Community Empowerment (Scotland) Bill
Submission to the Local Government and Regeneration Committee
Alison Johnstone MSP on behalf of the Green MSPs
28th August 2014

Background

- This document follows the consultation response submitted by the Green MSPs to the Scottish Government to the then Community Empowerment and Renewal (Scotland) Bill in January 2014, a document which was informed by consultations made by the Green MSPs with representatives of football supporters' trusts across Scotland. To avoid repetition, an edited version of that earlier document is included here as an annex.

- Although this current document will consider all the questions posed by the Local Government and Regeneration Committee in their call for evidence of 26th June 2014, the focus of this response will be on a series of legislative options designed to empower football fans' trusts to take control of their clubs, set out in the answer to question 4 below.

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

The Green MSPs believe the Bill will deliver more of the tools communities need to deliver community empowerment. We support the general principles of the Bill but would like to see some of the legislation and policy intent go further.

We support the proposed statutory footing for a system of national outcomes and associated reporting. Up-to-date reporting will be essential to inform the periodic reviews and we suggest a requirement for reporting to be as up-to-date as practicable, either generally or in advance of a review.

The inclusion of community bodies within the community planning process represents an improvement on the Local Government in Scotland Act 2003 definition (point 39 of the policy memorandum), as does the inclusion of a formal right for communities to initiate dialogue with public sector organisations (point 45). We continue however to have concerns about the centralising nature of the Single Outcome Agreements, which will be delivered in part through the Community Planning Partnerships. In fact this concern goes much wider and rests on the inability of Scotland’s very large local authorities to address local needs and deliver community empowerment. Many of these issues are set out in COSLA’s Strengthening Local Democracy report.

Scottish Government’s decision to reject the "Community Right To Challenge" approach, as used in England and as described in point 52 of the policy memorandum, is undoubtedly correct. Adopting that process would indeed expose key services to privatisation, the antithesis of community empowerment.

The extension of the community right to buy as described in point 57 of the memorandum is also a cautious step in the right direction, in our view. We support a single framework for the right to buy that covers both rural and urban land, one that recognises communities defined not exclusively by geographical area, and one where communities have more flexibility about the legal structures they adopt for this purpose.

The enlarging of the scope of legal entities that can be applicable (described in point 61 of the policy memorandum) is to be welcomed, although we believe Community Benefit Societies should be included in the initial primary legislation rather than merely optionally through subsequent subordinate legislation. We believe this is a matter of critical importance, because whilst both the proposed legal vehicles that would be eligible to exercise the rights – companies limited by guarantee (CLGs) and Scottish Charitable Incorporated
Organisations (SCIOs) are excellent vehicles to own and operate assets - they are very poor at raising capital to do so, because both are prohibited in law from having equity. The Community Benefit Society is, by contrast, able to be asset-locked whilst also issuing equity, but is prevented in law from paying dividends to members and is legally required to work for the benefit of its defined community which it seeks to benefit. We can see no reason to exclude the CBS, and every reason to include it in the legislation to enable communities to immediately draw upon the support of bodies like Community Shares Scotland, a joint venture of Locality and the Carnegie UK Trust.

We fully support the measures set out in point 94 onwards of the policy memorandum concerning allotments: better and more consistent community access to space to grow food would have substantial and wide-ranging benefits.

2. What will be the benefits and disadvantages for public sector organisations as a consequence of the provisions in the Bill?

The Bill rightly places additional duties on public sector bodies to engage with communities on a range of planning and ownership issues. These duties will have administrative costs associated with them, costs which will (at least initially) only partly be offset by the benefits brought by such engagement. We would urge Scottish Ministers to consider the provision of additional direct support on a transitional basis to bodies most affected. We also believe that these changes have the potential, at least, to lead to some beneficial culture change across the public sector, provided they are implemented with a degree of flexibility and openness.

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

Some communities do, but not all have the financial assets or institutional capacity to take advantage of the benefits that the Bill can bring: in fact, the communities which could benefit most from greater control over their lives are likely to include those for whom these kind of changes may be inaccessible. We believe the biggest restriction will be on the inability to utilise the community-friendly capital-raising powers of the community benefit society, a vehicle that fits superbly with the powers the Bill proposes to extend to Scottish communities but which has been omitted so far.

