

Response of Malcolm M Combe, of the University of Aberdeen's Rural Law Research Group

This response considers Scots law as at 10 January 2013 and, to a lesser extent, looks at land law reform from a socio-legal perspective. It is divided into the following sections:

an introduction;

some general comments;

an analysis of the ten indicative examples of the potential scope of the LRRG;

a specific analysis of the Land Reform (Scotland) Act 2003;

a reflection on each of the three limbs of the LRRG remit; and

three appendices containing:

 references to previous writings of the respondent on topics relevant to the LRRG);

 a response to a previous consultation on the Land Reform (Scotland) Act 2003; and

 a response to a previous consultation on the Community Empowerment and Renewal Bill.

Introduction

I welcome the opportunity to respond to the Call for Evidence (“the Call”) of the Land Reform Review Group (“the LRRG”). I also welcome the broad terms of the Call, which terms can be contrasted with the structure of the questionnaire-based exploratory consultation on the Community Empowerment and Renewal Bill.

I note that there is a degree of potential overlap with responses to the Community Empowerment and Renewal Bill and responses to the Call. That/THIS is to be commended (to ensure a holistic approach), but it also sounds a note of caution. There must be a synergy between the work of the LRRG and any new proposals further to that consultation. It would be most unfortunate were any “urban” proposals lost in a bureaucratic quagmire of overlapping roles or if anything were to fall between the cracks, so it is useful that the LRRG call specifically acknowledges responses to that consultation will be relevant. As such, please see the response of the Rural Law Research Group at the University of Aberdeen to that exploratory consultation. For an initial analysis of lessons from rural practice (and as such a tangential analysis of certain overlaps) see my article “[Rural Lessons for Urban Conveyancing](http://www.journalonline.co.uk/Magazine/57-8/1011528.aspx)”, (2012) Journal of the Law Society of Scotland, 57(8), pp.32 - 33, 2012 at www.journalonline.co.uk/Magazine/57-8/1011528.aspx .

I began blogging in August 2012 and a number of my blogs have touched on land law reform. That blog is found at <http://basedrones.wordpress.com/> and links to relevant posts are provided in this submission.

General Comments on the Call

Reform of the law relating to land can be of two broad types. The first is geared towards modernising or simplifying the law by eliminating anomalies or eccentricities of current land law. The second type makes a distinct change in the law, normally giving expression to the Government's political program in the process. Land law reform is – and always has been – political. As such, it is important that any political agenda is recognised such that it does not hinder reform when the law does not reflect contemporary societal needs. This point must be recognised by everyone involved in land law reform, whether commentators, agitators or defenders of the status quo.

It is this second type of reform, the politically motivated changes to a system of land organisation, which is the primary focus of this response and should be the primary focus of the LRRG in turn. The first type of reform is best left to organisations like the Scottish Law Commission. That said, some content in this response might be classified as more in the first category, particularly with regard to the rather bureaucratic pre-emptive community right to buy introduced by Part 2 of the Land Reform (Scotland) Act 2003 (hereafter referred to as “the LR(S)A 2003”). The Call has provided an opportunity to make representations about such anomalies or eccentricities, but that should not distract from the wider and pure policy issues.

Although “land law reform” is perhaps a more accurate descriptor for the activity the LRRG is considering, this response (like the Call) will henceforth adopt the shorter, more prevalent term “land reform”.

This response makes no particular reference to the history of land use or occupation in Scotland. That is not because the history of land and any attachment that current, former or even descendants of former occupiers may have to land is not important, but sentimentality is difficult to gauge and more difficult to weigh in any equation about how land should be owned or managed. The interaction between land, language and culture may well be important, but it is not something I am qualified to comment on.

Further, and perhaps most importantly, any reforms today ought to be justifiable in the context of contemporary society. With that in mind, it is noted that the Call acknowledges the concentration of landownership in Scotland. If concentration of landownership is an issue, and if this in turn leads to market stagnation or underuse of land, an analogy can be drawn with Article 102 of the Treaty on the Functioning of the European Union, which regulates abuse of a dominant position in the marketplace.

A fixation on ownership?

The Call and the remit of the LRRG are both broad, but one potential steering factor might be worth identifying as inherent in the constitutional documents of the LRRG.

As noted in the Call, the remit of the LRRG is to identify how land reform will:

“Enable more people in rural and urban Scotland to **have a stake in the ownership, governance, management and use of land**, which will lead to a **greater diversity of land ownership, and ownership types**, in Scotland;

Assist with the **acquisition and management of land** (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;

Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland” (emphasis added)

Per the emphasised text, two of the three limbs of this remit are somewhat ownership-centric in focus. A trend might be teased out of this, in that methods of redistribution of land in living memory all seek to empower certain members of society and/or render an asset more productive by transferring ownership from one party to another. (See also the reference to “making it easier for communities to obtain ownership” on page 2.) Examples of this approach that already exist include:

the individual crofter’s right to buy (s 13 of the Crofters (Scotland) Act 1993);
the council tenant’s right to buy (suspended in all local authorities in Scotland at the time of writing);
the tenant-at-will’s right to buy (s 20 of Land Registration (Scotland) Act 1979);
the transfer of certain public sector crofting estates regime (under the Transfer of Crofting Estates (Scotland) Act 1997);
the agricultural tenant’s right of pre-emption (Part 2 of the Agricultural Holdings (Scotland) Act 2003);
the rural community’s pre-emptive right to buy (Part 2 of the LR(S)A 2003); and
the crofting community right to buy (Part 3 of the LR(S)A 2003).

It might also be noted that only the last two mentioned rights empower a party or group that was not already in a privileged position *qua* tenant in a heavily regulated lease.

Recognising that commerce requires property rights that are neither fickle nor fragile, and assuming that land in Scotland shall continue to be susceptible to ownership, a concentration on reforms that retain the prevailing model of ownership can be characterised as treating the symptom rather than providing a cure. If there is a problem with certain owners not investing capital (financial or otherwise) into that which they own, can it always be assumed that new owners will approach the matter differently? The answer to that will vary depending on circumstance: a community or an individual owning only a limited number of assets will tend to (self-interestedly) look after that asset, but may in the process lose out on the benefits

economies of scale (at least in the short time, unless and until co-operatives could be established). The question itself should be considered carefully.

Some property law theorists would focus on the right to exclude as the key part of the right of ownership. Such an approach appears in the writing of the Scottish institutional writer Erskine, where he notes that ownership:

“necessarily excludes every other person but the proprietor; for if another had a right to dispose of the subject, or so much as to use it, without his consent, it would not be his property, but common to him with that other. Property therefore implies a prohibition, that no person shall encroach upon the right of the proprietor and consequently every encroachment, though it should not be guarded against by statute, founds the proprietors in an action for damages” (Erskine Institute, II.1.1.).

Is this statement to continue to be true, albeit mitigated for any modern concerns? It might be noted that common grazings committees deal with an asset that they do not actually own (rather, the common grazings are a pertinent to the crofting township), while the rights of responsible access under Part 1 of the LR(S)A 2003 operate with no regard to the issue of ownership or the status of the landowner. This is a point that merits some careful consideration, especially if the pace or the very idea of land redistribution is something that the LRRG struggles to find a way forward on.

