

# **THE CROFTING COMMUNITY RIGHT TO BUY IN THE LAND REFORM (SCOTLAND) ACT 2003**

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## **INTRODUCTION**

This article outlines, and offers a critique of, some of the principal provisions of the Land Reform (Scotland) Act 2003 (the 'Act' or the '2003 Act') in relation to the crofting community right to buy in Part 3 of the Act and considers the development of these provisions through the Parliamentary process. It is, however, important that these specific provisions should be seen in the context of the wider issue of the historical debate over land reform in Scotland in general, and crofting legislation in particular.

The ownership of land in Scotland or, to use a convenient expression, 'the Scottish land question' has long occupied a significant position in Scottish politics, although not consistently so. In his article on the Land Question and the Scottish Parliament<sup>1</sup>, Dr Ewen Cameron identifies three distinct phases of political debate since 1880: from 1880 to the mid-1920s when the issue was at the heart of the debate about the nature of society which accompanied the rise of the Labour party, a period which saw the Crofters Holdings (Scotland) Act 1886 and the enactments in 1911 and 1919 which extended the scope of crofting from the crofting counties of the Highlands and Islands to the whole of Scotland; a period from the mid-1920s to the mid-1960s when the question

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<sup>1</sup> Cameron, Ewen A. 'Unfinished Business': *The Land Question and the Scottish Parliament*, in *Contemporary British History*, Vol. 15, No1 (Spring 2001), p. 84.

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was less prominent; and the period from the mid-1960s to the present time. This last period is characterised by a sharp peak of interest at the start when the land question, in particular in relation to the Highlands and Islands, assumed renewed interest with the creation of the Highlands and Islands Development Board and the granting, in 1976, to individual crofters of the right to buy their croft; thereafter interest waned until the end of the 20th century when, with the return of a Labour Government and the creation of the Scottish Parliament the Scottish land question has assumed a primacy of interest and importance which might have surprised the early campaigners. In its 1997 manifesto, the Labour party committed itself 'to initiate a study into the system of land ownership and management in Scotland' and this commitment was met when the new Labour Government established the Land Reform Policy Group (the 'LRPG') under the Chairmanship of Lord Sewel, in October 1997 with a 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.<sup>2</sup>

As Donald Dewer had made clear in his 1998 John McEwen Memorial Lecture, the Scottish land question at the end of the 20th century did not relate merely to the Highlands: it was of universal importance to Scotland<sup>3</sup> and the remit of the LRPG was made suitably wide. The publication of the LRPG's first paper, **Identifying the Problems**, in February 1998 made it clear that '... providing opportunities for individuals and communities and ensuring more sustainable approaches to the environment'<sup>4</sup> were the key issues. Following consultation on this paper, the LRPG published, in September 1998, its paper **Identifying the Solutions** which gave its vision for the future which was stated to include '... more scope for community ownership and management of local land where this can be sustainable ... [and] ... more sustainable crofting communities.'<sup>5</sup> The concept of community

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<sup>2</sup> LRPG, *Identifying the Problems*, the Scottish Office, February 1998, p.1.

<sup>3</sup> Dewer D. *Land Reform for the 21st Century*, Perth, 1998, *The 1998 McEwen Lecture on Land Tenure in Scotland*.

<sup>4</sup> Cameron, 2001, p. 101.

<sup>5</sup> LRPG, *Identifying the Solutions*, the Scottish Office, September 1998 p. 7-8.

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was at the heart of the LRPG's proposals and in its January 1999 paper, **Recommendations for Action**, this became clear with a recommendation that there should be legislation to give a community right to buy and a separate crofting community right to buy.<sup>6</sup> In the July 1999 White Paper, **Proposals for Legislation**, the community right to buy was proposed for legislation but, so far as the crofting community right to buy was concerned, it was thought that this would '... be distinctively different in a wide range of ways from the general community right to buy'<sup>7</sup> and the Scottish Executive was said to be examining the implications of providing this right in a general Land Reform Bill rather than as part of a Crofting Bill. In the event it was announced, notwithstanding the distinctive differences, that the proposed Land Reform Bill would, after all, include the crofting community right to buy<sup>8</sup> and the draft Land Reform Bill published in February 2001 contained the relevant provisions<sup>9</sup>.

Croft land and crofters have, since the Crofters Holdings (Scotland) Act 1886, had a special, indeed privileged, position in Scottish land law but the basic principles of crofting law, since their formulation in 1886, have undergone little change save for the introduction, in 1976, of the individual right for each crofter to buy his croft house, inbye land and apportioned common grazings.<sup>10</sup> That individual crofters should own, rather than lease,

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<sup>6</sup> LRPG, *Recommendations for Action*, the Scottish Office, January 1999, p. 20-21.

<sup>7</sup> *Land Reform Proposals for Legislation*, July 1999, SE/1999/1; *Land Reform. Consultative Panel on Crofting: Power to give crofting communities the right to buy their croft land*, the Rural Affairs Department, 26 July 1999.

<sup>8</sup> *Scottish Parliament Official Report* 24 November 1999, column 850.

<sup>9</sup> *Draft Land Reform (Scotland) Bill. Consultation Paper, February 2001 (the 'Consultation Paper')*.

<sup>10</sup> This right was contained in the *Crofters Reform (Scotland) Act 1976* but since the consolidation of croft law in the *Crofters (Scotland) Act 1993* (the '1993 Act') is now to be found in sections 12 to 19 of the 1993 Act. For papers on the development of croft law see MacCuish, D.J. 'The Origin and Development of Croft Law', 'The Case for Converting Crofting Tenure to ownership', 'Reform of Crofting Tenure', and 'Ninety Years of Crofting Legislation and Administration', in *Transactions of the Gaelic Society of Inverness*, at, respectively, Volume XLIII 1962, p. 181-196, Volume XLVI 1969-1970, p.89-113, Volume XLVIII 1972-1974, p.557-583 and 1977-1978, p. 296-326.

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their croft land had, in fact, been suggested by the 1884 Napier Commission whose report gave rise to the 1886 Act<sup>11</sup> but it was not until 1976 that an individual right to buy became law.<sup>12</sup> After the right to buy has been exercised, the land remains subject to the control of the crofting legislation but the crofting tenure is extinguished and the new owner becomes the owner of a vacant croft.<sup>13</sup> The individual right to buy provisions have not, so far, been greatly used by crofters.

Community ownership of croft land is quite different from owner-occupancy under the 1976 legislation where the tenancy is extinguished. With community ownership of croft lands the crofters remain tenants but with a community landlord. Community ownership is not, itself, a new concept: the Stornoway Trust in Lewis has been in existence since 1923. But further development of the idea had, until recently, been little discussed, although the idea of community ownership of croft lands through a crofting trust had been mooted in the early 1970's by a working party set up by the Scottish Council of the Labour Party. The working party, set up to consider crofting policy, was strongly in favour of community ownership to be achieved by transferring all croft lands to an elected crofting trust.<sup>14</sup> The Public Accounts Committee also recommended that the Scottish Office should dispose of all its crofting estates. But the proposals did not find favour with the Government of the day and it was not until 1989 that the idea of such a disposal was to resurface at the Scottish Crofters Union conference in that year and in February 1990 the Department of Agriculture and Fisheries for Scotland issued a consultation paper on the possible disposal of the

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<sup>11</sup> See Report by the Commissioners of Inquiry into the conditions of Crofters and Cottars in the Highlands and Islands of Scotland, 1884, PP XXXII (the 'Napier Report'), p.41.

<sup>12</sup> The Crofters Commission Report of 1968 which gave rise to the provision had, in fact, recommended the more radical proposal that each crofter should be vested with the right of ownership in his own croft in return for an annuity.

