

## **Written submission from the Community Woodlands Association**

The Community Woodlands Association (CWA) welcomes the opportunity to submit evidence on the Community Empowerment (Scotland) Bill (CEB) as introduced to Parliament.

CWA was established in 2003 as the direct representative body of Scotland's community woodland groups. The first community land buyout in Scotland was at Wooplaw Community Woodland in the Borders (1987), and there are now well over 200 community groups across Scotland responsible for the management of tens of thousands of hectares of woodland and open space. More than half of our members own their woods, the remainder lease or work in partnership with public and private sector landowners.

We have extensive experience of supporting our members to acquire land by a variety of means: often through negotiation or open market sale but also often via Forestry Commission Scotland's National Forest Land Scheme (NFLS) or the Community Right to Buy provisions of the Land Reform (Scotland) Act 2003 (LRA).

In its call for evidence the Committee asked five specific questions. Our submission largely covers Q4. *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?* but also has important implications for Q1 *To what extent do you consider the Bill will empower communities, please give reasons for your answer?* and Q3. *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?*

Our evidence concentrates on two parts of the CEB: Part 4 - the amendments to the Land Reform (Scotland) Act 2003, and Part 5 – the provisions for asset transfer from public authorities. In general we are very supportive of the proposals; however we believe there are some important clarifications required, some unfortunate omissions and some areas where amendment would strengthen the Bill and contribute to more effective delivery of the Scottish Government's community empowerment objectives.

The Land Reform (Scotland) Act has had huge symbolic significance since enactment, but the complexities and hurdles contained within the act have severely limited its use on the ground: Registration, and even more so activation of registration, are exceptions rather than the norm. In part this is due to shortcomings in the legislation which, it is hoped, the Community Empowerment Bill will address. However, in our view it also reflects a certain lack of imagination as to how these provisions might be used to facilitate proactive community development planning, as the norm rather than the exception, and some of the points made below are designed to make the LRA fit for a much wider purpose, so that its value is not just symbolic, but hugely significant to and supportive of the empowerment of Scotland's communities.

### **Part 3 – Participation Requests**

We support the provisions as contained in the Bill but are disappointed that a number of the more radical proposals discussed in earlier consultations, such as participatory budgeting, appear to have been dropped.

We also note that not all public bodies (e.g. Forestry Commission Scotland (FCS)) are included in the scope of this part of the legislation.

### **Part 4 – Community Right to Buy**

CWA welcomes the Scottish Government's commitment to revise Part 2 of the Land Reform (Scotland) Act 2003 (LRA), and we are very pleased to see a number of amendments which should improve the usability of the legislation:

**27(1)(a)** allowing community bodies (CBs) to register an interest in land across Scotland, irrespective of size of settlement; we see no reason why "urban" communities should not enjoy the same rights their "rural" counterparts;

**28(4)** extending the range of eligible types of community body to include Scottish Charitable Incorporated Organisations (SCIOs) and any other type specified in regulations;

**28(7)** giving Ministers powers to prescribe other methods of geographic definition for communities;

**36** removing the reference to at least half of the members of the community voting in the ballot and provides that the requirement in section 51(2)(a) of the LRA is met if the proportion of the members of the community who voted is sufficient to justify the CB proceeding to buy the land;

**37** providing for the ballot to be conducted by an independent person appointed by Ministers

We also welcome the various adjustments to timescales: taking public holidays into account, ensuring adequate time for the valuation and increasing the time to finalise community acquisition from 6 to 8 months.

There are, however, a few elements of the Bill as introduced, and some omissions, that we believe will hinder the achievement of the Scottish Government's stated objectives.

#### ***Constitutional requirement to provide minutes***

**28(3)(c)** and **28(4)** require that a community body include in its constitution the provision that the CB give any person a copy of the minutes of a meeting within 28 days. The rationale for this requirement is not given in the policy memorandum or the explanatory notes, and it is not included in the list of criteria for a Part 3A Community Body.