“Ownership types”

As a Scots lawyer, the reference to “a greater diversity of...ownership types” confused me. Is this advocating the restoration of the feudal system, which was abolished on Martinmas 2004 by the Abolition of Feudal Tenure etc. (Scotland) Act 2000? Is it suggesting a split between legal and equitable ownership, as can be seen in England & Wales? The answer to both these questions has to be in the negative, so what is intended?

Scots property law is unititular – by which it is meant only one title can exist in any one thing at any one time. This does not stop shared ownership (e.g. where a husband and wife or civil partners share title to a family home), but it does prevent any kind of divided ownership. The case for introducing new ownership types is not clear and would require careful consideration of Scots law and its Roman/civil foundations, preferably with the Scottish Law Commission’s involvement. This submission shall proceed on the basis that there will be no new ownership types introduced. That said, the LRRG may be interested to note that the Canadian government and the First Nations people of Canada are considering the introduction of private property in traditional First Nations land. This provides a very interesting contrast to the point made above about the rights that stem from ownership. Might Scotland do the exact opposite, by introducing something akin to native title to land in place of or alongside ownership? That would be truly radical and would need very careful consideration indeed. Internet links to the Canadian proposals can be found here:

<http://www.theglobeandmail.com/news/politics/harper-government-to-introduce-law-to-allow-private-property-on-reserves/article4464434/> and

<http://www.cbc.ca/news/politics/story/2012/08/08/calgary-private-property-reserves-ottawa.html?cmp=rss>

It will also be noted that the non-historical approach this response has adopted rules out any innovation modelled on the basis of native title to land, as has been evident in jurisdictions like Australia (see *Mabo and Others v. State of Queensland* (1992) 107 ALR 1, (1992) 66 ALJR 408). It seems highly improbable that the judiciary in Scotland would acknowledge some kind of native title (with reference to the case of *In Re Southern Rhodesia* [1919] AC 211 at 233-235, not to mention the obvious difficulties in terms of defining a “native” in modern Scotland). Even if such a reform was to take place, it is submitted that the LRRG cannot predict or pre-

empt any judicial recognition of a right; and any recommendation towards the legislative recognition of such a right would benefit from the involvement of the Scottish Law Commission.

“Land, people, economy and environment”

Looking now at the third limb, “new relationships between land, people, economy and environment in Scotland” are the focus.

A query might be raised as to the need to have both “land” and “environment” as part of this limb. The traditional three-pronged approach to sustainable development focusses on community, economics and environment. Whilst there may be some merit in separating “land” (i.e. a corporeal heritable object that can be subjected to ownership) and “environment” (a catch all phrase that is certainly not limited to land or indeed things that can be subjected to ownership), there is also a potential danger in terminology or comprehension in separating land from environment. A query might also be raised as to whether there is a hierarchy. Three examples follow.

Does environment trump everything else (as in “strong” sustainable development), or do they all rank equally?

What is the “best” relationship for a person to the land? Is it by way of recreational access, (temporary) employment, a time-limited interest in land (e.g. a lease) or outright ownership?

Even more fundamentally, whose economy wins? The traditional estate, or untried (and potentially untested) economic proposals of the local community or from further afield?

To the first question arguments can be expressed either way, but “strong” sustainable development might be characterised as the only effective means to ensure there is any environmental capital to pass on to future generations. No answers to the second and the third questions are offered in this response.

Legislative Competence and Human Rights

It is acknowledged that the Scottish Parliament owes its existence to the Scotland Act 1998. In terms of that statute, the legislative competence of the Scottish Parliament is limited by expressly reserved matters (such as company law matters, a point noted below). It is also limited by the law of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).

EU law is not likely to be directly relevant to the work of the LRRG, but any attempt to regulate land to the detriment of (for example) the operation of the single market could not realistically be introduced. That said, regulation of land law in a manner that affected all Scots and EU citizens in the same way would be less likely to fall foul of EU law.

Returning to the ECHR, the key provision is the right to property in Article 1, Protocol 1 (“A1P1”), although Articles 6 (fair trial) and 8 (family life) might also be engaged. If any authority was needed, the case of *Salvesen v Riddell* [2012] CSIH 26; 2012 S.L.T. 633 puts beyond doubt that the courts will strike down legislation that is found to be contrary to the ECHR. That case related to the anti-avoidance measures contained in s 72 of the Agricultural Holdings (Scotland) Act 2003. The Inner House of the Court of Session ruled that the legislation went too far in imposing a “1991 Act tenancy” (in terms of the Agricultural Holdings (Scotland) Act 2003) on a landowner – with all the security of tenure and diminution of value

that might entail – in what was essentially an “anti-avoidance” piece of corrective legislation (see Combe, 'Human rights, limited competence and limited partnerships: *Salvesen v Riddell*', 2012 Scots Law Times, at 193 – 200).

Whilst that case might not be directly in point to the work of the LRRG, an even more recent case at the other end of the spectrum will be. *Paic Crofters Limited and Paic Renewables Limited v the Scottish Ministers* [2012] CSIH 96, discussed further below, demonstrates what reforms can be in a state's margin of appreciation when pursuing policies that are in the public interest. In that case, the Inner House of the Court of Session refused to strike down Part 3 of the LR(S)A 2003 and associated regulations as contrary to the landowner's rights under the ECHR.

Finally, it should also be noted that the ECHR is not only a retarding force that is to be used to protect the interests of a landowner. The ECHR carries certain positive obligations for signatory states, by which it is meant duties that a state cannot shirk, when it comes to property rights. Conceptualisations of the right to property do not necessarily stop at the negative obligation on states not to interfere, rather there might be a positive obligation on a state to ensure individual welfare for all citizens. This might be most obvious in certain (admittedly idiosyncratic) cases relating to Article 8 (on the need to respect private and family life, home and correspondence) and certain interferences with traditional ways of life, as discussed in the case of *Codona v UK* (App. No.485/05), *admissibility decision of February 7, 2006* (analysed in the Scots Law Times article above and in my blog [Property and positive obligations under the ECHR](http://basedrones.wordpress.com/2012/09/09/property-and-positive-obligations-under-the-echr/) at <http://basedrones.wordpress.com/2012/09/09/property-and-positive-obligations-under-the-echr/>). Although it will not always be relevant, an active, explicit consideration of both positive and negative poles in future ECHR calculations could help to evidence and ensure Scotland's compliance with its ECHR obligations. In terms of comparative law, the LRRG can look to South Africa, where there has been a recognisable movement towards a more social role for property law (see A J van der Walt "Ownership and Eviction: Constitutional Rights in Private Law" (2005) 9 Edinburgh Law Review 32).

Analysis of the ten indicative examples of the potential scope of the LRRG

Although this response is structured so as to reply to each indicative example, the points raised should not be treated as applicable to the relevant indicative example only.

1. Expand community ownership of land, housing and other assets in both town and country and in all parts of Scotland

To a certain extent this can be achieved by greater support for existing schemes, but as a general point such schemes are framed to confer ownership to an existing tenant “upgrading” his leasehold right or an existing community. That then raises the issue of something else that goes beyond those particular rights, such as some kind of public interest acquisition power, akin to the Community Empowerment and Renewal Bill proposals about a power to acquire derelict or underused assets. This issue goes right to the core of what land is. Is it a commodity that can be traded or banked, or is it more important than that? (This point was considered in my recent blog “Ownership, Land and Fitba” at <http://wp.me/p2E6mD-6m>.)

