



SCOTTISH LAND COMMISSION  
COIMISEAN FEARAINN NA H-ALBA

## COMMISSIONED REPORT

**Review of the effectiveness of current community ownership mechanisms and of options for supporting the expansion of community ownership in Scotland**

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# Summary

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Review of the effectiveness of current community ownership mechanisms and of options for supporting the expansion of community ownership in Scotland

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## EXECUTIVE SUMMARY

### I. Background

This summary presents the findings of research commissioned by the Scottish Land Commission to review the effectiveness of community ownership mechanisms and options for simplifying or improving these mechanisms to enable and support the expansion of community ownership in Scotland. This included reviewing processes relating to negotiated sales or transfers of land and/or assets to communities, as well as legislative mechanisms including the Community Right to Buy (CRtB), Crofting Community Right to Buy, the Transfer of Crofting Estates (Scotland) Act 1997 and Asset Transfer measures under the Community Empowerment (Scotland) Act 2015.

### II. Method and approach

The approach included three main elements: i) Desk-based review and 16 scoping interviews with stakeholders; ii) interviews with 32 community groups which had attempted or were attempting to acquire land or assets either through a legislative or non-legislative route, interviews with 13 professional intermediaries (lawyers, land agents and consultants) and interviews with 12 non-community landowners (including private, NGO and public landowners); and iii) two workshops with community groups (25 participants). The community interviews and workshops explored the experiences of communities with community ownership mechanisms, key challenges, and potential solutions. The key strengths and challenges identified by research participants are presented below as they relate to each ownership pathway, with cross-cutting challenges highlighted. The report's conclusions and recommendations are also summarised below.

### III. Mechanisms for ownership – key strengths and challenges

#### Negotiated transfers - Key strengths

- Interviewees recounted positive experiences of this pathway where the land or asset owners were willing sellers.
- A pre-existing relationship between the landowner and the community, and clear lines of communication, were perceived as helping the negotiation process.
- A clearly-identified community need and strong leadership within the community body were also seen as helpful for a smooth negotiation process.

#### Key challenges

- Communities identified challenges relating to establishing clear lines of communication with owners, while landowners faced challenges identifying 'official' community representatives and in relation to division of opinion on key issues within communities.
- Without a willing seller, it is not possible for communities to receive Stage one funding from the Scottish Land Fund to explore options for the land/asset(s).
- Negotiated transfer can take a long time and lead to high costs (time and money) for both parties.
- Landowners were wary of entering into negotiations where they perceived community bodies as lacking in capacity or as having undertaken insufficient business planning.

#### Community Right to Buy - Key strengths

- CRtB can result in ownership and the process was recognised as balanced. Learning can occur and the process can test community capacity for ownership. The indirect effects of the legislation were recognised, including: i) increased community confidence; ii) the creation of an environment for negotiation; and iii) increased awareness of community development needs among landowners. Recent amendments to the legislation were seen as positive, but insufficiently far reaching.

### Key challenges

- **Appropriate use of CRtB:** Cases where CRtB being used unnecessarily were apparent, with the use of CRtB to acquire publicly-owned assets seen as inappropriate. CRtB applications were also recognised as having been submitted to thwart a development or protect built heritage - purposes not fully aligned with the aim of sustainable development.
- **Complexity and failure rate:** CRtB represents a complex, challenging mechanism, with a high failure rate, requiring communities to work on multiple work streams in parallel.
- **Governance and community definition:** Communities were often required to set up a new body or modify their constitution to comply with the legislation, often a time-consuming process. Determining the most suitable governance structure and ensuring membership of the community body can include people from outside the defined area were challenging due to a requirement for 75% of the membership to be from within the community area.
- **Process and timescales:** Responding to an opportunity and completing the CRtB application process sufficiently quickly to avoid a late application was often challenging, particularly in urban contexts. In some cases this was compounded by delays in feedback from the Scottish Government, or delays in the valuation or ballot.
- **Perceptions and managing expectations:** Communities were often unaware of CRtB success rates, what the process entails (e.g. the time required) or that alternative routes may exist, resulting in unrealistic expectations in some cases. Failure to achieve a successful registration and/or purchase often led to demotivation and dis-engagement.
- **Landowner relations:** Factors communities identified as affecting relations between communities and landowners included: i) the paternalistic attitude of some owners; ii) vested interests; iii) personality clashes; and iv) conflicts around planning applications. Landowners also specifically referred to: i) uncertainty and the potential for financial losses resulting from delayed/halted sales or selling at a value below what the open market might pay; ii) difficulties communicating with community bodies or communication breakdowns; and iv) communities perceived as using CRtB to stop a sale or development. Communities also faced challenges when identifying and/or communicating with landowners and clarifying the boundaries of a site.
- **Legal challenges of CRtB:** In a limited number of cases CRtB has been challenged on legal grounds, in relation to subjective terminology, on technical grounds (e.g. accuracy of map) and in relation to options to sell. Legal challenges have resulted in CRtB applications being delayed, declined or overturned in some cases. Communities felt vulnerable to legal challenges and highlighted the costs of defending a challenge and a perceived lack of support for this from the Scottish Government.
- **Challenges in urban contexts:** Communities highlighted the difficulty of pre-empting sales and targeting assets for CRtB in urban contexts, where property sales completed quickly. This resulted in many urban applications being deemed late. Defining communities was often challenging due to their size and interactions being based around common interests rather than geography. Other challenges included low awareness of CRtB and high acquisition and development costs.
- **The emergent Community Rights to Buy:** Most interviewees welcomed the compulsory purchase CRtB routes, with the CRtB Abandoned, Neglected or Detrimental Land seen as potentially useful for overcoming existing challenging cases. Both routes were identified as backstop measures (not first options), with a likelihood that both may face lengthy legal challenges in the future due to the subjective nature of related terminology.

### Crofting Community Right to Buy - Key strengths

- Despite limited uptake, as a right of compulsory purchase which had stood up to a legal challenge, it was recognised as having had important indirect effects in relation to wider legislation and other crofting buyouts.

### Key challenges

- The Crofting CRtB was seen as highly complex and time consuming, particularly in relation to mapping of croft holdings, which caused delays, frustration and demotivation.
- Limited availability of financial and advisory support for the process was recognised despite the complexity, as well as inconsistent feedback and a lack of awareness among civil servants of the local context and related challenges.
- There remains limited scope for use of this route owing to: i) the complexity of the route; and ii) the reluctance of crofting communities to take on ownership.
- The disparate nature of multiple townships across relevant (often large) holdings can make unifying the dispersed 'community' around a buyout challenging.
- Crofting communities which have attempted a Crofting CRtB are not eligible to use CRtB in the future. In the Crofting CRtB legislative requirements (Part 3) the applicant body needs to be a crofting community body; however, once this organisation has been established it is not an acceptable community body under the CRtB provisions and therefore cannot utilise these provisions (Part 2)

### Transfer of Crofting Estates - Key strengths

- The Scottish Government are very willing to sell crofting land, with buyouts of government owned croft land a potential opportunity for expansion of community ownership; further cases may exist where community ownership offers potential for developmental benefits.

### Key challenges

- Crofters on government crofting estates were perceived as not motivated to acquire the land, as they benefitted from very secure crofting tenancies and a benign landlord.
- Taking on ownership of an estate required considerable capacity, which was a concern for some crofting groups with limited staff and volunteer time.
- Awareness of the Transfer of Crofting Estates (ToCE) route was perceived as relatively low among crofters, particularly in terms of whether it differs from other routes.
- Where attempted, the ToCE route has been a very slow (3-4yrs) and complex mechanism subject to major delays, including the need to collate crofting titles.
- Crofting communities which had attempted the route highlighted a lack of clear guidance and confusion around the requirements for communities by the Scottish Government.
- Crofting communities have been subject to requirements to pay for the transferred land, with one community also subject to clawback provisions.
- It is currently unclear whether the ToCE route represents the preferred route for the Scottish Government, or whether either asset transfer or the right to buy pathways represent more useful routes for communities to acquire government owned crofting land.

### Asset transfer - Key strengths

- The potential for asset transfer under the 2015 Act was widely welcomed and a number of relevant authorities were recognised as having listed their assets, with some having developed a detailed process for asset transfer.
- Examples of supportive and approachable relevant authorities were identified, with some local authorities recognised as having been more proactive than others in relation to asset transfer, with associated opportunities for shared learning.
- The National Forest Land Scheme (NFLS, which ceased in July 2016) was seen as a useful mechanism to learn from, with Forest Enterprise Scotland's Community Asset Transfer Scheme highlighted as a current model of good practice for transparent and accessible asset transfer.

### Key challenges

- **Legislative:** The implementation of the asset transfer legislation was seen as currently falling far short of the original vision for a transparent and robust process. Some perceived the 2015

Act as having hardened attitudes and processes, and prompted local authorities in particular to abandon simpler routes or try to limit asset transfer.

- **Compliance with legislation:** Some relevant authorities were identified as not currently complying with the legislation. Others were doing so in ways that do not meet the spirit or intentions of the guidance.
- **Process:** Most community groups had a challenging and stressful experience; some had extremely negative experiences which undermined trust and respect.
- **Unnecessary layers:** Some relevant authorities have created an additional 'expression of interest' (Eol) stage, used as part of the decision making process, although the legislation specifies that communities can submit an asset transfer request at any time without a formal Eol. In some cases Eols were perceived as being used as a trigger to put the asset on the open market.
- **Potential for conflict of interest:** Some relevant authorities appear to be blocking or undermining asset transfer requests from community groups, in ways that appeared to represent a conflict of interest, where assets were later put on the open market, or retained for possible future development by commercial interests.
- **Arms Length External Organisations (ALEOs):** Issues were identified relating to ALEOs established by many local authorities to manage (or own) assets. Some groups found it difficult to identify the owner; others found themselves in competition with the ALEO, or turned down because the local authority favoured the ALEO.
- **Timeframes:** Both the legislation and funders have created very challenging timeframes which affect deadlines for submission, validity of a valuation, etc.
- **Reviews and appeals:** Those groups whose asset transfer requests had been rejected reported confusion around the process for reviews and appeals.
- **Valuation and discounting:** Valuation processes vary widely, and do not consistently reflect whether the asset in question is a liability, a successful business, or productive land. The process of negotiating a discount is not widely understood by communities or relevant authorities.
- **Costs:** Even 'free' assets have legal costs. Local authorities expect communities to meet their legal costs and communities can face additional costs due to complexities over titles.
- **Purpose and impacts:** Experience with pre-2015 asset transfer indicates a need for long-term monitoring of asset transfers; this would help to provide robust evidence for criticisms. There is a need for sound business planning / feasibility studies and often a need for planning consent to go hand-in-hand with asset acquisition, as often there is no point owning the asset without having a legal right to develop.

#### IV. Cross-cutting challenges

**Funding:** The inclusion of urban areas under CRtB and implementation of asset transfer has increased the emphasis on funding urban acquisitions and the total number of projects being funded. The assets being acquired often have high development costs; the current limited availability of development funding is perhaps the most significant challenge for delivering wider sustainable community ownership. This was linked to: i) a reduction in the amount available through key schemes; ii) increased demand; iii) community bodies seeking funding for development related to previous acquisitions; and iv) increasingly ambitious development plans. Failure to acquire development funding can result in major delays in developing a viable project. Certain communities find it more difficult to acquire funding, including disadvantaged communities, where the need for funding may be particularly high.

