Written submission from Scottish Land & Estates

Scottish Land & Estates represents landowners, land managers and rural businesses across Scotland with wide-ranging interests in their local communities, many of whom are already working to deliver the aims of the Community Empowerment (Scotland) Bill ("the Bill"). We were pleased to form part of the Terms of Reference Group for the Bill and to have the opportunity to respond to the two previous consultations.

General Comments

Scottish Land & Estates is supportive of the principles of the Bill and the extension of community right to buy on the current willing seller basis to the whole of Scotland, but it is important that the Bill provides a framework through which groups, individuals and businesses are empowered to deliver locally. We fully recognise that successful community empowerment results from local enthusiasm leading to local initiatives, local decision-making and local processes, and wish to ensure that all parts of the community are truly empowered. Voluntary agreement has to be the essence of genuine community empowerment, and there are many benefits to be gained through collaboration and partnership. It is noticeable that much land which has been transferred into community ownership, has been undertaken without recourse to the provisions of the Land Reform (Scotland) Act 2003. It is imperative that lack of use of the powers is not seen as a failure of the community ownership agenda. The lack of information on land and property assets transferred to the community without recourse to the legislation must be addressed.

The apparent focus on ownership in the Bill does not of itself equate to “empowerment”. There are many ways in which a community can become empowered. As Stuart Hashagen, senior Community Development Adviser at the Scottish Community Development Centre said in evidence to your Committee on 12 March 2014, “My point is that not every community wants to take over buildings, land and assets.” Specifically we have concerns regarding the provisions in relation to abandoned and neglected land which we have addressed below.

Generally, it will be vital for the measures in the Bill to strike the correct balance between the policy objective of strengthening the role of communities in influencing the stewardship of local property assets, on the one hand; and the right for owners of property to be in a position to progress their own long-term asset management objectives on the other.

Part 2 - Community Planning

Scottish Land & Estates is broadly supportive of clauses 4 to 13 of the Bill in relation to Community Planning. We are of the view that effective community planning is central to helping enable more people in rural and urban Scotland have a stake in the ownership, governance, use and management of land. Therefore we welcome the alignment with national outcomes at Clause 4(3), having previously called for further work to align national policy initiatives with local planning. The sentiment in the Policy Memorandum in terms of maximising involvement from all partners, which obviously needs to include the private, independent and third sectors, is also encouraging. A strategic joined-up approach is vital and we would have welcomed
specific reference to Community Councils in Schedule 1 to the Bill. Overall, it needs to be borne in mind that legislation alone will not establish successful community planning which is dependent upon the relationships between and culture of, organisations. We would like a clear commitment from the Scottish Government that significant activity will be undertaken in addition to the legislation to improve the community planning process.

**Part 4 - Community Right to Buy Procedure**

Scottish Land & Estates is keen to ensure that the community right to buy process is as straightforward and equitable as possible for both parties, community and owner. It is in neither party’s interest for a community acquisition to be protracted or for there to be any uncertainty.

Clause 33 introduces a requirement for an owner to inform Ministers within 28 days of an exempt transfer being made of this taking place. We consider this to be at odds with the fact the transfer is “exempt”. Further, Registers of Scotland maintain both the Land and Sasine Property Registers as well as the Register of Community Interests in Land and at present it is sufficient to include a declaration in the disposition, detailing the exemption which is being relied upon. It would therefore appear to be most straightforward for there to be internal communication within Registers of Scotland as opposed to placing an additional unnecessary burden on the owner to notify.

Under the current legislation there is certainty regarding the outcome of the ballot result and we are therefore concerned that clause 39 of the Bill removes this certainty, reducing the worth of the ballot and increasing the time period for determination. A ballot is the best and fairest way to measure support as there requires to be transparency, clarity and a tangible outcome. The Post Legislative Scrutiny Report of the 2003 Act published in September 2010 noted, “There was strong support among Community Bodies for the principle of holding a ballot, and most (though not all) supported some level of minimum turnout requirement. One interviewee noted that the demonstration of community support achieved through conducting a rigorous ballot was very useful to their organisation because —no-one can say that the community don’t support what we’re doing.”