The Land Reform and Policy Group established by the Westminster Parliament under the chairmanship of Lord Sewel discussed a public interest power of acquisition in the three papers introduced between 1998 and 1999 (Identifying the Problems (1998), Identifying the Solutions (1998) and Recommendations for Action (1999)). No such power was enacted following those papers. A public interest power need not lead to a complete divestment of the landowner if that was deemed unsuitable or politically unpalatable. Compulsory or incentivised lets of land would be one alternative. Another option, following on from my point about a fixation on ownership above, is whether there might be other ways to reform productivity. For example, should all landowners, not just community landowners, be under a “sustainable development” obligation? A failure to comply with such an obligation might be used as a contributing factor towards a compulsory transfer or let.

2. Diversify and broaden ownership of land in Scotland, where more land is owned by fewer people than anywhere else in Europe

See above.

3. Encourage (or oblige legislatively) owners of land to give local communities a greater say in how land is managed and used

See above. See also the comments above regarding the role of common grazings committees. Care must be taken to ensure the embodiment of “local communities”, whether akin to a common grazings committee, community councils, or communities as provided for in terms of the LR(S)A 2003, the Transfer of Crofting Estates (Scotland) Act 1997 or in the “good neighbour agreement” regime in sections 75D-75G of the Town and Country Planning (Scotland) Act 1997, is truly representative of the community. One instructive comparison could be drawn with potentially skewed access to the benefits of local services, which might be less accessible to those from less privileged individuals: see Hastings and Matthews (2011) “Sharp Elbows”: Do the Middle-Classes have Advantages in Public Service Provision and if so how? Project Report, University of Glasgow at <http://eprints.gla.ac.uk/57021>.

4. Make it easier and cheaper for Forestry Commission land and other land in public ownership to be transferred to others

I have two concerns about this indicative example, one legal and one about priorities.

Taking the legal concern first, procurement rules exist to protect the public from public bodies entering into bad deals (see the Public Contracts (Scotland) Regulations 2006). How would these important duties, enshrined in European Union legislation, be side-stepped?

Secondly, in terms of priorities, are land banking, speculation and neglect more evident amongst public landowners or private landowners? No answer to that question is offered in this response. Also, it might be noted that empirical research by the campaigner Andy Wightman suggests that the broad category of “public sector” owner owns 12.1% of rural land in Scotland (Andy Wightman, *The Poor had no Lawyers: Who Owns Scotland (and how they got it)* (2010) (see Table 1c, at page 106)). Although that is not a reason for not looking at the issue of public ownership, it might suggest efforts would be better focussed elsewhere.

5. Improve the supply and lower the price of land for affordable and other housing in both town and country

Again, this strikes at the very heart of what land is about. Is it a commodity that a landowner can insist on “top dollar” for before selling? Might there be specific legislation to prevent “hope” values being added on to empty but developable plots of land? If so, would there be resultant market blight, and would that blight be a consequence worth bearing?

6. Help create new pathways, for younger people especially, into farming and crofting

One pathway might be via reform to the law of succession (see below). A further pathway might involve a “public interest” right of compulsory acquisition or compulsory let where a viable scheme is put forward by a potential in-trant farmer, perhaps in the same way as a crofter must put certain plans to the land court before a right to buy can be exercised.

Education and financial support for an in-trant would be an important part of the viability of any scheme. Any scheme might be restricted to “underused” land, however defined, and suitable compensation and/or clawback powers would be required. Land that is already in community ownership might be presumed to be less suitable for such a compulsory right of acquisition or let.

7. Enhance the position of tenant farmers by giving them a right (similar to the right enjoyed by crofting tenants since 1976) to buy their farms

Any increase in the rights of tenants must be measured against the decrease (or perceived decrease) in the attraction for prospective landlords of letting land for agriculture. This is a policy decision.

It might also be noted that an individual right to buy may diversify ownership, but it has the potential to do so without regard to the wider community (as per the individual crofting tenant’s right to buy, which might jar against a community scheme or offer an absolute get-out).

It can also be observed that land that is tenanted will generally be used productively in a manner that will not be guaranteed of un-let land (based on the requirements for good husbandry etc. as part of the lease). An individual right to buy does not unlock unproductive land that does not play host to a tenant (in much the same way as a community right to buy is predicated on there being a community).

8. Replace Council Tax and Business Rates with a tax on land values

No comment is offered on specific fiscal policy issues, but some general thoughts include the following.

A tax on land value would be difficult to administer, or even introduce. That said, Andy Wightman's research has highlighted how Lloyd George's government managed to undertake the early groundwork in the early twentieth century, so perhaps that criticism could be overstated. In terms of administration, there might be an attempt by landowners to "gerrymander" boundaries of land to mitigate any tax, so anti-avoidance mechanisms would be required.

That point on the problem of tax avoidance leads on to a key strength of a tax on immoveable property in any jurisdiction. The assets cannot be moved offshore. As such, that aspect of avoidance is removed, and foreign domiciled (or seated) landowners would be subject to a tax in a manner that hitherto has not been applicable. Careful consideration of how this might affect investment in Scotland as compared to the rest of the UK, not to mention enforcement powers of (presumably) Her Majesty's Revenue and Customs, would be required.

A recent [report](http://www.thewestmorlandgazette.co.uk/news/10132475.Call_for_tax_changes_to_encourage_longer_farm_tenancies/) on The Westmorland Gazette's website (at http://www.thewestmorlandgazette.co.uk/news/10132475.Call_for_tax_changes_to_encourage_longer_farm_tenancies/) suggests fiscal rules might be amended to encourage longer farm tenancies. That provides another fiscal route to productive land use.

Reform of inheritance tax reliefs as applicable to agricultural land not let on such long term arrangements, or otherwise used productively, provides another fiscal route to reform. As above, presumably this would require UK-wide consideration.

There might also be an argument for concessions on any business rates or other outlays for qualifying community landowners. It may be recalled that Lord Leverhulme's attempted gift of part of the Isle of Lewis had to be refused by islanders unable to meet such costs, leaving a legacy of non-community ownership that current land reform measures are currently facing. See my blog "[Giving away an island: Parts 1, 2 and 3](http://wp.me/p2E6mD-38)" at <http://wp.me/p2E6mD-38>.

9. Change the way in which fresh water resources are owned and managed in order to secure wider community benefit from these resources

This indicative example would require very careful consideration, as Scots property law already has a detailed system of rules for water. Any change to the prevailing ownership regime might be better considered by the Scottish Law Commission than the LRRG, lest there be any unintended consequences.

Management, on the other hand, might be reformed without quite the same caution, although it will be noted that any control of existing rights will need to be ECHR compliant. Would increased usage, in the face of objections by a riparian proprietor, be a fair burden for that proprietor to bear? Would that increased usage involve additional access over land? What would be the legal implication of upstream activities by the wider community if they affected downstream activities, such that they might be characterised as a nuisance under the law of delict? Would abstraction be permitted, and if so how would compliance with (for example) the Water Services Environment (Scotland) Act 2003 and the Water Environment (Controlled Activities) (Scotland) Regulations 2011 be ensured?

10. Change the law of succession as it affects ownership of land

The LRRG should not make any recommendations without taking heed of the work of the Scottish Law Commission in its Report on Succession (April 2009, ScotLawCom Report 215), particularly "Part 3 Protection from Disinheritance" of that report, which suggests ways in which the historical split between moveable and heritable (immoveable) property can be reformed.

