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Chapter 7

Legislating for Community Land Rights

Malcolm M. Combe

The Scottish Government recently reiterated its commitment to bring one million of Scotland's acres into community ownership by the end of 2020. The policy shift towards community ownership, and the legislation that accompanies that shift, is a relatively new development in the Scottish land law reform process, operating within a mature system of property law that has traditionally afforded a great deal of importance to the entitlements that flow from ownership. Legislative routes for communities to acquire land are set out in the Transfer of Crofting Estates (Scotland) Act 1997, the Land Reform (Scotland) Act 2003, the Community Empowerment (Scotland) Act 2015, and the Land Reform (Scotland) Act 2016. Whilst the 1997 Act is about communities in the Scottish Highlands and Islands acquiring crofting land that happens to be in public sector ownership in a manner that is mutually beneficial, and there are certain similar rights for communities to request assets from a range of public bodies in the 2015 Act, the net effect of the 2003, 2015 and 2016 legislation opens up four methods for a community to acquire land from a private owner, in a manner that (on the assumption the legislation is complied with) either: forces that owner to deal only with the community as and when the owner decides to sell; or forces that owner to sell to the community as and when the community wishes to acquire.

These are striking and important powers, which are designed to play a role in Scotland's drive towards community ownership. This chapter considers the framework for and the practical impact of this approach to date, with reference to examples of acquisitions which have variously taken place in accordance with such statutory schemes, been driven by the prospect of those schemes as a fall-back position, or occurred on ad hoc bases without any apparent reference to the modern legislation.

Section I: the legal landscape

Both the Land Reform (Scotland) Act 2003 (the '2003 Act') and the Land Reform (Scotland) Act 2016 (the '2016 Act') contain provisions that are of importance to Scotland's land other than those which can steer or enable a change of ownership. In the case of the 2003 Act, its first Part sets out the scheme for the right of responsible access that allows recreational, educational and in some cases commercial use of the outdoors.[1] The 2016 Act contains provisions about: deer management; the dedicated public body charged with a land reform role known as the Scottish Land Commission; and (of general relevance to Scottish communities) engaging communities in decisions relating to land that may affect them.[2]

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[1] Section 1. See generally Combe, M. M., *The ScotWays Guide to the Law of Access to Land in Scotland*, (Edinburgh: John Donald, 2018) (with chapter 2 considering the right of responsible access in particular). Much more could be written about the right of responsible access, but for present purposes please see the analysis in Bob Reid's chapter in this volume.

[2] See Parts 8, 2 and 4 of the 2016 Act respectively.

These provisions are undoubtedly important, but they do not form the focus of this chapter. Instead, it considers the provisions in both statutes that aim to facilitate or, in some cases, compel transfer of land from an existing landowner to a community body. Away from the land reform brand, the Community Empowerment (Scotland) Act 2015 ('the 2015 Act') also introduced new rights of community acquisition that can be deployed against private landowners, by way of legislative amendment to the 2003 Act (introducing a new Part 3A to it). It additionally introduced a scheme that allow communities to take on assets from the public sector. This chapter also analyses these.

None of this analysis should be taken as implying the well-developed system of property law that existed in Scotland before the recent legislation was passed is unimportant. Scots law is generally described as being a 'mixed' legal system, formed of a Civilian (Roman) foundation that has been overlaid by Common law (English) influence. Its system of property law has retained a Civilian flavour, within which a strong right of ownership gives much autonomy to the owner of a thing. In common with most civilian traditions, Scots property law is unititular.[3] That is to say, there is only one title of ownership in any thing at any one time. This has not been changed by any of the recent reforms brought in by the Scottish Parliament. As we shall see, the land reform measures that communities can benefit from operate within a single title per asset system,[4] allowing community members to associate together into a suitable body and in turn allowing that body to acquire sole title to local assets.

Further, the focus here on the means by which a community can take title to an asset should not be taken as an indication that other means of community participation do not matter. Separately, none of this analysis should be taken as an indication that other land reform measures are unimportant. This is a point that shall be returned to below, but for now it can be noted that community rights to buy do not operate in a bubble and there are other aspects of Scots (land) law that can give communities in various forms certain rights in relation to property. First, the specific examples of traditional commonties, the administration of common good land and crofting common grazings all demonstrate a flavour of community. Next, community involvement in local land decisions might flow from consultations with community councils, the wider planning process, and indeed the accountability of public bodies or the Crown that own or manage land in Scotland. Finally, neighbours may share similar title conditions in relation to land that they own, allowing for a micro-community to regulate land use (within the terms of the Title Conditions (Scotland) Act 2003). All of these rights can be important in particular contexts, but they are discussed elsewhere[5] and this chapter will focus on the new statutory rights. It does so by exploring why new community rights were introduced, then explaining how the rights work. It will conclude by offering some observations about what the rights mean for Scottish communities.

Community Rights of Acquisition: why is land reform happening in Scotland?

Part 2, Part 3 and Part 3A of the 2003 Act and Part 5 of the 2016 Act all offer a means by which a community can acquire land. In general, 'land' is used to mean the ground itself and

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[3] Reid, K.G.C., *The Law of Property in Scotland*, (Edinburgh: LexisNexis Butterworths, 1996); Gretton, G. L. and A. J. M. Steven, *Property, Trusts and Succession*, 3rd edn (Haywards Heath: Bloomsbury, 2017).
[4] Combe, M. M., 'Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?', *Juridical Review* 2006, 195-227 at 225.
[5] See Combe, M. M., 'Community Rights in Scotland', in T. Xu and A. Clarke (eds), *Legal Strategies for the Development and Protection of Communal Property* (Oxford, Oxford University Press, 2018).

any buildings on it, but communities can also acquire other rights such as those relating to salmon fishing and minerals.[6] Although these four schemes are self-contained, they are similar and an understanding of the structure of one aids understanding of the others. This chapter will analyse these rights of varying strength and application, which will be referred to for simplicity (and simplistically) as the community rights to buy. Before doing that, it will briefly explain why there has been engagement with the issue of land reform by Scottish politicians.

