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Land Reform (Scotland) Act 2003 (Part 2 The community right to buy) A Two Year Review

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INTRODUCTION

This Briefing Paper provides a review of the value, utility and operation of the Community Right to Buy (CRTB) provisions contained in Part 2 of the Land Reform (Scotland) Act 2003[1]. It covers the first two years of the Act being in force from 14 June 2004 to 14 June 2006.

The review is derived from the author's own experience leading up to and including the passage of the legislation through Parliament and from working with community groups in the two years since the legislation came into force in June 2004. See www.landreformact.com for further details.

The purpose of this review is to determine how the legislation is being used, how effective and easy it is to use and whether it is achieving the objectives it was designed to achieve. It is hoped that this review will help inform an official review that is supposed to be taking place during 2007.

A SHORT HISTORY

The CRTB was first proposed by the Land Reform Policy Group (LRPG) set up in October 1997 with the remit:

"*to identify and assess proposals for land reform in rural Scotland, taking account of their cost, legislative and administrative implications and their likely impact on the social and economic development of rural communities and on the natural heritage."*

The Group published 3 papers[2]. *Identifying the Problems* was published in February 1998 and set out for consultation the issues the group thought needed addressed. In September 1998, the Group published *Identifying the Solutions* which, as the name suggests, contained 75 proposals upon which consultees were asked their views. Finally, in January 1999, the Group published its final paper *Recommendations for Action* which contained its recommended policy proposals which were later to be put into effect by the Labour/Liberal Democrat coalition in the first term of the Scottish Parliament.

The CRTB formed recommendation LO9 in *Identifying the Solutions*. The advantages stated to be associated with the measure were that it: -

Advantages

- Would greatly empower communities.
- Would effect rapid change in pattern of land ownership.

Disadvantages

- Difficulties in defining boundaries and communities who would have the right to buy.
- Landowners might prefer properties on their estates to be empty rather than tenanted so as to minimise threat.

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[1] See http://www.opsi.gov.uk/legislation/scotland/acts2003/30002--h.htm

[2] These three papers are available at http://www.scotland.gov.uk/Topics/Rural/Land/15618/8284

- Significant risk of ECHR[3] difficulties if landowners inadequately compensated for constraint on present freedoms.
- Expensive if (as would seem likely) purchase costs sought from Government.

For policy analysts and observers of the land reform policy process, a strange thing then happened. The *Identifying the Solutions* paper was launched immediately following the 1998 McEwen Memorial Lecture[4] in Aviemore delivered by Donald Dewar. In his speech, he stated that,

"I wish to be absolutely clear that I regard this right (the community right to buy) as an essential prerequisite of land reform. The problems must be overcome and the right must be established".

This statement was made an hour before he launched *Identifying the Solutions*. Clearly the community right-to-buy was preordained. Any subsequent analysis which revealed deficiencies or problems could not, without a political u-turn, properly influence the development of public policy on the matter.

Dewar thus pre-empted the consultation he himself was to launch an hour later and admitted that regardless of what consultees thought of such an idea, it was going to happen anyway. It is also worth noting that Dewar's CRTB proposals were never fully debated within the Scottish Labour Party's rank and file member's fora.

Once the Scottish Parliament was established the following year, the legislative process began and the CRTB was included as Part 2 of the Land Reform (Scotland) Act 2003. The provisions came into force on 14 June 2004.

This paper is a review of the legislation in the first two years of operation up to 14 June 2006. It is intended to provide an assessment of how the legislation is working and what impact it is having in relation to its objectives.

THE COMMUNITY RIGHT TO BUY

Part 2 of the Land Reform (Scotland) Act 2003 provides opportunities for communities in rural Scotland to apply to register an interest in land and property. Once such an interest is approved by Scottish Ministers, it is entered on the Register of Community Interests[5] in Land held by the Registers of Scotland. The effect of the registration is to provide the community with a right to buy the registered land if and when the owner decides to sell it (or more accurately a right to try and buy the registered land since the landowner may subsequently withdraw it from sale).

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[3] ECHR - European Convention on Human Rights

[4] See http://www.caledonia.org.uk/land/dewar.htm

[5] See http://rcil.ros.gov.uk

THE LEGISLATION TO DATE

In the first 2 years of operations there were a total of 39 applications (CB0001 - CB00039) made to register an interest in land by 26 different community bodies (see table below). A number of these applications were re-applications by the same community over the same land following the failure or withdrawal of an earlier application. Eliminating these eight applications[6], there were a total of 31 discrete applications. Of these,

- 5 have been activated (the right to by has been secured)
- 12 are registered and
- 14 have been deleted

The table below shows the status of the applications at at 31 January 2007.

Case No.	Name	Status
CB00001	Boddam	Deleted
CB00002	Assynt	Deleted
CB00003	Assynt	Deleted
CB00004	Assynt	Deleted
CB00005	Ballater	Deleted
CB00006	Crossgates	Activated
CB00007	Newtonhill	Deleted
CB00008	Assynt	Activated
CB00009	Assynt	Activated
CB00010	Assynt	Activated
CB00011	Coigach	Deleted
CB00012	Mundole	Deleted
CB00013	Braemar	Deleted
CB00014	Silverburn	Activated
CB00015	Eilean Glas	Registered
CB00016	Holmehill	Deleted
CB00017	Kinghorn	Registered
CB00018	The Kipp	Registered

[6] They are CB00002, CB0003, CB0004, CB00022, CB00024, CB00027, CB00029 and CB00030

