COMMUNITY EMPOWERMENT (SCOTLAND) BILL
RESPONSE FROM SOLAR TO CALL FOR EVIDENCE

The Society of Local Authority Solicitors and Administrators in Scotland (SOLAR) welcomes the opportunity to respond to the call for evidence issued by the Local Government and regeneration Committee on 26 June 2014. The SOLAR response is solely to question 4 of the call for evidence paper: “Are you content with the specific provisions of the Bill, if not what changes would you like to see, to which part of the Bill and why?

1. SOLAR’s principal point in relation to the Bill as published concerns Part 6 of the Bill which deals with common good property. SOLAR’s view is that the Bill misses the opportunity to deal with the legal issue identified by the Court in the Portobello Park Action Group Association v City of Edinburgh Council case.

2. That issue arose from the court’s view, supported in a more recent case involving East Renfrewshire Council that it is not possible for a council to change the use of land that is viewed as being inalienable common good land. This contrast with the position of a council wishing to dispose of inalienable common good land where the legislation provides that this may be possible but only with the approval of the court.

3. SOLAR’s position is that a proposed change of use of or appropriation of inalienable common good land should be subject to the same controls as those that already exist for a disposal of the same property.

4. Such a change would avoid the need for an Act of Parliament to be promoted should another case arise where a council wished to appropriate common good land for another council function. The approval by the Scottish Parliament of the City of Edinburgh Council (Portobello Park) Act 2014 earlier this year demonstrates that there will be circumstances in which councils will legitimately wish to apply land held on common good for purposes different to the purposes for which the land was given to the council’s predecessors. Therefore, it is right that there should be a process short of promoting legislation to enable this to happen.

5. It is acknowledged that any proposal that could be perceived as weakening the existing legislative restrictions on changing the use of common good may be viewed with suspicion by some. However, the SOLAR proposal would not allow any appropriation of land to take place without the approval of the court. This, combined with the provisions in the Bill relating to consultation would give ample opportunity for scrutiny and challenge of any proposed appropriation.
6. The change could be accomplished by some minor, technical amendments to section 75 of the Local Government (Scotland) Act 1973.

7. SOLAR, in line with its response to the earlier consultation which closed on 24 January 2014, believe that the current provisions in the Bill relating to common good miss the opportunity to provide clarity on the interpretation on some key terms used in the 1973 Act. These include:

- How and in what circumstances moveable assets held on the common good account could be disposed of. The legislation is currently silent on this point.

- Definitions of “alienable” and “inalienable” common good. The lack of clarity on these definitions has resulted in the Keeper of the Registers of Scotland refusing to issue a full title indemnity on the sale of any common good land, even where the property is clearly alienable.

- Ideally, the Bill would attempt to define common good rather than having to rely on less than perfect common law definitions.