Whilst it may be good practice for a community body to make approved minutes of meetings available, e.g. on a website, few if any will have such a provision in their constitution. This requirement may not be a significant obstacle for future community bodies that have not yet been incorporated, but it does, however, erect a barrier to the hundreds, possibly thousands, of existing community bodies who will have to amend their constitutions to comply with the new requirement. This is not necessarily a simple operation, as the standard LRA-compliant constitution provides that CBs can only amend their constitution by special resolution (requiring 75% vote) at a general meeting called for that purpose.

Moreover, it raises the prospect that CBs who have already used the CR2B provisions to acquire land, or those with active registrations, will be required to amend their constitutions to maintain these registrations or keep the land thus acquired. We note that **35(2) of the LRA** provides that if Ministers are satisfied that a CB which has registered an interest is no longer eligible to do so they may direct the Keeper to delete that interest, and that **35(3) of the LRA** provides that if Ministers are satisfied that a CB which has used the CR2B to buy land which it would not now be entitled to do so, then Ministers may acquire the land compulsorily.

The requirement to include this in their constitutions be replaced with provision to allow Ministers to require that Community Bodies enact byelaws or Rules with the same effect. Any such regulations should:

- specify that the reference is to **approved** minutes, recognising that approval typically takes place at a subsequent meeting;
- clarify whether they apply only to the approved minutes of the main board, or to those of subgroups, committees and subsidiary companies;
- maintain the provision for CB to withhold information contained in the minutes.

### ***Period for indicating approval under section 38***

**30** precludes *Ministers considering any community support that is dated earlier than 6 months before the date an application to register a community interest in land is received by Ministers* (quoted from explanatory notes)

We believe this 6 month limit is unnecessary, and that Ministers should be free to take account of anything they consider relevant in indicating approval. In particular, where the approval of community members is being demonstrated through a coherent and proactive development planning process such support may well be over 6 months old by the time an application is lodged.

### ***Late applications to register an interest in land***

CBs face significant additional burdens in attempting late registration: demonstrating significantly greater support than for a timeous application, showing that registration is strongly in the public interest, and doing so in constrained timescales. However, in the absence of a process that supports proactive community development planning and promotes (or permits) mass and multiple registrations, it is inevitable that in many cases communities will only engage with a specific building or piece of land when they become aware that it may be available for sale, and thus it is essential that there be a usable mechanism to permit late registration.

**31(4)** replaces the requirement for a community to show “good reasons” for not submitting a timeous application, with a new provision to demonstrate they had undertaken, sufficiently in advance, “such relevant work as Ministers consider reasonable was carried out, etc”. Whether or not this is an easing of the demands on CBs will depend on the interpretation of the text.

**31(4)(aa)** requires that “the relevant work was carried out ... (ii) in respect of land with a view to the land being used for purposes 20 that are the same as those proposed for the land in relation to which the application relates,” which suggests that for instance where a community need has been identified (i.e. for affordable housing) which could be met by acquiring suitable land, then such work would be admissible as “relevant work” even though the land now being registered had not been specifically been identified. This would be a positive step in our view.

However the explanatory notes state “The new paragraph (aa) also provides that the relevant work or steps undertaken must be in relation to the land to which the application relates or other land being used for the same purposes as the land to which the application relates.” which could be taken to imply that the “other land” must be **already** be being used for the same purposes as the land to which the application relates. This could be usefully clarified.

### **Information for ballotter**

**37 51A(6)** requires that the CB provide the ballotter with “its proposals for use of the land in relation to which it has confirmed it 5 will exercise its right to buy” , although it is unclear why this is required when **37 51A(2)** requires Ministers to supply the ballotter with a copy of the application to register an interest.

We note two significant omissions from Part 2 LRA revisions: removing the prohibition on blanket registrations and easing the requirements for re-registration

### **Blanket registrations**

**67(2) of the LRA** should be amended to permit community bodies to buy part of the land which has been registered where this intention has been notified in the registration.