Case No.	Name	Status
CB00019	Park of Keir	Deleted
CB00020	Fairlie	Deleted
CB00021	Houston	Deleted
CB00022	Newburgh	Deleted
CB00023	Newburgh	Registered
CB00024	Newburgh	Deleted
CB00025	Ford	Deleted
CB00026	Sprouston	Deleted
CB00027	Seton Fields	Deleted
CB00028	Durness	Registered
CB00029	Portpatrick	Deleted
CB00030	Seton Fields	Deleted
CB00031	Pro Market	Deleted
CB00032	Bridgecastle	Registered
CB00033	Portpatrick	Registered
CB00034	Neilston	Activated
CB00035	Killearn	Deleted
CB00036	Newburgh	Registered
CB00037	Newburgh	Registered
CB00038	Seton Fields	Registered
CB00039	Seton Fields	Registered

Of the deleted applications,

- 3 community bodies failed to conclude a sale following a successful registration and securing of the right to buy
- 8 were refused registration by Scottish Ministers
- 2 applications were withdrawn by the community body
- 1 was deleted following a successful registration and a successful appeal by the landowner against that registration

LEGISLATION IN PRACTICE - UPTAKE

The legislation began to be used quite soon after June 2004 and ,as noted in the figures above, led to 31 applications for registration of which 17 out of 31 (55%) have succeeded in either securing an extant registration or a right to buy and the remainder have been deleted for the reasons outlined above.

Does this rate of uptake and success represent a success story? The answer depends on how one measures success. The only indication of the anticipated level of uptake of the legislation was provided in the Financial Memorandum published at the time of the Bill[7]. In para 324 of the Memorandum, the administrative costs of the Bill are admitted to be dependent upon the level of uptake by communities. It is stated clearly that the "*level of uptake"* is *"presently unknown"*. It goes on to estimate likely costs based upon *"assumptions"* which "*reflect advice from the Highlands and Islands and Scottish Enterprise (Community Land Units)"*.

These assumptions are for 25 applications to register interest in the first year and 5 per year thereafter. In the event these assumptions have proven to be broadly accurate. In my own response to the Bill, I argued that if this level of uptake was in fact to transpire then the Act would fail dramatically to achieve its goals (greatly empowering communities & effecting rapid change in the pattern of land ownership). Research carried out at the time confirmed that these aspirations were extremely low compared with the reality of what was taking place on the ground[8]

It is for others to agree or otherwise with this argument. But if the CRTB is such a radical and empowering legal provision conferring far reaching powers on communities then it is reasonable to expect a large number of communities to take advantage of it. This is particularly the case when one considers that the CRTB does not in fact confer a right to buy at all but a right to apply to register and, once registered, an option to acquire at some indeterminate point in the future. Any community would therefore be well advised to avail themselves of this option and thus the uptake should (if one follows this argument) be voluminous. By now some hundreds of community bodies should have submitted applications.

It is difficult to speculate why uptake remains so low but it is likely that the reasons include

- a low level of awareness;
- difficulty in progressing the idea of registration within a community;
- failing to see the benefits; and,
- difficulties posed by forcing a community consensus approach upon communities (when alternatives such as community businesses and co-ops might represent better ways forward).

It should also be noted that the estimates of uptake made at the time of the Bill (November 2001) were made when the population threshold used to define land eligible to be

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[7] Land Reform (Scotland) Bill. Explanatory Notes (and other accompanying documents). November 2001.

[8] See '*What Evidence'* said the one-eyed public policy maker? *A Brief Review of Recent Community Ownership Trends in Scotland*. Caledonia Centre for Social Development Land Programme. 1993. http://www.caledonia.org.uk/land/evidence.htm

registered was 3000[9]. In June 2004 it was raised to 10,000 bringing within the scope of the legislation a further 661,363 citizens in 117 settlements of between 3000 and 10,000 population. Of these settlements, the vast majority (111), are situated outwith the Highlands and Islands where in places such as Cupar, Blairgowrie, Oban, Tranent, Shotts, Auchterarder, Dingwall, Maybole etc.

Whatever the reason for the low uptake, it is not possible to at the same time hold the belief that,

1. CRTB will rapidly change the pattern of ownership and empower communities *and*,
2. that only 5 applications are anticipated per year.

LEGISLATION IN PRACTICE

These figures cannot be interpreted as a huge success for the community right to buy either in terms of the volume of applications over the past 24 months or in terms of the success of those same applications. Not only are they few in number but clear problems have emerged concerning how the Act is operating and a number of clear observations can be made from the experience so far. These fall into 4 distinct categories, namely

- Complexity of the legislation (from the community body point of view)
- Difficulty in preparing an application
- Scope of Ministerial discretion
- Administration

I now examine these in turn.

Complexity

The Act outlines the series of steps a community body needs to take to secure a successful registration. The process is complex and poses some practical difficulties. Some will argue that given the scope of the powers conferred by the legislation, it is inevitable that the provisions will be complex. However, evidence from land reform programmes elsewhere in the world (none were ever identified or studied by the LRPG despite some consultees supplying such evidence[10]) suggest that the more complex the process the poorer the results in terms of the aims of the programme.

Much of the complexity is a necessary consequence of the fact that the Act has to deal with processes of property law, respect human rights, and ensure that the powers contained in the Act are not abused. However, much of the complexity relates to the detailed demands made of communities in the process of making applications. Such details can and arguably should be simplified.

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[9] All land within settlements of 3000 and above would be excluded land which would not be eligible for registration.

[10] See for example the Communal Property Association Act of South Africa (1996) supplied to the LRPG by Caledonia Centre for Social Development.