<sup>13</sup> For a more detailed analysis of the right to buy, see MacCuish, D.J. 'Crofting Reform (Scotland) Act 1976' in *Journal of the Law Society of Scotland*, Volume 23, February 1978, p.113-116 and MacAskill, John. **We Have Won The Land: The story of the purchase by the Assynt Crofters Trust of the North Lochinver Estate**, Stornoway, 1999, p.206-209.

<sup>14</sup> Hunter, James. *The Claim of Crofting*. Edinburgh, 1991, p.141.

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Department's crofting estates<sup>15</sup> to community ownership, making special reference to Skye and Raasay. The consultation paper said that the idea of trust ownership was not a new one, referring to the example of the Stornoway Trust and to the proposals, during the 1960s, by the Crofters Commission that common grazing lands should be vested in a trust. The Highlands and Islands Development Board and the Scottish Crofters Union asked the Arkleton Trust (Research) Limited to submit a report on the legal and practical implications of a transfer of the Skye and Raasay estates to community ownership. In the event, nothing came of the Government's proposals. There was no appetite amongst crofters on the Department's estates for community ownership.

Following the acquisitions of private crofting estates by the Assynt Crofters Trust Limited in 1992, by the Borve and Anishadder Township Trust Limited in 1993 and by the Isle of Eigg Heritage Trust Limited in 1995, the Scottish Office published a consultation paper in 1996 on the disposal of the Secretary of State's crofting estates and a further, more far-reaching, idea was put forward by the Crofting Trust Steering Group comprising representatives of the Scottish Crofters Union, Comhairle nan Eilean and the Highland Council: a Pan Highlands and Islands Crofting Trust which would have the task of encouraging the setting up of local crofting trusts. The responses to the Scottish Office consultation paper showed that while most of the respondents were broadly supportive of the Secretary of State's proposals for crofting trusts and that while there was some interest in the idea of establishing trusts, most of the respondents saw the status quo as the preferred option. Notwithstanding this lack of interest, on 20th October 1996, the Government introduced a Bill in the House of Lords to enable the Secretary of State to dispose of his crofting estates, and the Bill completed its final stages on 18th March 1997, passing into law as the Transfer of Crofting Estates (Scotland) Act 1997 (the '1997 Act'), one of the final pieces of legislation of the Conservative Government. We shall compare, below, the main provisions of the 1997 Act with the crofting community right to buy in Part 3 of the 2003 Act, but it is important to note here that, while the 1997 Act was conceived as a community purchase, the nature of that community is not as wide as the

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<sup>15</sup> *These estates were acquired by the Scottish Office in the early 1900s to facilitate land settlement. There are some 50 such estates with some 1,400 croft tenancies covering some 105,000 hectares.*

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community in Part 3 of the 2003 Act: the 1996 Consultation Paper, significantly, said: 'It would be for the crofters to decide whether membership of the trust should be restricted to local crofters or also include other local community representatives.'<sup>16</sup>

The LRPG's vision for the future of crofting presaged important changes to croft law and administration and the LRPG's paper **Recommendations for Action**, in addition to the proposal for more sustainable crofting communities, put forward proposals for more local involvement in, and accountability for, crofting administration, simplified crofting legislation and administration, proposed more active crofters, and proposed the undertaking of a wider range of land-based and other economic activity rather than predominantly agriculture. The Scottish Executive issued a White Paper on Crofting Reform Proposals for Legislation in July 2002 which developed this vision of the LRPG.<sup>17</sup> It was announced on 25th March 2003 that decisions about further consultation and the timing of any Crofting Reform legislation would be a matter for a future administration after the 2003 elections for the Scottish Parliament.<sup>18</sup>

As we have seen, the proposal to give a crofting community right to buy was not to await such a Crofting Reform Bill which would give effect to the LRPG's vision for the future of crofting, but was included in the Land Reform Bill published in 2001: the first time since 1911 that important developments in croft law were not to be included in legislation directed solely to crofting.<sup>19</sup> The Bill was introduced on 27th November 2001,

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<sup>16</sup> *Crofting Trusts. Consultation Paper on the Disposal of the Secretary of State's Crofting Estates, the Scottish Office, February 1996.*

<sup>17</sup> *Crofting Reform Proposals for Legislation July 2002, SE/2002/105 (the '2002 Crofting White Paper'). It is interesting, and perhaps significant, to note that in the introduction to this Paper, one of the key objectives identified by the LRPG of 'undertaking a wider range of land-based and other economic activity rather than predominantly agriculture' was now expressed rather differently as 'undertaking a wider range of land-based and other economic activity in addition to agriculture' (emphases added).*

<sup>18</sup> *Scottish Parliament Official Report Written Answer 25 March 2003.*

<sup>19</sup> *The Small Landholders (Scotland) Act 1911 which extended the area in which the crofting code operated to the whole of Scotland. The term 'crofter' was superseded by the term 'landholder'... and the crofter tended to lose his identity and to become*

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received its Stage 1 approval on 20th March 2002 and was passed at Stage 3 on 23rd January 2003, receiving the Royal Assent on 25th February 2003 as the Land Reform (Scotland) Act 2003<sup>20</sup>.

The provisions in Part 3 of the Act are radical. They contain the absolute right for a group of private citizens, the members of a crofting community, to acquire croft land, certain related land and certain sporting interests without the consent of the owner, another private citizen. The general community right to buy in Part 2 of the Act does not give such an absolute right but rather a pre-emptive right to buy when, and if, the relevant land is offered for sale. The compulsory purchase nature of the provisions in Part 3 has led to concerns about their compatibility with Article 1 of the first protocol to the European Convention on Human Rights ('ECHR') - the protection of property.<sup>21</sup>

### **THE LAND WHICH MAY BE BOUGHT**

#### ***Croft land***

The right to buy extends to all land which is subject to crofting tenure and regulation and includes crofts even if unlet, and common grazings (both apportioned and un-apportioned), salmon fishings in inland waters which are within or contiguous to the relevant croft land, and mineral rights in the relevant croft land.<sup>22</sup> There is also a right for the crofting community body to buy croft land which consists only of salmon fishings or mineral rights.<sup>23</sup> The

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*submerged among the small agriculturalists of Scotland... ' - MacCuish, 1978, p.306-307.*

<sup>20</sup> *The Bill had the longest legislative passage of any Bill in the first session (1999-2003) of the Scottish Parliament.*

<sup>21</sup> *Justice 2 Committee 2nd Report, 2002, the Stage 1 Report on the Land Reform (Scotland) Bill (the 'Stage 1 Report'), Volume 2, p. 6 and p.34.*

<sup>22</sup> *Section 68(2). The use of the word 'contiguous' in section 68 presumably means that the salmon fishings must be touching the relevant croft land - see Agnew, Sir Crispin. **Crofting Law**, Edinburgh, 2000, p.80.*

<sup>23</sup> *Section 69. The rights may only be purchased if the crofting community body is applying to buy the croft land to which the rights relate or has already bought that land, in the case of salmon fishing rights, in the last year, and in the case of mineral*

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right to buy croft land does not extend to an owner-occupied croft - i.e. a croft where the right to buy the croft has already been exercised under section 12 of the 1993 Act.<sup>24</sup> The position of the owner-occupied croft is interesting and the Act, in excluding the right to buy in respect of owner-occupied crofts, may be thought to provide to the owner a privileged position over other private proprietors whose land is subject to compulsory purchase under Part 3 of the Act. This would not, however, be a correct interpretation. At its fundamental level, the exercise of the rights under Part 3 of the Act replaces the private crofting landlord with a community landlord; the croft tenancies in the crofting community continue as before. The owner-occupier of a croft is, by definition, an owner and not a tenant and the exercise of Part 3 rights over the owner-occupied croft would have resulted in the crofting community having absolute ownership of the owner-occupied croft rather than ownership as a landlord. This would have been an anomaly.