We also believe that – for reasons outlined below – that the ability of football supporters to use the powers of proposed in the Bill to buy the football clubs they support are limited and that without amendment, this potentially sizeable group of potential users will be excluded from bringing the benefits of community ownership to their sector of economic and cultural life.

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?

We would like to see specific changes to the Bill’s provisions to provide football fans’ trusts with more rights to be part of the ownership and governance of what is an important community asset. To do this requires a broadening of the community right to buy to a right not defined by land and physical assets alone.

The Bill’s values are set out very clearly in the policy memorandum. It states: "In line with trusting the people who live and work in Scotland to make decisions about the nation’s future, the essence of self-determination, the Scottish Government is also committed to supporting subsidiarity and local decision-making." (point 4)

It continues (point 5) to observe that the Bill seeks to: "Empower community bodies through the ownership of land and buildings and strengthening their voices in the decisions that matter to them."
These are objectives that the Green MSPs share. In particular, we wholeheartedly agree with the following assessment of the benefits this kind of empowerment can bring (point 7):

"When people feel they can influence what happens in their community and can contribute to delivering change, there can be many benefits. Communities can often achieve significant improvements by doing things for themselves, because they know what will work for them. They become more confident and resilient; there are often opportunities for people to gain new skills and for increased employment as well as improved access to services and support. These in turn can lead to improvements in a wide range of areas such as crime, health, and reducing inequalities."

However, the focus on land, in terms of the community right to buy, directly contradicts this excellent summary of the varied needs and aspirations of communities across Scotland (point 10 of the policy memorandum):

"Community empowerment means different things for different communities. Some communities will want to take on the ownership or management of land or buildings, or delivery of services to members of their community. Others may be more interested in engaging with the public sector to have more say in how services are delivered or how assets are used."

Furthermore, the asset transfer provisions are broader and not limited in this way (and Section 27 of the Bill as introduced does recognise non-land assets: just salmon fishings or mineral rights). The Green MSPs believe a community value test for other private assets (including services) should also be introduced for consistency, effectively broadening the terms of the Land Reform (Scotland) Act 2003 to cover a range of additional non-land assets. This could cover assets which are often crucial to rural communities but which are currently excluded: for example, village pubs, local post offices, and so on. Some services flow directly from the control of the physical assets in which they are operated from, such as pubs or cinemas. If you own the pub building, you can run the pub as a service. But in other cases the right to provide the service is key: for example, the building where the Post Office is run from can change, and the community’s core transport may be provided from a depot nowhere near where they live. In these cases, it is the right to provide the service that is the core property asset, not the premises most strongly associated with its delivery. The policy memorandum recognises this, in the section below (point 53), but provides no route for democratic community control over a local shop or community hub unless those assets are owned by a public body:

"Whether it is retaining the local shop, renovating a derelict site or providing a hub for community activities, control of assets can be a key factor in making a community more attractive to live in, supporting economic regeneration and sustainable development."

These same principles and benefits apply with regard to football clubs, and the Green MSPs believe clubs should therefore be included in the scope of these changes. The nature of football administration means this would require specific amendments to be made through this Bill to the 2003 Land Reform (Scotland) Act.

In our view, the "compulsory" community right to buy for abandoned and neglected land implemented through Section 48 should be extended to cover sports clubs that enter administration, using the same protection of Ministerial oversight and approval, including similar tests. Similarly, the right of community purchase where a "willing seller" exists should be extended to include sports clubs when they come up for sale, just as is already permitted with land in rural communities.

Under point 46, the policy memorandum also covers, for public engagement purposes, the definition of appropriate community bodies. The test set out there fits neatly with the structure and nature of fans’ trusts:

"Section 14 identifies the key features of a body which meets these requirements, ensuring that it is open to all members of the community and controlled by those members. It is for the body to define the community it
Local Government and
Regeneration Committee

Submission Number: 22

represents, whether that is by geographical boundaries or by common interests or characteristics of its members."