The appetite for reform is investigated elsewhere in this book[7] and beyond.[8] To oversimplify, a crucial factor in this modern land reform story was the establishment of the Scottish Parliament. The Scotland Act 1998 introduced a unicameral legislative forum with the time and the inclination to embrace land law reform when it brought devolution to Scotland. The new Parliament was spurred on by the formation of the Land Reform Policy Group (LRPG), at the instigation of the majority Labour government that came into power in the 1997 UK General Election. Naturally, calls for land reform did not start with devolution,[9] and the very existence of the pre-devolution Transfer of Crofting Estates (Scotland) Act 1997 nicely demonstrates that point, but devolution forms a convenient and not entirely arbitrary date stamp for analysis. The LRPG's recommendations were then taken forward in a variety of legislative measures in the first term of the new devolved administration.[10] The most important of these for present purposes was the 2003 Act, which established two community rights of acquisition. In this first wave of activity, the Scottish Parliament also legislated on matters relating to property law more generally, and specifically in relation to the heavily regulated agricultural holdings sector (as covered by by Hamish Lean in chapter 13 of this volume).

Notwithstanding the 2003 Act, the manner in which the land of Scotland is owned and organised in the present day as measured against contemporary commitments to sustainability and sound land management for economic, social and environmental goals continued to attract comment. Where previously the human right to property (as protected in Article 1 of the First Protocol to the ECHR, which protects the peaceful enjoyment of possessions and only allows deprivation or control by the state in narrow circumstances) held a certain prominence in the debate,[11] notions relating to food security and shelter have recently emerged as a counterpoint (to the extent that section 98 of the 2003 Act has been amended (by the 2015 Act) to make explicit reference to the International Covenant on Economic, Social and Cultural Rights).[12]

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[6] See the Land Reform (Scotland) Act 2003, sections 33(6) and 69. Although minerals are generally included, rights to oil, coal, gas, gold or silver are not.

[7] See Combe, M. M., J. Glass and A. Tindley, 'Introduction' in this volume.

[8] See Combe, M. M., 'The environmental implications of redistributive land reform', *Environmental Law Review*, 18 (2016) 104-25 and M. M. Combe, 'The Land Reform (Scotland) Act 2016: another answer to the Scottish land question', *Juridical Review* 2016 291-313.

[9] As detailed by Ewen Cameron at chapter 5 in this volume.

[10] Land Reform Policy Group, Identifying the Problems (London: Scottish Office, 1998); Land Reform Policy Group, Identifying the Solutions (London: Scottish Office, 1998); Land Reform Policy Group, Recommendations for Action (London: Scottish Office, 1999).

[11] A point discussed and critiqued by Frankie McCarthy in chapter 9 in this volume.

[12] Shields, K. 'Tackling the Misuse of Rights Rhetoric in Land Reform Debate', Greens Scottish Human Rights Journal, 68 (February) (2015) 1-4; Scottish Parliament Information Centre *Briefing 07/01, Human Rights in Scotland* (Edinburgh: SPICe, 2017), at <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_17-01_Human_Rights_in_Scotland.pdf> (last accessed 18 March 2019); and McCarthy, in this volume.

Away from such direct human rights concerns, drivers towards land reform have included arguments about local enterprise or complaints that the pattern of landownership in Scotland is such that there is dominance by major players in the land market.[13] To make a proper analysis of whether this is a problem for Scotland can be difficult or laborious, owing to the occasionally patchy information about who owns what that is available at present. That patchiness is twofold. First, data that is understandable for non-experts is not always available on public registers for land (albeit this point is being addressed by a move from a deeds registration system that has operated since the Registration Act 1617[14] to a map-based registration of title system that has been phased in since the Land Registration (Scotland) Act 1979); the transition has been slow, but is perhaps nearing completion, with both the Scottish Government and Registers of Scotland committing to a rapid completion of Land Register coverage to the whole of Scotland in line with the Land Registration etc. (Scotland) Act 2012.[15] The second issue is there can be a lack of clarity about who controls the landholding entity that is registered as owner, a point that Part 3 of the 2016 Act seeks to address. As far as concentration of landownership is concerned, a paper submitted to the Scottish Affairs Committee at Westminster suggests a figure in the region of 432 landowners own 50% of the privately-owned rural land in Scotland.[16] Another driver for reform is about the governance of land, which is particularly seen to be an issue when landowners are termed as 'absentee' (a point which can be compounded when a non-active, non-resident owner is also non-transparent). To simplify, land reformers contend that land is better governed when those who live or work on the land have a stake in its governance. When land is owned by persons who live and work on the land, land reform advocates claim, rural populations stabilize or even grow. Land reform sceptics, in contrast, question whether a community is the best candidate to take on the governance of land, especially when public support in the form of advice and money is being provided.[17] Organisations like Community Land Scotland strongly advocate the case for it.[18]

All of this gives a flavour of what has fed into the land reform debate in Scotland. The next consideration is where the community features as a result of that debate.

Community-oriented Scottish land reform

The first real statutory intervention that put communities as land owners to the fore came in the form of the Transfer of Crofting Estates (Scotland) Act 1997. This legislation provides for

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[13] Land Reform Review Group, *Final Report: The Land of Scotland and the Common Good* (Edinburgh: Scottish Government, 2014): Section 24, paragraph 25. And see now Glenn, S., J. MacKessack-Leitch, K. Pollard, J. Glass, and R. McMorran, 'Investigation into the Issues Associated with Large scale and Concentrated Landownership in Scotland' (Scottish Land Commission, 2019) at <https://landcommission.gov.scot/wp-content/uploads/2019/03/Investigation-Issues-Large-Scale-and-Concentrated-Landownership-20190320.pdf> (last accessed 4 June 2019).