**Support frameworks and professional advice:** A disparity of available support and funding across Scotland was identified (despite support frameworks and funding often seen as a key strength overall), including the lack of a clear equivalent to Highlands and Islands Enterprise in Central and Southern Scotland. The support available from local authorities across Scotland was

also seen as variable. Some communities faced difficulties in determining the most suitable source of advice, with the agency and wider support framework viewed as complex. The quality, availability and costs of consultants was recognised as highly variable, which can affect the quality of feasibility studies and business plans. Challenges were also recognised in relation to the availability of legal advice including: i) a gap in relevant knowledge within the legal profession; ii) a limited set of test cases; and iii) the costs of legal support and difficulty in predicting these costs.

**Community capacity:** Considerable differences exist in capacity and experience between communities, which can affect their ability to engage with these processes, with a frequent reliance on a core group of volunteers. This can affect long-term momentum as volunteers are affected by fatigue and burnout. Communities often feel “*out of their depth*” during application processes for CRtB and asset transfer and commonly referred to the need for extensive skillsets and rapid learning. Communities also faced the challenges of managing community expectations, time pressures and responsibilities and often a high emotional cost, with local authorities and community councils sometimes challenging and obstructive, leading to some communities feeling let down and betrayed by the process.

**Mis-alignment of legislative pathways and non-strategic approaches:** Communities were often unaware of property sales until relatively late, owing to sales occurring through informal channels without the land going to the open market. This can result in communities taking a reactive approach to acquisitions, with the momentum triggered by the sale in process as opposed to being part of strategic community development. These issues were further compounded by a lack of clear alignment between existing legislative pathways, including in relation to constitutional and membership eligibility requirements for CRtB and asset transfer and between funding streams and legislative pathways. Additionally, advice from local authorities, public agencies and the Scottish Government was often perceived as dis-jointed, a factor viewed as compounded by the departmental ‘separation’ of CRtB and asset transfer by the Scottish Government. The reactive approach to communities acquiring assets was also linked to the absence of a well-developed structure for local-level community planning in Scotland.

## V. Conclusions and Recommendations

The mechanisms and support frameworks through which communities can achieve ownership have evolved considerably and further opportunities for increasing community ownership clearly exist. Nevertheless, in relation to the existing mechanisms communities often report challenging, frustrating and exhausting experiences: relationships with public and private asset owners are at times undermined and attempts to acquire assets via legislative routes can take many years to accomplish, or are unsuccessful. Negotiated sales and transfers are widely considered the preferred route to ownership; however, often communities are channelled towards legislative processes and more could be done to facilitate and support negotiated routes to ownership. The processes of community acquisition are widely perceived as unduly complex, onerous and time-consuming. Considerable scope exists for further simplification and alignment of legislative processes, and for enhancing guidance and support.

The provision of sufficient post-acquisition development funding is critical to ensuring long-term sustainable development of assets and communities, particularly in the most disadvantaged communities. Currently asset acquisitions often occur in a reactive way and considerable scope exists for developing a more strategic approach to community asset transfer as part of local community planning processes. Furthermore, the current fiscal and policy framework contributes to increasing land values. This reinforces existing patterns of ownership and inhibits community ownership and, by extension, sustainable development. Key recommendations for future change are made below:

### **a. Negotiated transfers**

Negotiated transfers should be encouraged wherever possible and an environment for constructive dialogue fostered by all stakeholders. Guidance to relevant authorities should clarify that negotiated transfers should be the default method for transferring public assets to communities, particularly for lease renewals, lower value assets and where the asset has been notified for disposal and the community is not seeking a discount. The Scottish Government should consider measures to support private landowners, engaging in negotiated transfers, including providing additional guidance (e.g. building on the Protocol for Negotiated Sales<sup>1</sup>) and provision of a dedicated staff resource, including availability of a neutral third party to assist in challenging negotiations.

### **b. Robust and effective legal mechanisms**

In relation to asset transfer the Scottish Government should: i) ensure all relevant authorities are aware of their legal obligations and consider publishing a list of those not in compliance; ii) review its decision not to maintain a list of relevant authorities' asset transfer websites; iii) revise the guidance to clarify best practice around non-statutory elements, including the provision of a single point of contact and the signposting of communities to support services, to recommend the involvement of independent persons in the decision-making and internal review processes and to clarify that any 'Expression of Interest' process is optional; iv) clarify the scope of the asset transfer provisions with respect to Arms-Length External Organisations; and v) ensure that when reviews of decisions are concluded, case studies are produced and key lessons disseminated. In relation to CRtB the Scottish Government should: i) specify the information required from community bodies to demonstrate proper financial arrangements; and ii) clarify whether it is a legislative requirement for the Scottish Government to provide detailed comments on business plans to the community.

### **c. Alignment and improvement of legislative mechanisms**

The Scottish Government should: i) develop overarching guidance covering all routes to community ownership; ii) establish a single team within Scottish Government to deal with community assets issues; iii) create a single web portal for relevant guidance, templates and supporting documentation; and iv) clarify eligibility provisions for community bodies.

**The following amendments to CRtB are recommended:** i) Amend Parts 2 and 3A of the 2003 Act and Part 5 of the 2016 Act to allow the Scottish Government to designate community bodies and classes of community bodies as eligible; ii) Amend the 2003 Act to remove the requirement for 75% of the membership of a community body to be from within the defined community area; iii) Amend the 2003 Act to give communities the right to respond to landowners' comments on late registrations and to extend the period for which expressions of community support are valid.

#### **Further recommendations for legislative amendments include:**

- **Asset Transfer:** Make further orders to increase eligibility for asset transfer (e.g. permit Community Bodies with pre-2015 Act CRtB constitutions to use asset transfer).
- **Part 3A / Part 5:** Amend the 2003 and 2016 Acts to add an additional stage in the Part 3A and Part 5 processes, enabling communities to submit an initial application to Scottish Ministers prior to making the offer to buy or balloting the community, and which if accepted would lead to a prohibition on sale or establishment of an option agreement.
- **Transfer of Crofting Estates:** The Scottish Government should clarify the future status of the Transfer of Crofting Estates (ToCE) route.
- **Crofting Community Right to Buy:** Alignment of the Crofting CRtB and CRtB provisions for qualifying community bodies, or provision of a derogation for a community body designed to benefit from the Crofting CRtB, to facilitate crofting community bodies to undertake a CRtB application should the need arise.

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<sup>1</sup> A recently established suite of guidance tools for negotiated transfers developed by Scottish Land and Estates and Community Land Scotland: <http://www.communitylandscotland.org.uk/find-out-more/tools-and-resources/>

**Promotion and support:** The Scottish Government should undertake measures to promote all the routes to community ownership across Scotland, to normalise / mainstream these processes and reduce negative and adversarial perceptions. This should include facilitating sharing of best practice for communities, public and private landowners, and external advisors, including: i) developing case studies covering successful and unsuccessful attempts at community acquisition using various pathways; ii) developing additional guidance and/or training for specific groups (e.g. legal advisers); iii) developing further model documents and templates as required. Additionally, networking and knowledge-sharing between relevant authorities should be supported (e.g. by creating a forum for relevant authorities to discuss experiences of asset transfer) and between community bodies. Wider measures should also be considered by relevant authorities to facilitate cultural and structural change relating to asset management and community development.

**Funding:** The Scottish Government should extend its commitment to the Scottish Land Fund (SLF) beyond 2020 and ensure greater availability of post-acquisition development funding. SLF processes and timescales should be further aligned with the relevant legal mechanisms and SLF funding made available even where the seller appears unwilling, or where intention is for long-term lease or partnership. Additional support should also be made available for communities to obtain independent legal advice where necessary. Furthermore, the Scottish Government should seek to ensure a 'level playing field' across Scotland with respect to support, to include the development of a specific community-led economic development component within the proposed South of Scotland Development Agency.

**Strategic thinking:** The Scottish Government should: i) encourage the development of strategic thinking by communities for identifying a vision for their community, including in relation to asset acquisition, e.g. consideration of community assets should become a key component of Local Place Planning; and ii) consider processes of valuation and disposal of public assets to communities, to reduce inefficient use of public funding. Consideration should also be given as to how private landowners could be required to notify communities of intended sale of assets (above threshold value / size etc.), including the potential for a requirement to advertise sales in local media and/or a duty on landowners negotiating a private sale to publicise the impending sale to the local community for a fixed period prior to being allowed to register the sale. In relation to asset transfer, the Scottish Government should strongly encourage relevant authorities to publicise asset disposal to communities and to involve communities in discussion around the selection of assets for disposal.

**Fiscal and wider policy framework:** The Scottish Government should review the impact of the broader fiscal and policy framework of grants and subsidies, tax incentives and exemptions for land ownership and use in relation to community asset acquisition and seek, where possible to align these with furthering sustainable development.

**Monitoring/indicators:** A new indicator should be established by the Scottish Government for assessing progress relating to community ownership to include in particular the number of community organisations owning land and/or assets.

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## 1. INTRODUCTION AND BACKGROUND

The research presented in this report was commissioned by the Scottish Land Commission to review the effectiveness of current community ownership mechanisms and options for supporting the expansion of community ownership in Scotland. This includes a review of existing processes relating to the negotiated sale or transfer of land and/or assets to communities (Section 3), as well a review of key legislative mechanisms including the Community Right to Buy (CRtB) (Section 4), Crofting Community Right to Buy (Section 5), the Transfer of Crofting Estates (Scotland) Act 1997 (Section 6) and Asset Transfer measures under the Community Empowerment (Scotland) Act 2015 (Section 7) (referred to throughout this report as the 2015 Act). Many of the challenges discussed in Section 4 (CRtB) are to some extent, relevant to the Crofting Community Right to Buy and provide a backdrop for this section (Section 5).

Sections 3-7 include a number of relevant (anonymised) case study boxes to illustrate and ground key findings. These sections follow a consistent structure, including a brief discussion of key drivers/starting points, a summary of key strengths, and a detailed review of the challenges of relevance to the specific pathway. All cross-cutting strengths and challenges (e.g. community capacity, funding and support frameworks) are discussed in Section 8. Section 9 presents the main conclusions and a set of combined recommendations.

This section outlines the key project objectives and research questions and presents a summary of background literature relating to i) the evolution of community landownership ii) current policy context; iii) key constraining factors; and iv) the current extent and future potential for expansion of community landownership in Scotland. Section 2 further outlines the methodological approach taken to the research presented here.

### 1.1. Project objectives and research questions

The specific objectives of this research were to:

- i) Assess the effectiveness of community ownership mechanisms within the Land Reform (Scotland) Act 2003 and the Community Empowerment (Scotland) Act (2015) and to identify how these could be simplified or improved; and
- ii) Recommend what steps could be taken to enable and encourage more community ownership across Scotland – either by legislative routes or negotiated transfer.

