LAND REFORM REVIEW GROUP – CALL FOR EVIDENCE

SUBMISSION BY THE WEST HARRIS TRUST

Introduction

The whole area of land ownership and land reform is a vast one which the West Harris Trust (WHT) cannot hope to address *in toto.* WHT is a member of Community Land Scotland which is submitting a comprehensive submission and which we support. Therefore the Trust's submission focusses largely on its own experience of purchasing land and attempting to register an interest in other parcels in order to shed light on some of the issues involved. Some references to other Harris examples are also made. We trust that this will be of benefit to the Land Reform Review Group in illustrating important issues for consideration.

Summary

The West Harris Trust purchased the Scottish Government-owned estates of Luskentyre, Borve and Scarista in Jan 2010 after long and difficult negotiations. These negotiations were needlessly lengthy and tortuous due to a civil service culture geared to complying to every imaginable negative scenario rather than dedicated to community empowerment. This is in stark contrast to HIE's Community Assets team which has a prevailing "can do" culture. If other transfers of SGRPID land are to be facilitated the process needs to be made much clearer and simpler.

Part 2 of the Land Reform Act "The Community Right to Buy" is currently too complex for the West Harris Trust to use effectively. A combination of non-compliant Memo & Arts and local sensitivities meant that an opportunity to purchase the Isle of Taransay has been missed, and may not be available again. Registration of an interest in Taransay and other properties are possibilities for the local community that the Trust would be interested in following up if the process were simpler.

Other key points are:

- Synchronisation of land reform and charity law would greatly assist the process of establishing a community landowning charity
- Local communities need to have a right to be made aware of the sale of land that is not subject to a prior Part 2 registration so that they can seek to purchase if they wish to do so
- Public bodies should have a duty to offer assets to communities before putting them on the open market
- Communities should be able to own and manage seabed which is currently controlled by the Crown Estate

Background to the West Harris Trust

The 3 estates on the west side of Harris were purchased by the Department of Agriculture in the 1930's and '40's to provide land for the settlement of crofting families. Borve Lodge and approx. 50 ha of land was sold to a private individual in 1937 and then sold on to the old Highlands & Islands Development Board before returning to the private sector in the late 1990's. Following settlement the estates suffered a long period of relative decline due to a number of factors:

- There was no attempt to develop the land as the "Department" (not unreasonably) did not see that it had any remit to do anything other than manage the activities of a solely crofting estate
- There was a policy not to release land for public sector housing which resulted in the west side of Harris being the only area of the island with no such provision
- Declining family size and an inability to make a full-time living from crofting meant an inexorable decline in numbers of people living on the estates

In some senses Michael Forsyth's offer of the land under the Transfer of Crofting Estates (Scotland) Act 1997 came too soon. At that time community ownership and management of assets was extremely limited and (as with all other crofting estates held by the state) the croft tenants could see no value in taking on the responsibilities involved in managing loss-making estates.

However following the successful purchase and development of North Harris in 2003 the local community was able to see that community ownership could bring real changes and benefits to an area. A first public meeting was held in January 2007 and a feasibility study carried out leading to a community ballot with 77% in favour of purchase on 3rd October 2008. The purchase was completed on 25th January 2010.

Problems of process

By way of introduction it is worth noting that the process between a supposedly willing seller[1] and a willing buyer took 3 years. This was approximately 1 year longer than the purchase of the former Loch Seaforth Estate by the North Harris Trust in 2005. That estate was owned by an absentee octogenarian landlord living in Switzerland who held the land through a company registered in Panama.

For the Trust the key issues that caused this inordinately time-consuming and wearying process were:

- Despite the policy being to "transfer" the estates to crofting communities who wished them there was no previous experience within SGRPID, and therefore no capacity to deliver a straightforward process
- The process was led on the Edinburgh side by civil servants who appeared to have little understanding of the charitable community land-owning sector and therefore tried to minimise the potential for the community to make any surplus through future capital sales.

[1] The term "seller" is used advisedly as the Trust's view (as expressed below) is that the land should have been transferred at nil cost to the community rather than sold.