[14] The history of this system is more fully explained in chapter 6 in this volume by Andrew Simpson.

[15] Reid, K. G. C. and G. L. Gretton, *Land Registration*, (Edinburgh: Avizandum, 2017). Registers of Scotland is working to a target of migrating all titles to the Land Register by 2024: see <https://www.ros.gov.uk/about/what-we-do> (last accessed 18 March 2019).

[16] Hunter, J., P. Peacock, P.,A. Wightman, A. and M. Foxley, M. (2013), '432:50 – Towards a comprehensive land reform agenda for Scotland: A briefing paper for the House of Commons', (London: Scottish Affairs Committee, 2013) available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/scottish-affairs-committee/news/land-reform-inquiry/> (last accessed 18 March 2019).

[17] A point touched on by John Lovett in chapter 8 in this volume. See also Lovett, J. and M. M. Combe, 'The Parable of Portobello: Lessons and Questions from the First Urban Acquisition under the Scottish Community Right to Buy Regime' *Montana Law Review* (2019) 80(2) (2019) 211-28.

[18] See <https://www.communitylandscotland.org.uk/> (last accessed 18 March 2019).

the transfer of crofting lands in the Highlands and Islands that are owned by the state to a community body. That community body would then become a crofting landlord, such that it would inherit relationships with the crofting tenants that are *in situ* and take the ownership of the common grazings of the relevant area. The highly regulated crofting scheme that governs such land, which is explained by MacLellan in chapter 12 in this volume, would mean no particular change of land use could be easily instigated by the incoming owner in the event of a transfer of land ownership, meaning the actual 'on the ground' land reform effect of this measure was always destined to be limited. As it happens, its deployment has been limited anyway, as only one crofting community – West Harris in the Outer Hebrides – has availed itself of the legislative scheme to date.

That being said, a real impact of the 1997 Act was to propel 'community' into the thinking of those framing legislative intervention, but that was not the only factor. Many important examples of community ownership in Scotland came about as a result of community action that did not wait for legislation. The community acquisitions of the islands of Eigg and Gigha (amongst others) pre-dated such developments, and those bellwether communities have generally fared well: both witnessed population increases since transfer to their respective community.[19] That is not to say communities are insulated from all challenges of land management. The Isle of Gigha Heritage Trust has faced some documented issues, particularly in relation to the debt owed by the community landowning entity (and secured on its land) post acquisition,[20] although it can be noted that none have publicly failed in economic terms. In terms of how these organic buyouts have found form, even without any legislative scheme directing them, they have tended to channel that community through one landowning entity. They have been able to do this with a structure and membership that can be tailored to suit them without any particular legal constraints (subject to any stipulations by funders).

Taken together with the 1997 Act, these extra-statutory developments in Scotland and the means by which they were achieved, showcased community models to the Land Reform Policy Group. The LRPG went on to embrace community models in its work. In passing, it can be noted that it did so without any particular study of comparative models of land reform.[21] From a community land perspective, the culmination of the LRPG's work was the 2003 Act. As already noted, the 2003 Act brought in two rights of community acquisition which were innovative for Scotland. The measures gave rural communities (which were (initially) classed as those with a population of 10,000 people or less)[22] a right of first refusal over land (Part 2) and crofting communities a right to force a sale of certain crofting land and related assets (Part 3).

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[19] Hunter, J. *From the Low Tide of the Sea to the Highest Mountain Tops: Community Ownership in the Highlands and Islands of Scotland* (Kershader: The Islands Books Trust, 2012).

[20] Duffy, J., 'A tale of two islands as Gigha dream turns sour', *The Sunday Herald*, 23 November 2014, at <http://www.heraldscotland.com/news/13190772.A_tale_of_two_islands_as_Gigha_dream_turns_sour/> (last accessed 18 March 2019).

[21] The lack of comparative research has not continued with more recent studies (see, for example, Scottish Parliament Information Centre, *Briefing 15/38, International Perspectives on Land Reform* (Edinburgh: SPICe, 2015), at <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-38_International_Perspectives_on_Land_Reform.pdf>. (last accessed 18 March 2019); and Glass, J., R. Bryce, M. Combe, N. E. Hutchison, M. F. Price, L. Schulz, and D. Valero, *Research on interventions to manage land markets and limit the concentration of land ownership elsewhere in the world* Scottish Land Commission, Commissioned Report No 001 (2018) at <https://landcommission.gov.scot/wp-content/uploads/2018/03/Land-ownership-restrictions-FINAL-March-2018.pdf> (last accessed 18 March 2019).

[22] Under the Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2004 (SSI 2004/296).

After the flurry of activity in Holyrood's first term, land reform did not feature prominently in the second and third terms of the Scottish Parliament. It re-emerged as an issue when the Scottish National Party won an overall majority in the 2011 Scottish Parliamentary elections. Shortly thereafter the Scottish Government appointed a group to look at land reform in 2012. This Land Reform Review Group (LRRG) produced its Final Report in 2014, containing 62 recommendations as to what the Scottish Government should do,[23] but not before the then First Minister Alex Salmond announced (at the Community Land Scotland Annual Conference in 2013) a commitment to bring one million acres of Scotland under community ownership.[24]

With community having such a central role somewhat pre-judged, the LRRG Final Report considered a number of community-related options. In terms of statutory rights of acquisition, it suggested existing community rights should be made less bureaucratic and expanded to urban areas, and that 'statutory land rights of local communities should include [a] a right to register an interest in land, [b] the existing right of pre-emption over land and a right to buy land, as well as [c] rights to request the purchase of public land and [d] to request Scottish Ministers to implement a Compulsory Purchase Order'.[25] The latter category would have been a narrow one, designed only to be used where a land owner had engaged in some kind of avoidance activity that defeated an otherwise legitimate attempt at community acquisition.[26] It has not been legislated for. Then, a similar but slightly different recommendation also made in Section 17 was that communities 'should have the right to request that a local authority exercises a Compulsory Sale Order'.[27] This has also not yet been legislated for, but the Scottish Land Commission has been active in pushing for this.[28]

