CLAS is a third sector advisory service initially established in Scotland in 2011 to implement a recommendation of the Scottish Government’s Grow Your Own Working Group. Our function is to work with community groups and with landowners (both public and private sector) to facilitate agreements for community use of land for growing projects. Under this remit, we are usually more concerned with leases, licences and other arrangements for community use of land as opposed to community ownership of land. CLAS now also operates in England and in Wales, but with separate funding arrangements in each country. In Scotland, CLAS’ current main funder is Scottish Government Food and Drink Division.

1. To what extent do you consider the Bill will empower communities? Please give reasons for your answer.

Part 2 – Community Planning

1.2.1 That I can see, the expression “community empowerment” does not appear anywhere in Part 2 of the Bill – perhaps it should? Section 4(5) makes some provision for community involvement in the process, but arguably this is merely engagement as opposed to empowerment. I think it sends the wrong signal that, in the way the provisions have been drafted, a community body which does participate in the community planning process is not counted as being a “community planning partner” (see section 4(4)).

Part 3 – Participation Requests

1.3.1 I can foresee community growing initiatives making use of participation requests in seeking to improve outcomes relating to use and upkeep of open spaces which are owned by relevant public service authorities. This might in some cases involve a proposal that the community group itself take over maintenance of the space from the authority or the authority’s private sector maintenance contractors. Granton Community Gardeners in North Edinburgh provide an inspiring example of how members of a community are transforming areas of ground which the local authority previously struggled to maintain against fly-tipping, dog fouling and other anti-social behaviour.

1.3.2 I can see a participation request potentially being preferable to an asset transfer request in this scenario as it makes it clear that the community are providing the public sector landowner with an economically and socially valuable service. Accordingly, if any money is to change hands, it should be the landowner paying the community group. Conversely in an asset transfer, there could be an assumption that the community group would need to pay rent or a capital purchase price. Understanding the relationship between public body and community as being one in which the later provides a benefit to the former and not vice versa is also helpful to countering any argument that the transaction may be subject to the European State Aid rules.

1.3.3 The following discussion is relevant if there is a “no” vote in the forthcoming independence referendum. Section 16(4) of the Bill limits the public bodies to which participation requests can be made to devolved areas of government. I can envisage circumstances in which a community might wish to participate in an outcome improvement process with a reserved public sector landowner – for example the Ministry of Defence or Network Rail. As regards land situated in England and Wales, such public sector bodies are subject to the “Right to Contest” provisions of Part X of the Local Government, Planning and Land Act 1980 (c.65), under which the Secretary of State can order disposal of underused land, but those provisions do not extend to Scotland. In the event of a “no” vote, I consider that the Scottish Government should negotiate with UK Government to ensure that participation requests (and also asset transfer requests) are made equally applicable to reserved public sector landowners.

1 See https://www.facebook.com/grantoncommunitygardeners
1.4.1 I agree that extending the pre-emptive right to buy into urban areas is likely to lead to some community bodies making successful purchases under the statutory right and that these may support projects that will empower those communities. As has been the experience in rural areas, I expect that the existence of the statutory right in the background will also tend to encourage more non-statutory deals between landowners and community groups with urban land.

1.4.2 However, I would draw to the Committee’s attention that the types of community growing group that I work with may often be more interested in securing use of land in the here-and-now rather than ownership at some unknown future date. Nothing in the Bill as introduced does anything to promote meanwhile community use of privately owned land.

1.4.3 Scottish Ministers have set a target of getting a million acres of land into Community ownership. I am concerned that this target may be counter-productive. Societal benefit is surely measured in terms of numbers of individuals whose life situation is improved and not in land measure. Speaking as a former Civil Servant, I am concerned that the acreage target will lead to target-driven behaviour under which funds and other resources are focused on acquisitions on large areas of remote moorland at the expense of supporting urban projects seeking to acquire small areas of ground. Community use of small areas of ground can make big differences in urban areas; as examples, Gorgie City Farm in Edinburgh only extends to about 2 acres, whilst The Grove Community Garden, which is contributing to the regeneration of the Fountainbridge area of the City, began with just 600m². In saying this, I am not against further rural buy-outs. However rural communities have had the benefit of the Part 2 right to buy for ten years now; it is now important that proposed urban buy-outs should be properly supported.