- Meetings would be held (including with ministers) at which issues would be clearly agreed and then decisions made would be contradicted in follow-up correspondence from civil servants. The most glaring example of this was when Mike Russell MSP, then Environment Minister stated clearly that he had no wish for clawback provisions to be attached to the sale. However when documents were received from lawyers the clawback conditions were included. By this time Mr Russell had moved to another post and lengthy negotiations ensued to minimise the extent of the clawback provisions.
- Civil servants were moved resulting in a new person picking up the portfolio and effectively returning to square one in the process
- The 2 sides had completely different interpretations of the Public Finance manual. SGRPID insisted that the Trust pay full market valuation despite the original idea behind the Transfer of Crofting Estates Act being that the land should be transferred to the local community free of charge (this was confirmed informally by Lord Forsyth).
- State Aids were regularly quoted as a reason for Scottish Ministers not being able to gift the land. When it was pointed out that local authorities regularly dispose of assets for free or at below market value subject to approval by Scottish Ministers the group was told that local authorities were subject to different rules on this issue! The steering group also pointed out that when a review of the government-owned crofting estates was carried out prior to the Transfer of Crofting Estates Act, it was reported that they were losing in excess of £150,000/year. It is likely that that figure is currently somewhat higher and would in our view be more likely to be considered a state aid under European law. We understand that a civil servant went so far as to ask the State Aids team in Glasgow to notify Europe about the sale as a "scheme", and that they were given short shrift for wasting time on such an inconsequential proposal. It is difficult to avoid the conclusion that the making of such an approach suggests that there was a determined attempt within the civil service to prevent a sale on favourable terms at all costs.
- The valuation of the whole estate was a mere £59,000 yet it was still £59,000 that had to be raised. The Big Lottery Fund were not willing to grant aid a purchase from a Govt department. HIE in turn did not want to wholly or largely fund a purchase when their policy was to act as a minority funder to BIG's Growing Community Assets fund. The eventual package has included a £20,000 loan from another organisation which will have to be paid back at some point. This is in spite of both HIE and BIG recognising that having to raise funds locally for a purchase can be to the detriment of raising funds for development. It is now common to fund purchase costs 100% but to expect the community to raise some funds towards development.
- As mentioned above SGRPID insisted that a clawback provision be included as part of the sale. This stipulates that any development over and above a specific list of projects identified as part of the feasibility process would result in a clawback being paid to the government. Clawback provisions are normally put in place to cover a scenario where a known potential development takes place in the near future; not as a blanket provision to cover all possible developments. This is particularly galling when it is clear no development at all would have taken place while the Govt was landowner. Any additional monies would enable the community to invest in further developments of community benefit: To put it bluntly any requirement to pay clawback money would be a tax on success and has perversely resulted in discussions as to how to minimise the chance of such a scenario occurring.

It is difficult to overstate the difficulty of the process outlined above. It caused a lot of stress and anger to the steering group and resulted in far too much effort being spent on purchasing the land when it should have been spent on developing plans and putting these into action. In the view of the West Harris Trust there needs to be major changes to the system so that it facilitates rather than hinders the process of transfer to community ownership. It is not an overstatement to say that we could not recommend to another community that they seek to take over their land from the Scottish Ministers under the current system. We fear that if a less determined community tried they might give up part way through the process simply because they had too many obstacles to overcome.

WHT would therefore suggest the following improvements need to be made:

- Civil servants involved in the transfer of community assets need to have experience of the community sector so that they can understand what issues communities face
- A simple guide for use by civil servants should be developed that clearly delineates processes to be gone through to conclude a sale. This could be developed in conjunction with HIE's community assets unit.
- Title should be transferred at no cost.
- There should be no clawback conditions in titles whatsoever. This will leave communities free to develop their land without worrying about clawback issues. Scottish Ministers can be assured that appropriately worded governing documents will ensure that an unexpected windfall to a community will be reinvested in the community good and none will be distributed to members/directors.