Not all of the recommendations of the LRRG Final Report made their way into what became the Land Reform (Scotland) Act 2016. Some were destined for the separate but related statute on community empowerment. The Community Empowerment (Scotland) Act 2015 Act amended the 2003 Act, widening the scope of its pre-emptive community right to buy to the whole of Scotland,[29] and finessing the existing scheme to make it more user-friendly. It also introduced provision for communities to make 'asset transfer requests' from public bodies, including their local authority (that is to say, the municipal council), which *must* be considered by that public body in light of a statutory scheme and cannot simply be rejected out of hand. The self-contained regime for asset transfer requests is found in Part 5 of the 2015 Act and has been in operation since 23 January 2017.[30]

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[23] LRRG, *Final Report*. The author was appointed as an adviser to the LRRG in 2013.
[24] Scottish Government, 'A million acres in community ownership by 2020', 7 June 2013, <https://news.gov.scot/news/a-million-acres-in-community-ownership-by-2020> (last accessed 18 March 2019), and see now Scottish Government, 'One Million Acre Strategic Implementation Group', at <https://www.gov.scot/groups/one-million-acre-strategic-implementation-group/> (last accessed 18 March 2019).
[25] LRRG, *Final Report,* Section 17, paragraph 27.
[26] LRRG, *Final Report,* Section 17, paragraph 25.
[27] LRRG, *Final Report,* Section 17 paragraph 33). This has not yet been implemented.
[28] Scottish Land Commission, 'Compulsory Sales Orders – a proposal from the Scottish Land Commission', at https://landcommission.gov.scot/wp-content/uploads/2018/08/CSO-Proposal-final.pdf (last accessed 18 March 2019).
[29] By virtue of the 2015 Act, section 36 amended the 2003 Act, section 33. On the first urban buyout, See Lovett and Combe, 'The Parable of Portobello'.
[30] The Community Empowerment (Scotland) Act 2015 (Commencement No. 4 and Transitory Provision) Order 2016 (SSI 2016/363).

In terms of its impact on private land owners, the 2015 Act introduced a right of community acquisition where land has been 'wholly or mainly abandoned or neglected' or somehow managed in a way that was detrimental to a community's 'environmental wellbeing'.

Then came the most recent Land Reform (Scotland) Act, which was introduced to Holyrood with a 'right to buy land to further sustainable development' for communities. This additional right for communities was not presaged in the LRRG Final Report. The 2016 Act also made separate but related provision for land owners to consult with local communities when making decisions about land.

Section II: how does this suite of legislation work?

Having briefly explained how these legal steps came about and what they were designed to achieve, more detail on them follows below. The first wave of community rights – that is to say, the two rights of acquisition in the 2003 Act as originally enacted – will be analysed first, an approach that makes sense chronologically and also because the community body-centric scheme it adopted has been adopted in turn in later waves. The right to buy abandoned, neglected or detrimental land will then be examined as the second wave, with the right to buy land to further sustainable development following as the third wave. Lastly, the similar but different right to make an asset transfer request of a public body will be analysed after the consideration of the four transfer routes that affect private landowners.

First wave community rights of acquisition

The 2003 Act works by allowing a community body (that is, members of a locality associated together in a suitable juristic persona) to acquire land in certain circumstances. For communities in crofting areas of the Highlands and Islands looking to acquire ownership of land under crofting tenure, common grazings and certain eligible additional land, a sale can be forced on an unwilling seller. For communities seeking to acquire land under Part 2 of the 2003 Act, there are two crucial differences. The right is of first refusal, meaning the owner cannot be forced to transfer and the community right will only trigger when the owner decides to transfer the land. Relatedly, to acquire this right of first refusal, a community must first register an interest in the land it seeks to acquire in a public register, to put the landowner on notice of its plans.[31] The Register of Community Interest in Land is maintained by the Keeper of the Registers of Scotland and is available online.[32]

Whilst the owner cannot be forced to sell under Part 2, this right to register an interest in land and the resulting right of first refusal are still important powers for the community to have. The pre-emptive right to buy is stronger than the right to bid that applies in England and Wales as a result of Part 5 of the Localism Act 2011. That legislation only provides a right to make an offer for a targeted asset of community value, whereas the Scottish legislation provides that a transferring landowner must sell to the community at an agreed or set price, if that community has registered its interest in the aforementioned manner. Whilst the Scottish regime in Part 2 cannot force a sale to a community, as a landowner can choose to no longer sell at any point in the transaction, it does mean a properly constituted community body with a registered interest cannot be forced to contend with a new landowner for that asset it has targeted. This is because any transfer that did not first consider the community could be open

[31] The 2003 Act, section 36.
[32] See <https://www.ros.gov.uk/our-registers/register-of-community-interests-in-land> (last accessed 18 March 2019).

to challenge. The moratorium under the Localism Act 2011 gives communities a (relatively weaker) right to bid before the owner can transfer to anyone else.[33]

The schemes in Parts 2 and 3 both involve a number of preparatory steps, the first of which is incorporation of a suitable entity – referred to as a 'community body' or 'crofting community body' in the legislation[34] – that serves as its embodiment. This body will then own the land outright, on a single title. Where the body is a company limited by guarantee, its articles of association must be tailored to have not fewer than ten members, provision that at least three quarters of the members of the company are also members of the local community (with a related stipulation that those members have control of the company), and provision that any surplus funds or assets of the company are to be applied for the benefit of the community. As originally enacted, the 2003 Act obliged communities to incorporate as a company limited by guarantee, but following the 2015 Act they may form a Scottish charitable incorporated organisation or a community benefit society. Similar rules then apply as regards such an entity's constitution. In all cases, the body must have been recognised by Scottish Ministers as having a commitment to sustainable development.[35] Sustainable development is nowhere defined in the legislation.[36] The community is then left to operate in a suitably sculpted regime under the Companies Act 2006, the Co-operative and Community Benefit Societies Act 2014 or the Charities and Trustee Investment (Scotland) Act 2005 (as applicable).