It might also be noted that reforming the law of succession does little to affect the holdings of legal rather than natural persons, as (for example) companies and trusts have a capacity for greater longevity than human beings. Shares in such companies or beneficial interests in such trusts can be characterised as moveable, regardless of the assets those juristic bodies own. The fact that aspects of commercial law are reserved from the Scottish Parliament will limit any reform of that area as it relates to land. Another linked factor is the extent to which the market for land is regulated in general commerce. For example, should landownership be limited (in all or in certain circumstances) to natural persons, or institutions with a Scottish seat (or domicile)? Introducing any such reform would inevitably involve unpicking existing arrangements that have been structured quite legitimately, in accordance with Scots law as it then and now prevails. Whilst that caveat is valid, the immediate counter is that all land law reform must unpick exactly such arrangements. The question is to what extent the upheaval is justified to promote policies that are in the public interest and contribute to social justice (all in accordance with A1P1 of the ECHR, another factor that the Scottish Parliament must consider over and above specific reservations to Westminster).

See also the point in 8 above relative to inheritance tax, in that reliefs could be granted or withdrawn dependent on whether land is being used productively.

Analysis of the Land Reform (Scotland) Act 2003

Part 1 of the LR(S)A 2003 – responsible access

Assuming that the exclusionary/Erskine model of ownership continues to be the norm, it will be noted that the right of responsible access introduced by Part 1 of the LRSA is a relaxation of this. This reform has generated much comment, both indigenous (see R R M Paisley, *Access Rights and Rights of Way* (2006)) and overseas (see J A Lovett 'Progressive Property In Action: The Land Reform (Scotland) Act 2003' 89 (2011) *Nebraska Law Review*, available at <http://digitalcommons.unl.edu/nlr/vol89/iss4/5/>, with a shorter comment by Combe "Access Rights: A Letter From America", (2012) 16 *Edinburgh Law Review* 110). These rights are well-known, with an advertising campaign about the Access Code promulgated by Scottish Natural Heritage leading to publicity on public transport and television advertisement. Although litigation has taken place, with local authorities taking action against landowners seeking to take access in areas they felt were excluded under s 6 (*Gloag v Perth and Kinross Council* 2007 SCLR 530; *Snowie v Stirling Council* 2008 SLT (Sh Ct) 61) or in a manner that was not responsible (*Tuley v The Highland Council* 2007 SLT (Sh Ct) 97, reversed 2009 SLT 616), such clashes have been characterised as welcome to delimit exactly what the nascent legislation accomplishes and accommodates, and is certainly not extraordinarily commonplace. On this point, Professor Lovett (at page 742) notes "the tests and methodologies developed by the Scottish courts so far are, though not perfect, generally reasonable and have largely succeeded in avoiding demoralizing results."

As such, whilst some minor reform may be necessary from time to time (for example, *ad hoc* changes to the scope of section 7(1) of the Land Reform (Scotland) Act 2003, see the response of 9 November 2011, in Appendix 2), the legislation is not somehow unworkable in practice so there is no need to fundamentally reform at this stage. This accords with the analysis of the Rural Analytical Unit of the Scottish Government, [Overview of Evidence on Land Reform in Scotland](http://www.scotland.gov.uk/Resource/0039/00397682.pdf) (2012, available exclusively online at <http://www.scotland.gov.uk/Resource/0039/00397682.pdf>) which notes, at page 3, that, "Overall the evidence suggests that there is little appetite amongst access stakeholders for significant changes to the provisions of Part One of the Act." Granted, some respondents to the consultation on the provisions relative to core paths felt that some aspects of the reforms might be unravelled, but it is submitted that this is not indicative of a pressing need to reform the principle underpinning Part 1 of the LR(S)A.

The community rights to buy

Some aspects of Part 2 and 3 of the LR(S)A can be treated together. These will be considered below, after Part 2 then Part 3 are looked at in turn.

Part 2 of the LR(S)A 2003

The rural community right to buy has been referred to as the community right to register in some literature (a title that might be viewed as more accurate or pejorative, dependent on perspective). A statistical analysis of the activated community interests in land highlights a relatively small conversion ratio of registered interest into community ownership (13 out of 153 at the time of writing). To the extent that conversion rate is not illustrative of the effectiveness of Part 2 of the LR(S)A 2003 in and of itself, certain other points might be raised as a means to ease the bureaucratic burden on communities.

By definition, a pre-emption can only work when a sale is contemplated. A pre-emption will stop a spiteful landowner from transferring to another individual rather than a community, but it will not make any difference in a stagnant market place. Further, and perhaps more importantly, where land is owned by a company, for example, and shares in it are transferred,

the pre-emption is not activated. This is considered above in relation to the indicative example for succession. See also Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?", 2006 Juridical Review 195 at 212-213.

The five-yearly re-registration requirement for the community is of dubious utility. If the requirement is to remain, a longer time period could be introduced without any real detriment to the landowner. See Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?", 2006 Juridical Review 195 at 213.

The requirement that registered interests should relate only to land in one holding is of dubious utility, a point evidenced by the recent deletion of Community Interest 153 at Kinfauns (see s 37(15)).

The success of a landowner in deconstructing the terms of letters of the Scottish Ministers in the Kinghorn dispute (*Hazle v Lord Advocate*, Kirkcaldy Sheriff Court (ref B270/07), 16 Mar 2009) highlights just how carefully the Part 2 scheme must be navigated. Any means of simplifying the scheme or affording the chance for communities not to be prejudiced by its misapplication without in turn prejudicing the landowner would seem desirable. That case also highlighted just how formalistically a requirement it is that maps accompanying an application contain OS grid references, as required by the Community Right to Buy (Specification of Plans) (Scotland) Regulations 2004; even if the landowner knew where the land was and, more strikingly, in spite of the fact that the application form itself contained a grid reference.

Part 3 of the LR(S)A 2003

Analytical material for the crofting community right to buy is sparse in comparison to the Part 2 right of pre-emption, but it might be noted that the "hostile" *Pairc* buyout continues at the time of writing (see below).

One point that can be made relates to the individual right to buy that can still operate where there is a community body landowner, which jars against the central concept of community in Part 3. Whether that potential chink in the armour of the community is a good or a bad thing is not something that this response will offer a view on, but there is an apparent lack of consistency.

Parts 2 and 3 of the LR(S)A 2003

The need for a community to incorporate as a company limited by guarantee is of dubious utility. It is not evident in the Transfer of Crofting Estates (Scotland) Act 1997. It is not evident in comparator land reform regimes in South Africa, such as the Communal Property Associations Act, 1996 [No. 28 of 1996]. See Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?", 2006 Juridical Review 195 at 217-219.

In terms of the LR(S)A 2003 and the right to property in the ECHR, that right being expressed in A1P1, a landowner can only be divested of ownership when it is in the public interest for that to happen. 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". If Scotland had something similar enshrined in legislation, it may deter spurious challenges on human rights grounds, although it will be noted that the *Pairc* litigation, being the only challenge to the LR(S)A 2003 on human rights grounds to date, failed in its attempts to characterise the crofting community right to buy and relevant ballot regulations as a breach of Article 6 or A1P1 of the ECHR. The approval of the legislation as ECHR compliant in the Court of Session should be noted by the LRRG.