#### ***Additional land and extra sporting interests***

To enable the effective management of the croft land being acquired<sup>25</sup> the right to buy also extends, to a limited extent, to non-croft land<sup>26</sup> and extra sporting interests. The additional land can be purchased at the same time as croft land is being acquired provided it is contiguous to the croft land which is being acquired and is owned by the owner of the relevant croft land. It cannot include inland salmon fishings or mineral rights which are within or contiguous to the additional land. If the owner does not consent to a purchase (or has not requested that the land should be included in the croft land to be acquired) the additional land can only be acquired if the Scottish Land Court determines that such a purchase may be made:<sup>27</sup> in that case the additional land cannot exceed the greater of 10 hectares or 5 per cent of the combined area of the additional land and the relevant croft land being acquired or which has previously been acquired by the crofting community body under the

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*rights in the last 5 years. This provision caused considerable controversy but is outside the scope of this article.*

<sup>24</sup> Section 68(3).

<sup>25</sup> See the Consultation Paper, p. 39.

<sup>26</sup> Referred to as 'eligible additional land'. Section 70(1).

<sup>27</sup> Section 77.

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terms of the Act.<sup>28</sup> Where a crofting community body has, under the Act, bought or retained croft land, the body may apply to buy eligible sporting interests which the body has not previously leased under section 83 of the Act. The sporting interests which may be acquired are the rights of a person other than the owner of the relevant croft land under any lease or other contract to shoot or fish on the land.

### **WHO HAS THE RIGHT TO BUY?**

#### *The crofting community body*

The right to buy is given to a body (the 'crofting community body') which must be a company limited by guarantee.<sup>29</sup> In its Stage 1 Report on the Bill, the Scottish Parliament's Justice 2 Committee was not convinced that a company limited by guarantee was the only suitable vehicle for community purchase and invited '... the Executive to consider a more flexible approach to community bodies ...'.<sup>30</sup> In the event the Executive came to the conclusion that because there was '... a robustness, an openness and a transparency in relation to such a company and how they are established and maintained ...', the company limited by guarantee should be the only vehicle used. The fact that the model represented by the successful Stornoway Trust was rejected is interesting and not wholly convincing.<sup>31</sup>

The company must have at least 20 members. The Justice 2 Committee was not convinced that it was necessary to express a specific number and

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<sup>28</sup> *It is suggested that this right to buy additional land means that the crofting community body has the opportunity to acquire the whole estate owned by the owner of the eligible croft land - see Current Law Statutes 2003 asp 2, p. 100. However, given the restrictions on size, this cannot be a correct interpretation, but neither can it be wholly accurate to say that the rationale for including this right to acquire additional land was to deal with small 'tidying up' purchases and for dealing with potential 'ransom' strips, as was suggested to the author in a conversation with a civil servant in the Scottish Executive with responsibility for the Act.*

<sup>29</sup> *Section 71(1).*

<sup>30</sup> *The Stage 1 Report, Volume 1, para 82-87.*

<sup>31</sup> *For a consideration of the other vehicles which could be used, see MacAskill, 1999, p.56-58.*

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suggested that specific criteria (such as the need to be representative) would be sufficient, but this was not accepted by the Executive.<sup>32</sup> However, the Executive introduced, at Stage 2, an amendment to give Ministers discretion to disapply the minimum number requirement in the same manner as had originally been included in the parallel provision in Part 2 of the Act.<sup>33</sup> The majority of the members must be members of the crofting community and the members of the company who are members of the crofting community must have control of the company.<sup>34</sup> Membership of the company is not, therefore, limited to members of the crofting community and, furthermore, there is no requirement that croft tenants should have control or, indeed, that there should be a particular percentage of the crofting community represented by croft tenants. This is discussed below.

#### ***The crofting community***

The expression 'the crofting community' is not new to crofting legislation<sup>35</sup> but the definition of it in Part 3 brings a quite new dimension to the expression: it includes a non-crofter.<sup>36</sup> The crofting community is defined as comprising all those people who are resident in the crofting township which is situated in or otherwise associated with the croft land over which there is a right to buy, or are tenants of crofts in the crofting township and do not live there but live within 16 km of that township, and who are entitled to vote in local government elections in the polling district where the crofting township

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<sup>32</sup> *The Stage 1 Report, Volume 1 para 88-91, Volume 2, p. 205.*

<sup>33</sup> *Justice 2 Committee Official Report Meeting No. 37, 2002, column 1967. It was explained that this discretion was only likely to be exercised in exceptional circumstances. Section 71(2).*

<sup>34</sup> *Section 71(1)(d) and (e). It is not clear whether the words 'control of the company' refer to meetings of the Directors or of the members.*

<sup>35</sup> *The expression is used in relation to absentee crofters and decroftings in sections 22 and 25 of the 1993 Act where it can only include croft tenants and owner-occupied crofts - see Agnew, 2000, p. 110.*

<sup>36</sup> *There is, in fact, a similar definition of the expression in The Crofting Community Development Scheme (Scotland) Regulations 2001 where it means the residents of a township some or all of whom are the owners, tenants or sub-tenants of crofts in the township.*

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is situated or the district in which they live.<sup>37</sup> The provision that allows croft tenants who do not live on the croft but who reside within 16 km of the township to be part of the crofting community follows the provisions of the 1993 Act as to absentee crofters. But, rather oddly, the Act uses the concept of 'residence' rather than 'ordinary residence' as is used in the 1993 Act. It would be unfortunate if anything turned on this difference. On the assumption that the two are meant to be the same the interests of clarity and consistency would have been better served by following the words used in the 1993 Act.<sup>38</sup>

A crofting township is defined as any two or more crofts which share the right to use a common grazing together with that common grazing and includes houses pertaining to or contiguous to those crofts or common grazings.<sup>39</sup>

Members of the crofting community can include both people who are croft tenants and those who are not croft tenants, but apart from the non-resident tenants of crofts, the definition in section 71(5)(a) limits the crofting community to those persons who are resident in the relevant crofting township. Putting together the definitions of the crofting township and the crofting community, we find that the crofting community consists of '... those

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<sup>37</sup> Section 71(5)(a). Ministers, however, have the right to define the crofting community in such other way as Ministers approve, and so this definition is subject to change - section 71(5)(b).

<sup>38</sup> See Section 22 of the 1993 Act. Presumably, as is the case with the 1993 Act, the 16 km is measured in a straight line and is not taken to be the distance by road- see Agnew, 2000, p. 104. The much vexed question of residence for the purposes of the crofting legislation began in section 34 of the Crofters Holdings (Scotland) Act 1886 where residence on the croft was required. In the Small Landholders (Scotland) Act 1911, this residential requirement was omitted, probably accidentally, and replaced simply with a requirement for residence on the croft at the commencement of the 1911 Act - see **Rogerson v. Chilton** 1917 SC 453. The provisions as to residence and absentee crofters were introduced in the Crofters (Scotland) Act 1955 with 2 miles being the limit and this was changed to 10 miles in the Crofters (Scotland) Act 1961, and metrication was applied by the Crofters Reform (Scotland) Act 1976 when 16 km was substituted for 10 miles.

<sup>39</sup> Presumably the words 'contiguous or pertaining to' will be construed in the same way that the use of the words in section 12 of the 1993 Act is construed - see Agnew, 2000, p.79-80.

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persons who are resident in any two or more crofts which share the right to use a common grazing together with that common grazing and any houses pertaining to or contiguous to those crofts or common grazing and the tenants of those crofts who are resident not more than 16 km away'. So, the only persons who can form part of the crofting community are those persons who are resident on the crofts (i.e. the croft tenant and his or her family and any other person living in the croft house who qualifies as a local government elector), and those persons who are resident in a house which pertains to or is contiguous to the croft or the common grazings and who qualify as local government electors.