Whilst more flexibility has undeniably been introduced by allowing these two forms to be adopted by communities as alternatives to a company limited by guarantee, it can be noted that there are more flexible schemes in operation for certain community bodies recognised in other Scottish statutes. A notable comparator is the Transfer of Crofting Estates (Scotland) Act 1997, section 2, which simply needs a body (corporate or unincorporated) to be approved by the Secretary of State, after consultation with the Crofting Commission, that is 'representative of the crofting interests in the property to be disposed of' and 'has the promotion of the interests of persons residing on such property as its primary objective'. There is similar flexibility in the 2015 Act, section 19, which allows a body (again, corporate or unincorporated) with certain simple constitutional requirements to make participation requests of certain public bodies (allowing it to get involved with the delivery of a local service). Meanwhile, whilst there is not complete free rein for the composition of community bodies that can make an asset transfer request of a local authority (a scheme discussed further below), for now it can be noted that 2003 Act community bodies must be referable to a geographical area,[37] whereas asset transfer request community bodies might be a community of interest (i.e. an association of people united by a common cause rather than proximity).[38]

Returning to the 2003 Act, once a suitable body has been formed in its terms, there must also be evidence of local support. In terms of the Part 2 right of pre-emption, evidence is needed

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[33] Adamyk, S., *Assets of Community Value: Law and Practice* (London: Wildy, Simmonds and Hill, 2017).
[34] The 2003 Act, sections 34 and 71. See generally Combe, 'Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?'
[35] The 2003 Act, section 34(4) and section 71(4), as applicable.
[36] A point considered by Andrea Ross in chapter 10 in this volume.
[37] The 2003 Act, section 34(5).
[38] See the Scottish Government *Community Empowerment (Scotland) Act 2015: asset transfer guidance for authorities* (2017) at 5.12. A further and similar comparator community scheme now exists in terms of section 6 of the Scottish Crown Estate Act 2019, which might allow for delegation of public (Crown Estate) management functions to a community body but again along slightly different community lines to existing land reform legislation.

at the beginning of the acquisition process.[39] Ordinarily, all of this should happen before the land is exposed for sale, although if that is impossible a properly constituted community body can seek to have a 'late' application recognised provided the landowner has not yet finalised a transfer, albeit much stronger evidence of community support for the acquisition is needed.[40]

With regard to approval generally, for both the community right to buy (punctual or otherwise) and the crofting community right to buy, any movement to acquire is followed by a ballot to ensure majority support of the local community before exercise of the right itself.[41] Thereafter, even with that local mandate, acquisition will only be possible with the approval of the Scottish Ministers. That approval will only be forthcoming if the acquisition is in the public interest and compatible with furthering the achievement of sustainable development.[42] The (repeated) role of sustainable development in this statute has been described as a 'primary duty' on the decision-makers which 'has priority over any other duties or objectives',[43] so its application and interpretation are of crucial importance. Assuming a community steers itself through these provisions, the land is then transferred at an agreed or independently valued price.[44] There are provisions that allow the owner to have input into or appeal the overall process throughout.

Second wave community rights of acquisition

The 2003 Act now has a new Part 3A, introduced by section 74 of the 2015 Act, which enshrines a right which goes beyond pre-emption. This new entitlement has something in common with the crofting community right to buy in that it does not require a willing seller. There is also an overlap with both older community rights in terms of what is a properly constituted community body[45] and conditions for the approval of Scottish Ministers (including the acquisition having sufficient support locally).[46] Assuming those better-known criteria are met, community bodies have the right to acquire 'eligible land' if in the opinion of Scottish Ministers: '(a) it is wholly or mainly *abandoned* or *neglected*, or (b) the use or management of the land is such that it results in or causes *harm*, directly or indirectly, to the *environmental wellbeing* of a relevant community'.[47]

As to what this means, the statute itself lays down certain exceptions (including land being used as someone's home and croft land, the latter already being subject to the crofting community right to buy). Secondary legislation then explains that Scottish Ministers should assess for eligible status on the basis of certain factors.[48] 'Abandoned or neglected land' forms one category, 'detrimental land' is the second category.

For abandoned or neglected land, Ministers must consider the land's a) physical condition (which might include whether it is a risk to public safety or indeed the wider environment), b)

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[39] The 2003 Act, section 38.
[40] The 2003 Act, section 39.
[41] The 2003 Act, section 52 or section 75, as applicable.
[42] The 2003 Act, section 51(3)(c) and (d), or section 74(1)(j) and (n), as applicable.
[43] Ross, A., *Sustainable Development in the UK: From Rhetoric to Reality?* (Abingdon: Earthscan, 2012), 191.
[44] The 2003 Act, sections 59-60A or section 88, as applicable.
[45] The 2003 Act, section 97D.
[46] The 2003 Act, sections 97H(1)(i) and 97J.
[47] The 2003 Act, section 97C (emphasis added).
[48] See the (snappily titled) Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 (SSI 2018/201).

designation or classification (perhaps as nature reserve or monument, or relative to the local development plan for the area), or c) use or management (with actual use for any period of time for lawful public recreation, conservation purposes, or something that requires a permit or licence all being relevant, and conversely not being used for any discernible purpose for a period of time would be relevant). For detrimental land, Ministers must again consider use or management of land, and also look at whether harm to environmental wellbeing in a technical sense has in fact occurred, namely is there a 'statutory nuisance' in terms of the Environmental Protection Act 1990 or has there been certain enforcement action under the Antisocial Behaviour etc. (Scotland) Act 2004.

