We thank the Committee for the opportunity to present evidence on the Community Empowerment (Scotland) Bill. Our response to question 4 is as follows:

4. Are you content with the specific provisions in the Bill, if not what changes would you like to see, to which part of the Bill and why?

4.1 Types of community body

There seems to be room for confusion over what type of community body can do what and potential for overlap between the various community bodies. As drafted the Bill provides for 6 different types of community body as follows:

1. “Community bodies” in relation to a community planning partnership means bodies, whether or not formally constituted, established for purposes which consist of or include that of promoting or improving the interests of any communities (however described) resident or otherwise present in the area of the local authority for which the community planning partnership is carrying out community planning (Section 4(8)).

2. A “community participation body” which includes a community-controlled body, a community council and a body designated as such which may make a request to a public service authority to participate in an outcome improvement process (Section 15)

3. A “community controlled body” (body corporate or unincorporated) which may also be a community participation body (Section 14)

4. A “community body” which is a company limited by guarantee and / or an SCIO which may register an interest in land (Section 28)
5. A Part 3A community body which is a company limited by guarantee which may apply for consent to buy neglected and abandoned land (Section 48)

6. A “community transfer body” which is a community council and/or an incorporated or unincorporated body designated as such by the Scottish Ministers which may make an asset transfer to a relevant authority (Section 50)

We would question whether it is necessary to have so many different types of community body. Do the community bodies which become involved in community planning include all of the bodies listed above?

We would also query the lack of consistency for the requirements for different bodies. For example, it would appear that an SCIO may be a community body under Part 2 of the Land Reform (S) Act 2003 (“the 2003 Act”) but not under the proposed Part 3A. Is there a reason for this distinction? If the number of community bodies is to remain as it is at present in terms of the Bill, we would suggest that clear guidance on how each body may be constituted and what they can and cannot do should be issued for the benefit of lay persons.

4.2 Amendments to Part 2 of the 2003 Act

4.2.1 Extension of Community Right to Buy to Urban Land

Our understanding of Part 2 of the 2003 Act is that it sought to achieve aims specific to rural land. The justification for the community right to buy was specific to rural areas. The Policy Memorandum states that “A key reason given for the extension to urban land was to provide people living in urban areas with the same rights as those in rural areas”. Whilst we appreciate community ownership brings benefits to a community, there are specific reasons why the rural community right to buy was justified and we have concerns about simply extending the right to buy to urban areas for the purposes of symmetry.

Given that urban land is more likely to be developed, if the community right to buy is extended to urban property, it will be necessary to put safeguards in place to ensure that it is not used to stifle the development plans of competitors.

4.2.2 Extension of Time Period to 8 Months

In terms of the draft Bill, community bodies are to be given 8 months to buy a property. The sale and purchase of a typical commercial property would be completed well within such timescales. The owner of a property subject to a right to buy who intended to sell on the open
Local Government and Regeneration Committee

Submission Name: Brodies LLP
Submission Number: 129

market faces a delay of up to 6 months in situations where they may need the sale proceeds to settle bank debt or fund business expansion.

The community bodies which have successfully used the legislation to purchase land have proven that it is possible to complete the transaction within 8 months. We would therefore question why it is necessary to extend the time period, thus increasing the burden on the landowner. Our understanding is that any infringement of the landowner’s Article 1 Protocol must be proportionate and we consider that the extension of the time frame reduces the proportionality of the community right to buy.

4.2.3 Amendments to “late” applications

“Late” applications permit a community body to register an interest in land once the land has been marketed. This concession interferes with the live land market and so the circumstances in which a “late” application are to be permitted should be restricted as much as possible.

The amendments to section 39 of the 2003 Act appear to dilute the criteria required. In particular, the requirement to show “good reasons” why the application was not submitted prior to the land being put on the market is replaced with a requirement to show that an application was prepared or steps have been taken towards community ownership prior to the land being put on the market. Whilst we appreciate that this test would prevent community bodies who are simply reacting to the land being put on the market from registering an interest, our view is that community bodies should be obliged to explain why an application was not submitted prior to the land being put on the market. Otherwise, this amendment to the criteria for “late” applications could make some landowners wary of putting land on the market for fear of “triggering” community interest.