We should be absolutely clear, then, that the definition of the crofting community comprises not just the croft tenants and people who live on the crofts, but also extends to people who are not croft tenants and who do not live on the crofts. It is important to recognise this distinction. It is quite different, as we have noted, from the 1993 Act. It is also quite different from the formula adopted in the 1997 Act<sup>40</sup>. In the 1997 Act, which remains in force, the body which may apply for a transfer to it of Scottish Ministers' croft lands is required to be approved by Scottish Ministers after consultation with the Crofters Commission, and it must be a body which is representative of the croft tenants and those with rights in the common grazings in the estate and which has the promotion of the interests of persons residing on the estate for its primary objective.<sup>41</sup> As we have seen, the 1996 consultation paper which preceded the 1997 Act stated that it should be for the crofters to decide who should comprise the community. During the debate on the Bill in the House of Lords, the Earl of Lindsay<sup>42</sup> made the Government's position clear:

... there is a need to distinguish between two important considerations, one of which should have primacy over the other but with both of them still being valuable and unavoidable. The primacy should go to the interests of those who are residing on the property as tenants of the Secretary of State. The second consideration, which should form part of

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<sup>40</sup> *There are other important differences: for example in relation to mineral and sporting rights, the valuation of the land and the fact that there is no requirement for consistency with sustainable development.*

<sup>41</sup> *Section 2(1)(a) and (b) and section 7(1) of the 1997 Act.*

<sup>42</sup> *The Parliamentary Under-Secretary of State.*

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the advice from the Crofters Commission ... should not only include the interests of those who reside on the estate but also the interests of the wider community in the district in which the estate is situated.<sup>43</sup>

The extent to which non-crofters should be represented on the body and be involved in the consultation process over an acquisition was examined in detail in the evidence given before the Scottish Select Committee on the Bill<sup>44</sup> and it was clear that Lord Sewel, who was to become the Chairman of the LRPG, and Professor John Bryden, who was to be appointed external assessor to the LRPG, did not agree with this primacy of interest and believed that the formulation of the 1997 Act did not provide for adequate representation of the interests of non-crofters. As we have seen, the concept of community was a fundamental part of the vision of the LRPG contained in the 2003 Act and that the community should be inclusive and not exclusive: in the Stage 1 Report by the lead committee on the Bill, the Justice 2 Committee, the Committee determined that the exclusion of the wider community from the crofting community body would be a recipe for division and supported: '... the inclusion of all residents in the definition of a crofting community ...'<sup>45</sup>

As we examine the detailed exchanges on this issue in the Bill in the Scottish Parliament we should recognise that this vision which was crucial to the general community right to buy in Part 2 of the Bill, was also crucial in determining the definition of the crofting community in Part 3.<sup>46</sup>

There was, in fact, concern expressed by a number of people about the inclusion of non-crofters within the definition of a crofting community and the implications of their inclusion in terms of the control of the crofting community body. The Scottish Crofting Foundation wanted there to be a requirement that a majority of the Directors of the crofting community body

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<sup>43</sup> *Hansard House of Lords Debates 20 January 1997, column CWH 12.*

<sup>44</sup> *Transfer of Crofting Estates (Scotland) Bill [H.L.]. Minutes of Evidence of the Scottish Select Committee, Session 1996-97, HL Paper 27.*

<sup>45</sup> *The Stage 1 Report, Volume 1, p. 31.*

<sup>46</sup> *The consultation process for the Bill revealed that the crofting interests wanted the 1997 Act to provide the basis for determining the crofting community - see the Consultation Paper, para 5.1 and 5.8.*

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should be crofting tenants and that a resolution of the crofting community body should be passed by the same majority as provided for in the ballot held to determine whether an application should proceed.<sup>47</sup> John Farquhar Munro, the Liberal Democrat member for Ross, Skye and Inverness West, a self-declared '... poor Highland crofter', said, in the Stage 1 debate:

I have been to several meetings in the Highlands to discuss the issue and the overriding opinion is that the percentage of crofters that is needed to agree to a proposed buy-out must be raised to 75 per cent. I approve of increasing the percentage, but ... [a] more realistic figure might be 60 per cent approval from the crofting community. ... However, it is essential that crofting communities or grazing committees appoint a majority of directors to boards so that the communities do not lose their pastoral or agricultural basis. Ministers must make it clear from the start that ... the rights of crofters as they stood in 1886 and as they stand today must remain intact.<sup>48</sup>

While Rhoda Grant, a Labour member for the Highlands and Islands, did not support a change to the terms of the ballot, she did:

... ask the Minister to consider that 50 per cent of the directors of the community company should be crofters or their appointees. That would ensure that crofters' interests were represented fully at all times.<sup>49</sup>

John MacKenzie of the Assynt Crofters Trust Limited made known his concerns that croft land should be owned by crofters early in the process<sup>50</sup> and, together with Allan MacRae of the Trust, has continued to voice his concerns. Allan Macrae, writing in the October 2003 issue of **The Crofter** said:

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<sup>47</sup> See the Stage 1 Report, Volume 2, p. 142 and p. 168.

<sup>48</sup> Scottish Parliament Official Report 20 March 2002, column 10418.

<sup>49</sup> Scottish Parliament Official Report 20 March 2002, column 10409.

<sup>50</sup> *Am Bratach*, February 2001.

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Certainly as a crofter looking from Assynt it is a bitter disappointment that the Land Reform Bill [sic] has refused to recognise that crofters should own their land in their own right as we do [in Assynt].<sup>51</sup>

Although Ross Finnie, the Minister for the Environment and Rural Development, accepted that Rhoda Grant's suggestion of giving crofters 'ring-fenced places' on the crofting community body was constructive and one which should be considered at Stage 2<sup>52</sup> these concerns and the specific proposals were, in the event, rejected by the Scottish Executive. Ross Finnie was clear as to the reasons for this rejection:

... the croft tenants are usually a minority within crofting communities and have their own vested agricultural interests which can be at odds with the need of the wider community. There was therefore a risk that the effect would be to replace the landowner with what would simply be another monopoly interest. Furthermore, because the croft tenants already have considerable power to dictate the way the land is used the end result would be ownership by a vested interest with greater power than before.<sup>53</sup>

Allan Wilson, the Deputy Minister for the Environment and Rural Development, reinforced the Executive's views that crofters needed no further protection in Part 3:

If crofters were also given total control of the crofting community body, it might be envisaged that they would end up with more power over the community than the original landowner had. It is hard to demonstrate that a right to buy is in the public interest if total control of the land resource

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<sup>51</sup> *The Crofter*, October 2003, p.5.

<sup>52</sup> *Scottish Parliament Official Report 20 March 2002*, column 10433.

<sup>53</sup> *The Stage 1 Report, Volume 2*, p.373. See also *the Stage 1 Report, Volume 2*, p.182. Concern that crofters did not have control of the crofting community body was not, however, confined to those with vested crofting interests: the Law Society of Scotland expressed a similar concern at Stage 1 - see *the Stage 1 Report, Volume 2*, p. 6.

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is, in effect, to be vested in a small group that has no real democratic credentials to the exclusion of the wider local community.<sup>54</sup>

Wilson, however, was speaking of 'total control' by crofters whereas Rhoda Grant's suggestion was for some ring fenced protection for crofters which did not, necessarily, go as far as majority control.

It was, therefore, the specific intention of the Executive, following the vision of the LRPG and quite different from the principles of the 1997 Act, that neither crofters, nor even the residents of the croft, should be given the right to control the crofting community body, but rather that control of the crofting community body should be vested in the crofting community generally; this is achieved through the provisions of section 71(1)(e).