1.4.4 The provisions of this Part of the Bill are not by themselves sufficient to empower communities. Rural buy-outs to date have been supported both by the availability of funding toward purchase prices and the provision of support, both by officials and by third sector advisory services. I return to these points in sections 3.1 and 3.2 below.

1.4.5 In my view, the policy of the Bill as introduced is wrong in the scenario where a community body seeks to register interest over land which is subject to a prior option in favour of a third party (the details of this are discussed further at paragraphs 4.4.6 to 4.4.8 below.) Under the current terms of the 2003 Act and Bill, a landowner can make land “community interest proof” by granting an option over it, for example to an associate. In my view the correct policy is –

(a) an application may be made to register interest over land which is subject to a subsisting prior option.

(b) in considering whether to permit registration of an interest, Ministers must consult and have regard to the views of the option holder as well as the current owner.

(c) where an interest is permitted to be registered, a subsequent conveyance by current owner to option holder in implement of the exercised option is an exempt transfer.

(d) subsequent to that exempt transfer, action to sell by the former option holder (and now owner) triggers the community right to buy, as does action to sell to a third party by the original owner in circumstances where the option is declined.

1.4.6 In principle, I consider the proposed introduction of an absolute community right to buy abandoned and neglected land to be a good idea with considerable scope for empowering communities and also bringing about environmental improvement. However I am concerned that the scheme has not been adequately thought through, and that this may have the result that the right is in practice not as valuable as it could be. I discuss this further in paragraph 4.4.21 below.
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Part 5 – Asset Transfer Requests

1.5.1 I also consider that asset transfer requests are helpful idea which will in practice contribute to further empowering communities. I think it particularly helpful that a community transfer body will be entitled to request a right to manage or to use an asset as well as a transfer of ownership or a formal tenancy. Grants of rights of management or use seem to me capable of being very helpful for permitting community use in situations where the property is earmarked for another use in the longer term and in situations where the public authority is unable to cede exclusive use to the community transfer body. In practice, the agreements for community use which I currently advise and assist with very often take the form of licences rather than strictly leases.

1.5.2 As with participation requests my main issue with asset transfer requests is that the terms of the Bill do not permit a request to be made to public sector landowners whose functions and governance are reserved to Westminster, so limiting the community benefits that might be realised. Standing what I have said about communities in England and Wales already having better rights in relation to such bodies’ assets than communities in Scotland (see 1.3.2 above), I hope that the Committee may seek an assurance from Scottish Government that they will engage with Whitehall on this point.

Part 6 – Common Good Property

1.6.1 The rules on common good are a two-edged sword so far as community growing initiatives are concerned. On the one hand, they tend to protect unbuilt land from development and, where a growing project can be established on common good land, help to support its long-term future. However, where the community use is or may be an appropriation to another use, or where a proposed agreement between Council and community group may be considered an alienation, the common good rules stand as a barrier to agreements for community use and also fear of challenge and criticism may inhibit Councils from considering beneficial proposals.

1.6.2 I favour there being better information available to the public as to what is or is not common good property. However, in addition to the proposed new registers, I think it important that information be made available, in clear language accessible to the lay person, what the rules are as to what may or may not be common good and also what the rules on alienation and appropriation to other uses are. Without this information, I suspect that both local authorities and individuals and organisations within the community may end up embroiled in unnecessary debate as to what should or should not appear in the common good registers. In my experience, the current law relating to common good assets is not well understood. In this respect, I feel the Bill fails to grasp the nettle; in my view it would have been helpful to create a statutory codification of the substantive law.

1.6.2 As the Committee are no doubt aware, The Keeper of the Registers of Scotland has recently undertaken to register all public land in the Land Register of Scotland within the next 5 years. In respect of common good land and buildings, I consider that there should be cross-referencing between that register and the proposed common good register. The common good register should contain the title number of the parcel, and where a parcel is registered in a common good register, the Keeper should note that fact on the Land Register title sheet.