Even where Scottish Ministers are satisfied the targeted area is eligible land, there is more to consider. Before a forced sale can occur, the community must have already tried to purchase the land in question (an attempt which might, but theoretically need not, have involved registration of an interest in land under Part 2).[49] Plus, where the land acquisition turns on environmentally detrimental status, the community scheme must be capable of fixing the problem, and the community must have invited the relevant (environmental) regulator to take suitable action in relation to the harm in question.[50] There is then the familiar requirement for Ministers to consent to the exercise of the right, which they will only do if it is both in the public interest and compatible with furthering the achievement of sustainable development.[51] Given how poorly used or managed land must be to be eligible for this forced transfer, it seems fair to say a well-informed community with a viable plan should normally be able to pass the sustainable development criterion when its plan is compared to the existing use. Assuming Scottish Ministers consent, it is for them to appoint a valuer,[52] then the price payable by the community will be based on what this valuer assesses the market value to be. Such price is payable within six months of Ministers granting consent.[53] There is also an accompanying register maintained by Registers of Scotland where information about each right to buy is to be freely available.[54]

These provisions came into force on 27 June 2018.[55] Given their relative youth, there have been no (successful) attempts to use them yet. Given their variegated stipulations, it seems fair to say successful acquisitions will not be everyday occurrences, although these provisions may serve as an effective backstop in some situations (as has been the case with the crofting community right to buy, as noted below).

Third wave community rights of acquisition

Part 5 of the 2016 Act provides for the fourth legislative route whereby a community can acquire land from a private individual, namely the right to acquire land to further sustainable development. It is not yet in force, but its framework is in place and can be analysed nonetheless. Again, this adopts a community-centric model not unlike Parts 2, 3 and 3A of the 2003 Act with the usual need for a locally accountable community body and local approval of the scheme,[56] but this right to buy is augmented by an onerous process that

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[49] The 2003 Act, section 97H(1)(j).
[50] The 2003 Act, section 97H(5).
[51] The 2003 Act, section 97H.
[52] The 2003 Act, section 97S.
[53] The 2003 Act, section 97R.
[54] The 2003 Act, section 97F. The Register of Applications by Community Bodies to Buy Land can be found at <https://roacbl.ros.gov.uk> (last accessed 18 March 2019).
[55] The Community Empowerment (Scotland) Act 2015 (Commencement No. 11) Order 2018 (SSI 2018/139).
[56] The 2016 Act, sections 56 and 57.

communities might find difficult to negotiate if and when it comes to be used. The reason these tests are onerous is because the prize at the end involves a forced transfer from another individual: assuming the statutory tests are met, and subject to payment of an independently valued price within six months of consent being granted,[57] transfer is compelled.

Where the 2016 Act differs from the earlier rights of acquisition is in asking that more hurdles than public interest and sustainable development are cleared. The transfer of land must also be likely to result in 'significant benefit' to the relevant community, and must be 'the only practicable, or the most practicable, way of achieving that significant benefit'.[58] There is then a further test that 'not granting consent to the transfer of land is likely to result in harm to that community'.[59] Those additional conditions bring the ideas of 'significant benefit' and 'harm' to the fore, both of which are to be determined by an analysis of a community's economic development, regeneration, public health, and social and environmental wellbeing.[60] None of these terms are defined, although environmental wellbeing features in the second wave right of acquisition. The Scottish Ministers' outlook in relation to sustainable development will be fundamental to the operation of this right to buy (a point considered by Ross in chapter 10 in this volume). In the event of any disputes between a community body and a land owner in the future, it is likely that this will not be solved by lawyers (or at least not only by lawyers). In applying for consent, the community body must explain why it satisfies the so-called 'sustainable development conditions',[61] at which point anyone affected by the application can put forward their analysis of the same conditions.[62] The potential for a battle of the experts is apparent.

It is worth mentioning at this stage the way Parts 4 and 5 of the Act are tied together, which might offer a tiebreaker in situations where there is disagreement between the existing and aspiring owner about sustainable development, yet the existing owner has been so entrenched so as to make decisions about land without liaising with the local community. Under section 56(4), Ministers can take into account the extent to which land owners have had regard to guidance issued under section 44 (about engaging a community with decisions affecting land) in determining whether an application to buy land under Part 5 meets the 'sustainable development conditions' for a community buyout. This means the guidance could be important in certain forced sale contexts, and any landowners wishing to avoid a negative inference should follow relevant guidance,[63] meaning they should consider on what occasions they need to engage the community, who within the community they need to engage with, and how that engagement should manifest itself whenever they make a decision relating to land that might impact on local people.

Finally, attention should be drawn to one innovative feature of Part 5 as compared to the other rights of acquisition, namely that a community may nominate a third party acquirer to take title instead of the community, albeit the transfer to such a nominee would still need to

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[57] The 2016 Act, sections 64 and 65.
[58] The 2016 Act, section 56(2)(c). Although there was some sculpting of the provisions about community acquisition to further sustainable development during the legislative process, the general model stayed the same throughout. This provision was one that was amended slightly in the Scottish Parliament, allowing for measurement by way of a 'most practicable' test as opposed to simply 'only practicable'.
[59] The 2016 Act, section 56(2)(d).
[60] The 2016 Act, section 56(12).
[61] The 2016 Act, section 54(6)(a).
[62] The 2016 Act, section 55(2)(b). See further Ross, in this volume.
[63] Scottish Government, *Guidance on Engaging Communities in Decisions Relating to Land* (2018), at <https://www.gov.scot/Publications/2018/04/2478> (last accessed 18 March 2019).

meet all the tests already mentioned as modified to reflect the third party acquisition. This novel approach could open up funding and partnership arrangements that have not been possible under existing statutory schemes.

An alternative current: acquisition from the public sector

With regard to the three waves of community rights just mentioned, save for limited exceptions, it generally does not matter who the existing owner of the land is.[64] Normally of greater concern than the ownership status is the status of the land itself, either in law (as croft land) or in terms of what is happening on it. There are two legislative routes to community ownership though where it does matter who owns the land. Both are in statutes that have been mentioned already.