**67(2) of the LRA** specifically prohibits community bodies from exercising the right to buy over only part of the land which has been registered. The official guidance says (para 30) *You should not use multiple registrations as a “blanket” registration. Should your CB consider submitting multiple registrations, you should demonstrate serious intent to purchase any land subject to its registration. Your CB should make applications only in respect of land which, given the opportunity, you would want to buy. Any attempt to register a larger piece of land when a smaller piece is required will ... result in your CB having to buy either all or none of the registered land if the whole lot is put up for sale.*

There are many scenarios where a community body might, e.g. though a development planning process, identify specific needs/issues that it wishes to address, (e.g. retail, workshop or office space, or land for community growing / extension to cemetery / children's play / affordable housing etc) and then, after an

inventory of their community area, identify say 10 premises or plots of land that would fit their parameters.

If those plots/premises are in separate ownerships then separate registrations are required. However, if those ten plots / premises are all in the same ownership (not uncommon in some parts of Scotland), and in particular if they are subsections of a contiguous piece of land, then it would make much more sense for the community to make a single registration covering all suitable plots/premises with the stated intention of only buying one if it came on the market. This would require the community to state the size and other parameters (e.g. shape, road access, services, etc) of the plot that they wished to buy.

So for example, a single registration might cover 10ha of land, on either side of a road, but would stipulate that the community wished to acquire 1ha for their defined purpose, with the proviso that this must be a contiguous 1ha plot, with road frontage and a minimum width of 50m. If and when the whole or part of the registered area came up for sale the landowner would identify the plot, which would have to meet the parameters laid down in the approved registration, for sale to the CB.

### ***Re-registration***

The Bill contains no provisions to simplify the re-registration provisions, which are widely seen as unnecessary, and unduly demanding. The current 5 year cycle for registration is too short, and consideration should be given to extending this to 10 years.

Rather than replicating the original registration demands, which can be considerable, the re-registration process should be simplified, with a presumption in favour of continued registration unless the circumstances have materially changed. The community body should be asked to confirm that it wishes to continue re-register its interest, for the same objectives. There would also be an opportunity for the landowner or any other qualifying residents to lodge an objection, based on change in circumstance since the previous registration.

### **Section 48 Part 3A - extending the community right to buy “abandoned or neglected land”**

CWA welcomes the introduction of a new power extending the community right to buy to, circumstances where there is not a willing seller. We consider it a significant shortcoming of the LRA that community acquisition of an asset can be assessed and approved by Ministers as in the public interest and furthering sustainable development, and yet in the absence of a willing seller there is no mechanism to take it forward.

These proposed new powers should be viewed as a last resort, to be exercised when other methods and negotiations fail. The existence of such powers will, however, have an important role in incentivising negotiation. It is essential therefore that they are usable and credible, and that special care is taken to prevent avoidance on the part of landowners.

We believe that as proposed, the new right would be impossible to exercise: the bar is being set too high, there are too many obstacles in the way and there are clear opportunities for avoidance on the part of landowners. There are, however, a number of ways in which the Part 3A provisions could be helpfully clarified and strengthened, and thus made fit for purpose.

### ***Eligible land “abandoned and neglected”.***

**48 97C(1)** stipulates that “*Land is eligible for the purposes of this Part if in the opinion of Ministers it is wholly or mainly abandoned or neglected.*” We are concerned that this requirement is overly limiting and whilst it may be possible to demonstrate this requirement is met for buildings, we do not believe it will not be workable in practice with respect to woodlands and other extensive land-holdings.

We are aware that Community Land Scotland’s submission contains very detailed consideration of this point, and in particular on the importance of relating this requirement to the furtherance of sustainable development and potential interactions between these provisions and European Human Rights law; we endorse their submission on these points.

### ***Eligibility requirements for Part 3A bodies***

The eligibility requirements for Part 3A bodies and many of the procedures they will be required to follow have been drawn from the unamended Part 3 provisions. We believe that eligibility requirements should be harmonised with those in the (amended) part 2, i.e. including SCIOS and any other types specified in regulations.

### ***Balloting***

The provisions for the new balloting procedures in the revised Part 2 of the LRA introduced in Part 4 of the CEB should also apply to the new Part 3A.