More specifically, the review sought to address a number of key questions:

- i) Are existing community ownership mechanisms fit for purpose in rural and urban contexts and if not what changes are required to address this?
- ii) What (if any) changes are required to improve the alignment and interaction of different legislative routes to community ownership?
- iii) What are the constraints (and perceived constraints) to effective use of existing community ownership mechanisms (e.g. legal, funding, administrative, skills, capacity etc.) and how could these be addressed?
- iv) What steps could be taken to facilitate or incentivise more negotiated transfer to community bodies?
- v) What lessons can be drawn from Scotland's experience to date with community ownership mechanisms and how might these be reflected in subsequent legislation?

## 1.2 Background, ownership outcomes and policy context

### 1.2.1 The evolution of community landownership in Scotland

One of the earliest substantial community acquisitions of land in Scotland occurred in 1923, when the then owner Lord Leverhulme transferred part of his estate to the local community in Stornoway and its vicinity, which resulted in the establishment of the Stornoway Trust. However, it was not until the 1990s that the community land movement began to build momentum, with the landmark purchase of the 8620 hectare North Lochinver Estate by the Assynt Crofters Trust in 1993 (Brennan, 2001), followed by other high-profile community buyouts of the Isle of Eigg (1997) and Knoydart (1999), both of which occurred in direct response to perceived neglectful private landownership (Boyd, 2003). In some cases, communities which have acquired one asset have gone on to acquire larger assets and land as their experience and capacity has grown (LRRG, 2014).

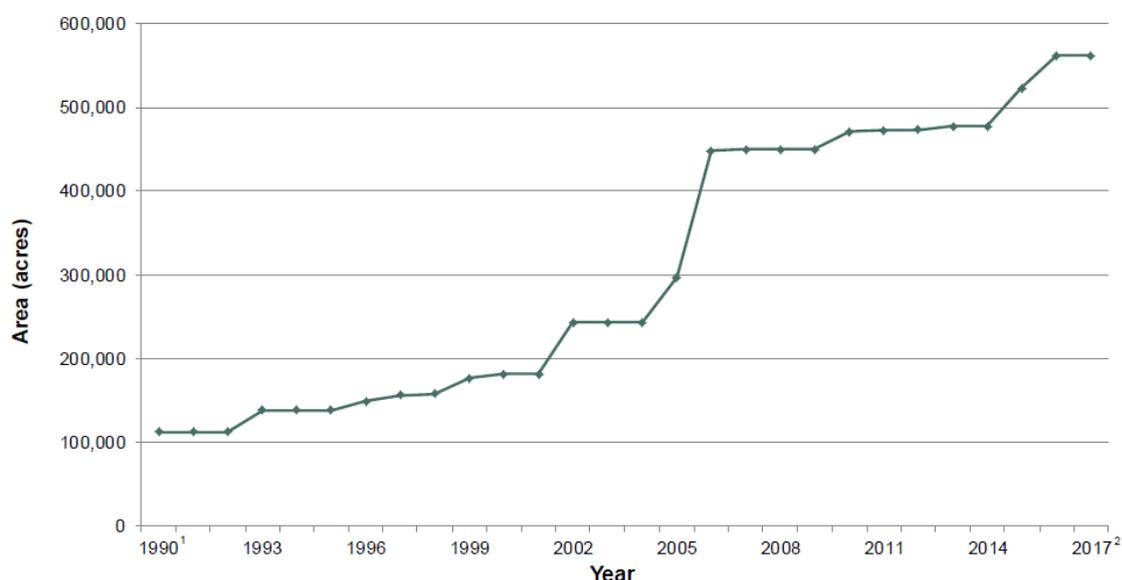
The establishment of the Community Land Unit (CLU) within Highlands and Islands Enterprise (HIE) in 1997 (tasked with providing advice to existing and prospective community landowners) and the introduction of the Scottish Land Fund (SLF) in 2001 to support community land purchases and subsequent management of these landholdings, demonstrated government support for increasing community ownership and formalised the process of community acquisition. The establishment and evolution of the organisational and legislative framework for community acquisition has shaped many aspects of the buyout process – including the definition of community and the structure of community bodies (most commonly companies limited by guarantee) engaging in buyouts. Community bodies are typically required to have constitutions that demonstrate: geographically defined, open membership, local control, public benefit objectives and non-profit distributing status, although the precise wording required to specify these characteristics varies between mechanisms. The Land Reform Review Group (2014) recognised a need for greater flexibility with respect to both community definition and the organisational forms available to community bodies.

Since 1990 the total area of community owned land has increased more than fivefold, with a rapid expansion between 2001 and 2006 (coinciding with the first Scottish Land Fund), with a slower rate of growth since 2006 (see Figure 1.1). Notably, most of these community acquisitions actually occurred without use of the provisions of the Land Reform (Scotland) Act 2003 (see Section 1.2.3) and the majority of acquisitions have been from private landowners (LRRG, 2014; Scottish Government, 2017). The LRRG (2014) reported that just 6% of the area then in community ownership had come from the public sector, whilst HIE's database of 232 acquisitions included approximately 20% from the public sector. Note that these figures predate the asset transfer provisions of the 2015 Act. The pattern may vary between sectors and asset types; amongst community woodlands a much greater proportion of the area in community ownership has come from the public sector, much of it through the National Forest Land Scheme.

Whilst community owned assets are distributed across Scotland the great majority of community land in area terms is found in the north west where, for example, some two thirds of the Western Isles is under community ownership. Various explanations have been suggested for this uneven distribution, including lower land values, the higher level of market failure on the periphery, the influence of crofting and the existence of high levels of social capital in remote regions (LRRG, 2014). Community landownership continues to represent a very small proportion (2.9%) of Scotland, with the bulk of this land area represented by less than 20 large rural landholdings (Scottish Government, 2017).

Collectively, buyouts represent a direct response to the landownership status quo, with Scotland continuing to exhibit one of the most concentrated patterns of private landownership in the world (Wightman, 2000). Community land acquisitions have often been driven by issues of insecurity, neglect and disempowerment linked to localised rapid community decline, owing to neglectful and absentee private landownership (Macaskill, 1999). Community acquisition of land and assets have also commonly been driven by a perceived opportunity for enhancing local socio-economic development and community retention – reflecting wider growth in community activity and the establishment of ‘asset based’ models of community development (Land Reform Review Group (LRRG), 2014; Flora et al, 2004). Ownership of land (and associated assets and development rights) is therefore increasingly viewed as a mechanism for facilitating community retention and growth, employment creation and facilitating inward investment and capacity building (Mc Morran, 2014).

Figure 1.1 Recorded area of community land 1990-2017 (Scottish Government 2017)



### 1.2.2 Community ownership outcomes

The acquisition of land and assets by communities has been increasingly recognised as resulting in far reaching economic, social and environmental outcomes (e.g. Mullholland et al., 2014; Skerratt, 2011; Bryan and Westbrook, 2014). Community ownership can facilitate the development of a framework for economic development, through access to land and assets in combination with enhanced participatory governance and rebuilding of community capacity (Skerratt, 2011). A review in 2014 of 12 established community landholdings demonstrated that since community acquisition, total combined turnover had increased from £1.7M to £6.1M, with staffing increasing from 22 to 103 and a total capital investment of £34M since acquisition, including £16M in renewable energy initiatives (Bryan and Westbrook, 2014). The development of business hubs by community land bodies has also occurred and business development has increased substantially (from 83 to 185 businesses on the 12 landholdings) since acquisition (Bryan and Westbrook, 2014).

Skerratt (2011) identified reduced out-migration on community landholdings since acquisition (linked to inward investment and increased housing availability), and stable or increasing populations. Buyouts have also been linked to increased individual and community confidence and cohesion, associated with collective action and security of tenure, which

enhances community capacity and motivation and facilitates long term planning (Slee et al., 2008; Hunter, 2012; Mc Morran et al., 2014). The experience gained through buyouts can also impact on community energy, capacity and empowerment in relation to local decision-making processes and commonly results in the emergence of local leaders, as well as increased transparency in decision making (Slee et al., 2008). The process of ownership and community governance can result in communities building stronger internal and external networks – increasing efficiencies and access to wider resources and enhancing community resilience (Lawrence, 2009; Skerratt, 2011). Community landownership has been associated with a reconfiguring of resource management away from passive approaches towards proactive, community-centred models which incorporate the re-working of traditional land uses and the reconnection of communities with the land and environment (Mackenzie, 2013; Mc Morran et al., 2014). Specific examples include: i) an emphasis on renewable energy and energy efficiency; ii) a shifting emphasis in deer management; (iii) developing opportunities for new entrants to crofting; and iv) the development of community woodlands and woodland restructuring and native woodland establishment (Mc Morran, 2016).

Critically, the extent of outcomes from community landownership can vary considerably, depending on: the income potential of the asset(s); the length of time since purchase; community capacity; and the existence of stakeholder partnerships (Mc Morran, 2016). Many authors have identified the considerable challenges which community landowners can face post purchase/acquisition. Based on four in-depth case studies of community landholdings. Mc Morran et al. (2014) identified four critical sustainability pressures faced by landowning communities: economic viability; division and conflict in the community; limited social capital; and limited resources and assets. This reflects earlier case studies (Boyd and Reid, 1999; 2001; 2000), which identified the key challenges for community landowners as: economic pressures; limited asset bases, including affordable housing; ageing communities and out-migration; inaccessibility of the land; shortage of local expertise and capacity; and difficulties in achieving community cohesion. As Slee et al. (2008) note, the income generation potential of assets is often limited and in some cases insufficient to deliver long-term financial self-sufficiency. Earlier reviews confirm that in many cases community acquisitions are under-capitalised and reliant on continued external funding (Thake, 2006; Quirk, 2007).

### 1.2.3 Policy context – Land Reform

The Land Reform Policy Group (LRPG), established by the Scottish Office in 1997, concluded that the existing system of landownership in Scotland was inhibiting development in rural communities and causing natural heritage degradation as a result of poor land management (LRPG, 1998). This led to the adoption of the core objective of Scottish land reform policy: “to remove the land-based barriers to the sustainable development of rural communities” that could “only” be achieved through: i) increasing diversity in land ownership – between private, public, partnership, not-for-profit and community sectors; and ii) increasing community involvement in local decision-making about how land is owned and managed (LRPG, 1998). Following these early reviews the first key step in the contemporary land reform process was the Abolition of Feudal Tenure etc. (Scotland) Act 2000 which removed the centuries-old system of feudal tenure and the lingering influence of feudal superiors in relation to land (LRRG, 2014). Following devolution and the re-establishment of the Scottish Parliament in 1999, momentum for land reform increased. The first Scottish Land Fund was established in 2001 (SLF 2001-2006), providing financial resources to communities to support land purchase.

Part 2 of The Land Reform (Scotland) Act 2003 (referred to throughout this report as the 2003 Act), introduced the ‘Community Right to Buy’ giving eligible community bodies the right to register an interest in rural (settlements of less than 10,000 people) land and the

opportunity to buy that land when it comes up for sale. Uptake of the CRtB measures and conversion of initial applications into full community land/asset acquisitions has been limited; by 2018 just 22 (13%) of the 174 community bodies which had applied to register an interest in land had successfully acquired the land/asset of interest<sup>2</sup> (Mulholland et al., 2015). The rate of community registrations slowed from 2008 onwards - the first 100 registrations took just over four years and the second 100 nearly 8 years – although the number of applications has increased slightly since 2015, perhaps influenced by increased funding availability and greater awareness of land reform generally.

