

## **Written submission from Law Society of Scotland**

### **Introduction**

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society Committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

Both the Law Society of Scotland's Planning Law and Rural Affairs Sub-Committees have considered The Scottish Parliament's Local Government and Regeneration Committee's call for evidence and should like to respond on behalf of the Society as follows:

### **General Comments**

The Society while welcoming the policy intent of the bill to empower community bodies through ownership of land and buildings in order that people can meaningfully participate in decisions that affect their lives, expresses some concern with regard to the complexity of this bill.

In particular, the Bill itself in terms of Part 4 (COMMUNITY RIGHT TO BUY LAND) modifies Part 2 of the Land Reform (Scotland) Act 2003. There are multiple amendments to certain sections of the 2003 Act of the Bill which are rather difficult to follow and this does not seem to sit well with the aim of empowering communities. The Society suggests that it would be simpler to repeal and re-enact part 2 of the 2003 Act.

For these proposals to work effectively, community empowerment requires to be easily acceptable and workable by the very communities it seeks to empower. The Society expresses a concern that if a community body requires to undertake much in the way of initial ground work then there is a risk that enthusiasm will be lost if the proposals appear overly bureaucratic.

The bill is intended to extend and increase the powers of communities in involving them in community right to buy in both urban and rural settings and also to provide them with a form of compulsory purchase order as outlined at part 4 of the bill (COMMUNITY RIGHT TO BUY LAND) in respect of abandoned and neglected land at section 48 of the bill which appears to be undefined.

The Society also notes that there are already in place a wide range of controls and powers ready for use where councils are so minded and that the justification exists. In general policy terms, the Society notes that the general swing towards de-regulation in order to assist business and increase competitiveness has an equivalent in a system in local government to do more with less.

Accordingly increased bureaucracy and managerial control is not always conducive to this. The Society believes enacting new measures which councils may find difficult to prioritise could have the unintended consequence of detracting from the credibility of the policy intent of this bill.

The Society also notes that a lot of the detail will be set out in subsequent regulation and also guidance and this makes it difficult at this stage to anticipate the overall effect of these provisions.

With particular reference to the questions set out by the Scottish Parliament's Local Government and Regeneration Committee, the Society should like to respond as follows:

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

The Society refers to its general comments.

While the Society that in terms of the Land Reform (Scotland) Act 2003 has assisted in bringing communities together in rural Scotland implementing a community right to buy, the Society questions the proposals as set out at Part 4 of the bill which extends the right to buy to the whole of Scotland and also provides a framework for community bodies to purchase abandoned or neglected land.

The Society highlights the marked differences between a right to buy exercised in rural Scotland and one now to be exercised with regard to land in an urban setting which may well have a higher acquisition and development consequent costs.

The Society highlights the unintended consequence of urban land in respect of which community interests may be registered where this land may already be subject to a redevelopment proposal (for example allocated in a development plan and/or subject to an extant planning permission). While the Society notes that Scottish Ministers may in those circumstances conclude that registration is not in the public interest, the uncertainty with such an application could have an adverse impact on investment decisions for developers.

The Society respectfully suggests that there requires to be clearer rules on how Scottish Ministers will deal with such an application where there are active development proposals and accordingly suggests that land subject to an active planning permission will, for a limited period of time, not be subject to registration under Part 4 of the bill. The Society also questions the lack of certainty as to whether the community purpose will be implemented and, in the case that it not being so implemented, what provisions are to be put in place with regard to "clawback".

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

Again, the Society refers to its general comments.

**Question 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.**

The Society notes that at present Highlands and Islands Enterprise assist communities by awarding grants and assuming an advocacy role in the direction of other organisations which have exercised the right to buy.

The Society suggests that a central organisation could be set up in order to steer community bodies through the provisions of this bill .

**Question 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?**

The Society's response to Question 1 identifies a requirement for further amendments to section 33 to restrict the application of community right to buy in urban areas where there is an active development proposal. If such provision is not made then an unrestricted community right to buy could have unintended but significant adverse effects on investment decisions. For example, it would not be uncommon to have a situation where planning permission is obtained for a redevelopment proposal with the aim of subsequently selling or leasing parts of the development to individual developers. There would currently be nothing to prevent an application for registration of a community interest being made in these circumstances as there would be no existing concluded missives or option in place. The risk of such an application being made, even if it is rejected by Scottish Ministers, may be a disincentive to investment in a Scottish development. At the very least, it would cause delay.