Part 7 – Allotments

1.7.1 I consider that allotments (along with other types of community growing) can be an important hub for community activity and contribute to empowerment. Accordingly I welcome the clear re-statement of allotment law and the provisions which will hopefully help to increase local authority provision of allotments and other growing spaces.

1.7.2 One of the barriers to getting allotments (and also other community growing projects) going is that structures such as sheds, greenhouse and polytunnels require planning consent (whereas often an identical structure sited within
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the curtilage of a dwellinghouse would not.) Where in regulations made under section 73 a local authority permits such buildings, I would like to see an additional provision to the effect that no separate planning consent is needed.

1.7.3 I am pleased to see that the proposed new duty of local authorities to prepare a food growing strategy involves identification of areas of land suitable for other forms of community growing as well as allotments. All forms of community gardening create community benefits and enhance empowerment, and in some cases other cultivation approaches may be preferable to allotments, for example where a site is small, awkwardly shaped, contaminated or only available for a short period. As the Bill’s proposed new definition of “allotment” restricts it to ground owned or tenanted by the local authority, this approach also means the strategy will take into account what are presently termed “private allotments”; those leased from a private sector landlord.

Part 8 – Non-domestic Rates

1.8.1 I agree with the proposed introduction of power for local authorities to make schemes for reduction and remission of rates, and hope that Councils would do so for small-scale community activities such a community gardening. This would remove an administrative burden- and in some cases a financial burden – from community growing projects. Community garden projects are not-for-profit and sometimes (but not always) registered as Scottish Charities. Under existing rules, rates reductions of 80 to 100% are often available, but a specific application must be made to the local authority, creating work for both the community group and the Council.

3. Do you consider communities across Scotland have the capabilities to take advantage of the provisions of the Bill? If not, what requires to be done to the Bill, or to assist communities, to ensure that happens?

3.1 Funding. As I understand it, most if not all of the successful buy-outs to date under Parts 2 and 3 of the 2003 Act have had significant help with grants or loans toward the purchase price. I think that urban buy-outs under revised Part 2, abandoned and neglected land purchases under Part 3A and asset transfers taking the form of outright purchase will all need similar support. The Scottish Land Fund currently has a rule that it will not lend to communities with populations over 10,000. I think that that rule should be changed, and also that making the change should not be left until the time when the new Act (assuming passed) is about to commence. Now that the Bill is before Parliament and it is predictable that the new statutory rights will soon be available, there may be increased willingness from urban landowners to voluntarily agree community purchases and also from public bodies to voluntarily agree asset transfer.

3.2 Support Services. At present there are various support services available to help community groups seeking to acquire and use land. As examples, the Community Ownership Support Service, run by Development Trusts Association
3.2.2 I believe dialogue needs to get underway as to what support by way of, for example, capacity building, training, materials and hands on assistance communities will need to take full advantage of the new rights contained in Parts 3, 4 and 5 of the Bill, and how best this support can be delivered. I think that building on the experience and expertise of existing support services, and not re-inventing the wheel, is the way forward, but changes to remits, funding arrangements and perhaps manpower may be needed. There will of course be new things to be learnt; the participation request and asset transfer processes are completely new, and the extension of the Part 2 right to buy into urban areas seems likely to raise new issues that have not so far been encountered in the rural context; and new materials will need to be prepared. On the assumption that these Parts of the Bill are likely to be commenced around a year after Royal Assent, I think the aim should be for agreement on remits and funding by the summer of next year to allow preparations for commencement to get underway.

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

**Part 4**

4.4.1 Section 27(1)(c). I wonder if the specific mention of salmon fishings and mineral rights in proposed new section 33(2A) of the 2003 Act may create an implication that the right to buy is not exercisable in relation to other separate tenements. I consider that the right to buy should also be available for rights to gather oysters and mussels; rights of port and of ferry; and also sporting rights separate tenements created under section 65A of Abolition of Feudal Tenure (Scotland) Act 2000.

4.4.3 Section 29(2). I suggest that in proposed section 35(A1) of the 2003 Act the words “of association” should be added after “memorandum” to conform with sections 7 and 8 of the Companies Act 2006.