Preparing an Application

Experience to date suggests that while some communities have managed to make applications relatively straightforwardly, others have laboured long and hard. Given that the CRTB is an essentially speculative endeavour (the actual right may never arise) which is unfamiliar to communities and given the policy aims of land reform, it is desirable that any community with the desire to make an application should be able to do so with the minimum of effort.

Difficulties noted to date relate to:-

- Memorandum and Articles of Association
- postcodes
- mapping

Memo and Articles

Section 34(1) of the Act requires that Community Bodies be constituted in a defined manner. They must be Companies Limited by Guarantee and their Memorandum and Articles of Association (M&A) must comply with a number of statutory requirements as laid down in this Section.

In the early stages of implementation, Highlands and Islands Enterprise (HIE) commissioned a model M&A for use by community groups. This was the subject of extensive consultation with the Scottish Executive before it was finally published. Some months later ,however, it was withdrawn as a result of further concerns by Scottish Executive lawyers. This was a sign that despite the limited and clear requirements of Section 34(1), the Scottish Executive were making further demands before approving the model thereby making it even more difficult for communities to constitute themselves in a way that could be clearly in line with the Act.

In a number of subsequent cases, applicants found themselves in a protracted dialogue with the Land Reform Branch over the detailed interpretations of their M&A. In some cases the concerns of the Executive went beyond the plain terms of Section 34(1) in their demands for changes.

What should be a relatively straightforward process of drafting or amending M&A to meet the eight clear requirements of Section 34(1) has become for many community bodies a seemingly endless process of drafting and redrafting to meet the ever changing demands of Scottish Ministers. This is both frustrating and outwith the spirit of the Act which provided Ministers with no powers of veto over Memo and Arts other than over the plain terms of Section 34(1) and 34(4).

Postcodes

The Act requires that Community Bodies be defined by postcodes. A Community Body consists of adults on the Voting Roll and resident in a number of defined Postcodes (e.g. AB1 2CD). During the passage of the legislation this was one of a number of improvements made to the Bill. Previously the definition was based upon polling districts which, although simpler, lacked the flexibility to more precisely define communities how communities wished.

Problems have arisen in the practical implementation of this requirement. Contrary to the Scottish Executive's own Guidance[11] (para 6 pg. 5 of Guidance), the information necessary to define a community by Postcodes is not available from the General Register Office for Scotland (GROS) except at the level of a local authority and in paper form at a cost of over £100.

The problem is not so much in obtaining the full range of Postcodes necessary to define a community (though this is a significant task for a larger community) - these are available together with addresses at the Royal Mail website and from the Post Office. The problem rather lies in having to translate these Postcodes into a map showing their boundaries. This involves the use of digital data which is not available to communities.

My own discussions with GROS about making the digital boundaries available to use so we could incorporate them in a CD-ROM resource for communities (whereby with a simple piece of free software they could select and manipulate the aggregations of boundaries to produce their desired defined community) ultimately fell apart after 2 years since Ordnance Survey royalty payments were likely to be around £4000 per year[12].

Mapping

Applicants are required to prepare maps to accompany their application in a form which complies with the requirements of the Schedule to the Scottish Statutory Instrument 2004 No. 231 The Community Right to Buy (Specification of Plans) (Scotland) Regulations 2004[13].

This schedule is as follows: -

1. Maps, plans or drawings shall-

(a) be drawn to a metric scale corresponding to a scale used by the Ordnance Survey for that land;
(b) be taxative and not demonstrative only[14];
(c) show north;
(d) contain map grid reference numbers and sufficient surrounding details (fences, houses etc.) to enable the position of the land to be fixed accurately; and
(e) when measurements are shown, be given to two decimal places

Such requirements are plain and arguably not onerous. Problems have arisen though as a result of some inconsistent and, frankly, bizarre decision making.

For example, Application CB00023 in Newburgh was registered in October 2005. The map accompanying the application, however, failed to meet almost every requirement laid down in the Statutory Instrument (see Annex I).

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[11] Community Right to Buy: Guidance. Available at http://www.scotland.gov.uk/library5/rural/lracrb-00.asp

[12] See http://www.freethepostcode.org/ for a project to challenge current rules on availability of postcodes.

[13] See http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/ssi2004/20040231.htm

[14] This is a technical term which, for legal reasons, must be displayed on the map.

- It may or may not have been drawn to a metric scale used by the Ordnance Survey. It is impossible to determine since there is no scale
- There is no indication that the map is taxative and not demonstrative only
- The map does not show North
- The map does not show grid reference numbers and it is difficult to determine exactly the boundaries of the land due to insufficient detail.

In short, this map could be anywhere.

Now a bit of flexibility is no bad thing but it leads to three problems. Firstly, it is unlawful if statutory requirements are not met. Secondly, it is unfair on applicants who may as a result face a legal challenge from the landowner or other members of the community and thirdly, it contravenes natural justice if such flexibility is not shown in a consistent manner.

On this third point it is worth comparing the competency of the decision making in the Newburgh case with that which was applied to another, later application. The map accompanying Application CB00027 Seton Fields (see Annex II) was prepared in strict accordance with the Statutory Instrument[15].

- The map was drawn to a metric scale used by the Ordnance Survey and this scale was clearly shown both in the legend and by use of a scale bar.
- The map is taxative and not demonstrative only and this is clearly stated in the legend.
- The map clearly shows North by means of a North arrow.
- The map contains grid squares and a central grid referenced point together with plenty surrounding detail which enables the position of the land to be fixed accurately.

In short, this is a map of high quality which should leave Ministers in no doubt either about the land that is the subject of the application or that the map meets the requirements of the Statutory Instrument. Certainly if a map of the standard of that which was deemed acceptable for the Newburgh application was permissible then surely the Seton Fields map should pose no problems - alas no.