While the intention of the Executive as to croft tenants is expressed in section 71(1)(e), there is a provision which could, perhaps, be used to support proposals that croft tenants should have some protected position on the crofting community body. This is section 74(1)(l) which provides that Ministers must withhold consent to an application if they are not satisfied that the crofting community is, in relation to the land to be acquired, an 'appropriate crofting community'. This is a very opaque provision and, without the benefit of the Explanatory Notes accompanying the Act, is almost impenetrable. The Explanatory Notes, however, tell us that the provision means that '... the crofting community body and the crofting community to which it relates [must] fully represent the crofting interests ...' in the land to be acquired.<sup>55</sup> This explanation bears a striking similarity to the words used in the 1997 Act and while it is probably not intended to detract from the inclusive definition of community it will be very interesting to see how Ministers act in relation to this provision. There are other difficulties with the section. Does it, for example, refer to a minimum number of crofter members of the company or to a minimum number of crofter Directors? Does it require formal provisions in the memorandum and articles of association, or does it simply require the body to represent the crofting interests as a

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<sup>54</sup> *Justice 2 Committee Official Report Meeting No. 37, column 1968. The reference to 'public interest' is of course highly relevant given the provisions of Article 1 of the ECHR - see Springham, Kay M. 'Trespassing on Human Rights? The Scottish Parliament and Land Reform', SLT 1999, 26, p.227-231.*

<sup>55</sup> *Explanatory Notes to the Land Reform (Scotland) Act (asp 2), p. 32.*

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practical matter? For such an important provision the lack of clarity is particularly unfortunate, but, of course, the very lack of clarity could be used for the benefit of croft tenants, and it must surely be arguable that crofting interests cannot be fully represented unless the croft tenants are given some protected position on the crofting community body. We can speculate whether an imaginative corporate lawyer could produce ideas based, perhaps, on different classes of members with separate class rights to achieve for croft tenants some of the protection sought by Rhoda Grant.

There is, however, one specific provision which does single out croft tenants as a distinct group. This derives from section 74(1)(m) which provides that no application can proceed unless the crofting community has approved the proposal to exercise the right to buy. It is theoretically possible for the crofting community body to satisfy Ministers as to its approval in some manner other than a ballot under the Act but a ballot under section 75 is, however, conclusive as to this approval. Under section 75, for the ballot to succeed, the vote on the proposition that the crofting community body should acquire the relevant land or sporting interests must be passed by a simple majority of all those voting and by a simple majority of the crofting tenants within the land proposed to be acquired (and so the owners of owner-occupied crofts cannot count towards the simple majority).<sup>56</sup> There is no minimum quorum requirement. Thus, unless a simple majority of the crofting tenants who vote (not, it should be emphasised, of the total number of all the crofting tenants entitled to vote in the ballot) vote in favour of the proposition, the application cannot proceed. It should also be emphasised that because of the use of the term 'crofting tenant' only the legal tenant is taken account of for this purpose and the spouse of that tenant, although a member of the crofting community (assuming the spouse has a local government vote), is not a crofting tenant as such. As we saw in our discussion of the composition of the crofting community above, as the Bill went through the Parliamentary process there were proposals that the 50 per cent. requirement

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<sup>56</sup> *A point which concerned the Scottish Crofting Foundation who pointed out that these owner-occupiers would almost certainly utilise the common grazings the subject of the purchase and should, therefore, be counted as croft tenants for this purpose - see The Stage 1 Report, Volume 2, p. 142.*

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for the ballot should be increased to 75 per cent.<sup>57</sup> These proposals were rejected by the Scottish Executive and, indeed, by the Justice 2 Committee,<sup>58</sup> rejections which included, somewhat oddly, the provision contained in the draft Bill published in February 2001, for a minimum quorum on the ballot of 50 per cent.<sup>59</sup>

As a final, but important, comment on this issue, we should note that while section 71(1)(e) requires the crofting community body to be controlled by the members of the crofting community, there is nothing in the Act which says that, as a practical matter, croft tenants must not control the body, whether at board or member level. While the Act does not expressly give protected rights to croft tenants<sup>60</sup> neither does it prohibit croft tenants from having control if, as a practical matter, this is how the membership of the crofting community body turns out in any particular case.

### **SUSTAINABLE DEVELOPMENT**

From its inception, the LRPG stated that:

... the overriding objective of current rural policy and thus land use should be to foster the sustainable development of rural communities; and the overriding objective of land reform today should be to remove the land-related barriers to that development.<sup>61</sup>

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<sup>57</sup> *Dr James Hunter's memorable comment on this was that the proposal was 'nuts' - see the Stage 1 Report, Volume 2, p.160; the Crofters Commission did not support the proposal - the Stage 1 Report, Volume 2, p. 164. Interestingly, the Napier Commission recommended that a two thirds majority of the occupiers should be required for a proposal to augment the size of a township - see the Napier Report, p.24.*

<sup>58</sup> *See the Stage 1 Report, Volume 1, p.31 and the Stage 1 Report, Volume 2, p. 181-2.*

<sup>59</sup> *Oddly because the responses to the consultation on the crofting community right to buy generally took the view that there should be a minimum level of support set at a high level. But the Executive was always rather half-hearted about a minimum quorum. See the Consultation Paper, para 5.8 and 6.61.*

<sup>60</sup> *Apart from section 75 and, perhaps, section 74(1)(l).*

<sup>61</sup> *LRPG, Identifying the Problems, the Scottish Office, February, 1998, p. 3.*

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The concept of sustainable development therefore lies at the heart of the Act and applies to both Parts 2 and 3. So far as the crofting community right to buy is concerned, unless Ministers are satisfied that the main purpose of the crofting community body is consistent with furthering the achievement of sustainable development and that the exercise of the right to buy by the crofting community body is compatible with furthering the achievement of sustainable development, then the application to buy must fail.<sup>62</sup> But what does sustainable development mean? The Scottish Executive got itself into something of a mess over the concept and it seems clear that, during the Stage 1 consideration of the Bill, problems were becoming apparent with the words contained in the Bill as introduced.<sup>63</sup> In the Bill as introduced, the requirements in relation to sustainable development were expressed as references to the sustainable development of the crofting community. The Bill also defined sustainable development of a crofting community as '... development calculated to (a) provide increasing social and economic advantage to the crofting community; and (b) protect the environment.'<sup>64</sup> By Stage 2, however, the Executive had become concerned over potential legal challenges under Part 3 and, apparently, that limiting sustainable development to apply to the crofting community was too restrictive. The Executive therefore proposed that the definition should be dropped and that the concept of sustainable development should not just relate to the crofting community, but should apply generally. The Deputy Minister for Environment and Rural Development, Allan Wilson, explained this decision by saying that:

We think that the definition of sustainable development on which the Bill depends is possibly too inflexible to cover the range of circumstances in which local communities will operate. We have considered alternative definitions but, as always, there are problems of legal terminology in

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<sup>62</sup> See section 71(4) and 74(1)(j).

<sup>63</sup> Dr James Hunter was asked, in evidence before the Justice 2 Committee, 'What is your understanding of the process by which Ministers will come to a view on whether [the requirement of sustainable development was satisfied]?' Dr Hunter responded: 'The honest answer is that I have no detailed understanding of that...' - see the Stage 1 Report, Volume 2, p.160.

<sup>64</sup> See clause 68 (2) of the Bill as introduced.