WHT's Experience of Part 2

Compatibility

WHT recognised even before it concluded its purchase of the estate that there were other land assets in the community area that could bring real benefits if brought into community ownership. The first Trust administrator therefore wrote to the community assets branch of SGRPID asking if the Trust's articles would be suitable for carrying out Part 2 registrations. The response stated "*For clarity, could you please confirm which part of the land Reform (Scotland) Act 2003, the Act, you wish to pursue. I note from your letter that it refers to Section 34(4), which is Community Right to Buy (Part 2) of the Act, however, your current M&A is built around the Transfer of Crofting Estates Act and Crofting Community Right to Buy (Part 3 of the Act). After a quick look I notice that there will have to be some revisions in order to be compliant with either part 2 or part 3 of the Act. If you are to go down the Part 2 route it may be best to opt for a new company to be formed to take forward part 2 specifically."* In our view it is absurd that a form of words which had to be adopted to satisfy one department of the government that WHT was a suitable body to sustainably develop a crofting estate is not suitable to buy another piece of land under Part 2 of the Land Reform Act.

Appropriate community bodies

The question of defining community is an important one and we believe that each community should be able to self-define. In the case of the Trust we allow croft tenants who do not live on the estate but are within reasonable travelling distance as defined by the Crofting Acts (formerly 16km, now 32km) to be members. These people have a stake in the community and are (or should) often be in the community to work their croft and are therefore quite rightly considered to be community members. However the letter quoted above goes on to state the *following "…there is scope for ministerial discretion other than by postcodes. The main aim is to ensure that the "people" you want are included in the community definition. Also, under Part 2 there is no scope to allow crofters with a tenancy within 16km to be an Ordinary member, though they could be brought in as associate members or otherwise."* If true there are shades of Henry Ford here: you can have any community you like as long as it fits the restrictive definitions of the Act. However we disagree with the analysis offered by the Community Assets branch in Edinburgh. Section 34 (1) of the Act states that the Community Body is a company, the articles of which include the following-

> (d) Provision that the *majority* of the members of the company is to consist of members of the community
> (e) Provision whereby the members of the company who consist of members of the community have control of the company

It seems clear to us that even if the Act failed to define "community" in a satisfactory manner there is nothing that would prevent crofters who meet the crofting Acts requirements from being members of a company that can be recognized as a community body. It perhaps highlights the complexities of the Act that even those charged with administering it are unclear as to how community bodies should comply with it.

However there is a wider and more general issue relevant to all communities at stake. Many communities already have active development trusts or similar bodies who would have the capacity to carry out a registration and to facilitate a buyout process but are prevented from doing so by the incompatibility of their governing documents. Even if they were able to do so they might conclude that they were not the most appropriate body to ultimately purchase and manage the land. Harris Development Ltd (HDL) was the body through which the feasibility study work for the purchase of the North Harris Estate was carried out. At the conclusion of the study it was decided that the best option was to form a separate body (the North Harris Trust) to purchase and manage the land; leaving HDL to carry out a general development role across the whole of Harris. HDL later assisted the Loch Seaforth community to carry out a feasibility study and decide on its preferred future. Once the community decided that it wished to join with the North Harris Trust HDL passed responsibility for the buyout process to NHT. Although both of these processes happened outwith the Act, it would appear to be in the interests of communities everywhere that such processes could be enabled by the Act.

Section 2 (1) of the Transfer of crofting Estates Act might provide a model for simple legislation. It states simply that the body to which the land is transferred:

(a) Is representative of the crofting interests in the property to be disposed of; and
(b) Has the promotion of the interests of persons residing on such property as its primary objective

Furthermore we see no need why a community body should have to be a company in order to register an interest in a piece of land. Registering a company and annual reporting requirements are onerous activities if the company is nothing more than an empty shell waiting for a property to be sold. Unincorporated associations are common in the voluntary sector and model articles are available from local councils of voluntary service, enabling properly structured community groups to be set up with ease. It may then be appropriate to convert to company status at purchase but it has no useful purpose at registration. It is notable that Section 2 (1) of the Transfer of Crofting Estates Act also allows for the disposal of crofting estates to either *"corporate or unincorporated"* bodies.