In their decision letter of 23 December 2005, issued over 2 months after the application was made on 18 October, Ministers refused the application. Their reasoning was as follows: -

The Scottish Ministers have considered the application by Seton Fields Community Company to register an interest in land at Seton Fields, near Longniddry, East Lothian and have decided that the interest should not be entered in the Register of Community Interests in Land for the following reason:

> *Q4 of the application form provides only one OS grid reference number (NT425755) covering the area of land to be registered and the accompanying map indicates, with a +, the location of that grid reference. While the map also identifies an area of land coloured orange, the application itself makes no reference to the land to be registered being shaded orange on that map. The*

[15] I should declare an interest here - I prepared the map on behalf of the Applicant.

result of this is that the area subject to the application appears to be an area at the point marked with a +. The application therefore does not provide an adequate description of the land to which the application relates. Scottish Ministers have no option but to reject the application.

Ministers thus took 66 days to decide that in effect the application was incompetent - a decision that should have been made within days and before the application was accepted for entry on the Register. If it was not clear what land the application related to, the correct course of action would have been to inform the applicant within days of them submitting the application and not to have approved it for entry in the Register of Community Interests in Land. Their reasoning defies rational explanation. After 66 days did Ministers really conclude that the land that was the subject of this application a small 100 square metre plot? Could they not in these two months have asked for clarification from the applicant?

Furthermore, there is no requirement in Question 4 on the Application form to refer to the map - the question simply asks for a written description of the land and this was given. Also given in response to Question 4 was a Grid Reference that accurately located the land and a completed box indicating that 2 maps were being supplied. What possible and legitimate doubt could ever have arisen in anybody's mind that the land that was the subject of this application was the land shaded orange on the map?

Above all why was this application rejected on the grounds of an inadequate description of the land when the Newburgh application was accepted but breached all the rules regarding mapping? Moreover, the grid reference supplied by Newburgh was of exactly the same single Grid Reference format but without the 100 km sq. prefix letters and so could arguably have been located at any of around 20 location within Scotland. Furthermore, the application makes no reference to the accompanying map - the precise grounds for rejection of the Seton Fields application.

It appears the the reason for such a bizarre decision is in itself a consequence of the complex and legalistic nature of the legislation. Apparently, the flaw identified in the application was claimed by civil servants to be possible grounds for an appeal by the landowner. Yet so were the manifest mapping failings in the Newburgh application and yet it was registered. Indeed nowhere in the Act and in the decision making process is there any reference to the risk of legal challenge being a factor that Ministers can legally take into consideration in accepting or rejecting an application.

Such inconsistency in decision making risks rendering the whole process something of a lottery. It certainly forms evidence that the Act and the decision making process that forms a part of it should be subject to an *independent external* review.

Ministerial Discretion

Ministers have substantial discretionary powers. The full extent of these are listed below. It has become clear that the extent and significance of these powers confers by far the greatest empowerment not to communities but to Ministers who sit in judgement of the necessity, worth and value of an community's aspirations.

The following list of Ministerial Powers excludes obligations (such as making excluded land maps available) and administrative tasks (such as sending letters to people) and contains only those powers which determine how the Act shall operate in individual cases.

It is important to note that I am not taking a view on whether these powers are legitimate or not (some of them are very necessary in the context of how the Act is designed to operate). They are highlighted here to emphasise the extent to which Ministers (and in practice civil servants) control the whole process and make important decisions as to who gets to exercise the rights under the Act and on what terms.

	Ministerial Discretionary Powers	Section
1	Definition of excluded land via Scottish Statutory Instrument	33(2)
2	Power to disapply the criteria defining a Community Body	34(2)
3	Satisfaction with main purpose of Community Body	34(4)
4	Power to direct how a community is defined	34(5)
5	Decide whether a democratically elected Community Body may alter its Memorandum and Articles of Association even after it has purchased land.	35(1)
6	Power to delete a registered interest	35(2)
7	Acquire land compulsorily from a Community Body	35(3)
8	Power to modify subsections of Section 36	36(6)
9	Satisfaction as to unknown landowner	37(4)
10	Power to decline to consider an application	37(11)
11	Decide whether to register land - timeous applications	38
12	Decide whether to register land - late applications.	39
13	Power to modify Sections	42
14	Power to determine applications for renewal every 5 years	44(2)
15	Wide discretionary power to delete a registered interest	45(1)
16	Satisfaction of ballot results	51(2)
17	Consent to right to buy (sustainable development test)	51(3)(c)
18	Consent to right to buy (public interest test)	51(3)(d)
19	Determination of changed circumstances	51(3)(e)
20	Power to decide on inclusion of salmon fishings and minerals	53
21	Power to decide which Community Body shall buy	55(2)

With such extensive and detailed powers, Ministers effectively act in a quasi-judicial capacity deciding which community can and which communities cannot exercise their rights under the Act. Such a situation poses many risks to the applicant in terms of the quality of administration and decision making.

It became apparent during the case of Holmehill Ltd. vs Scottish Ministers[16] that Ministerial decisions are made within a very flexible and opaque framework. Evidence led by Scottish Ministers in the case stated how communities must demonstrate *"serious intent"*, how late applications may be made only in *"exceptional circumstances"*, and how it is not acceptable for applicants to make applications that are *"reactive to a sale"*.

Evidence in this case also revealed how the decisions issued by Ministers are designed to comply not only with the Act and the circumstances of the application but with *"Ministers policy perspectives, intentions and wishes"* (whatever those might be). Quite astonishingly there was also reference made to a *"hidden policy"* of Scottish Ministers which was applied to the assessment process.