The Society submits that the primary legislation (as opposed to guidance) should provide greater certainty in the circumstances in which the community right to buy would operate in relation to active development proposals. In particular, the Society suggests that consideration is given to allowing for a mechanism to obtain a certificate exempting a site from community right to buy for a certain amount of time. This would allow investment decisions to be made with a degree of certainty but would also retain the community right to buy in the event that the development did not proceed as envisaged.

The Society makes specific reference to section 48 of the bill (abandoned and neglected land) and notes that this term has not been defined but rather, land is eligible in terms of section 97C of the 2003 Act as amended by section 48 of the bill, if in the opinion of Ministers it is "wholly or mainly abandoned or neglected". The Bill provides that in determining whether land is eligible, ministers "must have regard to prescribed matters. ". The lack of a definition for abandoned or neglected land gives rise to considerable uncertainty in relation to what land would be within the scope of section 97C,. The Society believes that there should be a proper definition of abandoned or neglected land. There is a particular concern about how the Part 3A process would operate in relation to long term development projects which may take a number of years to come to fruition

The Society further notes that the procedure with regard to the community right to buy abandoned or neglected land appears to be a similar procedure to compulsory

purchase and accordingly believes that the tests should also be similar. Accordingly, there should be a requirement for a viable business plan and robust development proposals in respect of any community right to buy abandoned or neglected land.

From a more practical point of view, the Society notes that, in terms of section 97Q of the 2003 Act as inserted by section 48 of the bill, there is an ability for Ministers to impose statutory real burdens on the land and accordingly questions the relationship of these burdens with the ultimate decision of the Clerk to the Land's Tribunal to confer title. The Society believes that it would be helpful to know what was to be envisaged here, e.g. what types of burdens and, in particular what types of clawback provisions should be put in place if the development contemplated by the community authority is not taken forward?

The Society further notes that the Clerk to the Lands Tribunal cannot grant better title than that possessed by the owner or person entitled and that accordingly title to be transferred to the community body will be subject to the same title conditions as that of the previous owner. This may cause difficulties for any project going forward and is to be distinguished from the provisions for a Compulsory Purchase Order which provide for a clean title to be obtained by way of a General Vesting Declaration. Accordingly, it may then follow that title transfer to the community cannot be used to fulfil its intended purchase with the consequent issues around funding.

The Society further highlights the practical issue with regard to the intent of the community bodies' right to buy against the provisions of the Local Development Plan and whether their proposal conflicts with the Local Development Plan or otherwise.

The Society highlights a further practical issue with regard to any owner who begins to maintain abandoned or neglected land once the provisions of section 48 of the bill are enacted.

The Society makes particular reference to section 97D (4) of the 2003 act as inserted by section 48 of the bill and note that the term "sustainable development" is undefined.

The Society also notes Part 5 of the bill (ASSET TRANSFER REQUESTS) and questions how this should apply to local government trusts, companies, joint organisations, or ALEOs

( Arms Length External Organisations). The Society questions why there is no appeal to Scottish Ministers against a refusal by a local authority for an asset transfer request.

The Society notes the provisions at part 6 of the bill (COMMON GOOD PROPERTY) and questions how an asset transfer request would work in relation to common good land. The Society would also suggest that the opportunity could be taken to simplify the law on common good land.

The Society makes particular reference to the recent Petition of East Renfrewshire Council for an order under section 75 (2) of the Local Government (Scotland) Act 1973 in respect of certain land at Cowan Park, Barrhead, East Renfrewshire [2014] CSOH 129 where that a PPP arrangement in respect of a new school to be built on common good account was held not to be a disposal and accordingly the Petition was refused as unnecessary. The case illustrates the current uncertainty on what constitutes a “disposal” as opposed to an “appropriation” in relation to common good land.

The difficulty is that whilst a local authority can submit a petition to court for alienation of common good land, there process cannot be used to authorise appropriation of common good land. The only alternative for a local authority in these circumstances is to petition for a private bill as was done with the recently enacted City of Edinburgh Council (Portobello Park) Act 2014,

The Society would suggest that the current bill could be used to clarify the law on alienation and appropriation of common good land. It is suggested that a requirement to resort to Private Bill procedure is not necessarily the best use of public resources and that the Bill should include a mechanism to authorise alienation or appropriation. Such a mechanism could, as is currently the case for alienation of common good land, be through a court petition. However, as the bill elsewhere vests public interest decisions on the use of land in Scottish Ministers, consideration could also be given to the authorisation procedure for alienation or appropriation of common good land similarly being through Scottish Ministers.

**Question 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?**

The Society has no comments