The 2003 Act is considered by some to have had additional indirect impacts, motivating buyouts which occurred through negotiation without recourse to legislative measures and facilitating a power shift away from private landowners towards communities (Slee et al., 2008; Macleod et al., 2010; McKee and Warren, 2011). Early concerns that the perceived threat of buyouts through the Act would lower land values have not been substantiated (Savills, 2009; Knight Frank, 2010).

The Crofting Community Right to Buy (Part 3 of 2003 Act), which provided crofting communities with an absolute right to purchase land and other assets (i.e. a potentially forced sale), fundamentally shifted the balance of power between crofting communities and landowners (Macleod et al., 2010). However, uptake has been very limited, with only two crofting communities having submitted applications. One application (Galson Estate) was subsequently withdrawn owing to the community forming an agreement with the landowner and the second (Pairc) approved by Scottish Ministers in 2011. Community purchases of croft land have also occurred outwith the 2003 Act's prescriptions (Macleod, 2010).

Recognising a loss of momentum in land reform, the Scottish Government established the Land Reform Review Group (LRRG) in July 2012, with the aim of '*generating innovative and radical proposals on land reform that will contribute to the success of Scotland for future generations*'. The LRRG was tasked with identifying how land reform will:

- Enable more people in rural and urban Scotland to have a stake in the ownership, governance, management and use of land, which will lead to a greater diversity of land ownership, and ownership types, in Scotland;
- Assist with the acquisition and management of land (and also land assets) by communities, to make stronger, more resilient, and independent communities which have an even greater stake in their development;
- Generate, support, promote, and deliver new relationships between land, people, economy and environment in Scotland.

In its final report (LRRG, 2014), the LRRG stated that '*The relationship between the land and the people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country. The structure of land ownership is a defining factor in that relationship: it can facilitate and promote development, but it can also hinder it.*' The report set out a number of recommendations regarding local community landownership, including that:

- The types of support services provided to communities in the Highlands and Islands should be made available to communities in the rest of Scotland and that the Scottish Government should take a more integrated and focused approach to encouraging and supporting the growth of local community land ownership.

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<sup>2</sup> In total 174 community bodies had completed an application to register an interest by 2014, with 116 of these subsequently achieving a successful registration, 39 of which expired/were deleted. The 22 successful purchases by 2014 also included some acquisitions that completed outwith the 2003 Act's legislative measures.

- The establishment of a Community Land Agency, within Government, with a range of powers, particularly in facilitating negotiation between land owners and communities, to deliver a significant increase in local community land ownership in Scotland.

The Scottish Ministers responded to the wider recommendations of the LRRG with a number of initiatives, including establishing a working group to help plan for the achievement of a million acre community land ownership target for 2020, the Community Empowerment Act (Scotland) 2015 (see Section 1.2.4) and the Land Reform (Scotland) Act 2016 (referred to in this report as the 2015 Act and the 2016 Act respectively).

*Box 1.1 A summary of the extended Community Rights to Buy Land*

Two further rights to buy land have been established which may represent a significant shift towards compulsory rights to purchase land. The Community Right to Buy Abandoned, Neglected or Detrimental Land, was established by the Community Empowerment (Scotland) Act 2015 (Section 74), which inserted a new Part 3A in the Land Reform (Scotland) Act 2003. This right came into force in June 2018. The Community Right to Buy Land to Further Sustainable Development, was established by Part 5 of the Land Reform (Scotland) Act 2016 and has not yet come into force.

**Part 3A of the Land Reform (Scotland) Act 2003 - CRtB Abandoned, Neglected or Detrimental land**

Part 3A allows community bodies to apply to buy land which is either: wholly or mainly abandoned or neglected; or, being used or managed in a way that results in or causes harm to the environmental wellbeing of a relevant community. Should an application be successful the landowner is required to sell the land to the community body subject to the requirements set out in the Act i.e. the right is a compulsory right of purchase and not contingent on the owner putting the land/asset on the market. The right is open to applications to the same types of community groups as the existing CRtB and subject to the CRtB criteria and additional criteria relating to the demonstration of the abandoned, neglected or detrimental status of the land/asset. The community must have previously attempted to purchase the land from the owner and the group must not have been offered the land in the preceding 12 months. Applications made under this route will be registered under a new Register of Community Interests in Abandoned, Neglected or Detrimental Land.

**Part 5 of the Land Reform (Scotland) Act 2016, The Community Right to Buy Land to Further Sustainable Development**

Part 5 of the 2016 Act contains a right for communities to purchase land or assets (including salmon fishing and mineral rights) to further sustainable development without a willing seller. Additionally, this further right to buy permits a community body to nominate a third party to acquire the title for the land (at market value) being acquired. The Act includes strict criteria, including requirements to demonstrate that the acquisition of the land by the community: i) is likely to result in significant benefit to the community; ii) is the only practicable, or most practicable, way of achieving that benefit; and iii) not granting consent to the transfer of land is likely to result in harm to that community. The criteria are currently relatively subjective, with the application process likely to require a significant level of information to demonstrate compliance with the criteria.

Part 4 of the Community Empowerment Act (Scotland) 2015 contained a series of amendments to the community right to buy, intended to improve and streamline the process. These included:

- extending the CRtB provisions to the whole of Scotland (by removing the population threshold),

- increasing the options for communities to define their community;
- extending the types of legal entities that can use the community right to buy provisions to include Scottish charitable incorporated organisations (SCIOs) and community benefit societies;
- in relation to the ballot required (after the community right to buy has been triggered), providing for the Scottish Ministers to arrange for this to be conducted by an independent third party and for Ministers to meet the cost of this, making the right to buy process easier for community bodies;
- extending the period available to complete the right to buy.

The 2016 Act included measures related to tenanted agricultural holdings, provision for the development of a land rights and responsibilities statement by the Scottish Government, the establishment of a Scottish Land Commission and the development of regulations on access to, and provision of, information about owners and controllers of land. These measures reflect an emphasis on increasing transparency and the placing of greater responsibility on landowners to manage their land sustainably and in the public interest. Additionally, the 2016 Act provided two new compulsory rights of purchase for communities (see Box 1.1).

#### 1.2.4 Policy Context – Asset Transfer from public bodies to communities

The Disposal of Land by Local Authorities (Scotland) Regulations 2010 provides specific legislative measures to facilitate local authorities disposing of land and assets to communities at below market value where a) the local authority is satisfied that a disposal for such a consideration is reasonable; and (b) the disposal is likely to contribute to the promotion or improvement of economic development or regeneration, health, social well-being or environmental well-being. As a direct result, many local authorities developed guidelines on the processes for transferring property to community bodies. These Community Asset Transfer Schemes represent a critical development for progressing community ownership of assets in Scotland, with the Land Reform Review Group (2014) recommending widespread adoption of Community Asset Transfer schemes across Scotland's Local Authorities.

Part 5 of the 2015 Act introduced a right for community bodies to make requests to all local authorities, Scottish Ministers and a wide-ranging list of public bodies, for any land or buildings they feel they could make better use of, through ownership, lease or other rights. The Act requires those public authorities to transparently assess requests against a specified list of criteria, and to agree the request unless there are reasonable grounds for refusal. The legislation came into force on 23 January 2017<sup>3</sup>. The Scottish Government has published guidance on asset transfer, including a Summary Guide to Asset Transfer<sup>4</sup>. In response various public bodies have established, or are establishing, procedures to process such applications. As it was an important reference point for many interviewees, the requirements of a valid Asset Transfer Request (ATR) are shown in Appendix 1.

The legislation does not specify how relevant authorities should facilitate Community Asset Transfer, although the Scottish Government has published guidance for Relevant Authorities which make various recommendations as to good practice<sup>5</sup>. Relevant Authorities bodies have established, or are establishing, various procedures to process Asset Transfer Requests. Forest Enterprise Scotland has established a Community Asset Transfer Scheme (CATS), with detailed guidance, a dedicated scheme manager and an independent panel to

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<sup>3</sup> <http://www.gov.scot/Publications/2016/11/3688>

<sup>4</sup> <http://www.gov.scot/Topics/People/engage/AssetTransfer>

<sup>5</sup> <https://beta.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-relevant-9781786527493/>

assess applications and make recommendations to the Chief Executive of Forest Enterprise Scotland<sup>6</sup>. To date, seven applications have been received and five approved; additionally a number of groups are currently conducting feasibility studies with Stage one support from the Scottish Land Fund.

Forest Enterprise Scotland had prior experience in facilitating the ownership (or lease and management) of land by communities and NGOs, through the National Forest Land Scheme (NFLS), which ran from 2005-2015. The NFLS represented the response of Forestry Commission Scotland (FCS) to the 2003 Act, developed as a voluntary programme to proactively facilitate community acquisition of Forest Enterprise Scotland land (FCS, 2011). As an innovative programme, it was well-documented. The NFLS was established to provide a mechanism for communities, NGOs or housing bodies to apply to buy or lease land managed by FCS, regardless of whether the land has been put up for sale. Over 50 applications were approved, with over 11,000ha of land sold or leased to communities and NGOs, including sale of land for affordable homes (FCS, 2015). In contrast to the Community Right to Buy, the NFLS offered communities the opportunity to buy or lease even where the land had not come up for sale; and through a simpler and more flexible process than CRtB<sup>7</sup>.

### 1.2.5 Supporting environment

The Community Ownership Support Service (COSS) has been funded by the Scottish Government to support community based groups in Scotland to take a stake in or ownership of previously publicly owned land or buildings. This adviser based service is being delivered Scotland wide and provides individual community groups and public bodies with a bespoke support service. Support includes a combination of:

- Expert advice on all aspects of asset transfer;
- Training courses on the asset transfer and asset development process;
- Sign-posting to other support agencies;
- Web access to information on good practice, toolkits and case studies.

Communities are also able to link into the Development Trusts Association Scotland's wider network to explore the wide range of business models being adopted by other communities throughout Scotland and across the UK. COSS is also tasked with supporting relevant authorities. They share and promote best practice, e.g. a Single Point of Contact to deliver Asset Transfer Request processes externally and internally; highlighting best value and assessing discount against benefits; provide bespoke training and development for relevant authorities and have a well-developed programme for this. Further support is also available from a range of wider organisations including Highlands and Islands Enterprise (see Section 1.2.1), the NGOS such as the Community Woodland Association and Community Land Scotland, as well as from the Scottish Government's Community Land Team.

## **1.3 Constraining factors for community ownership**

A number of studies have explored aspects of community landownership, although relatively few studies have directly investigated barriers to increasing community ownership i.e. post-purchase challenges for communities engaged with the process and barriers to engaging communities in the process in the first instance. Skerratt (2011) found that the preparations for land purchase often require considerable time (2-7 years), considerable community confidence, persistence, and determination, as well as capacity and practical skills. A

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<sup>6</sup><http://scotland.forestry.gov.uk/managing/get-involved/community-asset-transfer-scheme>

<sup>7</sup><https://scotland.forestry.gov.uk/images/corporate/pdf/fcfc102.pdf>

lengthy pre-purchase period and complex ownership and funding pathways can dissuade communities reliant on volunteer input, with energy levels dropping over time when progress is markedly slow (Skerratt, 2011).