None of these criteria appear anywhere in the Act. Such wide discretionary powers were described by Counsel for Holmehill Ltd. as being *"a bit like a community body going into a dark room and not knowing where the light switch is"*. Even the Sheriff, in a rare intervention from the bench, observed that the way in which decisions appeared to be made was *"Kafkaesque in a way"*.

It is worth noting that international best practice on legislative drafting warns of precisely this kind of situation. In a legal Drafting Training Manual prepared recently for the government of Sudan and funded by the UK Department for International Development, it is concluded that the scope for discretion in legislation should be limited:-

Limiting the scope of discretion:
Unaccountable broad discretion creates the basis for arbitrary decision-making. A stakeholder cannot participate meaningfully in decision-making unless he or she knows the basis on which the official may make a decision. Therefore, the least scope the official is allowed, the less likely that the official will make an arbitrary decision.

Some ways of addressing this are:

- To specify the kinds of problems that fall within the official's powers and the kinds of factors the official may admit.
- To specify the range of solutions officials may choose from and the factors the official must take into account in choosing a solution.
- To prescribe procedures to be followed *e.g.* that decisions must be taken by groups of officials, referred to an independent group of experts, or peer reviewed by a group of senior officials. These devices make arbitrary decisions more difficult.
- To use impact statements rather than polycentric decisions i.e. decisions which can be based on a wide range of criteria or which cannot be prescribed easily applicable

[16] See http://www.landreformact.com for details.

criteria e.g. avoid use of vague criteria such as ‘reasonable,’ ‘serious intent’, ‘strongly indicative’ etc.

Checklist of measures to combat arbitrary decision-making

(i) re-structure role of officials in decision-making process to reduce opportunities as well as capacity for arbitrary decision-making by limiting area for discretion, rotating officials, and defining rules for decision-taking.

(ii) open decision-making process to public view

(iii) improve management information systems and publish decision-making criteria, etc

(iv) change or reverse burden of proof to require official to demonstrate reasons for not grant right to register, etc

Source: *Legal Drafting Training Manual*, Sudanese Justice Institutions Capacity Building Project, Ministry of Justice and Atos Consulting, Khartoum, January 2007.

In any review of the Act, an important task will be to review the scope for Ministerial discretion.

ADMINISTRATION

At the root of some of the problems that have occurred is the role of the three or four civil servants who make up the Land Reform Branch. They are in effect the people who make the decisions since they administer the process and advise Ministers on what decisions to take.

These civil servants undertake a number of tasks including

- limited promotion of the Act (by responding to contact from communities)
- advising applicants on the Act and the process of making applications
- administering the processing of applications
- scrutinising applications in pursuit of the many Ministerial powers contained in the Act
- preparing advice to Ministers on the discretionary powers listed above
- make recommendations to Ministers as to whether to accept or reject the application and on what grounds.

Such a multitude of overlapping roles poses significant questions with regard to issues of arbitrary decision-making, conflicts of interest, corrupt practices, lack of transparency, division of responsibilities and civil service codes of conduct. Such a situation is unsustainable since it concentrates power in the hands of a handful of unaccountable individuals and involves too many conflicting roles. For example, the same civil servant who meets a community group will later advise Ministers on what decision to take and, if the group correspond with Ministers to challenge their decision, will draft the Ministerial reply.

Although on paper Ministers make all decisions, in practice they are taken based upon the advice of civil servants. One of the consequences of extensive Ministerial power is that the success or otherwise of any application will depend on the efficiency and competency of the decision making process. Whilst it is to be expected that there will be teething problems and some early hiccups in the administrative and decision making process, the results of too many applications reveal a worrying incompetence and lack of consistency in how applications are being treated.

This problem is not the fault of individuals who are trying to do what they consider to be their job but a problem of management and systems. Planning powers are exercised by Ministers on the advice of professional planners. Ministerial powers over health matters are exercised with the assistance of medical professionals. The same goes for many areas of Ministerial discretion and where there is no professional involvement, there are systems designed to make the decision making process transparent, accountable and understandable.

With land reform however, there is neither a professional civil service nor a consistent and transparent approach to decision making. The staff of the Land reform Branch are not trained in any of the disciplines that come into play namely planning, land economy or local economic development. Decision making is both inconsistent and lacking in any externally understandable criteria. Much of this comes down to Ministerial policy and guidance which is vague and subjective.

The evidence is that those involved in the administration of the Act have neither the qualifications nor experience to be undertaking so many tasks. Indeed it is probably not simply the quality of the decision making thus far but the very fact that the Act is so complex that means it may be beyond the scope of any individual or group to fairly and competently administer the Act. It may be that this very complexity needs to be removed so as to make the procedures clearer, more consistent and fairer.

In addition, much of the decision making is taken within an excessively legalistic context with civil servants constantly taking internal legal advice and constantly looking over their shoulders in anticipation of potential legal challenges - not by communities it might be added but by landowners. This has introduced a clear discriminatory element in the whole process whereby if there is any aspect of an application that may be open to challenge from the landowner, Ministers would rather reject it than accept it. In these circumstances, applications involving a hostile landowner are less likely to be accepted. Whilst this may in some cases be viewed as protecting the interests of the application (they can make a further application that may overcome the alleged deficiencies although by this time it may be too late), it is clear discrimination.

To make matters worse, Ministers can take as long as they like to reach the key decisions contained in Sections 37(19), 49(6), 51(7) and 59(1) of the Act which states that,

“Any failure to comply with the time limit specified in subsection (x) above does not affect the validity of anything done under this section.”