4.4.4 2003 Act section 37(4)(b). Given that the Bill intends to make it clear that the right to buy can be exercised in relation to separate tenements, I think that the requirement to affix a notice to the land needs to be relaxed for those cases. It would be impractical to affix a notice to a mineral interest and impossible to affix one to an incorporeal separate tenement.

4.4.5 2003 Act section 38(1)(c). I consider that the policy behind this section is flawed and the opportunity should be taken to change it. It is not necessary to hold a surface/alveus title in order to exercise salmon fishing or mineral rights as such rights may have either express or implied rights of access over the surface. Therefore I see no reason why an aspirant community owner of such rights should also need to have or be seeking a surface title. If this argument is accepted, section 53 of the 2003 Act should also be repealed.

4.4.6 Prior Options – section 31(7) and (8) and Schedule 5 line 35; 2003 Act sections 39(5) and 40(4)(g)(iv). This discussion concerns the scenario where, at the date when Ministers receive an application for registration of a community interest, the landowner has already entered into a binding option agreement with a third party under which that party may elect at some point in the future to buy the land. The 2003 Act as passed contains what appears to me a contradiction on this point. On the one hand, section 39(5) appears to say that the application must be refused (although section 39(1) limits the application of section 39 as a whole to the different situation where a binding option has not yet been conferred.) On the other hand section 40(4)(g)(iv) provides that, following registration of a community interest, a transfer by landowner to option holder under a prior option is an exempt transfer, this suggesting that the intention was that it should be possible to register interest over land subject to a prior option.

4.4.7 Scottish Government’s view appears to be that section 39(5) prevails over section 40(4)(g)(iv); certainly this was the reason given for declining an application for registration of an interest by the Holmehill community group in
Dunblane. In the Bill, Government are proposing amendments to the 2003 Act that would put it beyond any question that a prior option trumps a community interest application. The proposed new wording of 2003 Act section 39(1) and proposed new subsection (4A) deal with the existing tension between subsection (1) and subsection (5). Schedule 5 proposes to simply repeal section 40(4)(g)(iv).

4.4.8 I think that this is the wrong policy choice; I think that it should be possible for Ministers to consider whether in the given circumstances a community interest may be registered over land subject to a prior option — my view of the correct policy is set out at paragraph 1.4.5 above. Given that if the option is exercised that transfer would be exempt, there is no detriment to either the current landowner or the option holder.

4.4.9 Section 34 – proposed new section 44A(1) of the 2003 Act. I wonder if this subsection should also refer to section 39, on the view that a late application is registered under that section and not under section 37.

4.4.10 Section 44 – proposed new section 60A of the 2003 Act. In my view this section is flawed as it gives Ministers discretion whether or not require payment from the owner but gives no clue as to the criteria which Ministers are to take into account in reaching the discretionary decision. In the current terms of the section, I do not see how a Sheriff hearing an appeal under subsection (4) could decide that appeal.

4.4.11 Section 46 – proposed new section 67A of the 2003 Act. I appreciate that Government have inserted this provision in response to consultation responses. However it seems to me a recipe for mistakes and confusion to make it that some of the time periods specified in the 2003 Act include public and local holidays whereas others do not.

4.4.12 Section 48 – proposed new section 97C(1) of the 2003 Act. As indicated above, whilst in principle I am in favour of a community right to buy abandoned and neglected land, I have a number of issues and concerns with the terms of proposed new Part 3A of the 2003 Act. This provision is to the effect that land is susceptible to the absolute right to buy if, in Ministers’ opinion, it is wholly or mainly abandoned or neglected. Aside from some special cases mentioned in subsection (3) any further specification of the concepts of abandonment and neglect is left to be prescribed by future statutory instrument (which would not, if I am reading the provisions correctly, be subject to affirmative procedure.) I have four different concerns about this approach. Firstly, I think that the terms on which the State will take the important and serious step of depriving a landowner of their land without their consent require proper Parliamentary debate and scrutiny. To me, this is clearly a matter of such gravity that it is for the elected Legislature and not the Executive. The second related point is that if too much is left to subordinate legislation and Ministerial discretion then too many attempts by communities to exercise the new right will end leading to disputes that can only be resolved by the Courts, with all the associated delay and expense. Third, I think it important to give this issue due weight because it is not risk-free. Scotland has such a long history of effective security of title that it becomes easy to take confidence in land title for granted. If it becomes too easy for a landowner to find themselves in a position where they are being deprived of title against their wishes, this could have adverse consequences for the land market. Finally, there is the question of fairness to landowners who, in my view, are entitled to see clear rules so that they can know how they must act to avoid risk of losing their land and who should not be exposed to arbitrariness.