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defining the balance between economic, social and environmental benefits.<sup>65</sup>

But it is clear that, while the Executive was apparently finding it difficult to produce a workable definition at all, what the Executive was really concerned about was that a definition of sustainable development in the Act could lead to legal challenge and, indeed :

Any definition in the Bill would restrict the Courts' interpretation of the meaning of sustainable development. As we all know, sustainable development can mean different things to different people and I am concerned that opponents of the right to buy could use a restrictive definition of an objective to frustrate communities' attempts to buy land.<sup>66</sup>

It was the intention of the Executive to '... mitigate the possibility of future legal challenge.'<sup>67</sup> That the Executive was also struggling to define the concept in any satisfactory way is clear from the earlier exchange between Ross Finnie, the Minister for Environment and Rural Development, and Duncan Hamilton, an SNP member for the Highlands and Islands, in the Justice 2 Committee Meeting of 30th January 2002.<sup>68</sup> As to the decision to apply the concept of sustainable development generally, Allan Wilson gave the following explanation. The Bill, he said:

... would no longer rely on a definition that relates to sustainable development in a community. Instead, references to the achievement of sustainable development would apply generally and would not be confined to a community and the land that it seeks ... to buy. In addition, by using the wider definitions that are in use in the Executive's publications on achieving sustainable development, we can better

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<sup>65</sup> Allan Wilson, *Justice 2 Committee Official Report Meeting No. 37, 2002, column 1960.*

<sup>66</sup> Allan Wilson, *Justice 2 Committee Official Report Meeting No. 37, 2002, column 1960.*

<sup>67</sup> Allan Wilson, *Justice 2 Committee Official Report Meeting No. 37, 2002, column 1964.*

<sup>68</sup> *See the Stage 1 Report, Volume 2, p.199.*

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emphasise the need to balance economic progress and social and environmental justice, which is a concurrent aim.<sup>69</sup>

Wilson wanted there to be no doubt as to the Executive's commitment to the concept and the reasons for the changes:

The reasons for the changes are to reduce the scope for legal challenge to the right to buy and to move the emphasis on sustainable development away from the community itself and set it in its broader context. That can better be achieved by removing the existing definition, which could be very inflexible in this context.<sup>70</sup>

But Wilson then appeared to backtrack on the importance of sustainable development. He said:

The Executive amendments propose that the objective that should be highest on the agenda of the ... crofting community body should be the development of the community, rather than sustainable development per se.<sup>71</sup>

As a confirmation of this confusion, the Executive also amended what is now section 74(1)(k) and dropped, without explanation, the word 'sustainable' from the requirement that Ministers should be satisfied that where the application to buy related to fishings, mineral rights of sporting interests, the crofting community body had sufficient croft land to support the '... sustainable development of the crofting community'.

The Deputy Minister explained that the Executive would cover the relevant issues in guidance notes to be issued for communities on how to prepare applications for exercising their rights under the Act. But there seems little doubt that the inclusion of the undefined expression 'sustainable development' in the Act will lead, at least in the early stages, to frequent applications to the Land Court for a determination under Section 81 and, indeed, the Deputy Minister accepted that this would be so, and considered,

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<sup>69</sup> *Justice 2 Committee Official Report Meeting No. 37, column 1960.*

<sup>70</sup> *Justice 2 Committee Official Report Meeting No. 37, column 1961.*

<sup>71</sup> *Justice 2 Committee Official Report Meeting No. 37, column 1962.*

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rather startlingly, that the Courts were better placed to decide what sustainable development really means:

A legal challenge might arise, but the Courts will be in a better position than we are to determine whether a development in a certain locality and circumstances contravenes the principles of sustainable development. We cannot do this in this meeting.<sup>72</sup>

As the Act provides that Ministers must give written confirmation that they are satisfied that the main purpose of the company is consistent with furthering the achievement of sustainable development and, more fundamentally, that Ministers are obliged to withhold consent to the application if they are not satisfied that the acquisition is compatible with furthering the achievement of sustainable development<sup>73</sup>, Ministers will, themselves, have to reach a conclusion as to what sustainable development means. Given that the Executive considers the Land Court better placed to make such a decision than Ministers, Ministers will, no doubt, be making frequent applications to the Land Court for a finding under section 81, but the suggestion that the Land Court should be in a better position than Ministers to reach a finding, particularly when given no help from a definition in the Act, is less than satisfactory. Guidance notes are to be produced for the benefit of potential applicants<sup>74</sup> but we might question the status and use of these notes given the Executive's insistence that only the Land Court can properly determine what 'sustainable development' means. It remains to be seen how the Land Court will approach this task: it will not be easy, for while the concept of sustainable development cannot '...be dismissed as empty rhetoric ... It is a concept that does not lend itself to dissection or precise definition. Even if it is not an oxymoron, it is not a concept that is easily operationalised as a precise goal.'<sup>75</sup>

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<sup>72</sup> Allan Wilson, *Justice 2 Committee Official Report Meeting No. 37, 2002, column 1964.*

<sup>73</sup> *Section 71(4) and section 74(1)(j).*

<sup>74</sup> *It will be interesting to see how these are phrased: in particular whether the acquisition of land for conservation purposes will be permitted.*

<sup>75</sup> *Mather, Alexander. 'The Moral Economy and Political Ecology of Land Ownership' – a paper presented to the Land Reform in Scotland Conference, 29 October 1999. The expression sustainable development is sometimes used in the area*

## **THE LAND COURT AND APPEALS**

Given the fact that Part 3 of the Act deals with compulsory purchase provisions, the Scottish Executive was concerned to ensure that the appeals procedures in the Act were compliant with Article 6 of the European Convention on Human Rights which provides, in summary, that on a determination of a person's civil rights and obligations, that person is entitled to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law.

Part 3 of the Act is drafted so as to reserve to Ministers a considerable degree of discretion, something which was noted with some concern by the Scottish Crofting Foundation at Stage 1<sup>76</sup>. The Executive was concerned to ensure that the Act provided for an independent determination of fact and law which would comply with the provisions of Article 6 of the ECHR and Part 3 of the Act contains a number of separate, but regrettably not wholly consistent, provisions for questions to be determined by the Land Court.

When the appeals procedures were considered by the Justice 2 Committee there was concern expressed over the differentiation between Part 2 and Part 3 of the Bill: in particular that in Part 3 appeals to the sheriff under section 91 were to be only on points of law, whereas under the parallel provisions in Part 2 the appeals could be on questions of both fact and law.<sup>77</sup> There was a somewhat confused debate on the different levels of appeal which were available and the extent to which appeals could be on questions of fact, law or both.<sup>78</sup> The Deputy Minister undertook to write a letter of explanation to the Convener before the Stage 3 debate.<sup>79</sup> The explanation from the Deputy

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*of planning law where there are differing views as to its meaning – see Current Law Statutes 2003 asp 2, p. 41.*

<sup>76</sup> *The Stage 1 Report, Volume 2, p. 143.*

<sup>77</sup> *Section 91(5) was, in fact, amended at Stage 2 to make it clear that appeals to the sheriff could only be on questions of law.*

<sup>78</sup> *Justice 2 Committee Official Report Meeting No. 39, 2002, column 2059-2063 and column 2091.*

<sup>79</sup> *The Deputy Minister for Environment and Rural Affairs, Allan Wilson, wrote such a letter on 3 January 2003 to the Convener of the Justice 2 Committee (the 'Appeals Letter').*

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Minister in the Appeals Letter as to the differentiation was that all the contentious questions of fact under Part 3 would have been decided by the Land Court under sections 77, 79 and 81 of the Act and so the appeal, under section 91, to the sheriff need not, for ECHR purposes, also cover questions of fact. The Deputy Minister also said that it was not usual for appeal bodies to reconsider the facts of a case and that it would be quite inappropriate for findings in fact of a superior tribunal, the Land Court, to be reviewed by an inferior court, the sheriff.<sup>80</sup> It was the view of the Deputy Minister that the appeal procedures under section 91 were compliant with the ECHR.<sup>81</sup> But the Minister's letter is satisfactory only up to a point. Under Part 3 of the Act, Ministers are obliged to decide a considerable number of difficult questions and it is by no means fair to state, as the Minister did, that all the contentious questions of fact would have been decided by the Land Court, unless, of course, Ministers or, indeed, the owner or the crofting community body have made frequent use of section 81 of the Act.<sup>82</sup>

If, indeed, section 81 is used freely, this will raise to a significant level the importance of the way in which the Land Court determines questions put to it and there must be a possibility that the provisions of the Act relating to appeals from decisions of the Land Court will be open to challenge. This arises from a small, but highly significant, change made to section 97 of the Act at Stage 2. Under paragraph 5 of schedule 1 to the Scottish Land Court Act 1993, the normal quorum for the Land Court is 3 members. However, under paragraph 6(1), the Land Court is entitled to delegate its powers to any one or two members of the Court and, under paragraph 6(2), an order or determination arrived at under this delegation is subject, on appeal, to a review, on both questions of law and fact, by 3 or more members of the full

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<sup>80</sup> We might just note, however, that there is the bizarre, if unlikely, scenario of an appeal to the sheriff under section 91 on a point of law which the Land Court, or even the Court of Session, has already decided.