The subsections referred to in 37(19), 49(6), 51(7) and 59(1) are all subsections that oblige Ministers to make decisions or take actions within a specified time limit. But the effect of the *Any failure....* subsection is to, in effect, render these time limits meaningless.

Community bodies have also to take certain actions and decisions within statutory time frames but they, unlike Ministers, are provided with no such comforting subsections that allow them to take more time if they need to. If they fail in their statutory obligations, their interests will be extinguished.

The balance appears to be wrong here. Ministers and bureaucrats can take months but communities (who do not have the same resources of full time staff, legal advice and money) have to jump and jump fast or all is lost.

THE WIDER CONTEXT

The Scottish legislation has been the subject of inquiry by a working group from the Home Office and the Office of the Deputy Prime Minister that looked at how a community right to buy might be formulated in England.

In their Final Report [17] they came to a number of conclusions about how relevant the Scottish model might be for England. Among these were,

Extent of Application: ..it seems more equitable and consistent with the neighbourhoods policy of offering opportunities everywhere if a community right to buy in England applied to both urban and rural areas.

Complexity: The complexity of the Land Reform (Scotland) Act 2003 is a major disincentive to community groups...

Type of Community Body: In Scotland the community body had to be a particular kind of organisation (company limited by guarantee). This had proved to be restrictive....

Promotion and profile: Awareness had been a problem in Scotland as the Scottish Executive has not publicised the new powers....

Centralised vs. localised approach: The Scottish precedent is highly centralised with a great deal of Ministerial consent built into the Act. Such a centralised approach would be unsuitable and undesirable in England and we need to avoid a bureaucratic system. It was agreed that the process should be as simple as possible, reducing the need for central Government intervention.

This analysis appears to underline many of the conclusions of this Briefing.

DISCUSSION

The Land Reform Act has frequently been cited as one of the successes of devolution and a measure which, had the Scottish Parliament not been established, would never have reached the Statute Book. This latter observation is undoubtedly true. With the lack of Parliamentary time at Westminster for Scottish legislation and the hurdle of the House of

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[17] See Communities Taking Control: Final Report of the Cross-sector Work Group on Community Ownership and Management of Assets, ODPM, London April 2006. Available at http://www.communities.gov.uk/pub/905/CommunityManagementandOwnershipofAssetsFinalReportfromtheWorkGrouptotheNeighboud_id1164905.pdf

Lords (even in their present form), it is inconceivable that such an Act would have been passed.

The first observation is true in so far as the Land Reform Act is an example of the Scottish solutions for Scottish problems that Donald Dewar promoted in his speech announcing the first legislative programme in June 1999. But it is no longer enough to claim success merely on the back of the passing of such legislation. The real test comes in its application.

It is hard to escape the conclusion that the Scottish Executive still fail to properly understand the land issue and the role of their proposed reforms. In the Introductory statement on the part of the Scottish Executive website devoted to the Act, it is stated

The Land Reform (Scotland) Act was passed by the Scottish Parliament on January 23 and received Royal Assent on February 25, 2003.

It ended the historic legacy of feudal law and created a framework for responsible access to land and inland water and also for rural and crofting communities to have the right to buy land in their area.[18]

This is both incorrect and misleading. The Act has nothing whatsoever to do with ending the historic legacy of feudal law (that was the Abolition of Feudal Tenure etc. (Scotland) Act 2000). Claiming that it does is typical of the puff that has so frequently accompanied statements by politicians on the radical nature of the Land Reform Act. It is misleading because the Act does not provide for communities to have *"the right to buy land in their area"*. It provides communities with the right to apply to register an interest in land in their area. Whether that interest is registered is a decision for Ministers and whether the right to buy is ever activated is dependent on the actions of the existing owner of the land. If it is never sold then the right to buy can never be invoked. Even if it is put up for sale and the community decide to exercise their right to but, the landowner can then withdraw it from the market leaving the community high and dry.

It is interesting to compare the CRTB with the other land reform measure introduced by Parliament - the Agricultural Tenant's right to buy contained within the Agricultural Holdings (Scotland) Act 2003. this provided tenant farmers with a similar conditional right to buy their farm if and when it is put up for sale by the landowner. Like the CRTB, a tenant farmer has to register their interest in order to take advantage of the right to buy[19].

Unlike the CRTB, however, the tenant farmer right to buy involves a fairly simple process and the completion of a fairly simple form. This is then submitted not to civil servants and Ministers but to the Keeper of the Registers of Scotland. The Keeper is required to follow a few simple steps to ensure the application is in order and has no powers of discretion to decide whether farmer A deserves the right and farmer B does not. Within a predictable timetable, the tenant farmer has their right registered. The only grounds for refusal are if the application does not conform to specific terms in the Act (such as that the land to be registered is not held under a qualifying agricultural tenancy). Such refusal can easily be rectified by submitting an amended application correcting such deficiencies.

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[18] See http://www.scotland.gov.uk/Topics/Rural/Land

[19] See http://rcil.ros.gov.uk

In practice any tenant farmer whose holding qualifies under the Act can, if they wish, obtain a registered interest. They don't have to make any case for sustainable development, demonstrate serious intent to do anything or submit their case for consideration to a panel of civil servants to take months to determine. Barring the fact that the right to buy is only available when the land is sold, this Act is much more in line with real land reform as being enacted in places such as South Africa.

The evidence of success is there for all to see in the Register of Community Interest in Land (Agricultural Tenants) where, as of 30 June 2006, there were over 750 successful registrations.