Following the *Holmehill* litigation, there is some confusion as to what can be in the public interest when a community's plans run counter to an extant planning permission (*Holmehill Limited v The Scottish Ministers* 2006 SLT (Sh Ct) 79). A declaration that a community's plans can still be in the public interest notwithstanding any rival plans may prevent any further issues (see Combe "No Place Like *Holme*: Community Expectations and the Right to Buy", (2007) 11 *Edinburgh Law Review* 109).

Reflection on the LRRG's remit

By analysing the indicative examples and providing a critique of the LR(S)A 2003, this response has offered some proposals as to how people in Scotland might have a greater stake in immovable property in Scotland, whether or not that stake is in the form of outright ownership or otherwise. It has suggested that some rules relating to the acquisition and management of land may need finessed to allow increased community involvement and/or increased individual involvement. It is also submitted that community and individual action can complement each other. It may be misguided to focus entirely on community schemes, as such schemes are predicated on an extant (and energetic) community on the land in question, when individual schemes as a means for bringing land into use are possible and may, in turn, provide the genesis of future communities.

New relationships between people, economy and environment in Scotland can be generated in a number of ways, but that which already exists should not be curtailed unnecessarily. That comment applies in particular to the Part 1 of the LR(S)A 2003 right of responsible access, although it is acknowledged periodic and situational suspensions can be appropriate (as is the case with s 11 orders and/or local bylaws in places like Loch Lomond National Park).

In the Call, respondents were asked to address the following three bullet points:

1. Outline your vision of how things could be different and explain why, in your opinion, they should be different;
2. Indicate any barriers there may be in the way of attaining your vision;
3. Suggest how these barriers could be removed and progress facilitated – whether by voluntary, legislative, fiscal or other means.

To a certain extent, this response has done none of the above. Rather, it has identified various policy questions and analysed them with reference to practical and theoretical legal perspectives. It has also analysed where barriers and, perhaps more importantly, drivers towards land reform may exist (those drivers being an increasingly social view of property law and positive obligations that flow from the ECHR). Notwithstanding the approach that eschewed the directions of the LRRG, I hope this response still proves useful and provides a foil to any other responses that make bold claims in favour of the status quo or reform.

Appendix 1 – Further land reform reading

References are provided to relevant literature contributed by the respondent, Malcolm M Combe

On the community andcrofting community rights to buy

"Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?", 2006 *Juridical Review* 195.

"No Place Like *Holme*: Community Expectations and the Right to Buy", (2007) 11 *Edinburgh Law Review* 109: *A discussion of the failed Holmehill buyout*.

"Access to Land and to Landownership", (2010) 14 *Edinburgh Law Review* 106: *A discussion of the Kinghorn case, where registered community interests were struck down*.

"*Ruaig an Fhèidh*", (2011) *Journal of the Law Society of Scotland*, 56(5), 54: *A discussion of the Pairc buyout to date*.

"Rural Lessons for Urban Conveyancing", (2012) *Journal of the Law Society of Scotland*, 57(8), pp.32 - 33, 2012: *A discussion of the "urban" right to buy proposals contrasted with the existing community right to buy in rural Scotland*.

On the right of responsible access

"No Place Like Home: Access Rights Over Gardens", (2008) 12 *Edinburgh Law Review* 463: *A discussion of the Gloag and Snowie cases*.

"Access to Land and to Landownership", (2010) 14 *Edinburgh Law Review* 106: *A discussion of the Tuley case on the landowner's right to regulate responsible access*.

"Access Rights: A Letter From America", (2012) 16 *Edinburgh Law Review* 110: *A critique of the much longer Lovett article on the right of responsible access*.

Of interest in terms of the ECHR

"Human rights, limited competence and limited partnerships: *Salvesen v Riddell*", 2012 *Scots Law Times*, at 193 – 200

Appendix 2 – submission of Malcolm M Combe on behalf of the University of Aberdeen’s Rural Law Research Group to the Draft Order to permit closures of core paths under the Land Reform (Scotland) Act 2003 (made on 9 November 2011).

I am in principle satisfied with the scope and effect of the reform of section 7(1) of the Land Reform (Scotland) Act 2003 but two observations follow.

Local authorities to consider alternatives when <6 day orders are made

Arguably, the proposed “make alternative arrangements if possible” duty incumbent on Scottish Ministers when granting an order for six or more days should also be placed on a local authority when making an (unsupervised) order under section 11 for less than 6 days. As such, section 11 should be amended to provide at least a “duty to consider” to be placed on local authorities so as to prevent core paths being closed without due consideration. The duty should not be onerous and there would be no problem with a closure offering no alternative(s) provided the local authority considered the point. Admittedly, the need to actually specify which core paths are affected in a section 11 order may mitigate this somewhat, but it would at least focus local authorities on the need to maintain adequate provision for local access, all in accordance with the role of local authorities as access champions under section 13.

Public rights of way not affected

Explanatory notes/guidance should make clear that a core path which is also a public right of way cannot be stopped up by a section 11 order, as those rights transcend the access rights conferred in the Land Reform (Scotland) Act 2003. There is no need for the statute to say anything, as that will be the law even if the legislation is silent, but there could be a scenario where a local authority thinks it has suspended access over a core path when it in fact has not owing to it also being a right of way. It might be useful to head off any confusion at the pass.

Community Empowerment and Renewal Bill

CONSULTATION QUESTIONS

PART 1: STRENGTHENING COMMUNITY PARTICIPATION

Community Planning

Q1. What would you consider to be effective community engagement in the Community Planning process? What would provide evidence of effective community engagement?

No strong views are offered, other than the general point that any reforms that perpetuate ineffective community engagement, or indeed makes any engagement difficult to comprehend, run a real danger of causing disenchantment so this will need to be carefully managed.

Q2. How effective and influential is the community engagement currently taking place within Community Planning?

No comment.

Q3. Are there any changes that could be made to the current Community Planning process to help make community engagement easier and more effective?

No comment.

An overarching duty to engage

Q4. Do you feel the existing duties on the public sector to engage with communities are appropriate?

No comment.

Q5. Should the various existing duties on the public sector to engage communities be replaced with an overarching duty?

Yes No

Please give reasons for your response below.

No strong views, but an overarching duty is certainly easier to comprehend

both for communities and for any employees of public sector entities subject to such a duty.

If you said 'yes' to Question 5, please answer parts a. and b. –

a. What factors should be considered when designing an overarching duty?

Any new overarching duty would need to be in no way a dilution as compared to any pre-existing duty.

b. How would such a duty work with existing structures for engagement?

There is no reason why a new duty cannot take over smoothly from any duties that it (impliedly or expressly) repeals.

Community Councils

Q6. What role, if any, can community councils play in helping to ensure communities are involved in the design and delivery of public services?

Community Councils might have a role, but any prioritisation above any other community bodies should not be assumed. For example, the case for community councils' special place in relation to Good Neighbour Agreements (under the Planning etc (Scotland) Act 2006) was arguably not made out (see Malcolm M Combe "Good neighbour agreements - bad law?" (2007) Journal of the Law Society of Scotland, 52(8), pp.50-53 also at <http://www.journalonline.co.uk/Magazine/52-8/1004430.aspx#.UFtm21HhfD8>). See also this BBC report <http://www.bbc.co.uk/news/uk-scotland-15545566> , which links to a now defunct organisation, the Association of Scottish Community Councils.

Q7. What role, if any, can community councils play in delivering public services?

Any increase in the role of community councils would need to carefully consider whether the current election mechanism and term-of-office for a community councillor is satisfactory for such an increase in powers.