The Impact Evaluation of the Community Right to Buy (Mulholland et al., 2015) identified a number of challenges for community groups using CRtB, which can be summarised as:

- The requirement for a willing seller. In situations where landowners opposed the registration of an interest or refused to sell the asset, community bodies felt there was little action they could take.
- Where the land does not come up for sale, the requirement to re-register interest in the land was viewed as onerous and challenging, with community interest and support often declining following the initial burst of energy around the original registration of interest in buying the land.
- The CRtB process is widely viewed as highly bureaucratic, with specific concerns around the requirements (and cost) for running a community ballot and developing a business plan. These concerns around bureaucracy reflect those of wider authors, with some suggesting the complexity of CRtB has acted as a barrier to community acquisitions in its own right (Macleod et al., 2010).
- The availability of funding to make the land purchase represented a further challenge in cases where the asset came up for sale, with communities also questioning the fairness of valuation processes. The timescales for acquiring funding to secure purchases were also identified as very tight and challenging for some communities.

The post-legislative review of the Land Reform (Scotland) Act (2003) (Macleod et al., 2010) identified further challenges faced by communities when engaging with CRtB, including: i) the land being withdrawn from the market once the CRtB registration was accepted, stopping any potential sale; ii) rejection of CRtB applications owing to their lateness; iii) applications to register an interest being judged as flawed owing to incorrect mapping and a lack of compliance with the Articles of Association requirements in the 2003 Act. At least some of these barriers (e.g. timescales and ballot costs) have now been addressed to some extent through measures brought in under the Community Empowerment (Scotland) Act 2015 (Mulholland et al., 2015). The slow pace of the registration application process was also identified by communities consulted for the Macleod et al., (2010) review as resulting in frustration and in some cases the complete loss of the opportunity to acquire the land.

Even alternative mechanisms for community ownership, such as the National Forest Land Scheme (NFLS), were experienced as arduous and frustrating by many groups, despite providing more user friendly pathways to ownership (than CRtB). Research into the processes of community buy-outs under the NFLS (Lawrence, 2009) showed that communities often had idealistic expectations of what ownership will do for them, which could generate frustration about the scale of the task, and the time taken for practical benefits to appear. Communities found it hard to understand timeframes for processing funding and planning applications. Communities had to develop capacity and governance skills in order to organise the purchase but the process was sometimes experienced as overload. Nevertheless the flexibility of the scheme, the experience gained by key FCS policy staff over the course of the scheme, and the general willingness to make it work, were key factors affecting success.

Macleod et al., (2010) also identified barriers to ownership related to the Crofting Community Right to Buy, with this mechanism viewed as a particularly complex (due in part to onerous mapping requirements) or even 'unworkable' and resource intensive pathway to ownership for communities. Collectively, these barriers were recognised as representing powerful disincentives for greater take up of the crofting community right to buy.

In relation to community ownership uptake more generally, the LRRG Final report highlighted the availability of public support and funding as a critical limiting factor – particularly at the acquisition stage and during early years of ownership (LRRG, 2014). In particular the LRRG identified the key importance of ensuring adequate development of integrated legislative and financial support structures in the future to support increased demand for community acquisitions in both rural and urban areas.

#### **1.4 Existing extent and future expansion of community ownership**

As of June 2017 some 227,526 hectares of land was identified as being in community ownership (2.9% of the total land area of Scotland), ranging from large estates to smaller assets, including community owned shops, industrial units and village halls (Scottish Government, 2017). This total included 492 land parcels and/or assets owned by 403 community groups. However, most of this land was in fact owned by a relatively small number of large community owned estates (over 85% of the total land area was owned within 13 landholdings and 97% owned within 37), and the vast majority relates to very small parcels of land or community assets. It is recognised that these figures do not give a complete picture of community land ownership and do not include the majority of community assets. Skerratt et al. (2008) found that there are close to 3,000 village halls and other community facilities in rural Scotland, and that around 80% (2,400) of these are community owned. Community housing associations also own substantial numbers of houses in both urban and rural areas; DTAS (2012) estimated that 75,891 property assets (mainly houses) are owned by 2,718 community-controlled organisations in Scotland. Any consideration of community ownership therefore need to consider the full range of community assets – including housing and other buildings as well as larger areas of land (e.g. rural estates).

As identified by the LRRG (2014), buyouts of entire large estates (as has occurred in the north west of Scotland) are less likely in the south and east of Scotland (owing to higher land values, fewer large estates and a greater number of owner-occupied farms, amongst other reasons). Consequently, smaller-scale acquisitions by communities are likely to continue to represent the majority of community acquisitions in the future, although opportunities continue to exist for larger whole estate buyouts. Notably, achieving the Scottish Government's target of one million acres under community landownership by 2020 appears unlikely, given this requires that a further 437,769 acres (177,159 hectares) come into community ownership over the next two years. It should be noted that the total area of land under community ownership is only one factor against which success can be measured, with the number of community bodies involved, the number of assets and the extent of beneficial outcomes for communities more meaningful than total area in some respects.

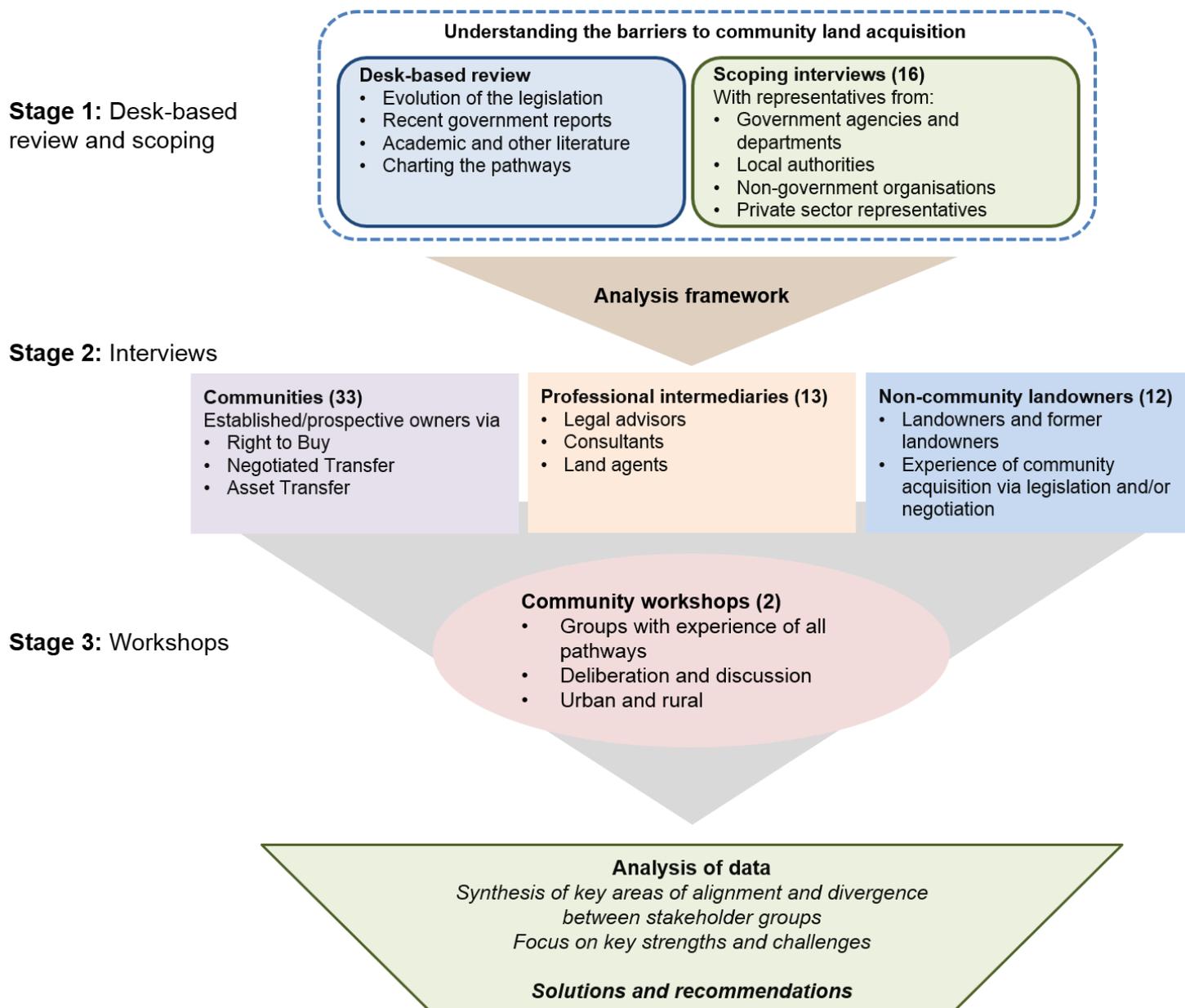
As Macleod (2017) notes, while the community land sector has matured considerably in recent years, it is still relatively young. Nevertheless, the existing evidence of positive outcomes of community landownership, combined with the implementation of the Land Reform Act (Scotland) 2016 and Community Empowerment (Scotland) Act 2015 and the establishment of a new Scottish Land Fund in 2016, has provided an increased impetus to the sector. This review has been undertaken partly in response to these recent legislative and wider developments, with the aim of assessing the effectiveness of established ownership mechanisms (e.g. CRtB), as well as reviewing the impact of recent relevant amendments (e.g. the adoption of CRtB in urban contexts) and more recently established mechanisms (e.g. Asset Transfer). The review takes a broad approach, considering all relevant 'pathways' to community ownership, to determine what lessons can be learned with respect to alignment of mechanisms, support needs and requirements for legislative change.

## 2. METHODS

This section outlines the methods used to address the project objectives. There were three stages of data collection:

1. Desk-based review and scoping interviews;
2. Interviews with community groups, professional intermediaries and non-community landowners; and
3. Workshops with established/prospective community owners.

An overview of the research process is shown below.



### 2.1 Stage one: Desk-based review and scoping interviews

A desk-based review of relevant academic and other literature was carried out to identify key barriers to community ownership. This considered the evolution and effectiveness of

improvements to CRtB mechanisms introduced in the Community Empowerment (Scotland) Act 2015, with a view to identifying any unresolved issues. In addition, key, recent reports were considered: including the 2010 report on Post-legislative Scrutiny of the Land Reform (Scotland) Act 2003; and 2014 Impact Evaluation of the Community Right to Buy published by the Scottish Government; and c) the 2014 Land Reform Review Group Report.

To support the desk-based review, and provide a thorough and up-to-date understanding of barriers to community ownership, 16 scoping interviews were conducted with 19 representatives of key organisations with a remit related to community land ownership. The interviewees represented government agencies and departments, non-governmental organisations, private sector representatives, and local authorities.

The interviews lasted between 30 and 60 minutes. Questions were tailored to suit the expertise and experience of the interviewee and, in general, covered the following points:

- i) Key barriers faced by communities in acquiring land through legislative and non-legislative routes;
- ii) Potential solutions (e.g. support structures) for reducing constraints;
- iii) Potential mechanisms for incentivising landowners and community bodies to engage in negotiated transfer;
- iv) Potential for streamlining and aligning existing routes to ownership to improve the interaction and complementarity between different routes;
- v) Opportunities for learning from Scotland's experience with community ownership mechanisms and how these might be reflected in subsequent legislation.