4.4.13 I consider that more consultation and discussion is needed on the sorts of land susceptible to the proposed right to buy. This should include consideration of (1) land landbanked by developers for future development, (2) farmland left fallow as a matter of good agricultural practice and (3) spaces deliberately allowed to go wild for environmental reasons.

4.4.14 Proposed section 97C(3)(a) of the 2003 Act. The exception at the end of this paragraph leaves me concerned; apparently Government have in mind some possible situations in which a person’s home will, without consent, be sold to the community. The Explanatory Notes do nothing to reassure. This provision brings a new human rights dimension

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2 See Ministerial decision letter dated 11 May 2007 in the associated documents section of entry CB00072 in the Register of Community Interests in Land.
to bear; whereas to date in considering rights to buy the issue has been compliance with Article 1 of the First Protocol to the European Convention, on this point Article 7 (conferring amongst other things a right to one’s home) becomes relevant.

4.4.15 Proposed section 97C(3)(e) of the 2003 Act. I do not see why land that should or might be administered by the Queen’s and Lord’s Treasurers Remembrancer (QLTR) should be an exception to the general rule. To my knowledge, the QLTR does not maintain sites that have fallen to the Crown bona vacantia or ultimus haeres. Those sites may therefore be considered neglected or abandoned. Proposed section 97H(j) should have the effect that a right to buy application under Part 3A cannot proceed if the community has not already tried to do a deal with the QLTR. However if the QLTR has been unresponsive, dilatory or unreasonable, I do not see why land which is under the QLTR’s power of disposal should be treated differently from any other land.

4.4.16 Proposed section 97D of the 2003 Act. The types of body permitted to acquire a Part 3A right to buy should be the same as those permitted to acquire a Part 2 right to buy under Part 2 as proposed to be amended by the Bill. Accordingly this provision should be amended to permit SCIOs and other bodies prescribed by statutory instrument to be Part 3A community bodies.

4.4.17 Proposed section 97E(1) of the 2003 Act. Consequential to the point just made, this provision should be amended to refer to constitutions as well as memoranda and articles.

4.4.18 Proposed section 97E(3) of the 2003 Act. I think that the word “body” has been omitted after “community.”

4.4.19 Proposed section 97F of the 2003 Act. I do not see the point of creating a Register of Community Interests in Abandoned and Neglected Land and further adding to the proliferation of different registers that contain land information. In my understanding, the creation of the Register of Community Interests in Land for registration of interests under the Part 2 right to buy was at the time expedient for reasons including the following: (1) As a Part 2 community interest over land may well subsist for a long time, and given the terms of section 40(2) of the 2003 Act (a purported transfer in breach of community interest is of no effect), there was a risk that an innocent third party transacting with land and unaware that it was subject to a Part 2 community interest could part with money for a void title. (2) At the time of development of the policy of the Bill that became the 2003 Act, not all counties were operational for purposes of the Land Registration (Scotland) Act 1979 and further the Keeper had no power to unilaterally transfer the title to a given parcel of land from the Register of Sasines (which is very difficult to search conclusively) to the map-based Land Register of Scotland (which is easy to search conclusively); accordingly there was a requirement to develop a different way of making public the existence of a pending or registered Part 2 application.