CONCLUSIONS

It is vital that if a programme of land reform is to achieve its desired results, that the opportunities be made clear to the potential beneficiaries, the process be made easy to understand and use, and the outcomes be definable and predictable. None of this is entirely the case with the CRTB. Some of the deficiencies are inherent in the legislation (e.g. on predictability, the right to buy may never be conferred since the land may never be put up for sale). But many can be rectified by reform of the existing Act, by improving the promotion of the legislation and, above all by simplifying the process and the administration of the registration process.

The reality is that the Act is such a complex, legalistic piece of legislation that it provides numerous opportunities for bureaucratic nit-picking and fine legal arguments. This keeps bureaucrats and lawyers in business but does nothing to empower communities. Such a situation has greatly diminished both the radical intent of the Act and its practical utility. What should have been a straightforward process delivering tangible benefits to communities has turned into a time consuming and impenetrable process of micromanagement by officialdom.

Is this legislation having the impact that was intended? The argument put forward by the LRPG was that such a measure *would greatly empower communities* and *would effect rapid change in pattern of landownership*. At this point it is hard to see how the Act is having such an effect. Communities are certainly using the Act (in some cases successfully) but uptake remains very low and in line with the modest (5 cases per year) estimates put forward by the Scottish Executive at the time of the Bill. The rapid change in the pattern of landownership has yet to materialise and it is hard to see see how it will.

The Caledonia Centre for Social Development, in it's response to the Draft Bill published in June 2001 made the following comments,

Our concerns included

- *Highly centralised and lacking in operational subsidiarity to other levels of government and local administrative units*
- *Overly dependent on Ministerial discretion*
- *Unnecessarily prescriptive and procedurally complex*
- *Over-elaborate and controlling.*

Ministerial Discretion

We have grave reservations about the democratic credentials and scope for popular participation in land issues when so much of the detailed decision-making on key aspects of this so-called community right is in the hands of Ministers in central Government. In our experience this is a recipe for obfuscation, strife, and distrust. It also raises serious questions about the transparency of the whole process. Far better, in our view, would be to vest much of this decision-making in local fora which could take evidence and take decisions in public.

It provides no comfort to note that, five years later, this is appears to be precisely what has happened.

RECOMMENDATIONS

It is not the purpose of this Briefing to propose detailed recommendations for changes in the Act - this can only be done after further discussion and debate. However, some broad recommendations can be made.

Guiding all such recommendations is the proposition that the Act should be

- simplified,
- that the process of making an application be made less bureaucratic; and ,
- that the discretionary powers of Ministers be substantially curtailed.

Some broad recommendations are as follows.

- Extend the extent of eligible land to incorporate all of Scotland by including urban settlements of over 10,000 population

- Eliminate most of the areas of Ministerial discretion

- Make the formation of community body formation more flexible.

- Simplify how communities are defined (line on a map rather than complex postcodes)

- Remove the requirement to make separate applications for each parcel of land held in separate ownership [20]

- Move the administration of the Act to Communities Scotland in the short term and in the longer term to local government.

- Convert late registration procedures to a simple pre-emption right

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[20] This has led to the ridiculous situation recently where on 1 November 2006, Kinghorn Community Land Association 2005 made an application to register an interest in land surrounding Kinghorn Loch. Because the land was owned by different owners they had to prepare and submit 18 separate applications (CB00049 - CB00066).

- redraft the appeal provisions to make clear that the substance of Ministerial decisions can be challenged in the Sheriff Court[21].

Ministers have announced that they will review the Act during 2007. You are encouraged to participate in this review.

Andy Wightman
February 2007.

[21] The ruling by Sheriff McSherry in the case of Holmehill Ltd. vs. Scottish Ministers concluded that Ministerial discretion is "*best left to elected representatives such as the Scottish Ministers, who are in possession of relevant information and who are charged with exercising such discretion in respect of late applications made throughout Scotland in terms of section 39."* This ruling effectively rendered the appeal provisions of the Act worthless unless in cases of gross wrong decision making.

ANNEX I
EXTRACT FROM
CB00023

4 Details of land in which interest is being registered

Number of maps/ drawings enclosed: 3

County: FIFE

Postcode details: KY14 6BZ

OS grid reference numbers covering land to be registered: 191231

Written description of land in which interest is to be registered (complete on a separate sheet if necessary).

DRYING GREEN

THE LAND CONSISTS OF A RECTANGLE OF LAND IN THE NORTH WESTERN CORNER OF NEWBURGH. THE NORTHERN BOUNDARY IS A SEA WALL ERECTED AROUND 1910S ALONG THE SIDE OF THE RIVER TAY. THE WESTERN SIDE IS BOUNDED BY A PRIVATE LANDOWNER. THE SOUTHERN BOUNDARY ABUTS THE FORMER BASE FOR THE TAY SALMON FISHING CO. WHICH IS OWNED BY A MR WATSON, INVERLEITH ROAD, EDINBURGH OR ONE OF HIS COMPANIES. THE EASTERN BOUNDARY IS A SEA WALL ON THE SIDE OF A SLIPWAY.
THE GROUND WHICH IS MADE UP BEHIND THE SEA WALL IS CURRENTLY GRASSED OVER AND THERE IS AN INFORMAL PATH ACROSS IT.

NOTE

Any map or plan supplied must conform to the requirements in the Community Right to Buy (Specification of Maps) (Scotland) Regulations 2004.