To provide a basis for identifying sufficient case studies and community interviewees a database of community land and asset owners was developed. This was based on collating existing information from the Scottish Government database on community landownership, data from Highlands and Islands Enterprise, the Development Trusts Association Scotland (DTAS) and Community Land Scotland (CLS) and from the Register of Community Interests in Land. Additionally, a snowballing approach (including the scoping phase) was taken to developing comprehensive lists of potential interviewees for the professional intermediary and non-community interview sample groups.

During the scoping phase a consultation framework was developed as a basis for developing a consistent approach to conducting the interviews across all groups. Based on this overarching framework interview question sets were developed for each group, to provide scope for triangulation of findings across stakeholders, as well as allowing for the identification of differences between groups and barriers specific to certain groups.

## **2.2 Stage two: Interviews**

On completion of the desk-based review and scoping interviews, an over-arching interview dimensions framework was developed to guide the design of all interview questions in Stage two (see Appendix 2). Individual questions were tailored to suit the different interview groups and a common list of prompts was used (see Appendix 2) to gather contextual data about the cases that were discussed. In general, all interviewees were asked to:

- Describe their experience (including which acquisition attempt(s) they had been involved in, what their role was);
- Provide information about the acquisition(s) (for example, the tenure prior to purchase, population, timings, governance arrangements, etc.);
- Recount their experience of the acquisition(s). They were asked to describe the process and recount any challenges (a list of prompts was used by the interviewer);

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- Reflect on their experience and consider what worked well, what didn't, and what they would do differently if the process was repeated. They were also asked to suggest what advice they would give to other groups seeking to acquire land, as well to others involved in the process.
- Suggest changes to the legislative process and to organisational support mechanisms, and suggest any changes that might enable or incentivise more negotiated transfer.

The majority of interviews (including during the scoping phase) were conducted by telephone, with some carried out in person where travel time was minimal. Participants were asked to complete consent forms prior to taking part and assured of their anonymity in the final report. In total, 56 interviews were conducted with professional intermediaries (13), non-community landowners (12) and community bodies (31).

### 2.2.1 Professional intermediaries

Interviews were conducted with 13 professional intermediaries (lawyers, land agents, consultants) who have been involved in acquisitions on behalf of community groups and/or on behalf of landowners. The group consisted of:

- Four lawyers with experience of working with communities and/or landowners engaged in acquisition processes;
- Five consultants (all acting on behalf of communities to prepare business plans, feasibility studies and/or providing advice on business accounting procedures); and
- Three land agents (one acting on behalf of a community group, two acting on behalf of landowners); and one other adviser from a government department.

### 2.2.2 Non-community landowners

To help identify practical steps that could be taken to make it easier for communities to acquire land through negotiated transfer, 12 landowners, landowning representatives, and former landowners with experience of community buyouts secured via legislation and with experience of buyouts secured via negotiation were also interviewed. Their cumulative experience included examples of potential, ongoing, successfully completed, and unsuccessful processes. The interviewee group included:

- Two private landowners, and three representatives of privately-owned estates (estate managers and land agents), who have varying experiences of interactions with local communities regarding land acquisition (different stages of process);
- One former private landowner, who transferred ownership of their estate through a negotiated transfer; and
- Six representatives of other landowning organisations, who shared multiple experiences of working with geographical and communities of interest in processes of property transfer to communities (including asset transfer).

In addition to the interview questions listed earlier, these interviewees were asked to consider: challenges faced by landowners when selling or transferring land to communities; potential support mechanisms for landowners selling/transferring land to communities and mechanisms for incentivising landowners to engage in negotiated transfer routes to ownership; and recommendations for future change.

### 2.2.3 Communities

To capture the views and practical experience of communities that have acquired or attempted to acquire legal title to land, interviews were conducted with 32 representatives of community bodies. The database of community landowners (see Section 2.1) was utilised to develop a purposive sample which was selected and sub-divided to ensure a sufficient geographical spread and mix of new and more established groups as well as groups which had failed to acquire the land and/or assets of interest to them. In particular the sample was designed to include community groups that had:

- made use of the legislative provisions to acquire land;
- negotiated a transfer, without recourse to legislation;
- taken initial steps toward community ownership but failed or decided not to continue; and/or
- communities currently attempting to acquire land through any means (i.e. prospective community owners).

Specifically, the communities sample included interviews with representatives of communities that had attempted to acquire land or assets (successfully or unsuccessfully) through negotiated transfer/sale routes (4), Asset Transfer (15), CRtB (10), Transfer of Crofting Estates (2) and the Crofting Community Right to Buy (1).

### 2.3 Stage three: Community workshops

Two community workshops were held to capture additional perspectives from community groups who had not been included in Stage two. The first workshop was held on 18 May 2018 before the Community Land Scotland conference in Stirling with twelve attendees, including community body representatives previously or currently engaged in negotiated transfers, Asset Transfers, CRtB and the Crofting CRtB (see Appendix 3 for workshop structure). The second workshop was held on 30 May 2018 at SRUC Oatridge College in West Lothian and was attended by thirteen participants from community bodies previously or currently engaged in CRtB applications, negotiated transfers and Asset Transfer, the majority from within the Central Belt. The workshops lasted three hours and comprised the following:

- i) Overview of the project: a short introduction by the research team to the aims of the research and the workshop, introductions around the room;
- ii) Sharing experiences: discussion in small groups about barriers and support mechanisms and then consider what their experiences have in common;
- iii) Identifying lessons: consider what worked well, how they would advise other groups and consider what others involved in the process (landowners, advisors, etc.) could do differently; and
- iv) Identifying solutions: discuss potential changes to the legislation, changes that would enable more negotiated transfer, changes to organisational support mechanisms, and any other initiatives to increase community ownership.
- v) Feedback session: reporting back from all groups.

### 2.4 Data analysis

Qualitative thematic analysis was conducted on the data gathered in the interviews and workshops. The results are presented according to ownership pathway in the sections that follow, with the key strengths and challenges identified (in relation to each pathway) across the different interview groups included for balance. Recommendations are made for each pathway, based on interpretation of the data gathered from participants. Where pertinent,

key areas of agreement and divergence, both within and between the different stakeholder groupings, are identified. Cross-cutting themes (e.g. funding streams and wider support networks) emerging from the data which are relevant across all pathways are presented in Section 8. The pathway sections are interspersed with a selection of relevant anonymised<sup>8</sup> case studies (based on a sample of the relevant interviews), to illustrate key points and ground the findings. It should be noted that some of the cases discussed occurred prior to the recent amendments to the land reform legislation and in some cases some of the specific challenges discussed have, to some extent, been addressed through the recent changes to the legislation. Additionally, while the pathway sections contain multiple perspectives throughout the main text, the case boxes are based (predominantly) on the perspective of the community bodies concerned, which highlights challenges from the community perspective alone, as opposed to presenting multiple perspectives in each case.

### 3. NEGOTIATED TRANSFER

This section presents key findings relating to the experiences of those involved in attempts (successful or otherwise) to achieve a sale or transfer of land and assets through negotiation between a community group and a landowner. It also explores the scope for increased community ownership via this route.

#### 3.1 Starting points

The majority of community asset acquisitions have been completed through negotiated transfers occurring outside of legislative or other formal mechanisms, via a community approaching a landowner (or *vice versa*) to discuss a potential sale. Much of the significant growth in community land ownership prior to the 2003 Act was via this route. Since then, the presence of the legislation is likely to have provided a backdrop that indirectly facilitates sales via negotiation (see Section 1.2.3). Where a landowner enters a negotiation willingly, a negotiated transfer can take place within a timescale that suits both parties. In most cases it remains necessary to evidence community support and develop a business plan, to demonstrate to the community and potential funders that the project is viable and locally-controlled<sup>9</sup>. In many cases, communities and/or landowners have attempted a negotiated transfer with the aim of avoiding legislative routes and facilitating positive dialogue.

#### 3.2 Key strengths

Interviewees from all groups suggested that negotiated transfer is the preferred route to community ownership. Historically, this has been the most common way for communities to acquire land or assets, with many landowners prepared to work collaboratively to complete sales amicably when communities react to an opportunity. Interviewees generally recounted positive experiences when there is a willing seller because “*in a deal where parties go in willingly, the seller has to reveal his/her hand voluntarily*” (professional intermediary). Similarly, negotiated transfer was seen by some scoping interviewees as a ‘good route’ when the property in question is sold at or below the valuation price, and it allows communities to focus on what they need rather than feeling that they have to buy ‘everything’. Negotiated transfer also avoids the legislation, which was described as long, drawn-out and costly (see Sections 4-7), and satisfies a strong desire among communities to negotiate rather than use the legislative process (it is ‘friendlier’).

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<sup>8</sup> It is recognised that some cases studies in particular, although anonymised, may be recognisable due to the specific nature of the asset or case. To address this the wording of all case studies and the relative level of anonymity has been checked and confirmed by all case study participants to ensure their agreement.

<sup>9</sup> HIE (2018). Community Assets: <http://www.hie.co.uk/community-support/community-assets/routes-to-ownership.html>

Nonetheless, legislative routes were regarded as important for negotiated transfer because the existence of the legislation can be used by communities to help them progress discussions with landowners (see Section 4.1). In multiple cases communities had used part of the legislative route (to facilitate a clear pathway and negotiating mechanism) and subsequently switched to a negotiated sale. However, some interviewees from the scoping and professional intermediaries groups viewed the legislation as having a negative impact on negotiated transfers because the legislation has altered the tone of discussions for the worse. The 'Protocol for Negotiated Sales'<sup>10</sup> (see Box 3.1) is designed according to the view that the best route to land purchase is through "*voluntary negotiation directly with owners, in the shadow of the strengthened law*".

*Box 3.1: Interviewees' reactions to the Protocol for Negotiated Sales*

The potential offered by negotiated sales processes initiated by a landowner or a community has been formally recognised within the 'Protocol for Negotiated Sales' (PNS), developed in 2016 by Community Land Scotland, in partnership with Scottish Land & Estates. The protocol uses flowcharts and accompanying notes to set out a series of around 25 recommended steps that guide a negotiation process. Those using the protocol are advised to adjust/remove steps in the process to suit local circumstances. It is a process that should be entered in 'good faith' by both parties "*with the intention that there should be a positive dialogue about reaching a mutually agreed sale*".

The PNS was regarded by interviewees from the scoping and professional intermediaries groups as 'useful' when used properly, particularly as it addresses a concern that negotiated transfers have no formal structure comparable with the legislative process. Additionally, it provides a tool for educating professionals (lawyers, land agents, etc.) about best practice in sales of this nature. However, the protocol has yet to be used widely (interviewees who discussed the PNS were generally aware of two or three cases) and is only likely to be used by landowners who are members of Scottish Land & Estates, which supports its use (not all private landowners are members of the organisation).

There appears to have been variability in the degree to which landowners and communities follow the process step-by-step, with the protocol seen as more useful when employed at the outset of negotiations, rather than at an interim point. The protocol needs two willing parties and there have been issues when those using it have not 'honoured its spirit'. For example, a landowner can use the strict adherence to its stages as a delaying tactic or blocking mechanism, and a community can require a landowner to follow the process strictly whilst at the same time adjusting/skipping steps themselves.

It remains to be seen what impact the PNS will have on the number of successful negotiated transfers. Currently, there is no formal monitoring of its use or any detailed analysis of what has happened in cases where the PNS has been employed.