The Transfer of Crofting (Estates) Act 1997 was drafted to allow the Secretary of State for Scotland (now the Scottish Ministers) to transfer government owned crofting assets to local communities. Its scheme does not require a community to register an interest or even request an asset, but the community would need to be party to and engaged with the scheme as a suitable representative body (in terms of section 2) must be formed to take on the asset.

Of much wider application, on two fronts, are asset transfer requests under Part 5 of the Community Empowerment (Scotland) Act 2015. The first reason this is of wider application is an obvious one, namely that it does not just apply to croft land. The second reason is it does not only apply to land owned by Scottish Ministers. This legislation allows communities (in terms of section 77) to request asset transfers from certain 'relevant authorities'. These are the public sector entities listed in Schedule 3 of the 2015 Act, including arms of devolved and municipal government (i.e. the Scottish Ministers and local authorities) and other entities like the Scottish Environment Protection Agency, the Scottish Courts and Tribunals Service, and Scottish Water.

Communities can use this legislation to seek ownership of land or they might seek a right short of ownership, namely a lease or a right to manage or occupy the land. Where ownership is not sought, there is a statutory requirement to have a written constitution but there is no requirement to incorporate in any particular form (although it seems likely that a public body or any funders would expect a tenant to adopt a suitable form). Where a community body seeks to acquire ownership, section 79(3) requires that it is embodied as a suitable legal personality. As with the community rights that are not restricted to land currently owned by a public sector owner, these include a company limited by guarantee, a Scottish charitable incorporated organisation and a community benefit society, although a noticeable difference is that the legislation asks for 20 rather than ten members.[65] Sensibly, regulations have allowed some bodies to acquire land even if they have less than this floor of 20 members, namely where a community body that has been approved for another right of acquisition then seeks an asset transfer. This means there is no need for a community approved for an earlier acquisition under different rules to re-incorporate or form some sort of subsidiary to benefit from this scheme.[66]

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[64] The exceptions are technical, such as the exception to the newer rights where land has fallen to the Crown when the owner has died without any heirs: see the 2003 Act, section 97C(5) and the 2016 Act section 46(2)(d).
[65] See also the Scottish Crown Estate Act 2019, section 6.
[66] The Asset Transfer Request (Designation of Community Transfer Bodies) (Scotland) Order 2016 (SSI 2016/361).

The right to request an asset transfer is not triggered by anything in particular and, subject to certain restrictions to (for example) prevent repeated applications for the same asset,[67] a community can expect any request to be given due consideration. The community can request ownership or a lease of the land in question, and (on the assumption ownership is sought) the request must state the land to which the request relates, the reasons for making the request, the benefits which the community transfer body considers will arise if the authority were to agree to the request, and the price that the community would be prepared to pay (Section 79). Assuming full compliance, the relevant authority is not allowed to sell the asset until it considers the request (section 84) and it must give due consideration to the application based on the scheme set out in section 82, including whether or not the agreeing to the request would be likely to promote or improve economic development, regeneration, public health, social wellbeing, or environmental wellbeing. Importantly, a relevant authority is also under a reporting obligation, to establish and maintain a register of land that it, to the best of its knowledge and belief, owns or leases.[68] This must be accessible to the public and as such it will allow communities to plan for potential acquisitions with reference to that list of assets.

This modern scheme is clearly an innovation, but it should be recalled that local authorities might have decided to offload land in some circumstances prior to this legislation coming in to force and it remains competent for them to transact with relevant assets when those assets have not been subjected to an asset transfer request, subject to compliance with local government law generally and any particularly applicable regime, such asprocurement and state aid rules and The Disposal of Land by Local Authorities (Scotland) Regulations 2010.[69] Such transfers might well have been instigated by the relevant council rather than a community within its area, although it can be acknowledged that communities could have made these requests anyway, albeit such requests may have met by a refusal or even no response at all. The real innovation, and the real shift in the power balance for community ownership, is that the public sector body *must* agree to a properly made request unless there are reasonable grounds for refusing it, in terms of section 82(5). In this regard, a certain resonance with the new right to buy to further sustainable development found in the 2016 Act is evident: if an application is for a strong purpose, it *must* be granted. Where a community is not satisfied with a decision, there is an appeal and a review mechanism.[70]

Whilst only brief coverage of this statutory scheme is possible here, and its associated regulations have not been covered in detail, it is useful to set out the asset transfer scheme as a counterpoint to the other rights of acquisition. As with the right to buy abandoned, neglected or abandoned land, it is perhaps too early to offer bold conclusions about its effects, and the fact it can only apply to land owned by certain bodies will necessarily limit the amount of land it can affect, but it is useful to highlight its terms as an alternative model, not least because of the potential for a community of interest. Further, community asset transfers have already attracted some analysis in terms of the interaction communities have had with them, in a piece of research commissioned by the Scottish Land Commission.[71] No

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[67] The 2015 Act, section 93.
[68] The 2015 Act, section 94.
[69] SSI 2010/160.
[70] The 2015 Act, sections 85 and 86.
[71] Mc Morran, R., A. Lawrence, J. Glass, J. Hollingdale, A. McKee, D. Campbell, and M. Combe, 'Review of the effectiveness of current community ownership mechanisms and of options for supporting the expansion of community ownership in Scotland' (Scottish Land Commission, Commissioned Report, 2018) available at <https://landcommission.gov.scot/wp-content/uploads/2018/11/1-Community-Ownership-Mechanisms-SRUC-Final-Report-For-Publication.pdf> (last accessed 18 March 2019), chapter 7.

further analysis of the effect of that scheme is offered here, but some brief analysis of the actual effects of the earlier legislation – which has had more time to bed in and be engaged with – will now be offered.

Section III: what effect have the measures had so far?