### ***Mapping requirements***

**97G(d)(ii)** reproduces the mapping requirements from Part 3 of the LRA, which are widely considered to be excessive. Again we see no justification for any higher mapping requirements than those that apply to Part 2 of the Act.

### ***Ownership***

**97H(d)** requires that the owner of land is accurately identified. We note that whereas Part 2 of the LRA as enacted includes provisions covering circumstances where the owner of the land in question cannot be found, there is no equivalent in the proposed part 3A; although such circumstances might well be pertinent if the land in question was actually “abandoned”.

Equivalent provision should be included in Part 3A.

### ***Current ownership “Inconsistent with furthering sustainable development”***

**97H(c)** requires that Ministers must not consent to an application to buy by a community body unless they are satisfied *“that, if the owner of the land were to remain as its owner, that ownership would be inconsistent with furthering the achievement of sustainable development in relation to the land.”*

We believe this requirement should be deleted. Given that Ministers already have to satisfy themselves that the land is eligible land, (i.e. abandoned or neglected), and that purchase by the community body is both in the public interest and compatible with furthering the achievement of sustainable development in relation to the land, this further test is either an unnecessary duplication or sets an impossible hurdle, as it is unclear what additional level of mismanagement (successful prosecution for wildlife crime?) would be required to actually trigger such a judgement, and begs the question why statutory authorities would not already be intervening in such a case.

### ***Previous attempt to acquire land***

**97H(j)** provides that Ministers must not consent to an application unless they are satisfied that the CB has already tried and failed to buy the land. Guidance is needed to clarify whether this means the CB simply has to make an offer which the landowner refused, whether the offer has to be based on a specified valuation methodology, and also on whether the CB required to have gone through a formal process (e.g. registration under part 2).

### ***Potential for avoidance***

**97H(j)** provides that CBs must have already tried and failed to buy the land, and **97J(1)(a)** that the CB must have carried out a ballot in the 6 months preceding the submission of an application. These actions would give plenty of warning to landowners, who if minded to obstruct the process, could obfuscate ownership by selling (or giving options on) some or all of the land (unless the CB already had an active registration on the land), or by carrying out the bare minimum of management activity required to counter the “abandoned and neglected” criterion. Regulations and guidance will need to be framed to guard against such avoidance, in particular in taking a long-term view of management practices on the land in question.

### ***Timescale for completion***

**97R** provides that where the valuer has taken longer than expected, this will cut into the time that the community has to raise finance and complete the acquisition. This seems unjust, and we suggest that it be amended to ensure that whenever the valuation process is complete, there is a period of 4 months for the completion of payment.

### ***“Market value” of the land***

**97S(5)(c)** identifies *“the amount attributable to any disturbance to the seller which may arise in connection with the transfer of the land to the Part 3A community 20 body”* as a component of “market value” and which must be paid by the CB. This seems unnecessary, as given that the Bill requires the CB to already have made an offer, it is in effect the landowner’s choice to force the CB to use the Part 3A

provisions. It also raises the prospect that landowners may choose this route deliberately in order to gain such compensation and thus inflate the sale price.

### ***Relationship with Part 5 Asset Transfer provisions***

The interaction of Part 3A and the Asset transfer provision contained in Part 5 for the CEB needs to be addressed: can communities, having failed with asset transfer request, then attempt a Part 3A acquisition? And if so, what are the decision making processes where Scottish Ministers are the landowner?

### ***Power to Ministers to facilitate discussions and make regulations***

We believe it would be useful if Ministers had powers to facilitate discussions and dispute resolution between communities and landowners.

### **Part 3 of the Land Reform (Scotland) Act**

We were concerned at the apparent omission of any measures amending part 3 of the LRA, and welcome the recent correspondence from the Scottish Government to the Conveners of the LGRC and RACCE notifying them of its intention to use the CEB to also simplify Part 3 of the LRA. Amongst the key points that should be addressed are streamlining the mapping process, and aligning the eligibility criteria with those for Parts 2 and 3A of the amended act.