In terms of extenuating circumstances which may be taken into account we would be keen to guard against spurious claims and specifically would be interested to know if there is any standard practice or guidance from the Electoral Commission or other impartial body in relation to elections generally which should be reviewed if such a measure is to be adopted. It is entirely proper that circumstances such as adverse weather should be accounted for.

We appreciate that the Financial Memorandum suggests expenditure involved in running the ballot will not be onerous, but this is predicated on a certain restricted usage of the measures in the Bill. In our view, as the ballot is at the initiation of the community body it should be for the community body to meet the expenses and not the public purse as proposed in clause 37 of the Bill.

Late applications were intended to be the exception rather than the rule, but now account for around one-third of community right-to-buy applications. The Bill further
relaxes the criteria in terms of Clause 31. In reality if the process is working properly we believe that this should reduce the need for late applications. Community right to buy in our view is intended to be a proactive as opposed to reactive tool and the legitimacy of the process is undermined where late applications become almost standard.

One suggestion which may improve the late application procedure would be if a landowner could obtain exemption from a late application by giving forward guidance of say, six months, of a potential sale of land by advertisement in a local newspaper, giving the community body say, 4 months, to organise itself and register an interest in that land, failing which no late application would be entertained by Ministers.

One part of the existing process where there has been undue delay in consideration of applications to date is in relation to the discretion which Ministers currently have and there is no recognition in the drafting of the Bill or accompanying documentation of the potential role of Scottish Ministers delaying determination of matters, whether that be political or resource-led. Ultimately it should not be forgotten that community right to buy involves three parties, not just the landowner and community body, but also the Minister as well. The Final Report published in September 2010 on the Post-Legislative Scrutiny of the Land Reform (Scotland) Act 2003 by Calum MacLeod and others flagged this issue of Ministerial discretion. We would welcome the introduction of a monitoring system into delays in this part of the community right to buy process.

Clause 44 of the Bill means that a landowner who withdraws from a sale to a community body following Ministers appointing the valuer, will be at risk of having to pay to the Ministers, at their discretion, any expense the Ministers have incurred. This provision is a cause for concern, given that under the Community Right to Buy, an owner has the right to withdraw his land from a sale to the community body, after the right to buy has been activated, provided the appropriate notification has been given. We would look for comfort that Clause 44 is not used to arbitrarily penalise a landowner who for a variety of reasons decides not to proceed to sell land, as is his right. A landowner may decide not to proceed for a number of valid reasons, such as where land is owned in Trust, not all of the trustees being made aware of the sale, where family or financial circumstances of the landowner change. We do however appreciate that there may be cases where use of these provisions is warranted.

**Abandoned and Neglected Land**

Scottish Land & Estates' members similar to others in their respective communities will be supportive of moves to deal with derelict, vacant and untidy ground which impacts on the local amenity and environment. However, we have serious concerns about the current drafting of clause 48 of the Bill in relation to “Abandoned and neglected land”. If the aim of this section is genuinely to stop community blight and allow for productive use of the land as the Policy Memorandum appears to indicate, then this is not realised in the current drafting of the Bill. We are concerned that the provisions will in fact give succour to those seeking to thwart development or other management plans.

It was noticeable that of the 75 questions in the second consultation document only 2 of those concerned this absolute right to buy provision on neglected and abandoned
land and there was no reference to it in the draft Bill which accompanied the consultation. The responses to those questions by consultees across various sectors expressed concerns about how this proposal could be adequately legislated for and it is extremely disappointing that definitions have not been developed by the Scottish Government since that second consultation, given the passage of one whole year. It will not be clear at all how this will work in practice until regulations are published and even then it will depend upon the drafting of those regulations which will enjoy less thorough scrutiny than primary legislation. While we recognise there is a purpose for secondary legislation where detailed procedural matters require to be fleshed out, in this instance the critical matter of definition is being left to secondary regulations.