Annex 1 below sets out the specific amendments which the Green MSPs believe the Committee should consider at Stage Two. In particular, we believe options 1, 3 & 6 there would be straightforward to implement, while option 5 should be considered: options 2 and 4 are probably beyond the scope of amendments that could be brought to the Bill as drafted. The Scottish Government has this year set up a working group on fan ownership, and we believe that, given the absence of another suitable legislative vehicle, it would be a major error not to lay the legislative groundwork for any recommendations about fans' right to buy which that working group may propose. Given the proposed tests around Ministerial assessment of each bid, adopting these amendments would also not prejudice the outcome of that work.

At Stage 1 we hope the committee will consider how the right to buy provisions could be broadened to include eligible assets beyond land and buildings. In terms of football clubs this asset would be the membership shares enabling the club to play in the league – further explanation is given in Annex 1. Finally, we encourage the committee to invite representatives of football fans trusts to give oral evidence on a fan’s right to buy.

5. What are your views on the assessment of equal rights, impacts on island communities and sustainable development as set out in the Policy memorandum?

As per the Pairc case in 2012, we believe these proposals, and the extension of them set out above, are within the margin of appreciation afforded member states with regard to Article 1 of Protocol 1 of the ECHR. We also share the Scottish Government's assessment of the impact of this Bill on island communities, and also on sustainable development as defined by the Scottish Government (with the caveat that the latter is defined by Scottish Ministers in a way which promotes growth at the expense of true sustainability).

Annex 1 - January 2014 response to Scottish Government consultation

Outline

Greens believe football clubs are prone to suffering from many of the same problems tenants have historically had with absentee landlords, and that football clubs are frequently at the core of communities across Scotland. We believe that a right for fans to buy their clubs, either at any point or when their clubs get into financial difficulties, would be desirable in policy terms and also that the CE Bill represents the ideal vehicle for such legislative changes.

Purpose and background

Fan ownership in Scotland and beyond

Fan ownership is a common ownership model for sports clubs, and is the norm in Scandinavia and Germany. However across Scotland and the rest of the UK, private ownership remains the norm. Fan ownership in Scotland has grown during the devolution era, mainly thanks to the efforts of Supporters Direct, and in particular as a response to clubs’ financial difficulties.

Several clubs have been majority owned by their supporters, notably Clyde FC, East Stirling, Stirling Albion and most recently Dunfermline Athletic, currently the largest club to hold this status with Annan Athletic expected to join them in the coming months. The current preferred bidder for Heart of Midlothian is the Foundation of Hearts, a fan-led consortium. Both Ayr United and Motherwell are working on plans to be community owned by the start of season 2014-15.

There are two major problems affecting the take-up of fan-ownership.
At present, owners are under no obligation to even deal with their supporters, let alone involve them in ownership and governance. As a result, fan ownership overwhelmingly comes about against a backdrop of corporate failure, where the lack of willingness of clubs’ owners to engage with supporters is followed by the willingness of an insolvency practitioner to deal with anyone proposing a realistic rescue plan. However, as a result, most fan ownership arrives against a legacy of failure, debt and limited capital.

Relatedly, a common model is for a private owner/supporter to commit the club to spending money it cannot afford and to supplement revenue with their own resources. That means that without a wealthy benefactor, Scottish clubs are regularly faced with a dilemma in which sporting goals cannot be achieved through ‘normal’ trading, i.e. trading where expenditure is based on earned income. As a result, financial success and sporting success are, for the vast majority of clubs, mutually exclusive. Under this model, clubs continue to be solvent only as long as their benefactors have the means to support them, but when such means are exhausted, the club quickly moves from apparently rude health to severe insolvency. It is this which lies at the root of the deep structural instability of the game, which has seen the majority of professional clubs in the UK go into formal insolvency over the past 20 years, most spectacularly at Rangers - one hundred and fifty four administrations in the UK since 1992.

While there are mechanisms which seek to address this in terms of controlling club expenditure, these efforts have had limited effects at best. The evidence is that expanded fan ownership is the only current option to go beyond those mechanisms in the interests of the sport at both a club and national level. Where the fans are in a position of control unsustainable options are simply taken off the table; if the club has no wealthy benefactor, there is simply no way for it to be run other than as a ‘normal’ enterprise in which income and expenditure are linked in a sustainable manner.

A critical mass of fan owned clubs would be the most effective way to achieve sustainable Scottish professional football, and sustainable football is also a necessary condition for successful and sustainable fan ownership.