4.4.20 As the proposed Part 3A right to buy is absolute and not pre-emptive, the community right will not hang over the land for a long period as it usually does with a Part 2 right. Further, as matters now stand, the Land Register is now operational for the whole of Scotland and the Land Registration etc. (Scotland) Act 2012 will be fully commenced shortly, empowering the Keeper to unilaterally register any unregistered parcel. If regulations are made under proposed section 97N of the 2003 Act prohibiting transfer of land subject to a Part3A application, the necessary publicity and warning to would-be transferees can simply be entered in the Land Register (with the Keeper registering the plot at that time if it is not already registered), where it will be disclosed in routine conveyancing searches. Insofar as third parties might have any interest in seeing the various documents listed in section 97F(2), those could be obtained by making a freedom of information request to Scottish Ministers.

4.4.21 Proposed section 97G of the 2003 Act. This section is based on existing section 73 in Part 3 of the 2003 Act, the crofting community right to buy. In practice a crofting community will always know who their estate landlord is, and how to get in touch with that person or their representative land agent or factor. This will not be the case with abandoned and neglected land. I think that communities will often face real difficulties in establishing who owns or has current right to complete title to such sites. Sometimes even with extensive searching and investigation – which costs
money – the Register of Sasines does not provide a conclusive answer (one may either come up with no likely owner or two or more possible owners.) Even where a definite name can be found, it may be a date in the distant past. For example the last transaction on record may show the property to have been owned by a trust in 1919, or to have been bought by a partnership in the 1930s. It can be impossible to get from this information to the identity of the person(s) currently in right of the property. Even where the records show a person who is thought still to be alive (or an entity thought to still exist) as owner, they do not give current contact details, it can prove difficult or impossible to trace and make contact with that person. Accordingly I think that communities would often find it difficult to comply with the requirements of subsections (5)(b)(ii) and (7)(a) to identify the owner and copy the application to them. This is an area where I am concerned that the practicalities of the proposed Part 3A right to buy have perhaps not been adequately thought through. Other situations which I think likely to arise in the context of abandoned and neglected sites, and which may merit thought as they may suggest further needs for changes to the provisions of proposed Part 3A are (a) what is to happen where the owner turns out to be an adult with incapacity, for example with senile dementia and (b) what is to happen where the owner turns out to be a lapsed trust with no surviving trustees who are capable of acting.

4.4.22 Proposed section 97J of the 2003 Act. I think that this should be modified in the same way as the equivalent provision in Part 2 to provide that the ballot is to be conducted by an independent ballotter appointed and paid by Ministers.

4.4.23 Proposed sections 97T and U of the 2003 Act. I note that these are based on sections 89 and 90 in Part 3 of the Act and provide that any claim for compensation has to be raised with the community body, with Ministers having a discretion - but no more - to fund the claim. I note the contrast with section 63 in Part 2 of the Bill where compensation claims are made direct to Ministers. I think that the Part 2 approach may be fairer to landowners in the abandoned and neglected land context. A particular question which arises in my mind – I do not know if it has ever been raised in the context of the Part 3 right to buy – is what is to happen where the absolute right to buy causes the owner a capital gains tax or corporation tax liability on the price which could have been avoided or reduced had the owner had control over the timing of the sale. I certainly do not think that the community should bear this cost, but equally do not think the owner is being properly compensated for the deprivation if they are left in this position.

Part 7

4.7.1 I note that the definition in section 68 restricts the statutory meaning of the word “allotment” to those rented from a local authority. In contrast, the definition used in the Allotments (Scotland) Acts 1922 and 1950 appears capable of encompassing privately owned allotments as well. As in Schedule 5 to the Bill the 1922 and 1950 Acts are repealed in their entirety, I wonder if anything that has continuing significance for private allotments is being repealed without replacement. Section 17(2) of the 1922 Act and sections 3 and 4 of the 1950 Act are perhaps examples.

4.7.3 Sections 77 and 78. As these sections are not solely about allotments, I suggest that either they should be in a separate part of the Bill or alternatively that a change to the title of Part 7 is required.

4.7.3 Section 77(3)(c). Although this provision concerns both allotments and other forms of community cultivation, it is only triggered when unmet demand for allotments reaches a certain level. I suggest it should also be triggered where it appears to the authority that there is a significant unmet demand for land for other forms of community cultivation.