In our view, an owner is entitled to know, prior to the Bill becoming law, what is meant by the separate terms of “abandoned” and “neglected”. As the Bill is currently worded neither owner nor community body will have certainty on the circumstances in which these provisions could be used. We would suggest that is not appropriate to deal with the transfer of fundamental property rights through secondary legislation. The definitions of “abandoned and neglected” need to be set out in the Act, given this is such a major issue and introducing compulsory acquisition.

The clause heading in the Bill refers to “Abandoned and Neglected” land which we assume refers to the fact that both areas are to be dealt with in that clause, since the part which is to be inserted in the Act refers to “abandoned or neglected”. Clarity is required not only in terms of definition of both, but also that these are being considered exclusively in that the land need only meet the tests of one definition. We also question whether consideration has been given to this part of the Act relating to urban areas alone, rather than coverage being for the whole of Scotland? If we are looking to address those small parcels of land which prevent sustainable development or cause blight then should we restrict use to settlements over a certain population?

We are unclear as to the reference to “wholly or mainly” at 97C(1). The extent of the landholding to be considered requires to be thoroughly scrutinised in forming any legislation in this area. Indeed, 97C(3)(a) requires further consideration in terms of the definition of “an individual’s home” and also the extent to which the location of stables, log sheds and other outbuildings are considered. We also have concerns regarding 97C(3)(f) which allows for the exclusion of prescribed land, particularly if this includes large charities.

While we recognise abandonment as a concept in terms of a leasehold interest, we are not clear how title to a property can be abandoned. The Court of Session only last year on appeal ruled in relation to Scottish Coal Company that Scottish liquidators were unable to abandon land owned by an insolvent as a means of avoiding onerous duties relating to the land. Indeed we are also unclear how land can be “mainly abandoned”. This does not appear to be a legally competent term.

In terms of the process set out in the Bill, we believe that deprivation of ownership is not the appropriate final outcome and it is questionable in ECHR terms whether this is in fact a proportionate response. Where there is “abandoned and neglected” land, the key issue the Bill requires to address is land use, not ownership. This is not
realised by 97H(c) which solely relates the criteria for consent to ownership. In contrast the Housing (Scotland) Act 2006 addressed problems of condition and quality in private sector housing with Housing Renewal Areas very much focused on addressing use.

For example, owners of land under agricultural tenancies may have very limited control over the utilisation of the leased land and short of going through time-consuming and potentially costly court processes may be unable to rectify this. It would seem inequitable for land to be compulsorily acquired, where the owner is not actually responsible for the perceived absence of activity or poor management.

Some redevelopment projects can take a considerable period of time and the sense that nothing is being done with the land is not the reality. The various flora and fauna that may be existing in an “overgrown” site may have a value all of their own. This must be carefully examined. In a rural context a scheme to return land to wild land status may appear neglectful to some in a community, but in fact the absence of active management is not necessarily a sign of either “abandonment” or “neglect”. Land may be delivering wider public good in the form of ecosystem services despite not being actively managed. Active management of itself can therefore not be properly used as a term in defining abandonment and neglect. Biodiversity, carbon capture, recreation and cultural value may all be components of different sites and the Bill as drafted does not take into account such circumstances, despite page 19 of the consultation document stating “Land which is intended for recognised conservation purposes would not be considered to be neglected or abandoned”, the Bill as drafted does not reflect that.

Under the provisions there is a risk that land which is lying fallow as a result of sound farming practice or land which cannot currently be developed for justifiable commercial reasons or land subject to a conservation agreement to reduce sheep grazing would be threatened. Rather than empowering a community, this provision as it stands could lead to conflict in a community.

There is in the present drafting no clear opportunity afforded to the owner to counter suggestions of abandonment or neglect. The only provision available is clause 97G(9) whereby Ministers may invite views in writing on the application by the owner and the community body thereafter has another opportunity to address those points, without further input from the owner of the land. This would seem to be inequitable.