A decisive break is required with the failed models of ownership. While the Scottish football authorities can address overspending in a slow and incremental way, the governing bodies are creatures of their members, and as a result, regardless of the ways in which fan ownership helps deliver their stated goals of a more sustainable sport, the authorities inevitably cannot endorse it as an ownership model. They will remain structurally unable to drive greater fan ownership until such a time as a majority of clubs are fan-owned in order, i.e. when this objective is already largely achieved. That leaves the Scottish Parliament as the only body with the means and ability to effect change.

**Constitutional and policy basis**

Schedule 5 of the Scotland Act does not reserve sport to Westminster, meaning the Scottish Parliament can legislate in this area. There are limitations to the powers of the devolved institutions here, though: the prescribed forms of corporate vehicle and terms of their registration are not devolved, so more radical options - such as creating a specific legal form for sports clubs, as is the norm in the rest of Europe - are not possible. Similarly, the Scottish Parliament will not be able to amend insolvency legislation, but can use insolvency as a trigger for the right to buy (see below).

**Human rights**

To quote the Land Reform Review Group’s Interim Report from May 2013:
Local Government and Regeneration Committee

Submission Number: 22

A free society also has to respect the rights of an individual with regard to his or her property. The European Convention on Human Rights, at Article 1, Protocol 1.5 states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it seems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Central, therefore, to a consideration of land ownership lies the concept of the public interest and the tension between it and individual human rights.

This tension would similarly apply where the right to buy is extended to non-land assets such as football clubs. However, in our view the public interest arguments (economic and social) for community ownership of clubs will typically be stronger than any human rights arguments used by a transient owner of a football club, especially where a club has a long history of community support.

Consistency with the 2003 Act
The thrust of the CER Bill is to enable communities in every part of Scotland to enjoy the same rights around land reform and related issues as communities in places where the 2003 Act already applies, and in so doing, extend the benefits of community ownership across Scotland.

The assumption inherent in the CER Bill is that community ownership is good for the assets owned by communities and good for communities themselves, indeed that it is in the broader public interest: a principle which the Green MSPs support wholeheartedly. The Bill focuses on local self-determination, and it would be hard to find a situation more likely to lead to feelings of disempowerment than the collapse of a football club.

Football clubs are one of the few places where people across a community meet each other on equal terms, regardless of the differences between them in terms of occupation, income and education. They are critical parts of their various community networks, and benefit from being owned and operated by people for whom that character is more important in their strategic management of the club than its potential to maximise profits for the short term.

A wealth of reports at national, UK and European levels have illustrated the advantages of community ownership of football clubs for the greater sustainability of clubs (and thus incidentally supporting their contribution to general taxation), their greater focus on long-term community engagement, increased usage of local suppliers to maximise local economic multipliers, and their overall contribution to community well-being and resilience.

In short, supporting fan ownership of football is an ideal opportunity to enhance the social, economic and environmental benefits clubs bring to their communities, and to boost local decision-making and control.

The first important amendment required
The 2003 Act is specific in its focus on land and physical assets, and the focus of the CER Bill is consistent with this. In this case, though, the physical assets (the football stadium, training ground) are not the focus of the community interest: that is in the football club itself. It is what is done through the ownership of a form of
property - a club - which matters, and it is ownership of the club, not the land, which gives the power to current owners to make the operating decisions they do.

To bring football clubs themselves under the control of this process of community empowerment will require an amendment to the 2003 Act to broaden the scope of eligible assets beyond land and buildings on it to encompass a class of related assets which are better understood as rights that entitle the asset owner to undertake certain functions (although the land clubs use remains important). This could be delivered either as a football-specific amendment or as a more general change.

In this instance, the particular asset aimed for here is the membership share in the Scottish Football Association and leagues (hereafter called ‘membership shares’). These are the key asset which underpins football clubs, as they give them the right to play football under the aegis of the respective bodies. No club can be a member of the SPFL which is not already a member of the SFA, and no club without a member share in the SPFL can play in any of the Scottish leagues.

As a result, the right to participate economically in Scottish football flows from ownership by the football club company of these assets. A club without a stadium can share a ground with another club; a club without a league membership share cannot play football against anyone else in the world.

