Written submission from Community Land Scotland

The Crofting Community Right to Buy - February 2014

Further Evidence to the RACCE Committee in response to Scottish Government proposals to amend Part 3 of the Land Reform (Scotland) Act 2003.

Introduction

Community Land Scotland, among others, was consulted by the Scottish Government in November on their then proposals to amend Part 3 of the Land Reform (Scotland) Act 2003. This submission of evidence is that sent to the Scottish Government at that time.

Generally speaking, and while recognising concerns raised by the RACCE Committee in their Stage 1 Report about the process followed which give rise to consideration now about Part 3 of the Land reform Act, Community Land Scotland would want to re-assure the Committee that the Scottish Government consultation has been well received across the range of stakeholders and has provided ways forward which appear well targeted. We would not wish concerns about procedures to prevent the proposals for change the Committee is now having the opportunity to scrutinise, to prevent the welcome improvements that are being proposed.

1st November 2003 Evidence to Scottish Government

Community Land Scotland is pleased to be able to respond to the consultation questions on the above consultation in the following terms.

Community Land Scotland (CLS) strongly advocates the need for changes to Part 3 of the Land Reform (Scotland) Act 2003 in order to make its use simpler and fairer, while maintaining appropriate rigour to test what is in the public interest and furthers sustainable development.

CLS is conscious that others have insights into the challenges of the current Part 3. In particular Highlands and Islands Enterprise, but also experienced advisors to community owners, such as Simon Fraser. CLS is aware that Simon Fraser submitted evidence to the Local Government and Regeneration Committee on Part 3 and we commend his analysis of the issues and urge it is taken most seriously. In addition, John Randall, of Pairc Trust who have unrivalled experience of the practical issues, also submitted evidence in a personal capacity, and again we commend that evidence.

CLS has gained particular insights into the Pairc case and how the final reconciliation of positions represented in the level of agreement now reached between owner and community was achieved. Though yet to be finally concluded, the advanced stage of agreement now achieved was only reached by a process of voluntary mediation between the parties. While on this occasion that was possible, partly because of the physical location of the parties and the ‘mediator’, it is not appropriate to leave such matters to chance and it would be helpful if this facility was available to all communities and owners in future, should the need arise. This points
to a simple power being given to Ministers to be able make suitable arrangements for such mediation, if requested to do so. That power currently does not exist and would be a helpful addition to wider simplification measures around Part 3 as set out in the Appendices to this submission (this could have application to part 2 as well).

For completeness, we attach as Appendices previous evidence we have given on issues around Part 3, much of this is overtaken by the current proposals, but not all of which have been picked up by the questions in the consultation.

CLS will be happy to provide such further additional information or clarifications as may be requested.

Responses to consultation questions

**Question 1.** The Scottish Government proposes to allow SCIOs and BenComs to be crofting community bodies in addition to companies limited by guarantee. Do you agree with this proposal? Are there any other types of body which you think should be permitted to be a crofting community body?

Agree with proposal, with Ministers having a power to add such other types of body as they may see fit to give future flexibility.

**Question 2.** The Scottish Government proposes removing the requirement for the auditing of accounts to be included in a company limited by guarantee’s articles of association in order for it to be a crofting community body. This proposal would bring Part 3 of the Act in line with proposed amendments to Part 2 of the Act. Do you agree with this proposal?

Agree.

**Question 3.** The Scottish Government proposes expanding the definition of a crofting community. Do you agree with the proposal? Do you think that this is a more accurate description of a crofting community?

Generally agree. However, very few crofts will be registered on the new register for some time to come. Instead, or in combination, the Commission’s existing Register should be used.

A further potentially complicating circumstance that should be considered is where the number of crofting tenants or owner occupiers registered outweigh those actually resident within the immediate area. It is not clear whether this circumstance may arise, but it potentially could.

**Question 4.** The Scottish Government proposes amending the existing mapping requirements which must be included in a Crofting Community Body’s application. Do you agree with this proposal?

Agree, although it will be important to see the final and specific proposed wording of the change.

**Question 5.** The crofting community body’s right to buy application must be advertised by Ministers by placing a public notice in a newspaper circulating in the
area where the land or interests are located, and in the Edinburgh Gazette. The Scottish Government proposes that public notice of the crofting community body’s right to buy application continues to be given by Ministers by advertisement, but that the form of this advertisement be set out in regulations. What is your view on this proposal?

Agree.