Missed Opportunity
The Isle of Taransay unexpectedly came on the market in May 2011. The situation described above meant that the Trust could not apply for a late registration under part 2 of the Land Reform Act. It had also been made clear by a previous Minister that late registrations were less likely to be successful some years after the Act had been implemented because communities could reasonably have been expected to have done a timeous registration by then. However the Trust was interested in carrying out a purchase and contacted the sellers to ask for a meeting. The meeting did not take place because the sellers concluded a sale agreement with the purchaser within a fortnight of the island going on the market.

A secondary issue touching on part 2 here is that the island was owned by 2 local brothers, both of whom were croft tenants of the Trust; one had been part of the steering group and then an initial director of the Trust following the purchase. Even if the Trust had been eligible to carry out part 2 registrations it would have been questionable as to whether it would have done so. For right or for wrong there is a strong belief that carrying out a registration could have been interpreted by the owners as a strong signal that they were no longer wanted as landowners in the community. This would not have been the reality but relationships are very important in rural communities and people would not have been inclined to risk jeopardising those relationships for a possibility of ownership that in all likelihood would have been perceived as remote.

Other issues in facilitating community ownership

Charitable status
The Land Reform Act uses the term "sustainable development" and Memo & Arts must show that a community is pursuing this objective in order to be allowed to register an interest and purchase land. However this is not a charitable purpose as defined in Section 7(2) of the Charities Trustee and Investment (Scotland) Act 2005.

The nearest charitable purpose is "The advancement of citizenship or community development." Others of relevance are: "The advancement of the arts, heritage, culture or science" and "The advancement of environmental protection or improvement". Various groups have had difficulties in coming up with a suitable form of words which satisfies both the requirements of the Land Reform Act and charities legislation.

WHT was compelled to make clear references to the Transfer of Crofting Estates Act and to the benefits to crofters in its Memo & Arts in order to be able to purchase. However the wording was found to be inappropriate for registering for charitable purposes. The Trust then had to agree a form of words with OSCR which was acceptable and then get approval from Scottish Ministers before the necessary changes could be made.

Notification of Sale

Many community purchases have only occurred because communities became aware that the land was for sale. Prior to the land being put on the market there was no particular local momentum for a purchase but having been made aware of the sale the local community rose to the opportunity and purchased the land. The sale itself was the trigger for action.

For many communities the sound of the starting gun is never heard because the land is either sold following informal marketing or through a channel that the local community is not aware of. Examples of these in Harris are relevant and come from both public bodies and private individuals:

- Scottish Water has sold a number of redundant assets in recent years across Harris including lochs, weirs and small buildings. As a rule these are sold by auction in the central belt and local residents have only been made aware of these sales extremely late in the process and where there was little they could do about it. Prior to the purchase of West Harris Scottish Water sold a weir and a small area of ground nearby to a private individual. Notwithstanding the low likelihood of being able to secure planning permission the individual has the desire to build a home at the site which is about 1/2mile from the road, well away from a settlement and in an elevated position. The site of the weir is the perfect location for a small hydro scheme and if the Trust owned the weir it would be able to reduce the costs of its planned hydro development. However negotiations have not been successful and the Trust will need to build a separate weir. This example illustrates how the seemingly innocuous disposal of an unwanted asset by a public body can be a burden to a community.
- It was noted in our introduction that HIE had at one time been owner of Borve Lodge. In addition to a small area of land they had acquired sporting leases over the West Harris estates from SGRPID which they sublet to the purchasers of Borve Lodge on sale. One of the leases ended while the local community was negotiating the purchase of West Harris. HIE was approached by the owner who wished to purchase a 99 year lease over all of the land and it was in the process of being agreed by HIE and SGRPID when the community discovered what was being proposed. It was only through quick action that the rights were not lost to the community for generations. If the community had not been pursuing a purchase at the time it is almost certain that there rights would have gone to a 3rd party,

thereby potentially undermining the viability of any later community effort to take over the estate.