The goal therefore is to enhance in legislation the definition of eligible assets or property to encompass the limited companies that own league membership shares in Scottish football governing bodies. This, ultimately, is what defines a Scottish football club, and is not dependent on whether a club’s ultimate corporate parent has a registered office in Cumbernauld or the Cayman Islands.

That might be done through direct legislation. Better, however, would be to allow a broader definition within constraints, such as:

- Eligible assets upon which the Community Right to Buy powers may be exercised shall be any land in Scotland (unless deemed to be excluded under the terms of the Act), and other property of a consistent community character which may be deemed to be included.
- Ministers shall be responsible for all determinations as to which assets may be included and excluded under this definition.
- In defining what non-land property shall be included, Ministers shall have regard for assets whose ownership and operations are a matter of significant public concern and interest in their community of operation.
- Ministers may only define such non-land property as included by reference to a specific class of assets or asset and not by direct reference to a specific asset in isolation of comparable assets in the same sector of economic or cultural activity, to avoid discrimination or the appearance of same.
- The process by which each class of assets shall be registered, the groups eligible to register and launch a bid and the terms under which they may do so may be varied by Ministers to reflect the specific operating environment of assets in that class, within the framework established by the Act.

Once this has been legislated for, we propose at the same time that Ministers are directed to include all companies registered in the UK which own a league membership share in a Scottish football governing body. The result would be that football clubs would be classed as suitable cases for community right to buy.

**Detailed options**
Beyond that, several other options should be considered, in part to reflect the diversity of Scottish clubs, in terms of scale, value, indebtedness, and wealth of the community they are based in.
For all of these options, the assessed prices of any club would be subject to revaluation at the end of every football season, and in the event of a club entering insolvency, the fair price is determined by the insolvency practitioner at the time.

1. **Right to buy when clubs are being sold.**
   This would require a time limit to assemble funds - provisionally six months - and would probably also require a cooling-off period after any unsuccessful bids, perhaps two years, to reduce uncertainty for clubs. There could be an exception to the two year restriction where the assessed price falls sufficiently far to allow the sum raised during the six month period to be viable (e.g. if land is sold off or if a club is relegated). This is aligned with the existing model for rural land reform.

2. **Right to a say when clubs are sold.**
   Where fans simply can't afford to buy a club, and where more than one bid meets that assessed price, the fans get to be involved in the decision. This would ensure bidders take account of fans' views, and might include incentives to offer fans' trusts free shares, seats on the board, or other increased involvement.

3. **Right to buy when clubs go into administration.**
   We do not believe that changes to insolvency and company law would be required: those areas are reserved, but the relevant parts of this proposal would merely use insolvency as a trigger.

4. **Right to buy a proportion of the shares at any point where a right to buy overall exists.**
   This would probably apply in blocks of 5% or 10%, allowing fans' trusts to make a start and head towards control without having to find the entire sum. It could be particularly useful for the larger clubs, whose fans might find a full purchase in one go impractical. The same time limits would apply as above.

5. **Right to buy at an independently assessed price at any time.**
   This would keep owners in check, and would protect against sale of grounds without change of ownership. A change of this sort would be powerful in particular in combination with 4 above.

6. **Access to SG funding to support clubs.**
   Funds will be made available for urban community purchase through this Bill, and it would be straightforward to adding clubs to the list if the other amendments pass. The objective here would be merely to add clubs to the list of assets for which such funding could be applied, rather than to pursue new money or to mandate specific amounts of funding. The decisions here would be for Ministers, who would merely be empowered to act in this way.

In addition, the current consultation by the Scottish Government asks for views on the issue of which legal forms can be considered eligible for the purposes of exercising rights to buy. It is imperative that this definition includes Industrial and Provident Societies in general, and specifically in the case of football.

The supporters' trusts, who would be the bodies in football who would seek to exercise a right to buy, are all legally registered as IPS Community Benefit Societies, and so these legal entities need to be included to allow supporters trusts to be able to access these rights.

Secondly, IPS are not regulated by the Financial Conduct Authority for the public offer of equity, and so can undertake share offers to raise capital quickly and cheaply. Since the right to buy is dependent on the ability to raise the necessary capital, a vehicle which has proven very effective at raising capital for community
ownership would seem to be essential; such vehicles have raised over £20m in the last 3 years over the UK across all sectors, and are on track to increase that to £30m by the year-end.