**Question 6.** The Scottish Government proposes that the owner, tenant, person entitled to sporting interests, (depending on the nature of land or interests that the application relates to) and any creditor in a standard security in relation to that land or interests are correctly identified in the application form in order for Ministers to consent to the crofting community body’s application. What are your comments on the proposal?

It does not seem an unreasonable proposition for a community to use all its best endeavours to accurately identify owner, person, etc…. However, the question arises of what would happen if the owner, person, etc … could not, even after all reasonable steps had been taken by the community, be identified. This could arise by virtue of some of the complex and potentially overseas arrangements that can be put in place to hide ownership and beneficial interest, or simply by the passage of time, complex and dispersed ownership arrangements that can follow from one time changes in ownership. The same comment can be made about the Section 3A, which this proposal is designed to align with, and which Parliament has yet to consider. It is not clear why this change is necessary either for Part 3A or for this proposed section. This proposal would only be acceptable if accompanied by a provision to allow Ministers to, notwithstanding this provision, grant consent when they are satisfied that the community has taken all reasonable steps to identify the owner, person, etc …, but have been unable to do so.

**Question 7.** The Scottish Government proposes Ministers having a specific power to make regulations setting out the information that the crofting community body is required to provide to Ministers about the ballot, or any consultation that the crofting community body may have held with the community about their application. The crofting community body already are responsible for paying for the cost of the ballot. The Scottish Government proposes to expressly state in the Act that the crofting community body is liable for meeting the expense of conducting the ballot. What are your comments on the proposals?

The proposals in the Community Empowerment (Scotland) Bill regarding Part 2 of the Land Reform (Scotland) Act 2003 makes provision for the Scottish Government to in future take responsibility for the balloting arrangements and pay for such. As a matter of principle, this proposal was not seen as one of simply making it easier for the community body, it was also seen as a proposal which could ensure the proper conduct of any such ballot and which therefore provided re-assurance to the parties concerned and for the wider public interest. These latter reasons would apply equally and might even be seen to be more important to the conduct of ballots in the crofting community and in circumstances where there was not a willing seller. There is therefore a case for the same provisions as it is proposed will apply to Part 2 (through
revisions in CEB) to apply to this part. If the concern was simply one that in such circumstances Government would be funding a ballot on what was a `compulsory' sale, this could be readily justified as being appropriate to ensure proper conduct and public confidence in the conduct of such a ballot.

Question 8. The Scottish Government proposes that, when an application is extinguished under section 76, Ministers should be required to notify each person invited to give views on the application. This proposal aligns Part 3 with the proposed Part 3A of the Act. What is your view on this proposal?

Agreed.

Question 9. The Scottish Government proposes clarifying the certain persons listed in section 81(1) of the Act who may refer a question to the Land Court at any time before Ministers reach a decision on an application made under Part 3. What is your view on this proposal?

This does not seem unreasonable.

Question 10. The Scottish Government proposes increasing the timescale in which the valuer must notify the value of the land from 6 weeks to 8 weeks. Do you agree with this proposal?

Agreed.

Question 11. The Scottish Government proposes requiring the valuer to seek counter-representations when representations regarding the valuation of the land are received from the land owner, tenant, person entitled to sporting interests, as the case may be, or the crofting community body. Do you agree with this proposal?

Agreed.

Question 12. Section 89 of the Act allows compensation to be paid in respect of a loss or expense incurred in connection with a crofting community right to buy application. Ministers are already required to set out the procedure for claiming compensation by way of order. The Scottish Government proposes amending this order so that Ministers may, via an order, specify the amounts payable in respect of compensation and who is liable to pay these amounts. What are your views on the proposal?

This does not seem unreasonable.

Question 13. The Land Court is required to give its decision in writing within 4 weeks of the date of the hearing. The Scottish Government proposes removing the 4 week time limit, and remove the provision requiring the reasons to be provided in writing. What is your view of this proposal?

It is not clear why this is necessary or helpful to the parties involved. Having reasons in writing seem appropriate, as does having a reasonably short timescale for these matters being concluded.
Appendix 1
Submission to Land reform Review group first call for evidence – December 2012

Part 3 – 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:

- 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.

- 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.

- 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.

Appendix 2

Submission made in response to consultation on Community Empowerment Bill – January 2013

Part 3 – Further Issues

The Crofting Community Right to Buy

The same points as are at Appendix 1 were repeated in this submission (above) plus

Crofting Community Definition [Probably now overtaken by current proposals]

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 suitable 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.