In tackling land abandonment, the reasons behind this, not necessarily related to statute should be better explored. These can include environmental such as a decrease in soil fertility; socio-political, for example rural depopulation; or economic, market globalisation. Whether abandonment poses a threat or an opportunity may depend on a whole variety of factors. The Final Report of the Land Reform Review Group highlighted “long-term urban land vacancy and dereliction” and we feel that the focus ought to be on urban renewal where there are recognised problems.

One area of concern we have is that the abandoned or neglected ground might give the appearance of that owing to a blight such as ransom/lack of access, which any community body purchasing would only inherit and be equally incapable of defeating – unless it was envisaged that the Government would use compulsory powers to
remove the blight. We would sincerely hope that Ministers are not following that arbitrary route which we believe would be discriminatory.

We are not clear in terms of the proposed clause 97D why the community body for this part of the Act effectively requires to be a company limited by guarantee and suggest that there is parity with the new provisions for normal community right to buy.

In summary, we support the aims of this section but do not believe that the mechanism is the appropriate tool.

**Part 6 - Common Good**

Scottish Land & Estates welcomes clauses 63 to 67 of the Bill in relation to the common good. In our consultation responses, we supported the establishment and maintenance of a publicly accessible common good register following clarification of the assets which form part of the common good. The Bill rightly focuses on this area and we do not have any further comments at this stage.

**Part 7 - Allotments**

The Bill repeals the Allotments (Scotland) Acts of 1892, 1922 and 1950 in their entirety as well as the allotments provisions contained in the Land Settlement (Scotland) Act 1919.

While the original legislation refers to local authorities letting to tenants, subsequent legislation does, at least in part, envisage private letting of allotment sites in the wording of some sections. This is particularly in relation to the termination of tenancies and compensation to both landlord and tenant. Therefore while we support the tidying of older legislation and the clarity and consistency which comes with the definitions in clauses 68 and 69 of the Bill, it does not appear that the relevance of some of the older legislation to privately owned allotment sites has been accounted for. This needs to be carefully reviewed prior to the passing of the Bill.

We support the duty incumbent on local authorities at clause 77 to prepare a food-growing strategy. While we note that in relation to allotments this only incorporates land owned or leased by a local authority per the definition, we are pleased that clause 77(3)(b) extends this to “other areas of land in its area that could be used for the cultivation of vegetables, fruit, herbs or flowers”. As we commented in our consultation response we consider that the totality of land available, including that outwith local authority supply should be taken into account in shaping such a strategy.

We disagree with clause 87 of the Bill in relation to the sale of surplus produce. While there is reference to “other than with a view to making a profit”, this does raise issues around trading income etc. There is a danger that this clause could be used to circumvent regulations and requirements which other businesses require to meet and could potentially raise environmental health matters. Allotments have moved towards a recreational hobby pursuit and are not commercial enterprises as recognised in clause 68 (c)(ii) and we would perceive allotments as being for non-
commercial personal or community food growing. Therefore this clause ought to be deleted.

**Part 8 – Non-Domestic Rates**

Scottish Land & Estates is encouraged by the fact that while clause 94 provides powers to local authorities to create localised relief schemes, the local authority must have regard to their council taxpayers’ interests and we appreciate in specific instances like flooding, such a power may well be worthwhile. However, the potential and viability of such schemes is not yet known and we may wish this part to be re-visited if there are adverse consequences for private sector businesses. In particular local authorities will require to be cognisant of ECHR and Competition Act rules in relation to this provision. We would oppose any relief scheme which arbitrarily gives a market advantage to one particular type of ownership or governance structure and we could perceive difficulties arising for instance in the rural sphere where a community-owned farm shop was party to relief, which was not available to an adjacent privately family owned farm shop paying full rates. It may be helpful if your Committee were to take soundings as to how similar provisions in the Localism Act 2011 work.

We would be happy to provide further detail on any of the issues raised in our written evidence.