There have been a number of community transfers under the scheme of Part 2 of the 2003 Act, albeit the impact has not been profound in terms of numbers of activated community interests in the Register of Community Interests in Land: only twenty-four community interests have been activated, and even then there have been instances where a number of activations have actually been part of only one scheme. In terms of qualitative rather than quantitative impact, recent Scottish Government commissioned research seems to indicate positive trends for communities and other benefits across a range of aspects.[72] The scheme is not a one-way street for communities though: there have been occasions when communities have faced challenge in court, and indeed certain communities who thought they were progressing along the land reform process (having obtained Scottish Ministerial consent for that) have been challenged through litigation.[73] .

The impact of the crofting community right to buy, or at least its looming presence, has been more noticeable. This too has been the subject of litigation, but the one buyout which began with community and landowner at loggerheads eventually resulted in a transfer to the relevant community, after the landowner's challenge to the scheme of Part 3 based on the European Convention of Human Rights was unsuccessful.[74] It has also contributed to various transfers of land (particularly in the Western Isles) in the limited area where it operates without the need to resort to litigation.[75] These developments chime with earlier commentary that Part 3 of the 2003 Act marks a 'fairly radical step away from the traditional protection afforded to Scotland's landowners'.[76]

Only brief consideration of the effectiveness of the more developed rights of acquisition has been possible here. Recent research offers further food for though.[77] For now, that snapshot allows some questions to be considered by way of conclusion.

Conclusion

Much has already been said about Scotland's community-centric approach to land reform.[78] This chapter has offered some further analysis, by distilling how the reforms have come to

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[72] Mulholland, C., G. McAteer, C. Martin, L. Murray, R. Mc Morran, E. Brodie, S. Skerratt and A. Moxey, 'Impact Evaluation of the Community Right to Buy' (Edinburgh: Scottish Government Social Research, 2015) at <www.gov.scot/Publications/2015/10/8581> (last accessed 18 March 2019).
[73] Consider *Holmehill Limited v The Scottish Ministers* 2006 SLT (Sh Ct) 79, *Hazle v Lord Advocate* (Kirkcaldy Sheriff Court (ref B270/07), 16 March 2009), and *West Register (Property Investments) Ltd. v Lord Advocate* (11 March 2015, Selkirk Sheriff Court (unreported)), and see further: Combe, M. M., 'No Place Like *Holme*: Community Expectations and the Right to Buy' *Edinburgh Law Review*, 11 (2007) 109-16; Combe, M. M., 'Access to Land and to Landownership', *Edinburgh Law Review*, 14 (2010) 106-13; and Reid, K. G. C. and G. L. Gretton, *Conveyancing 2015* (Edinburgh: Avizandum, 2016), 37-39.
[74] *Pairc Crofters Limited and Pairc Renewables Limited v The Scottish Ministers* [2012] CSIH 96. See further Combe, M., '*Ruaig an Fhèidh*: 3', *Journal of the Law Society of Scotland* 58(2) (2013).
[75] Hunter, *From the Low Tide*.
[76] Carey Miller, D. L. and M. M. Combe, 'The Boundaries of Property Rights in Scots Law' *Electronic Journal of Comparative Law*, 10.3 (2006) <http://www.ejcl.org/103/art103-4.pdf> (last accessed 18 March 2019).
[77] McMorran et al, 'Review of the effectiveness of current community ownership mechanisms'.

pass, how they work in practice, and noting some of the opportunities, benefits and indeed challenges that have followed from the legislation. Two questions occur, though, as we take stock of the rights that have been introduced at a time when there has been no particular indication that further community rights to acquire will be introduced.

The first question is: why are we here? Did we think this through, or did it just happen because an organic movement which reacted to problems that existed in parts of Scotland caught the imagination of legislators, at just the right time and when there was some precedent for community landownership on the statute books to adapt (with the 2003 Act following the 1997 Act, to an extent)? A related question is: having developed this framework, why are we aiming for one million acres? Is a metric based on land area the correct one where smaller, strageic urban assets are concerned? This is not to criticise or praise where Scotland sits, but there are times when Scotland seems to be on something of an accidental community land ownership journey which is not really replicated elsewhere, so these questions are worth considering.

This is not to say community ownership is not a legitimate and important pursuit when it comes to vibrant communities.[79] What makes the question especially worth considering though is not so much to do with the merits and demerits of community ownership, but rather to wonder whether Scotland has missed a trick when it has been distracted: have other approaches to land reform been somewhat side-lined in comparison to the community-oriented approach? Other approaches to land reform do exist (notably there there are some individual rights of acquisition available to certain tenants in Scotland),[80] but even then such rights might not change much on the ground, and (like community or even third party rights to buy based on a community of place) they are predicated on something happening on or near the ground at the given moment. Perhaps this is something that will be investigated further in the future: the Scottish Land Commission has been keen to learn what other jurisdictions are doing in contrast to Scotland's approach to community, and also pushing for other the introduction of other devices like the compulsory sale order.

Those heretical questions aside, and even working to the assumption that Scotland has stumbled into its particular model community-oriented land reform, this chapter should provide some detail about how it can work in theory and in reality. The rights of community acquisition introduced to Scots law have provided real opportunities to communities across Scotland without, it is submitted, causing too many issues as regards the rule of law, the protection of private property, and operation of the land market in Scotland. Further analysis about many of these matters now follows in subsequent chapters in this volume, and no doubt further analysis will follow in the future.

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[78] Consider Bryden, J. and C. Geisler, 'Community-based land reform: Lessons from Scotland', *Land Use Policy* 24 (2017) 24-34 and MacKenzie, A. F. D. *Places of Possibility: Property, Nature and Community Land Ownership* (Somerset, NJ, USA: John Wiley & Sons, 2012).

[79] Hopkins, R., *The Power of Just Doing Stuff: How Local Action Can Change the World* (Cambridge: UIT/Green Books, 2013), 58-59.

[80] In terms of sections 13-19 of the Crofters (Scotland) Act 1993 and Parts 2 and 2A of the Agricultural Holdings (Scotland) Act 2003.