A common point made across all interview groups was that positive experiences of negotiated transfer tend to exist where the landowner and his/her representative(s) have already established a relationship with the community and there are clear lines of communication between the parties. This was particularly the case where landowners perceived themselves, and/or were perceived by the community as a part of the community. The importance of a locally-based landowner or representative was seen as a key strength as they can be in "*constant conversation with the community [therefore] most things don't come as a surprise*" (Non-community landowner).

<sup>10</sup> Community Land Scotland and Scottish Land & Estates: Protocol for Negotiated Sales (2016): <http://www.communitylandscotland.org.uk/wp-content/uploads/2016/06/CompleteCLSPProtocol.pdf>

In tandem with this, a clearly identified community need (or existing track record of the community body doing good work), strong leadership within the community body, and a democratic process (e.g. ballot) that shows a clear decision in the community to take ownership of an asset, are invaluable for a smooth negotiation process. Interviewees with direct experience of transferring land and assets to communities (the non-community landowners group) explained that a ‘good outcome’ is when an asset does not have to go on the open market and can instead be transferred directly to a purchasing community group (see Case 3.1).

*CASE 3.1: Willing sale of a small amenity area to a local development trust*

A community body in south west Scotland approached the local landowner about taking ownership of a small area of ground in the centre of the village. The land is adjacent to existing amenity land and includes two hectares of broadleaf woodland. The landowner had no commercial interest in the land and had previously offered it to the local authority, which had declined to take on ownership. The community had identified a need to undertake remedial work in the area to restore it for recreational, educational and biodiversity purposes. The land was transferred to the community in 2016.

Prior to approaching the landowner, a community consultation meeting was held and this led to the community body being set up and a paper being published that identified the community’s priority issues. The community’s wish to have control of the area of land for recreation, paths and other amenity services was identified in this paper.

There was no conflict between the parties and the right-to-buy process was “*acknowledged but not adhered to*”. Both parties were proactively engaged in the process, with good leadership and regular meetings on the community side, and supportive Trustees on the landowner’s side. The community was well-supported financially with income from renewable energy (wind) community benefit funds and the land was offered for sale for £1, on agreement that the community body paid for the landowner’s legal costs. These costs and the community’s own legal costs amounted to approximately £2,500 and were paid for via the community benefit fund.

Despite the positive aspects in this case, the whole process still took substantially longer than anticipated owing to the complexity of the archaic land titles associated with the sale. The landowner had to produce a registered title plan and residual plans had to be passed to Registers of Scotland to demonstrate that they could pass ownership to the community body. This was a complex process for the legal team involved. The time taken for negotiations to be reported back and approved at community meetings and quarterly Trustees’ meetings also added to the overall duration of this case.

### 3.3 Key challenges

Interviewees in all groups noted important challenges related to communication between landowners and communities when working towards a negotiated transfer. Community interviewees expressed frustration that it can be hard to ‘get the landowner to the table’ and establish clear lines of communication (with the landowner’s lawyers and/or land agents not helping to resolve this issue in some cases), while non-community landowner interviewees also described challenges they encountered when trying to ascertain who are the ‘official’ representatives of a community. Linked with this latter point is the challenge experienced by landowners when the community (or the Board members of the community body) is ‘split’ in opinion with regard to the best way forwards: “[community] *views are not necessarily expressed formally, publicly, or where there are tensions, so people don’t want to express them publicly*” (Non-community landowner). Some landowners are “*concerned about*

*causing conflicts in communities if one [community] group is favoured by a sale”* (Scoping interviewee).

Entering willingly into negotiations with a community body can also present challenges for landowners, particularly if the community body is disorganised or lacking in capacity, either in terms of the community governance arrangements, or because of a perceived lack of knowledge regarding the commercial potential of the land or asset(s) and the running costs, particularly if insufficient business planning advice has been provided. Concerns about fragmentation of landholdings (specifically, the creation of ‘ransom strips’<sup>11</sup>) and the land management skills of community groups were also raised by non-community landowners. Any combination of these factors can contribute to a landowner not wishing to enter a negotiation or having reservations about continuing with negotiations. Landowners can also be concerned that they will not receive any financial compensation for costs incurred if either party pulls out of a deal in a non-legislative scenario (e.g. legal costs).

A key challenge is that, without a willing seller, Stage one preparatory funding from the SLF is generally not available (for feasibility studies, business plans, legal costs, etc.) (see Case 3.2). In cases where there is no willing seller, communities have limited options for exploring options for progressing along this ownership pathway.

The timescale for negotiated transfers is lengthy (even relative to legislative routes), even when there are no other significant challenges, and this can impact negatively on a landowner’s business planning and resource input, as well as the volunteer effort required from the community body. In some cases, landowners and communities can end up in a state of ‘limbo’ where the negotiations get to a stage that neither continuing nor ending the process are appealing options with regard to cost and/or future relationship implications. ‘Delaying tactics’ used by both landowners and communities can have negative impacts on the time required and also have cost implications. One community interviewee explained how community bodies can incur very high legal costs over a long period of negotiations (also evident in CRtB cases see Section 4). In one example, the community body was required by a statutory authority to pay fees for an additional lawyer to verify the credentials of a private landowner’s legal representation, which was based overseas.

Specific challenges arise in the case of negotiating sales with charities. The role of charitable trustees to achieve ‘proper value’ on disposal of any charity or trust asset is a key challenge for communities wishing to acquire assets from these types of owners. Interviewees from the non-community landowner group suggested that there is “*a woeful misunderstanding of what trustee obligations actually mean*” among community bodies. Furthermore, there is often a tension between charity legislation or trustees’ obligations and the disposal of property, which sits uneasily with many charitable organisations. This is particularly pertinent for public interest charities (e.g. environmental organisations): while these organisations may aspire to support community development, they are often resistant to the sale or transfer of their land or assets. Although some public interest charities have explored leasing arrangements with communities, these tend not to be taken up by communities because of the lack of access to revenue funding for leased land and assets.

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<sup>11</sup> The ownership of small, strategically located strips or plots of land that are needed to access or control a greater area of land located nearby. This term was used in interviews to refer to community-owned strips of land, although historically it has been applied to the retention of strips of land by private landowners to prevent development by denying access from the land to another parcel, or to the road network (see [RICS, 2015](#)).

CASE 3.2: Negotiations with an unwilling seller

In one rural community that is somewhat isolated and surrounded by estate land, a community body has existed since 2014 to explore options for community ownership of land. An interviewee from this community explained that the community aspires to bring new, young families to the village and improve the local infrastructure (housing, tourism facilities, services). Ideas were formalised at a public meeting attended by 'all sides' in 2014 to explore the possibility of formally registering an interest in the estate, via the Community Right to Buy.

The landowner has been (and remains) strongly resistant to land purchase by the community, although the estate is "*willing to come into partnership, but that means that we never get any real income*" (Community interviewee). The estate manager explained that the landowner is willing to sell discrete plots of land but not a larger identified area, because: i) the owners feel it is not clear what the community wants to do with the land; ii) the area is core to the estate's economic activity; and iii) in the owner's view community social and economic benefits can be delivered in partnership without land purchase. The community body's application for Stage one funding was declined as "*we were unable to get to Stage two within 5-6 months with an unwilling seller*" (Community interviewee).

Engagement has been a real challenge since the outset: the community interviewee believed that the estate did not want to engage with the community regarding land acquisition, and the estate manager felt that, despite several attempts to initiate a dialogue, the community body was reluctant to meet and the estate was not told what the community body wished to purchase. The estate offered to fund the formal engagement of a community development specialist to support more formal engagement but without success. A third party was then invited in 2017 to facilitate a constructive dialogue. Since then, there has been more communication, including: i) a published plan for the estate's current and future management; ii) a well-attended public meeting facilitated by the estate to explain their activities and future plans, with the aspiration to make this an annual event to report on progress; and iii) further dialogue between the estate and the community council and community body. The estate manager explained that the community body has now met with the landowner to discuss the community body's aspirations, and there is now ongoing dialogue to look at the potential for the community to acquire "*gap housing sites*" in the village for affordable housing and a building for a village hub.

Despite the challenges encountered in this case, there now appear to be higher levels of engagement between the estate and community, compared with when the initial public meeting took place in 2014 and community-estate relations appear to have improved. Nevertheless, a negotiated transfer has still not taken place and the community is now looking at alternative areas of land that are available for purchase from a different seller.

## 4. COMMUNITY RIGHT TO BUY

This section reviews the Community Right to Buy legislative route. A brief summary of the commentary across all interviews relating to Part 3A of the 2003 Act (Community Right to Buy Abandoned, Neglected or Detrimental Land) and Part 5 of the 2016 Land Reform Act (Right to Buy Land to Further Sustainable Development) is included in Section 4.4.

### 4.1 Starting points

The drivers for communities pursuing a CRtB can vary, but commonly CRtB applications are either a response to the potential loss of an asset or service and a desire to secure the asset, or an effort to acquire a local asset perceived as underutilised, to make use of the asset for community benefit. These ownership aspirations often relate to concern around community decline linked to out-migration, declining employment opportunities and a desire to harness local assets to facilitate job creation, affordable housing and the preservation of local heritage and identity. The types of assets sought under CRtB vary and have included rural estates, buildings, libraries, lighthouses, community centres and public toilets (among others), as well as small brownfield or greenfield sites adjacent to settlements.

### 4.2 Key strengths

Despite most interviewees focusing on challenging aspects of CRtB, many also identified key existing strengths of the process. This included that the process can and does result in some community ownership success stories. Furthermore, the process was noted by some interviewees from all groups as balanced (between community and owner interests), with respect to the underlying ethos (public benefit and sustainable development), the valuation process and setting reasonable timescales. A minority of (predominantly public sector) interviewees argued that the arduous nature of the process represents a strength, as it tests the capacity and will of a community for asset ownership (a view not commonly shared by community bodies). As one stated “*it works in that if you cannot complete the application you should not get the asset*”. Community interviewees also referred to learning during the CRtB process, building experience and networks, the existing support frameworks (including the Scottish Government Community Land Team) and funding streams as key strengths, all of which are discussed as cross-cutting themes in Section 8. In relation to undertaking a CRtB application community interviewees outlined a number of key points of advice for other communities, which included:

- Ensure all community body members are aware of the CRtB legislation and the Scottish Government’s application pack and CRtB guidance manual – regardless of their current interest in CRtB. Additionally, consider altering the community body constitution to ensure compatibility with CRtB requirements should an opportunity arise, to demonstrate forward thinking in any future CRtB application.
- Ensure the process is recorded from an early stage (e.g. meeting minutes for the first group discussion relating to the CRtB attempt) to ensure an evidence base to use to demonstrate the process timeline if required.
- Engage with and obtain wider support at an early stage, including through approaching the relevant local authority, local MSPs, the Scottish Government (to acquire input on draft application), agencies and NGOs.
- Ensure sufficient continual communication with the wider community relevant to the CRtB to maintain interest, build and demonstrate support and avoid community conflicts.