<sup>81</sup> See the Appeals Letter.

<sup>82</sup> Indeed, the fact that appeals to the sheriff are limited to questions of law may well mean that the Land Court is approached on a regular basis under section 81 for its determination of questions, although we should remember that section 81(4) gives a discretion to the Land Court not to hear issues which it decides are irrelevant to Ministers' decision on an application.

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Land Court which has to include the Chairman.<sup>83</sup> At Stage 2, the Executive introduced a new sub-clause to the Bill the effect of which was to remove, in relation to decisions of the Land Court under Part 3 of the Act, this right under paragraph 6(2) of schedule 1 to the Scottish Land Court Act 1993 to appeal delegated decisions of the Land Court for a review by the full Court.<sup>84</sup> The explanation given by the Deputy Minister at the Justice 2 Committee was that, if the provisions of paragraph 6(2) were to apply, the most expeditious way for the Land Court to proceed would be to arrange for the full Court to consider questions referred to it under the Act and '... it would be impractical to proceed in that way.'<sup>85</sup> In the Appeals Letter, Wilson said that:

It was considered that there were adequate appeal provisions in the Bill and that to retain the provisions of paragraph 6(2) would not only slow decision making by the Court but could also be used as a delaying tactic by an opponent.<sup>86</sup>

This is unsatisfactory, particularly given the Deputy Minister's insistence that as all the contentious questions of fact would be determined by the Land Court the appeal to the sheriff under section 91 need be on matters of law only.<sup>87</sup> To remove the normal protection given to applicants before the Land Court in relation to provisions concerning compulsory purchase is a very odd

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<sup>83</sup> *Graham, K.H.R. Scottish Land Court Practice and Procedure, Edinburgh, 1993, p.9.*

<sup>84</sup> *Section 97(3).*

<sup>85</sup> *Allan Wilson, Justice 2 Committee Official Report Meeting No. 39, 2002, column 2091.*

<sup>86</sup> *The Appeals Letter. If there was a concern that the Land Court would be inundated with references to it because of the number of applications being dealt with and, so, make the convening of a full Court impractical, the Minister's amendment may have been explicable, if still difficult to justify. But the Scottish Executive, in a Memorandum to the Justice 2 Committee expressly stated that it did not believe the rights in Part 3 would be widely used; rather, the threat of them would lead to negotiated sales in most cases - see the Stage 1 Report, Volume 2, p.183.*

<sup>87</sup> *And also, while an appeal lies from the Land Court to the Court of Session, this appeal only lies on questions of law and not fact - section 1(7) of the Scottish Land Court Act 1993.*

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thing to do as, for that matter, is the Executive suggesting, by implication, what is, or is not, expedient for the Land Court in terms of how it conducts its hearings.<sup>88</sup> It remains to be seen the extent to which this will result in challenges under the ECHR.<sup>89</sup>

In framing Part 3 of the Act, the Executive considered itself obliged to steer a course between the Scylla of Article 6 of the ECHR and the Charybdis of delays and obstructionist tactics. However the course chosen has led to a *mélange* of less than satisfactory and inconsistent provisions on appeals and determinations of fact and law and the considerably less than satisfactory denial of the right, available to the parties in all other cases involving the Land Court, to a determination of their rights and obligations by the full Court.

### **THE VALUE OF THE LAND**

The provisions as to valuation received, as one might have expected given their importance in the context of the ECHR, much attention. Amendments were introduced to the Bill at Stage 2 which were '... intended to specify more precisely, and with greater clarity, how the valuation is to be determined.'<sup>90</sup> This confident assertion is, however, open to question. The main principle is that the value to be paid for a transfer under Part 3 should be the open market value of the land or interests, but, of course, the fact that the transfer is to be made compulsorily, and patently not with a willing seller, has particular implications. In the Bill as introduced, the market value was defined as the open market value between a willing, knowledgeable and prudent seller and buyer, and in arriving at the market value account was to be taken of (i) particular factors, (ii) the depreciation in value of the land or interests resulting from the transfer and (iii) any disturbance to the seller arising from

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<sup>88</sup> *The amendment to paragraph 6(2) was made after 'consultation and with the agreement of the Chairman of the Land Court' - see the Appeals Letter.*

<sup>89</sup> *It is true that, as a matter of practice, virtually all the cases heard by the Land Court under the 1993 Act are delegated to one member with a legal assessor as his clerk and legal adviser (see Graham, 1993, p.9), but this is a decision of the Court and the appeal provisions in paragraph 6(2) remain as a safety net for all the applicants.*

<sup>90</sup> *Justice 2 Committee Official Report Meeting No. 39, 2002, column 2039.*

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the transfer. The Bill provided that no account should be taken of factors attributable to any unlawful use of the land or interests or the absence of the period of time during which the land or interests would, on the open market, be likely to be advertised and exposed for sale. At Stage 2, the Executive introduced amendments which changed all this around, so that the definition of market value became, in section 88 (6) and (7), the aggregate of (i) the open market value as between a willing seller and buyer (the words 'knowledgeable and prudent' were dropped), (ii) the depreciation in value as above and (iii) the disturbance to the seller as above.

So far so good. But the amendments went on to state that, in arriving at this market value, account could be take of certain factors but that no account was to be taken of the depreciation or the disturbances as described above. In the debate in the Justice 2 Committee there was a degree of confusion about the express inclusion of the depreciation and disturbance factors in the definition of market value, and the express requirement that these factors should not be taken account of. Duncan Hamilton, SNP member for the Highlands and Islands, asked the Deputy Minister how the express inclusion and exclusion could be consistent. The Deputy Minister, Allan Wilson, needed some time to consider this and eventually gave the memorable answer that: 'The provisions are put in and taken out. There is no inconsistency in our position in relation to the provisions ...'.<sup>91</sup> Hamilton pursued this confused answer and suggested that what the Deputy Minister was really saying was that, given the aggregation of the three factors within the definition, there needed to be a provision which said that no additional account should be taken of depreciation or disturbance. If this was right, Hamilton said: '... would you consider inserting that wording in the Bill? I cannot be the only person who would be misled by that.' Wilson replied: 'I accept that.'<sup>92</sup> Unfortunately, no such amendment was made and the confusion remains.