Q8. What changes, if any, to existing community council legislation can be made to help enable community councils maximise their positive role in communities

See above.

Third Sector

Q9. How can the third sector work with Community Planning partners and communities to ensure the participation of communities in the Community Planning process?

No comment.

National Standards

Q10. Should there be a duty on the public sector to follow the National Standards for Community Engagement?

Yes No

Please give reasons for your response

No strong views, but the Standards might provide a model.

Community engagement plans

Q11. Should there be a duty on the public sector to publish and communicate a community engagement plan?

Yes No

Please give reasons for your response

No comment.

If you said 'yes' to Question 11, please answer part a. –

a. What information would be included in a community engagement plan?

Auditing

Q12. Should community participation be made a more significant part of the audit of best value and Community Planning?

No comment.

Named Officer

Q13. Should public sector authority have a named accountable officer, responsible for community participation and acting as a primary point of contact for communities?

Yes No

Please give reasons for your response

No comment.

Tenants' right to manage

Q14. Can the Scottish Government do more to promote the use of the existing tenant management rights in sections 55 and 56 of the Housing (Scotland) 2001 Act?

Yes No

Please give reasons for your response

The inclusion of this question in a consultation on new legislation appears slightly curious. The Scottish Government should do more to promote the use of any law that is underused and might be of utility to the residents of Scotland.

Q15. Should the current provisions be amended to make it easier for tenants and community groups to manage housing services in their area?

Yes No

Please give reasons for your response

This pre-supposes existing tenants' rights are currently difficult to access, which is inherently difficult to gauge in terms of empirical data.

That point notwithstanding, the Scottish Ministers can already force recalcitrant landlords to enter into agreements even if they do not want to, which is a restriction on an owner's usual autonomy and as such may engage the property provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1, Protocol 1). Any strengthening of such tenants' rights would be a careful balancing act.

Community service delivery

Q16. Can current processes be improved to give community groups better access to public service delivery contracts?

Yes No

Please give reasons for your response

Assuming that public service delivery contracts are already tendered in accordance with the Public Contracts (Scotland) Regulations 2006 (all in compliance with the EU procurement regime), it is difficult to see what processes need to change. Community involvement that comes as a replacement for what might otherwise have been the most economically

advantageous tender would need to be carefully considered and justified.

Q17. Should communities have the right to challenge service provision where they feel the service is not being run efficiently and that it does not meet their needs?

Yes No

Please give reasons for your response

No comment.

Community directed spending – participatory budgeting

Q18. Should communities have a greater role in deciding how budgets are spent in their areas?

Yes No

Please give reasons for your response

No comment.

Q19. Should communities be able to request the right to manage certain areas of spending within their local area?

Yes No

Please give reasons for your response

No comment.

If you said 'yes' to Question 19, please answer parts a., b. and c. –

a. What areas of spending should a community be responsible for?

b. Who, or what body, within a community should be responsible for making decisions on how the budget is spent?

c. How can we ensure that decisions on how the budget is spent are made in a fair way and consider the views of everyone within the community?

Definitions for Part 1

Q20. Please use this space to give us your thoughts on any definitions that may be used for the ideas in Part 1. Please also give us examples of any definitions that you feel have worked well in practice

“Community”. This is inherently difficult to define and whilst legislation relating to community councils and the Land Reform (Scotland) Act 2003 might provide an insight, it is questionable how this would work in an urban environment. See below.

PART 2: UNLOCKING ENTERPRISING COMMUNITY DEVELOPMENT

Community right to buy

Q21. Would you support a community right to buy for urban communities?

Yes x No

Please give reasons for your response

In principle, subject to consideration of impact on private property rights (see the human rights point above), definition of circumstances in which such a right might be exercised, types of property impacted and underlying rationale for the 'right' as expressed in the legislation.

A number of successful community land ownership projects have demonstrated that community land acquisition can empower communities and contribute to the sustainable development of rural communities (e.g. Eigg, Gigha, Abriachan Forest Trust. See Pillai, *The Community Right to Buy: Progress Towards Sustainable Development*, PhD Thesis, University of Aberdeen, 2004). The Land Reform (Scotland) Act 2003 ("LRA 2003") has demonstrated that it is possible to legislate to replicate these kinds of models but there are difficulties surrounding the LRA 2003 including the very low impact of the pre-emptive right to buy contained in Part 2 of that Act and the failure of the government to clarify the definition and interpretation of sustainable rural development in that context (Pillai, *Sustainable rural communities? Land Use Policy* 2010). Clarification of these issues is important if a balance is to be found between social, economic and environmental considerations.

A short comparison of the Proposed Community Empowerment and Renewal Bill consultation and the community right to buy can be found here: Malcolm M Combe "Rural Lessons for Urban Conveyancing", (2012) *Journal of the Law Society of Scotland*, 57(8), pp.32 – 33 and at <http://www.journalonline.co.uk/Magazine/57-8/1011528.aspx#.UFt4rlHhfD8>

If you said 'yes' to Question 21, please answer parts a., b. and c.:

- a. Should an urban community right to buy work in the same way as the existing community right to buy (as set out in Part II of the Land Reform (Scotland) Act 2003)?**

No.

The existing CRB under the LRA 2003 is very limited in scope due to the pre-emptive nature of the right. Although there are 151 registrations (including those that are pending) on the RCIL there have only been 11 purchases to date under the Act. Whilst the existence of the legislation may have an underlying impact by persuading more landowners to enter into negotiation to sell or lease land outwith the LRA 2003, this impact has not

yet been quantified (and would be extremely difficult to quantify). There is no doubt that concerted community efforts to purchase or otherwise gain control of community land and bring its use under community control have led to some exciting projects for sustainable rural development: Eigg, Gigha, Abriachan Forest Trust. However, these examples illustrate that it can be done without supporting legislation. The grand claims made by successive administrations of the Scottish government as to the impact of the rural CRB are, therefore, not particularly well founded.

There are numerous other issues, such as the bureaucratic nature of mapping requirements and the apparently fatal effect that small administrative oversights may have. This point is well known to the residents of Kinghorn in Fife (Combe, "Access to Land and to Landownership", (2010) *Edinburgh Law Review*, 14, pp.106-113).

There is no need to mirror the requirement for communities to incorporate as a company limited by guarantee (Combe, "Parts 2 and 3 of the land reform act (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?", (2006) *Juridical Review*, pp.195-227. Instead an organisation's rules/constitution can be vetted, as is the case in the comparator jurisdiction of South Africa.

There seems to be little merit in mirroring a registration process for a pre-emption, as exists in LRA 2003 and under the Agricultural Holdings (Scotland) Act 2003 for agricultural tenants. Notwithstanding the extra administrative burden for the keeper, registering an interest has questionable value insofar as it publicises a right of acquisition. There is no need, for example, for a crofter to pre-register an interest to acquire his croft under s 13 of the Crofting (Scotland) Act 1993. The publicity can be inherent by virtue of the nature of the asset itself.

If a registration requirement was thought to be useful, a five yearly re-registration process seems onerous. That is the effect of s 44 LRA 2003. Either a longer time period could be chosen, a fast-track re-registration process could be introduced, or both.

b. How should an 'urban community' be defined?