### **Part 5 - Asset Transfers**

We strongly support these provisions. We have considerable experience of working with Forestry Commission Scotland's National Forest Land Scheme (NFLS), and believe that there is much that can be learned from the experience of operating this scheme, in particular the value of:

- Within a public authority, there should be a single point of entry to any asset transfer process, with identified administrators, dedicated guidance, and a single decision making process, to maintain consistency of advice to applicants and assessment of applications.
- The criteria and the levels of evidence required to meet them should not be "one-size-fits-all" but commensurate with the size/value of the asset in question; as for example, with the NFLS, where a full business plan and a community ballot are only required where the asset is valued at >£50,000.
- External input to the evaluation process helps maintain consistency and enables the process to remain positive (as an assessment of what an application is attempting to achieve) rather than a negative sifting (approving applications on the basis that they don't fail any specific, rigid, criteria). Additionally, external evaluation distances public authority staff charged with administering the scheme from the decision making process, which assists the management of both external and internal relationships, whilst the public authority is not perceived to be sitting in judgement on decisions to which it is also an interested party.



We consider that the effectiveness of these asset transfer provisions would be strengthened by a duty to provide publicly accessible asset registers, and by amendment of the Scottish Public Finance Manual to ensure that all public authorities have the discretionary power enjoyed by local authorities, to transfer at less than market value under certain conditions.

The provisions as introduced are relatively light in a number of areas of detail, which are explored below. In general we agree that it is better to cover these aspects in regulations and guidance, rather than in the legislation itself, but this makes it critical that the regulations are written effectively. We would recommend that there is thorough stakeholder (and in particular user) input to the regulations and associated guidance.

### ***Eligibility criteria***

**50(2)** appears to allow a wide range of local community of interest groups (e.g. sports clubs) and social enterprises to use the provisions, subject to Ministerial order.

We welcome this apparent flexibility, but consider that regulations and guidance should include elements of definition to ensure a local connection with the asset, and that the requirements are commensurate with the asset

### ***Valuation***

**52(4)(e)&(f)** place the onus on the community transfer body (CTB) to indicate the price / rent that it is prepared to pay for transfer of ownership / lease of the asset, but price / rent is not explicitly included in the list of matters **(55(3)(c))** to be taken into consideration by the public authority when reaching its decision, e.g. whether agreeing to the request would be likely to promote or improve economic development, regeneration, public health, social wellbeing, or environmental wellbeing.

However, **55(3)(h)** provides that the authority must also take into consideration “*any obligations imposed on the authority, by or under any enactment or otherwise, that may prevent, restrict or otherwise affect its ability to agree to the request*” . which appears to allow public authorities to use their obligations to the Scottish Public Finance Manual to refuse an asset transfer request which does not (in their opinion) comprise an appropriate valuation.

Guidance should be made available to CTBs on determining the price /rent they offer. Where this is carried out by an independent professional valuer to specified criteria, either a “full market valuation” or such other valuation methodology as prescribed by a revised Scottish Public Finance Manual, there should be a presumption that public authorities be obliged to accept it the valuation. If not, then guidance needs to describe what processes will be used to facilitate settlement when the CTB and public authority disagree over price or rent.

### ***Decision-making***

The Bill as introduced says nothing about the decision-making processes within public authorities: who receives and administers asset transfer requests, who assesses eligibility and who makes decisions on whether or not the asset transfer request is granted.

We agree that such matters should be covered by guidance rather than directly legislated for, and believe there is much to be learned from the experience of the National Forest Land Scheme, as noted previously. We trust these issues will be addressed in statutory guidance, and would request that stakeholders, particularly those with experience of asset transfer, be consulted in the process of drawing up such guidance.

### ***Forestry Leasing***

We note that there is a potential conflict between a community transfer body as defined in the CEB and the definition given in the **Section 11** of the Public Services Reform (Scotland) Act 2010, which amends the Forestry Act (1967), (which otherwise restricts FCS's ability to delegate its responsibilities) to permit leasing of land for forestry purposes to community-controlled companies by guarantee.

This should be dealt with by placing an appropriate amendment to the Public Services Reform (Scotland) Act 2010 in Schedule 4 (introduced by section 98(1)), Minor and Consequential Amendments.