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<sup>91</sup> *Justice 2 Committee Official Report Meeting No. 39, 2002, column 2046-2047.*

<sup>92</sup> *Justice 2 Committee Official Report Meeting No. 39, 2002, columns 2049 and 2050.*

## CONCLUSIONS

In his article on the Land Question and the Scottish Parliament<sup>93</sup>, Dr Cameron said that: 'Any indication of a failure to confront the difficult questions and vested interests which have to be faced in reforming the Scottish land laws, will quickly lead to a perception that the new parliament is impotent' and, indeed, he noted the argument that the ECHR might prevent the inclusion of a radical provision such as a compulsory purchase right against private landowners.<sup>94</sup> The crofting community right to buy in Part 3 of the Act certainly provides a reassuring example that the Scottish Parliament is taking its Viagra, and that it has not flinched in the face of the ECHR, proprietorial and, indeed, crofting vested interests, and the Scottish Parliament has produced an historic piece of legislation.

But there remains a concern that including the crofting community right to buy in the Act rather than waiting for a Crofting Reform Bill which would seek, in a comprehensive manner, to legislate for the vision of the LRPG as to the future of crofting has led to a less than satisfactory provision and a missed opportunity to consider some of the inherent inconsistencies between the crofting legislation as it stands and community ownership of croft land. It is difficult to see where, if at all, the pressure was coming from to bring forward the crofting community right to buy as part of the Act. While the Consultative Panel on Crofting accepted that the crofting community right to buy would be distinctively different in a wide range of ways from the general community right to buy, the Panel argued that there was a '... need for modern arrangements to enable crofting communities to buy their land in concert' and to 'tidy up' the existing provisions in the 1997 Act and the individual right to buy in the 1993 Act.<sup>95</sup> The 1997 Act which provided for such arrangements in relation to croft land owned by the Scottish Ministers has yet, however, to be used and there have been a number of examples of privately owned croft estates passing into community ownership without the need for legislation, Assynt, Melness, Bhalto, Borve and Anishadder, Eigg, Orbost, Knoydart and North Harris being the principal examples. It is not, of

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<sup>93</sup> Which was, of course, written before the proposals contained in Part 3 of the Act had been announced.

<sup>94</sup> Cameron, 2001, p. 108-109.

<sup>95</sup> Land Reform. Consultative Panel on Crofting: Power to give crofting communities the right to buy their croft land, Rural Affairs Department, 26 July 1999.

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course possible to say whether, if Part 3 had been left to form part of a specialised Crofting Reform Bill, the crofting community right to buy would have been materially different: in particular whether the primacy of the interests of crofters as characterised by the Earl of Lindsay in relation to the 1997 Act would have had more recognition. It is not the purpose of this article to make the case that this primacy should be so preserved<sup>96</sup> but to point to the strong views which were expressed as the Bill went through the Scottish Parliament and to suggest that it is an issue which might, perhaps, have been better considered in the light of a Bill which related solely to the reform of croft law and administration. Perhaps when seen in the context of detailed proposals for crofting in the 21st century in a comprehensive Crofting Reform Bill the argument for moving away from the primacy of interest of crofters in the community ownership of croft lands would have been more evident.<sup>97</sup> As it is, and in the absence of a detailed understanding of the vision for crofting in the 21st century, the suggestion from the Executive that, in relation to croft land, crofters are an undemocratic monopoly with vested agricultural interests which can be at odds with the needs of the wider community is not particularly helpful. The inclusion of the crofting community right to buy in the context of a general Crofting Reform Bill would also have allowed a mature consideration of the fact that the existing crofting legislation was never conceived or drafted on the basis that crofters would, in effect, be their own landlord, and so certain anomalies and difficulties may be expected to arise: in particular, there is a potential for conflicts of interest to arise between the interests of the community company as landlord and individual members of that company as croft tenants.

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<sup>96</sup> *But it is relevant to note that in the case of the Assynt Crofters Trust Limited, which is the prime example of croft lands being owned by a community trust limited solely to crofters, while there is discussion over the extension of the representation of non-croft interests at Board and member level, there is no particular pressure for any major change - see Mackenzie, A Fiona D; MacAskill, John; Munro, Gillian; and Seki, Erika. 'Contesting land, creating community, in the Highlands and Islands, Scotland' in **Scottish Geographical Journal** (forthcoming).*

<sup>97</sup> *Although there are frequent references to 'the crofting community' and 'the local community' in the 2002 Crofting White Paper, there is not the level of detail which a draft Bill would provide for a sensible view on this to be reached. But it is interesting to note that in the proposal to devolve administrative decision making to local groups it appears that croft tenants and members of the crofting household were to be given primacy of position on such local groups; this proposal has, however, been dropped.*

### *The Crofting Community Right To Buy*

Furthermore, it would have allowed a consideration of the issues raised by the argument that the 1993 Act individual right to buy is, itself, inconsistent with community ownership: the very existence of this right means that the main asset of a crofting community body which has acquired croft land under a community right to buy is, itself, subject to compulsory purchase by individual crofters at a price which will be a fraction of the price paid by the crofting community body: the main asset of the crofting community body is, potentially, a dwindling asset<sup>98</sup>.

There are now three statutes which provide for ownership of croft lands in different ways: the 1993 Act which gives the individual right to buy and the 1997 Act and the 2003 Act which provide for community ownership, and although the Consultative Panel on Crofting referred to the crofting community right to buy as being a proposal which '... essentially tid[ies] up existing right to buy arrangements for individual crofters and for crofting communities whose landlords are the [Scottish Ministers]', the provisions of the 1997 Act and Part 3 of the Act are, as we have seen, by no means consistent, not least in the way in which they respectively define the crofting community. And as we have noted, the individual right to buy does not sit all that comfortably with community purchase and ownership. As a 'tidying up' exercise, Part 3 of the Act has not, in these terms, been a success<sup>99</sup>.

While it is, of course, true that most, if not all, legislation is flawed in some respects, the wording of Part 3 of the Act in a number of areas, only some of which have been discussed in this paper, and, in particular, the debates on the Bill and the amendments made as the Bill passed through its legislative

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<sup>98</sup> *It was, of course, just this point which the Assynt crofters used to such good effect in their campaign to acquire the North Lochinver Estate- see MacAskill, 1999, p. 97-128, and, indeed, more recently by the community of North Harris in its campaign to acquire the North Harris estate. It does not appear from the 2002 Crofting White Paper that the issues raised by the potential for conflicts of interest between community landlord and croft tenant have been appreciated; and if the proposal in the 2002 Crofting White Paper that owner-occupiers should be able to sub-let their croft without creating a croft tenancy is proceeded with this could even exacerbate the potential for a dwindling asset. It is interesting to note that the Napier Commission did give some thought to the implications of individual ownership in the Highland township scheme it had recommended, especially what would happen when more than half the occupiers became individual owners – see Napier Report, p. 42.*

<sup>99</sup> *And there is no suggestion in the 2002 Crofting White Paper that the inconsistencies between the 1997 Act and the 2003 Act are to be addressed.*

### *Scottish Affairs*

Stages, leave something to be desired. The fact that the twin concepts of community empowerment and sustainable development have been the key themes of the LRPG and have thus driven the legislation has not, perhaps, helped: they provide a good example of the difficulties and dangers of building legislation around inherently vague, indeed slippery, concepts.<sup>100</sup> It may, also, have been that the radicalism and challenge to vested interests which Cameron feared the legislation might lack, in fact led the Scottish Executive into being, perhaps, over-sensitive as to the prospects of the legislation being challenged with a consequent defensive approach to drafting: the provisions as to appeals are an example of this. While the Land Reform (Scotland) Act 2003 is a very important piece of legislation and together with the Abolition of Feudal Tenure etc. (Scotland) Act 2000 represents a sea change in the way in which land ownership and management in Scotland is to go forward in the 21st century, it is a pity that this baptism of fire for the Scottish Parliament, particularly after the considerable time and attention which was afforded to the Bill, is not represented by a more polished piece of legislation.

*September 2004*

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<sup>100</sup> *As Professor Sir Howard Newby described the concept of sustainable development in his address to the XI World Congress of Rural Sociology, Trondheim, 25 July 2004.*