not being used in a manner conducive to its sustainable development. There are instances where it might appear that ownership is purposefully concealed in off shore arrangements and/or and by other means; in addition, the existence of large areas of rural land which have not yet been brought within the mapping system of the Land Register continues to create uncertainties in identifying the owner in certain cases. It will, therefore, be important to make provision for such a deadlock to be broken through providing for the community taking reasonable steps by publicly advertising their intentions in an appropriate journal, when their reasonable steps to ascertain ownership have failed.

The requirement (97D) to have a separate Part 3A community body means that the creation of that body is an open and public process. This, of itself, can have the effect of alerting an owner such as to permit them to take steps at that point to seek to demonstrate the land in question was not wholly or mainly (and possibly ‘significantly’) abandoned or neglected, or to shift and possibly seek to conceal, ownership. It will be important to provide for these circumstances in some way, so as not to allow an owner to circumvent the provisions of Part 3A, having been alerted to the community’s interests by the provisions of Part 3A itself requiring a public process of registering an interest.

Further, 97H (j) might benefit from some clarification, possibly in guidance, as to what might have constituted circumstances in which it could be held a community

had tried and failed to buy the land. This would be important in general, and not least in circumstances where ownership was not known.

97B the definition does not seem to include salmon and mineral rights, and this may be necessary for clarity.

97R could helpfully make it clear that whenever the process of valuation is complete, there is a period of 4 months for the completion of payment. This would exist if the valuation is completed timeously, but could be shorter if that was not the case, to the disadvantage of the community and while not a matter in their control.

Greater diversity in Scotland's land ownership patterns

The Scottish Government has made clear in recent PQ answers, replies to debates in Parliament and policy pronouncements that it wants to see a greater diversity in the ownership of Scotland's land. This Bill could usefully support that objective. One way would be for the provisions at 97C to have a further provision to the effect that, *eligible land would be land, the sale of which to a community body, would contribute to the achievement of a greater diversity of ownership of land in Scotland.*

Consistency in revisions to Part 3A and Part 3 of the LRA

Part 3A extends the community right to buy and is modelled on the crofting community right to buy in Part 3 of the LRA. Experience has shown real difficulties with Part 3 of the LRA which are, therefore, repeated in this new Section 48 Part 3A. This also has the effect of leaving substantial inconsistencies between the community right to buy for a community body in the revised Part 2 of the LRA introduced by Part 4 of the CEB (with the suggested amendments above), while utilising none of the helpful simplifications and flexibilities introduced into Part 2 in this new Part 3A, let alone Part 3 of the LRA. This is why it is very welcome the Scottish Government now intend to use the CEB to change Part 3 of the LRA.

The simple way to manage this would be for the changes to the definitions of a community body brought in by Part 4 of the CEB in relation to Part 2 of the LRA to be applied to the definitions of a Part 3A community body at 97D, and to Part 3 of the LRA. Similar provisions for the new balloting procedures in the revised Part 2 of the LRA introduced in Part 4 of the CEB should apply to the new Part 3A, and Part 3 of the LRA. Consistency more generally between the new Part 3A, Part 3 of the LRA and the revised Part 2 of the LRA should be sought throughout the provisions of the CEB, as appropriate.

Most importantly, among these matters, the mapping requirement at 97G (d) (ii), and in Part 3 of the LRA, are excessive. CLS contend that it is not necessary for any purpose for a Minister to know of all "sewers, pipes, lines, watercourses or other conduits and fences, dykes, ditches or other boundaries in or on the land", in order to make a decision and given all the other criteria, including a map of the location and boundaries of the area. This requirement is a near impossible task for any significant land holding and gives substantial room for technical appeals based on a minor error in the extent of a ditch within, say, a 40,000 acre estate of the sort purchased voluntarily in recent years. This mapping requirement should be deleted as being far in excess of what is needed. The Land Reform Review Group in their final report has

acknowledged the excessive nature of the mapping requirements on which these requirements are based.

In addition, it seems odd and unnecessary that a Part 2 community body could not also be a Part 3A community body by some simple means, otherwise an unnecessary duplication of effort would be required when it is conceivable that a Part 2 community body which had registered an interest in land could proceed to the Part 3A provisions if they subsequently formed the view the land in question had in fact become abandoned or neglected.

CLS is aware of detailed evidence from Mr Simon Fraser on Part 3 of the LRA. Mr Fraser is highly experienced and respected in these matters and CLS draws particular attention to his submission in raising issues of importance for attention.

Prescribed matters

There are significant matters to be dealt with in regulations throughout Part 4 and it would be important that a clear understanding of what the regulations will contain is seen prior to Stage 2 and where possible to see actual draft regulations, in order to consider whether leaving important matters to regulation is appropriate in all circumstances.

Power to Ministers to facilitate discussions and make regulations

The new Part 3A sets up a process which holds the prospect of dispute arising between community and current owner, because of the nature of the request for what is a compulsory sale. These are circumstances under which dispute resolution or mediation would be helpful. Ministers do not have powers to facilitate this at present.

It would seem appropriate to give Ministers power to make such arrangements as they may regard appropriate to facilitate discussions between the community body and owner upon a request from either party and to have powers to set out procedures for such facilitated discussions through regulation, if they ever felt the need for this.

Part 5 - Asset Transfers

CLS strongly supports the provisions of Part 5 as important in improving the potential transfer of public assets and building on practical experience in, for example, forest estate transfers to date.

The provisions could be strengthened by a duty to provide publicly accessible asset registers, and making clear, possibly in guidance, the local authority discretionary power to transfer at less than market value is available to other public bodies in the Scottish Public Finance Manual, under certain conditions.

CLS recognises the expertise within DTAS and CWA both of whom have made submissions on these provisions, and supports their suggestions.

Part 6 - Common Good Property

In so far as the provisions go, they are advantageous to greater transparency on the ownership, use and disposal of Common Good property. 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. A wider review of the common good issues may be a preferred way of moving forward as part of the actions flowing from the recommendations of the Land Reform Review Group. This could embrace a statutory definition, rights for communities to take back title to common good assets that were foregone in 1975. A further useful change in the legislation, now, would be to remove the requirement for Sheriff Court approval for common good assets being transferred to communities. This seems an unnecessary and additional hurdle and adds extra time and cost.

Part 7 – Allotments; and Part 8 Non-domestic rates

CLS has no comments on these Parts.

Conclusion

Community Land Scotland continues to consider and develop thinking on suggested improvements, particularly to Part 3A, and will publish supporting reasoning on its website and share with the Committee and the Scottish Government any significant developments in thinking relevant to the above submission.