MLWS
Mean Low Water Springs
Mean High Water Springs
4761
7447
Mugdrum East Lodge
Mugdrum House
Shelter
Bruchbrae
South Butts
Brusch
The Butts
WEST PORT ROAD
Kyle Rhea
Teal Lodge
Readinche
GARDENS ROAD
Apple Yard
4136
St Katharine's Court
Museum
Surgery
Church
Hall
HIGH STREET
PCs
Bank
The Bungalow
SHUTTLEFIELD STREET
SHUTTLEFIELD ST
Dun
PC
WEST SHORE ROAD

ANNEX II
EXTRACT FROM
CB00027

4 Details of land in which interest is being registered

Number of maps/ drawings enclosed: 2

County: EAST LOTHIAN

Postcode details: EH32 0PG

OS grid reference numbers covering land to be registered: NT425755

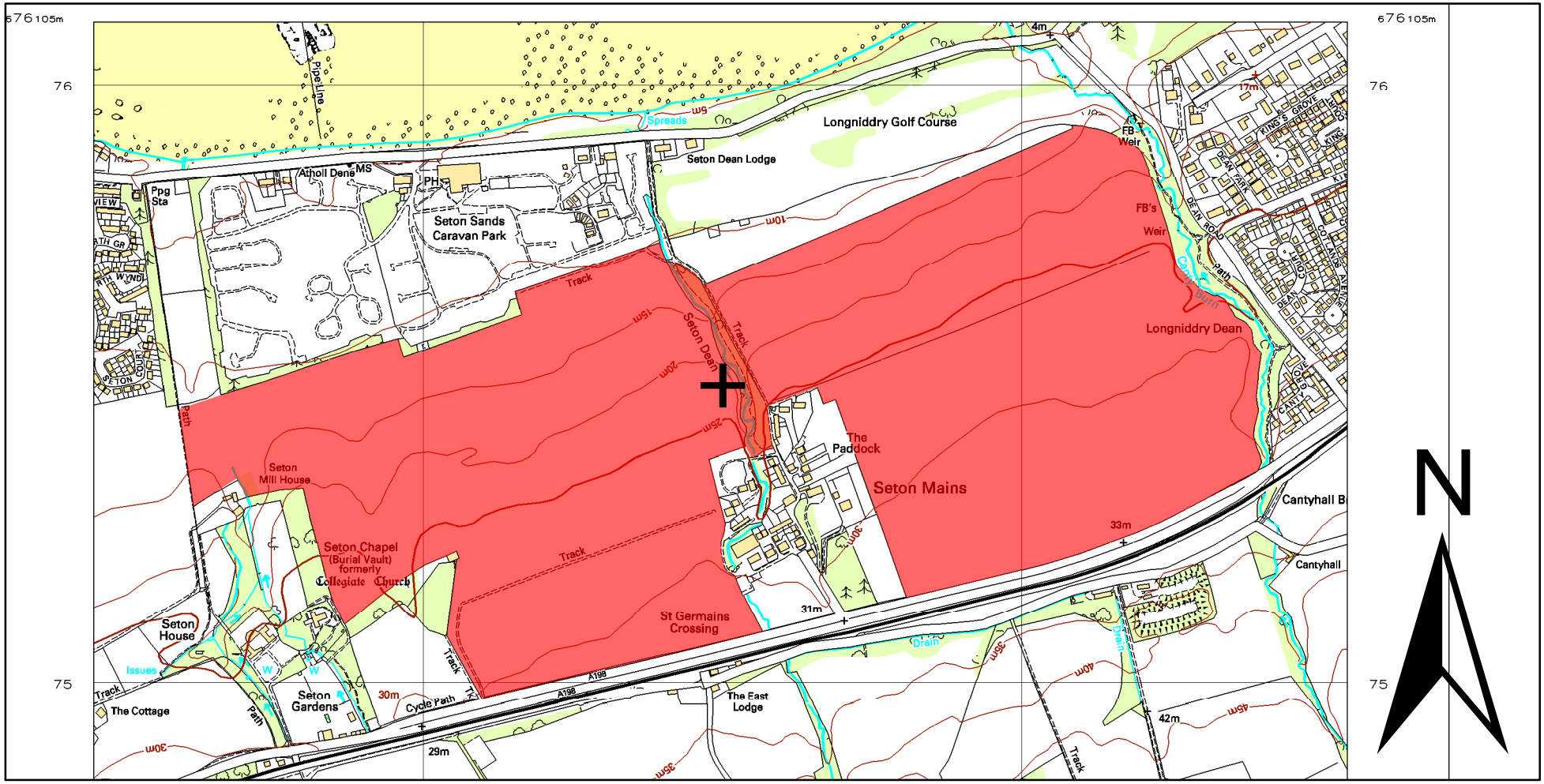
Written description of land in which interest is to be registered (complete on a separate sheet if necessary).

LARGE PROPORTION OF THE AREA HAS, UNTIL RECENTLY, BEEN IN CEREAL PRODUCTION. THE REMAINDER HAS BEEN LEFT AS ROUGH UNCULTIVATED GRAZING, AND HEADLANDS.

A SMALL CENTRAL STRIP (SETON DEAN WOODLAND AND BURN) IS WOODED AND IS CURRENTLY UNDER THE MANAGEMENT OF THE WOODLAND TRUST.

NOTE

Any map or plan supplied must conform to the requirements in the Community Right to Buy (Specification of Maps) (Scotland) Regulations 2004.



Map 1 Seton Fields
Scale 1: 10,000

+ National Grid Reference NT 425755

LEGEND

Seton Fields

This is the map relating to the application by The Seton Fields Community Company to register an interest in Seton Mains Fields under the terms of the Land Reform (Scotland) Act 2003. Prepared 5 October 2005.

This map is taxative and not demonstrative only.