

Written submission from Malcolm Combe, University of Aberdeen

I welcome the opportunity to respond to the Call for Evidence of the Local Government and Regeneration Committee in relation to Stage 1 of the Community Empowerment (Scotland) Bill.

This response is made in a personal capacity, but two points should be noted in that regard. First, I am employed by the University of Aberdeen at the School of Law. Second, I was an adviser to the Land Reform Review Group (appointed in June 2013). Neither role has had any direct impact on this submission.

Please note that I submitted a response to the Land Reform Review Group's Call for Evidence and a response to the exploratory consultation on Community Empowerment and Renewal Bill. Both of those responses are publicly available and may be of interest to the Committee.

I am happy for this response to be in the public domain.

This response will focus on: human rights; the use of the term "abandoned"; the need for a company limited by guarantee in the proposed Part 3A of the Land Reform (Scotland) Act 2003; and the Part 3A register

Human Rights

The right to property is recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), that right being expressed in Article 1, Protocol 1 ("A1P1"). A1P1 does not mean that private ownership is sacrosanct in all circumstances. A landowner can be divested of ownership when it is in the public interest for that to happen. The Committee may be interested to note that in South Africa, there is a [specific constitutional declaration](#) in section 25 that "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" (although the recognised need for reform in post-apartheid South Africa is not a direct comparator to Scotland).

The yin that is the apparently retarding force of A1P1 is balanced against the yang of Article 11 of the UN International Covenant on Economic, Social and Cultural Rights, which guarantees certain rights such as sanitation, food and housing. Scottish legislation must not be in breach of the ECHR, in terms of the Scotland Act 1998, but the Committee should be aware that human rights do not begin and end at Strasbourg (where the European Court of Human Rights sits).

That said, the ECHR is crucial because of the role it plays in relation to devolved legislation (in the Scotland Act 1998 (as amended)). The Committee should therefore note that a compulsory transfer of property from one landowner to a new private landowner is acceptable in ECHR jurisprudence, as seen in [James v UK](#) (1986) 8 EHRR 123 and more recently in *Paic Crofters Ltd v Scottish Ministers* [2012] CSIH 96; 2013 S.L.T. 308.

It can also be noted that the operation of positive prescription (under the Prescription and Limitation (Scotland) Act 1973) can serve to replace a remiss owner of land with another owner, where the new owner has possessed that land for a certain length of time and registered a deed at the Land Register of Scotland. That process is due to be reformed very soon, by the Land Registration etc. (Scotland) Act 2012, but for present purposes it shows that Scots law is perfectly comfortable with the idea of one person's ownership being usurped by another.

As such, it would seem the current proposals to introduce a new Part 3A to the Land Reform (Scotland) Act 2003 and to widen the scope of the right already conferred by Part 2 are well within the realms of ECHR compliance.

Abandoned land

Clause 48 of the Community Empowerment Bill deals with “abandoned and neglected land” by giving communities a right to acquire land that is “wholly or mainly abandoned or neglected” (see the proposed s.97C(1) of the Land Reform (Scotland) Act 2003. The word “**abandoned**” is suboptimal, because it has a very specific meaning in Scots private law. Property lawyers would use that term in a situation where an owner has actively sought to walk away from an item of property. This is most readily imagined with corporeal moveable things (i.e. tangible objects that are not attached to land): consider Carey Miller with Irvine, *Corporeal Moveables in Scots Law* (2nd edition, 2005) at paragraphs 2.07-2.08. Whilst land cannot be cast away in quite the same manner, an owner may seek to disclaim land. This was most recently witnessed in the case *SEPA v Joint Liquidators of Scottish Coal* (2014 SLT 259).

As such, a synonym for abandoned seems preferable, but it is tricky to pick one. “**Unused**” and “**underused**” are ripe to cause arguments and there may be issues where an owner has made a conscious decision to not manage land (i.e. allow it to go wild, perhaps for conservation purposes). “**Derelict**” might be appropriate, but in common usage that normally relates to buildings. “**Deserted**” might imply a complete surrender of any relationship to the land. Unfortunately, I do not have an ideal substitute for “abandoned”, but the Committee should consider carefully whether “abandoned” is appropriate. One drastic solution might be to remove “abandoned” entirely, leaving the legislation to relate to “wholly or mainly neglected land”.

Company limited by guarantee

There is no compelling reason to mirror the requirement for communities to incorporate as a company limited by guarantee (*but see below relating to the Part 3A Register*). Whilst it might be argued consistency with the rest of the Land Reform (Scotland) Act 2003 is useful, this comes at the cost of flexibility for a community. An alternative approach is to focus on an organisation's rules/constitution, as is the case with some common property options in the comparator jurisdiction of South Africa (See further Combe, “Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?”, (2006) *Juridical Review*, pp.195-227).

The Part 3A Register

Although publicity is undeniably important when dealing with land, a query might be raised about the need for a new register. Assuming the requirement that a community be embodied as a company limited by guarantee is retained, publicity about that community comes via Companies House. The Land Register will provide publicity about the land. Notifications from the Scottish Ministers can (presumably) be publicised without a new register. Is a new register justified?

That said, a central reference point for Part 3A could be useful for a variety of people, so this potential criticism should not be overstated.