This is a difficult issue for a number of reasons, not least because of the question of scale of 'community', as in an urban context this could potentially be quite large. Connection to the property may be more difficult to determine than in rural communities since urban communities are more disparate and people tend to travel across towns and cities for goods and services. Therefore, we would recommend that 'community' be defined loosely for the purposes of the legislation in order to accommodate different types of community groups.

c. How would an urban and rural community right to buy work alongside each other?

An urban and rural community right to buy could work alongside each other perfectly compatibly. It is conceivable that there may be overlaps in some areas between the rights and it is possible to have a competitive process as in section 55 of the LRA 2003.

From a policy perspective it would also seem preferable that the policy commitments should be coherent across the two rights. An ongoing policy commitment to sustainable development is a useful component of the legislation to ensure the integration of environmental concerns into community decision-making processes. If the commitment to sustainable development were to underpin the new urban right then further work would have to be done to clarify not only the Scottish Government's interpretation of the principle but also its application in this particular context. The approach adopted by most community bodies under the LRA 2003 of adopting a commitment to the Brundtland definition of sustainable development ('meeting the needs') is commendable in that it is the most widely used definition of sustainable development and incorporates intergenerational equity. Nevertheless it is so vague as to make it, from a legal perspective, virtually unenforceable, even when it is enshrined in the constitution of a company limited by guarantee as the overarching objective of the community body. It would be helpful to have further guidance to flesh out what the key elements of the principle are in the context of community rights of acquisition in accordance with the evolving academic understanding of the principle. In particular, the procedural elements of the principle could be brought to bear on community land purchases to ensure that wide public participation forms a central component. This is particularly important since the most widely used legal mechanism, the company limited by guarantee, does not require any significant wider community involvement beyond the AGM, but rather leaves the running of the body to a small cohort of directors.

Community asset transfer

Q22. The public sector owns assets on behalf of the people of Scotland. Under what circumstances would you consider it appropriate to transfer unused or underused public sector assets to individual communities?

The question almost answers itself. When such assets are unused or underused, what is the justification for keeping them unused or underused? As such, subject to appropriate clawback mechanisms if the assets remained unused or underused (such as in s 35(3) of LRA 2003), a transfer seems appropriate.

Please also answer parts a. to d. below:

a. What information should a community body be required to provide during the asset transfer process?

Commitment to sustainable development.
Plans for the asset (development)
Proposed use
Mechanism for widest possible community participation in use
Sources of funding and/or viable revenue generation for ongoing projects

b. What information should a public sector authority be required to provide during the asset transfer process?

Everything that is in the public domain: anything that is accessible in terms of a Freedom of Information request (under the Freedom of Information (Scotland) Act 2002; and anything that can help the community obtain an asset at a fair price then make that asset thrive.

In fact, it might be classed as perverse that information would be held back from the community that any new regime purports to empower.

c. What, if any, conditions should be placed on a public sector authority when an asset is transferred from the public sector to a community?

The standard "Public Contracts" regime for obtaining the best deal for disposal of assets or award of a public contract would seem adequate.

d. What, if any, conditions should be placed on a community group when an asset is transferred from a public sector body to a community?

Restrictions on future sale or transfer.
Restrictions on use not compatible with sustainable development
Review process

Q23. Should communities have a power to request the public sector transfer certain unused or underused assets?

Yes No

Please give reasons for your response

This is a policy decision. To achieve true empowerment and renewal, the answer seems to be "yes".

If the community right is to have "teeth", then a bare pre-emption is unlikely

to achieve real redistribution of assets.

The meaning/interpretation of “request” is also important. Is “request” a polite suggestion? Alternatively, there is an argument that that meaning “request” does not go far enough, perhaps some kind of compulsion (as per Part 3 of LRA 2003 for crofters) would be more appropriate where there is such neglect (subject to human rights concerns and the property rights of a landowner/adequate compensation). See Malcolm M Combe, *Ruaig an Fhèidh*, 2011 Journal of the Law Society of Scotland, 56(5), pp.54-55 and http://www.journalonline.co.uk/Magazine/56-5/1009707.aspx#.UFuJ_1HhfD8 . Even though the crofting right to buy has only been contested (and thus tested) in Pairc on the Isle of Lewis, it has undoubtedly had a background effect in places like Galson (also on the Isle of Lewis) where a transfer has been encouraged in the shadow of the absolute right to buy.

Q24. Should communities have a right to buy an asset if they have managed or leased it for a certain period of time?

Yes No

Please give reasons for your response

Yes. They should certainly in no way be penalised when the sole reason an asset was not unused or underused was the community’s initiative. It would be perverse to not allow an already active community the rights that will accrue to an inactive community.

If you said ‘yes’ to Question 24, please answer part a:

a. What, if any, conditions should be met before a community is allowed to buy an asset in these circumstances?

- As above.

Common good

Q25. Do the current rules surrounding common good assets act as a barrier to their effective use by either local authorities or communities?

Yes No

Please give reasons for your response

No answer is offered.

Common good is a huge area and its inclusion in this consultation exercise is questionable. Whilst it would be preferable to answer this question in the context of a wider/dedicated consultation, the answer would seem to be that the rules are a block, but the block only comes into effect when the terms of reference for such common good assets (which may or may not be relevant in contemporary Scotland) are tested. As such, it is questionable whether

sweeping changes of common good asset regulation should be part of this exercise.

Q26. Should common good assets continue to be looked after by local authorities?

Yes No

Please give reasons for your response

No answer is offered.

Similar to Q.25, this is a complex area of law and it is submitted that the good governance of common good assets might have as much to do with any controls set out in (for example) a trust deed as it has to do with who in fact looks after an asset.

If you said 'yes' to Question 26, please answer parts a. and b.:

a. What should a local authority's duties towards common good assets be and should these assets continue to be accounted for separately from the rest of the local authority's estate?

The duties to the common good asset should refer back to the conveyance or equivalent that put that asset in a local authority's control, subject to any relaxations that might be necessary in contemporary Scotland (a comparison with the Court of Session's jurisdiction in relation to trusts may be apposite here).

Yes, these assets should be accounted for separately.

b. Should communities have a right to decide, or be consulted upon, how common good assets are used or how the income from common good assets is spent?

Arguably yes, but again this relates to the wider issue of regulation of common good assets in Scotland.

If you said 'no' to Question 25, please answer part c.:

c. Who should be responsible for common good assets and how should they be managed?

Asset management

Q27. Should all public sector authorities be required to make their asset registers available to the public?

Yes No

Please give reasons for your response

Yes. No reason why not.

If you said 'yes' to Question 27, please answer part a.:

a. What information should the asset register contain?

As much as it can, to the extent that will not blind the community with science.

At the very least and land that is owned should be available on the register with much information as appears in a Land Register in terms of the Land Registration (Scotland) Act 1979 as amended by the Land Registration etc. (Scotland) Act 2012.

Q28. Should all public sector authorities be required to make their asset management plans available to the public?

Yes No

Please give reasons for your response

Is there any reason why they should not be? Reference also the Freedom of Information (Scotland) Act 2002.

If you said 'yes' to Question 28, please answer part a.:

a. What information should the asset management plan contain?

See response to question 27 a.

Q29. Should each public sector authority have an officer to co-ordinate engagement and strategy on community asset transfer and management?

Yes No

Please give reasons for your response

No strong views, but we would incline to say a dedicated role is not necessary. Any such role could readily be twinned with the role of Information Officer, which Scottish Public Authorities will already have in light of the Freedom of Information (Scotland) Act 2002.

Q30. Would you recommend any other way of enabling a community to access information on public sector assets?