- Aline Estate bordering N Harris was sold by private agreement a number of years ago with no public marketing of any sort that the local community was aware of. It rankles that the community did not have a chance to purchase the estate and try to develop it for community benefit. However as the law stands no private landowner has any duty to publicly market an estate, far less inform the community that it is on the market. The UK Govt has powers to prevent the export of art objects considered to be national treasures for a period in order to allow UK buyers to match the sale price and keep the art in this country. If that can be done for art, surely it can also be done for the primary assets of a community?
- The Port of Leverburgh Estate is a scatter of land parcels concentrated around the village of Leverburgh at the southern end of Harris. It was put on the market briefly round about 2010 through a Stornoway-based estate agent but then quickly withdrawn, shortly after the idea of a community purchase was floated within the community. There was a suggestion that there were discrepancies between the actual title and what was being offered for sale but there was also a suspicion that there may have been a desire to keep the land out of community hands. It would have been difficult for the local community to register an interest in some or all of the parcels of land due to the complex nature of registration and unclear information on what land the estate actually comprised. Therefore no attempt was made to do anything. At the time of writing it is being circulated locally that a private sale has been concluded with another local landowner.

The first 3 examples show how easy it is for public bodies and private individuals to sell or offer to sell significant assets without any reference to the local community whatsoever. The 4th example illustrates how even when some information is available the barriers are too high for a community inexperienced in the issues to give community land ownership serious consideration. All of these examples occurred post Land Reform Act. In our view it is reprehensible that in the 21st century the future prospects of whole communities should be decided without reference to the people most affected by the use, non-use or misuse of their local assets.

Crown Estate

There is no reason why assets held by the Crown Estate should not be transferred to communities, especially those like WHT which have a long coastline and would like to promote economic activity linked to the sea. It is a source of great anger to local communities that their development prospects are limited by the Crown Estate's activities and their futures determined by the awarding of leases to developers with no prior local knowledge or influence.

The situation regarding foreshore rights in W Harris is a complex one. The rights to the Borve Estate were established in the 1960's following correspondence regarding royalties on sand-mining by a local business. Following purchase WHT has sought to establish these rights for Scarista and Luskentyre as well. The Chief Executive and Chair of the Crown estate Commissioners for Scotland met with directors of the Trust in Tarbert and informally seemed quite happy to concede the rights to the 2 estates. However when they drove south and saw the tide out at Luskentyre revealing up to 3km of sandy foreshore the Chief Executive immediately started back tracking. The Crown Estate subsequently informed us that they would not contest

our claim to Scarista but that we had not provided sufficient information for Luskentyre; this despite the fact that the same types of evidence had been produced for both locations. An additional affidavit was provided for Luskentyre showing further use of the foreshore but nothing has been heard since. We are left to wonder whether we might have been more successful had the Chair and Chief Executive visited at high tide.

Like many communities we would like to develop pontoon and mooring facilities and explore options for sea-based renewables. It is extremely frustrating that in order to do so we will have to negotiate permission from and pay rent to the Crown Estate. In reality it is nothing more than a body which extracts taxes from the local economy and provides no benefit in return. On-shore feudalism has been abolished in Scotland but off-shore feudalism is alive and well.

Conclusions

Significant changes need to be made to the legal framework to enable more communities to own land, and for the process of doing so to be as simple as possible. WHT therefore proposes the following changes in the law:

- The requirements for recognising a community body should be made much simpler. A registration should be able to be carried out by any representative group of a community, including unincorporated associations.
- A community body which carried out a registration should be able to transfer the right to purchase the land to another community body if that is deemed to be the best solution for a given community
- Late registrations should be carried out under same requirements as timeous ones
- The LRRG should explore how Land Reform and Charities legislation could be synchronised to enable easier compliance by community land owning trusts.
- All sales of land and other assets which are publicly marketed must be advertised in a significant local media outlet at the same time as any wider marketing. This would put local communities on an even footing with national and international buyers without putting an undue burden on sellers.
- Public bodies should have a duty placed on them to actively offer redundant assets to the community as a first option.
- A private landowner who negotiates a sale informally with no marketing should have a duty to publicise the impending sale to the local community for a fixed period prior to being allowed to register the sale. This would effectively give the community the opportunity to register an interest and have a right of pre-emption on the land.
- Communities should have an automatic right to purchase the rights to their local sea bed from the Crown Estate and develop it for their local good.

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