4.2.4 Cost of independent valuation

The Bill reserves the right for Ministers to recover the valuation costs from a landowner if he withdraws from a sale where a community body had planned to buy his property. Market conditions or personal circumstances may have changed in the additional time required to complete a sale to a community body and so we would hope that this discretion is exercised with care.

4.3 Part 3A - Right to buy neglected and abandoned land

We appreciate that land which is left abandoned/neglected can be a barrier to sustainable development. However, we do not consider that the only solution to this perceived problem is
Local Government and Regeneration Committee

Submission Name: Brodies LLP

the transfer of land to community bodies and would question whether Part 3A is necessary when local authorities have existing powers of compulsory purchase. The Policy Memorandum confirms that this concern was also raised by local government respondents during the consultation periods.

If it is considered that control of land by community bodies is the best means of achieving sustainable development, the community could be given the chance to lease the property in the first instance. The lease could be for a period of 5 years with an option to purchase the land at the end of that period. This would give the community a fair chance to see if they can make the property work for them and pass the test of sustainable development.

The lease could be for a nominal rent provided the community undertook to make improvements to the property. If the community found that it didn’t work out, the lease could come to an end and the community could remove all equipment and fittings belonging to them and, where appropriate, seek alternative premises. If the community found that they did make a success of the project operating from the property, they could exercise the option to purchase the property at the end of the lease.

4.3.1 Definition of Abandoned and Neglected Land

We note with concern that the Bill contains no substantive provisions regarding the definition of neglected or abandoned land. Leaving the definitions of neglected and abandoned land to the discretion of Ministers and only setting out factors which may be taken into account leaves much uncertainty for all concerned with what may or may not be abandoned and neglected land. This may discourage purchasers from buying land which may be deemed abandoned and neglected if they do not plan to develop or use that land straight away.

We also question whether it will be possible to frame guidance on neglected and abandoned land in regulations which provides sufficient legal certainty. Landowners must be able to look at the regulations and identify whether their land falls within the definition of “neglected” or “abandoned”. They would want to know, for example, how long a property must have been left vacant and unused to be deemed to be abandoned. They would also want reassurance that certain types of property would not be deemed to be abandoned or neglected. For example, there are many examples of rural land which may look abandoned to the naked eye but in fact have deliberately been left as such for agricultural purposes. Some farm buildings may also seem neglected but still be in operation or part of long term plans for the farm. We would hope that Ministers would not consent to the sale of such property.
Local Government and Regeneration Committee

Submission Name: Brodies LLP
Submission Number: 129

We note that there is a provision seeking to exclude an individual’s home from the provisions. We support this exclusion and, given the protection afforded to a person’s private and family life in terms of the European Convention on Human Rights, consider it to be significant. We are however wary that this exclusion is also subject to further regulation.

It is our understanding of section 33 of Part 2 of the 2003 (as amended by the Bill) that a community body can register an interest in salmon fishings or mineral rights if they are owned by the owner of the land or if they are owned separately from the land. Section 53 of Part 2 provides that Ministers will not consent to the exercise of the right to buy in respect of the salmon fishings/minerals unless the community body is also exercising its right to buy the land (or already owns it).

We do not consider the position with regard to mineral and salmon fishings to be clear in Part 3A. Does the fact that mineral rights and salmon fishings are not specifically excluded mean that they are included in the definition of “eligible land”? Given the possibility for confusion as to whether salmon fishings or mineral rights are included, we would suggest that clarification is given.

If minerals and salmon fishings are included in the definition of eligible land in Part 3A, we are not convinced that the tests of abandoned/neglected land (however they may be framed) may be applied to these rights which, by their nature, are not “used” or occupied in the same way that land is. We would question the justification for including mineral rights and salmon fishings in land which can be purchased under Part 3A if they cannot be “abandoned” or “neglected”.