No comment.

Allotments

Q31. What, if any, changes should be made to existing legislation on allotments?

Whilst the regime is old, the most important issue is whether or not those who desire and/or need allotments can access them. There is no need to update a statute simply because the language is of its time (witness the Leases Act 1449). That being the case, the proposals regarding the need to respond within a certain timescale and a specified amount of allotments per capita seems sensible.

Q32. Are there any other measures that could be included in legislation to support communities taking forward grow-your-own projects?

No comment.

Definitions for Part 2

Q33. Please use this space to give us your thoughts on any definitions that may be used for the ideas in Part 2. Please also give us examples of any definitions that you feel have worked well in practice

See the above comments re community and sustainable development.

PART 3: RENEWING OUR COMMUNITIES

Leases and temporary uses

Q34. Should communities have a right to use or manage unused and underused public sector assets?

Yes No

Please give reasons for your response

This is a policy decision. To achieve true empowerment and renewal, the answer seems to be “yes”, especially as it may provide an important bridging step for communities who cannot obtain the funding for an outright purchase.

If you said yes to Question 34, please answer parts a., b. and c.:

a. In what circumstances should a community be able to use or manage unused or underused public sector assets?

Again, the question answers itself. When those assets are un- or underused the onus should be on the public sector to justify retention rather than the other way around. Land banking flies in the face of empowerment and regeneration and thus should be discouraged.

b. What, if any, conditions should be placed on a community’s right to use or manage public sector assets?

See above. Clawback if the community also un- or underuses the asset.

c. What types of asset should be included?

Land (and, for the avoidance of doubt, buildings/erections on that land).

Encouraging temporary use agreements

Q35. Should a temporary community use of land be made a class of permitted development?

Yes No

Please give reasons for your response

If not making such a step was a restriction on development, then clearly the restriction should be removed.

Q36. Should measures be introduced to ensure temporary community uses are not taken into account in decisions on future planning proposals?

Yes No

Please give reasons for your response

No firm view is expressed, but again it would seem perverse to penalise an active community for any action that any subsequent legislation might encourage.

Q37. Are there any other changes that could be made to make it easier for landlords and communities to enter into meanwhile or temporary use agreements?

No comment.

Dangerous and defective buildings

Q38. What changes should be made to local authorities' powers to recover costs for work they have carried out in relation to dangerous and defective buildings under the Building (Scotland) Act 2003?

The logic of the inclusion of this question is not immediately clear. If the building is a public asset, the landowner will have to fix it. If it is a community asset, they will have to deal with it as per any business plan. If the asset is privately (i.e. non-community/non-public) owned, ss 28-30 of the Building (Scotland) Act 2003 already provides a suitable scheme for recovery of costs.

Q39. Should a process be put in place to allow communities to request a local authority exercise their existing powers in relation to dangerous and defective buildings under the Building (Scotland) Act 2003?

Yes No

Please give reasons for your response

To the extent the community would not do so anyway (by reference to their local councillors directly), it seems sensible to allow communities a more direct route to raise any concerns.

Compulsory purchase

Q40. Should communities have a right to request a local authority use a compulsory purchase order on their behalf?

Yes No

Please give reasons for your response

This is a policy decision. The arguments against prominent developers (e.g. Donald Trump at Menie) making use of compulsory powers can be deployed against communities, *mutatis mutandis*. On the premise that community empowerment is a good thing, then a suitable right of compulsory acquisition seems sensible.

If you said 'yes' to Question 40, please answer part a.:

- a. What issues (in addition to the existing legal requirements) would have to be considered when developing such a right?

Whether or not it is appropriate to mirror a compulsory right of acquisition for a community on e.g. the compulsory acquisition in planning law or the compulsory acquisition power in Part 3 of LRA 2003.

Q41. Should communities have a right to request they take over property that has been compulsory purchased by the local authority?

Yes No

Please give reasons for your response

See above answer to question 40.

If you said 'yes' to question 41, please answer part a.:

- a. What conditions, if any, should apply to such a transfer?

Power to enforce sale or lease of empty property

Q42. Should local authorities be given additional powers to sell or lease long-term empty homes where it is in the public interest to do so?

Yes No

Please give reasons for your response

Subject to that important public interest caveat and adequate compensation, such a power could be part of an overall scheme for community empowerment.

If you said 'yes' to Question 42, please answer parts a., b. and c.:

- a. In what circumstances should a local authority be able to enforce a sale and what minimum criteria would need to be met?

The rights of a property owner cannot be lightly cast aside, so a minimum length of time unoccupied (perhaps a period between "short" and "long" negative prescription in terms of the Prescription and Limitation (Scotland) Act 1973, i.e. between a benchmark between five and twenty years) followed by a genuine attempt to contact the owner and a right for the owner to put forward and implement alternative plans. Compensation would also be required on human rights grounds.

b. In what circumstances should a local authority be able to apply for the right to lease an empty home?

As a) above, but perhaps less stringent tests might be acceptable for a compulsory let.

c. Should a local authority be required to apply to the courts for an order to sell or lease a home?

Yes No

Please give reasons for your response

To not do so would run the danger of being classed as an arbitrary deprivation. This could fall foul of Strasbourg jurisprudence on the property provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Q43. Should local authorities be given powers to sell or lease long-term empty and unused non-domestic property where it is in the public interest to do so?

Yes No

Please give reasons for your response

Answer 42 applies *mutatis mutandis*

If you said 'yes' to Question 43, please answer parts a., b. and c.:

a. In what circumstances should a local authority be able to enforce the sale of a long-term empty and unused non-domestic property and what minimum criteria would need to be met?

b. In what circumstances could a local authority be able to apply for the right to lease and manage a long-term empty non-domestic property?

c. Should a local authority be required to apply to the courts for an order to sell or lease a long-term empty non-domestic property?

Yes No

Please give reasons for your response

Q44. If a local authority enforces a sale of an empty property, should the local community have a 'first right' to buy or lease the property?

Yes No

Please give reasons for your response

Arguably yes. At the very least a local authority would need to ensure the most economically advantageous option for the asset was employed (i.e. no alienation at a below market price or rent-free lease).

If you said 'yes' to Question 44, please answer part a.:

a. In what circumstances should a community have the right to buy or lease the property before others?

If the right of first refusal is to be meaningful, it ought to apply in all circumstances.

Definitions for Part 3

Q45. Please use this space to give us your thoughts on any definitions that may be used for the ideas in Part 3. Please also give us examples of any definitions that you feel have worked well in practice

ASSESSING IMPACT

Q46. Please tell us about any potential impacts, either positive or negative, you feel any of the ideas in this consultation may have on particular group or groups of people?

No comment, beyond noting that any resultant legislation that empowers one group of people might do so at the expense of another group of people. Provided that is part of a sensible policy in accordance with ideas of social justice, that is fine. See the European Court of Human Rights decision of *James v UK* (1986) 8 EHRR 123, at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507> .

Q47. Please also tell us what potential there may be within these ideas to advance equality of opportunity between different groups and to foster good relations between different groups?

No comment.

Q48. Please tell us about any potential impacts, either positive or negative, you feel any of the ideas in this consultation may have on the environment?

No comment, although an increased recognition of sustainable development should have environmental benefits.

Q49. Please tell us about any potential economic or regulatory impacts, either positive or negative, you feel any of the proposals in this consultation may have?

No comment.