4.3.2 Criteria for an Application

Ministers must consider whether the owner’s continued ownership would be inconsistent with furthering the achievement of sustainable development. Ministers are entitled to ask the owner to give information about the proposals for the land. This means that even if a landowner proposes to use land in a certain way, if that use is not deemed to be compatible with “sustainable development” the land can be acquired by a community body. In effect, Ministers are being placed in the position of comparing the different proposals for land use and deciding which is preferable for “sustainable development”. We suggest that, if a landowner has a proposed land use (whether that be development in a number of years or planting a crop of turnips next season) which can be supported by evidence, that should be sufficient to prevent a community body from compulsorily purchasing the land.
The final criteria is that the community body has “tried and failed to buy the land”. We would suggest that this should be expanded upon to provide that the community body must have acted in good faith or used reasonable endeavours in their effort to purchase the land.

4.3.3 Points of Process

In terms of Section 97G(11) Bill, the community body is to receive copies of all views submitted to the Ministers. The landowner should also be entitled to see these views and make counter representations if necessary.

The Bill allows the community body to ask the Minister to keep the community’s funding plans confidential. However, we note that the community body is obliged to send a copy of the application and accompanying information to the landowner in terms of section 97G(7). We assume that this includes any “confidential” information withheld from the register and support the idea that all information should be sent to the landowner for comment. The position could perhaps be clarified for the avoidance of doubt.

Ministers are entitled to make Regulations which will freeze dealings with a property in respect of which an application to buy has been received (section 97N). We would ask that this proposal be considered carefully and that any “frozen” period be short.

On registration of a title to land acquired by a Part 3A community body, any standard security over the land will fall. Will a creditor whose debt will not be satisfied by the sale proceeds be entitled to block the sale of the land to the Part 3A community body? If not, will the creditor be compensated under Section 97T?

4.4 Asset Transfer Requests

Where the land is leased to the relevant authority by another relevant authority or a company owned by a relevant authority, the sub-letting and use restrictions do not apply to the lease to the community transfer body. This could put some authorities in difficult positions if they have agreed to such restrictions to comply with title conditions or tenant mix requirements and so this provision should be qualified accordingly.

4.5 Common Good
Local Government and Regeneration Committee

Submission Name: Brodies LLP

The Bill should contain a definition of common good based on the principles established by the 1944 Magistrates of Banff case which are clear and have been established for 70 years. These principles should be formally adopted by any reforming statute.

The drafting appears to allow any party to make representations to the Council that property is common good. This raises the prospect that Councils may be requested to register a large number of properties that are not, in fact, common good. Identification of common good can be a time consuming and complex process. The only way to determine whether property is indeed common good is by forensic analysis of the Council’s title deeds, historical committee minutes etc. We would therefore suggest that any representations made to the Council that property is common good must be supported by evidence of this status.

With reference to the intention to register common good property, we would suggest that it be clarified whether it can be assumed that Council owned property which does not appear on the Register is not common good. In theory any asset can be common good. On the assumption that it is not practicable to create or maintain a register of moveable common good assets we would invite the government to restrict common good status only to land.

Does the consultation procedure referred to in Section 65 replace the existing statutory provisions (Section 75 of the Local Government (S) Act 1973)? If so, this is potentially more onerous than at present; Councils are currently entitled to determine that common good land can be alienated without requirement for court consent, depending on relevant circumstances (public benefit, public use of the property etc).

The Bill refers to the disposal and use of common good assets but does not refer to ‘inalienable’ common good; that is common good which a local authority is prohibited from disposing of. We would support the view that all common good should be capable of disposal by local authorities; it should not be the case that any land must be held in perpetuity or require consent of the Scottish Parliament to dispose.

Consent is proposed to be required to any disposal or change of use of land. The Government should consider whether there should be exceptions to this, e.g. in the case of de minimis transactions which do not change the overall or primary nature of use of the land, or grant of leases or licences (which we consider to fall within the scope of a ‘disposal’) which preserve the status / use of the land.