A further point related to the indirect effects of the legislation (particularly in rural areas), with multiple scoping and community interviewees arguing that the legislation has facilitated dialogue. The existence and increasing awareness of the legislation (and success of key

buyout communities) was widely viewed as having created an environment for negotiation through a repositioning of communities and the dynamic between landowners and communities, with power now existing “*on both sides*” (see Section 3.2). Three community interviewees perceived the legislation as having increased their confidence, as well as having influenced the attitude of the landowner to their community and a potential sale/transfer. As two intermediaries (with experience of advising landowners) noted, the legislation has been a key aspect of why “*community ownership is now on estate meeting agendas, with estates now more aware of the rights and responsibilities of communities*”. Additionally, private landowner interviewees recognised the potential for involving third party facilitators in CRtB negotiations as a potential advantage (albeit not a formal element of the process), with the time limit also recognised by some owners as useful in terms of ensuring momentum.

The majority of interviewees welcomed the recent amendments to the CRtB legislation (see Section 1.2), with the inclusion of Scottish charitable incorporated organisations (SCIOs) and community benefit societies as eligible organisations, the independent postal ballot, inclusion of urban areas and changes to the requirements for timeous/late applications<sup>12</sup> highlighted as particularly helpful. Nevertheless, some scoping and intermediary interviewees argued that the amendments had not been sufficiently far-reaching in terms of streamlining the process.

### 4.3 Key challenges

This section summarises the key challenges of implementing the CRtB route from community and wider (other stakeholder and intermediary) perspectives.

#### 4.3.1 Appropriate use and application of CRtB

Scoping interviewees noted that CRtB should only be used in cases where there was a specific requirement for a legislative route and where no less onerous route was available. The appropriateness of CRtB should be determined on a case by case basis, with some interviewees noting examples where communities had been compelled to attempt CRtB where alternative pathways were available. This included one example of a large public organisation and one large non-public organisation preferentially using CRtB to facilitate sales to communities (owing to the formality and security provided by the legislative process), when negotiation would have facilitated a less complex route to ownership.

The use of CRtB to acquire publicly-owned assets (a significant number of the successful CRtB cases having been from public bodies) was widely viewed as inappropriate owing to the costs and requirements for staff time inputs, with negotiated transfer (or asset transfer) widely recognised as the most appropriate route in these cases.

Three scoping interviewees noted that a CRtB request on a public body was likely to be symptomatic of failings on their part (e.g. in relation to engagement). Some scoping and intermediary interviewees identified cases where CRtB applications had been submitted with the aim of thwarting a proposed development (e.g. a windfarm) and (urban) cases where groups had developed an application to protect built heritage, neither of which represent appropriate uses of the legislation, the main purpose of which is to ‘further the achievement of sustainable development’.

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<sup>12</sup> In particular the inclusion of evidence of preliminary discussions (e.g. meeting minutes) now being indicative of having started the CRtB process from a legal perspective. See Section 34 (as amended) and section 39 (amended) of the 2003 Act for the urban inclusive approach and the procedure for late applications respectively.

#### 4.3.2 Complexity and failure rates

Interviewees (all groups) commonly stated that CRtB is a complex route (with many points for communities to fail on), which (combined with the need for a willing seller and correspondingly low re-registration rates) has resulted in a very low success rate for CRtB in terms of achieving ownership, with 23 ‘RTB Activated’ CRtB registrations listed on the Register of Community Interests in Land (RCIL)<sup>13</sup>. A number of communities were uncertain if they would attempt CRtB again, with three highlighting the difficulty in “*seeing the way forward and having to work on multiple work streams at the same time, most of which you have no experience of*”. Intermediaries and scoping interviewees agreed that the process is highly complex. As one professional intermediary stated: “*there is a general feeling in the profession that the complicated legislative hurdles a community body has to overcome are formidable. It needs a fairly determined bunch of people to see it through...it is not for the faint-hearted*”. The recent legislative redrafting process was recognised as having been very complex and a number of stakeholders argued that, owing to these changes further legislative change may be unlikely in the near future, particularly as emerging routes such as the Community Right to Buy Abandoned, Neglected or Detrimental Land are yet to be fully implemented.

#### 4.3.3 Governance and community definition requirements

A key challenge faced by many communities was the need to establish either a new community body or to modify the constitution of their existing organisation prior to registering an interest to ensure compliance with the legislation (with many existing community bodies not meeting these requirements). Communities generally found this process time consuming, with the requirements seen as difficult to follow. This was a particular issue for community bodies representing communities of interest, which are not CRtB compliant. Those involved with these types of organisations often found the process of establishing a compliant (geographic) community body challenging.

The expansion of eligible organisational forms<sup>14</sup> was widely recognised as helpful for community bodies, although in many cases communities are still required to alter their constitutions. Both scoping and intermediary interviewees argued that the most suitable eligible structure for a community body should be determined on a case by case basis based on informed and strategic thinking, rather than being overly influenced by the legislative requirements.

Several communities referred to difficulties with mapping their defined community in accordance with the legislation. These included in relation to acquiring the relevant maps at the appropriate scale, the complexity of identifying titles and ownership (see Section 4.3.6.2) and aligning the postcodes from council maps with those generated by the CRtB electronic application process<sup>15</sup>. Additionally, communities often found it challenging to determine the most suitable way to define or map their community under the 2003 Act owing to the multiple options available<sup>16</sup>.

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<sup>13</sup> Since the enactment of the legislation in 2003 over 200 communities have applied to register an interest in land/assets; however, only 23 (by August 2018) have successfully completed a purchase via the full CRtB legislative route (although a number have partially utilised the CRtB provisions and subsequently completed a sale through negotiated transfer). (<http://www.gov.scot/Publications/2015/10/8581/downloads>)

<sup>14</sup> Under the 2015 amendments, as well as being able to form as a Company Limited by Guarantee, a community body is now also able to form as a Scottish charitable incorporated organisation (SCIO) or community benefit society (BenCom);

<sup>15</sup> For example in the case of *Hazle v Lord Advocate*, Kirkcaldy Sheriff Court (ref B270/07), 16 Mar 2009, the sheriff viewed the lack of inclusion of a grid reference on a map as fatal.

<sup>16</sup> As specified under amendments to the (2003) LR Act in the (2015) CEA Act, in addition to the existing option to define a community by reference to postcode units, options to define a community now include electoral ward, community council area, postcode area, postcode district, postcode sector, island, settlement, and locality. Some communities found the process of determining the most suitable approach challenging, necessitating advice and detailed input from advisory bodies.

As one rural community interviewee noted, the asset of interest to them was also of interest to people outside their defined area; however, extending membership of the community body to those people (e.g. as associate members) was challenging and dependent on the specific mechanisms chosen to define the community. This is also a key issue in urban contexts, see Section 4.3.7), with the most suitable approach generally case-specific.

Two scoping interviewees highlighted the challenge faced by some community organisations that cover a wide geographic area (e.g. an island), when the asset being sought is only of interest to a specific segment of that community (e.g. a village). The CRtB requirements suggest that in such a case the village community should establish their own community body to take on the asset however, this may not be the most efficient or suitable option for either the village or wider island community.

The CRtB legislation requires that 75% of the membership of community bodies be residents of the defined area<sup>17</sup>. This can result in communities facing challenges in increasing their support from community members with the most active interest in the asset (as many may live outside of the defined area or be part time residents etc.). To address this, some communities turned down applications for associate memberships when numbers reached the limit, or developed separate ‘friends of’ groups. A final point, raised by one scoping and one community interviewee was the requirement that all community body members be over 16, which was viewed as running counter to the wider momentum for involving young people in land reform, albeit the legal capacity of young persons (in terms of the Age of Legal Capacity (Scotland) Act 1991) must be acknowledged.

#### 4.3.4 Process and timescales

Scoping, intermediary, landowner and community interviewees all collectively recognised the challenge of responding to an opportunity (e.g. an impending sale) and completing a complex application process sufficiently quickly to avoid a late or failed CRtB application. The different stages of the process were often referred to “*all seeming to happen together*” or in rapid succession, making it a “*rush to the finish line*”. Some communities viewed the timescales<sup>18</sup> as making it “*an uneven playing field*”, with one community describing a situation where a suitable area of land had come up for sale, but they had run out of time to alter their constitution and complete a CRtB application before the asset was sold.

The slow speed of feedback on draft constitutions and applications was also criticised by some communities. While the Scottish Government (Community Land Team) was praised by the majority of interviewees (all groups), a minority of communities perceived the feedback they received on their draft articles of association and development plans as overly prescriptive, which delayed the process unnecessarily. As one community interviewee stated: “*some of the feedback was subjective and overly prescriptive, the articles were based on a standard template and belong to the community and they should be reviewing them for compliance only, but some of their comments did not relate to this and they were inconsistent and not always aware of comments they had made on earlier drafts, with new changes coming even after six or seven iterations*”. Some community and scoping interviewees argued that the Scottish Government lawyers were overly cautious, with delayed responses potentially resulting in the loss of an opportunity to acquire an asset (see Case 4.7).

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<sup>17</sup> This requirement was increased from 50% under the 2003 LR Act to 75% under the (2015) CE Act.

<sup>18</sup> Under the (2015) CE Act amendments to CRtB the timescale for completion of the transfer of the land has been extended from 6 to 8 months and, the valuation period from 6 to 8 weeks and the ballot is now conducted by an independent balloter appointed by Scottish Ministers.

Specific aspects of the process seen as challenging to complete within the timescales included the valuation (which is required before the ballot commences); preparing the business plan and carrying out the ballot. As one community interviewee stated: *“it was very challenging getting a timely valuation, with their [the valuer’s] availability and that had to be done before the ballot could start and the electoral officer was on leave, so very little time to get the result to the Ministers, if anything had needed to be amended we would not have made it in time”*. While the change to ballots being conducted independently (and funded by the Scottish Government) was widely praised as having countered some key issues, community bodies raised further concerns with the ballot process:

- The formal (and potentially off-putting) appearance of the ballot form and lack of scope for improving the clarity of the wording of the choices on the form;
- The requirement for re-running a ballot following process-related delays causing the signatures to be out of date;
- The requirement for multiple ballots where communities had submitted multiple applications for one area - due to subdivision (see Case 4.6) of the underlying ownership.

#### 4.3.5 Perceptions of CRtB and managing expectations

Interviewees (in all groups) recognised that some awareness of CRtB often exists among communities across Scotland, although this is generally much higher in the Highlands and Islands. Despite this, many interviewees felt that communities were often unaware of the success rates of CRtB applications, what the process entails, and that alternative routes (e.g. a negotiated sale) may exist in some cases. Scoping interviewees and community groups highlighted the risk of unrealistic expectations of CRtB; the term is seen as misleading, as it is a right to pre-emptive purchase only and not an absolute right to buy. As one scoping interviewee stated: *“some communities have very unrealistic expectations, they expect CRtB to deliver ownership quickly, but it is not quick and the outcome is very uncertain and often the community does not get the asset”*. A number of community interviewees felt they had underestimated how arduous the process would be, the timescales and the resulting pressure on volunteers (issues relating to community capacity are discussed in Section 8). The ballot was recognised by some as having increased community expectations, requiring continual communication to ensure the community is aware of the uncertainty.

Failure often led to community groups becoming demotivated and cynical about the process (see Box 4.1). This was particularly evident where the community body had progressed relatively far down the CRtB pathway, but either failed to acquire the asset or had their registration overturned (see Case 4.2). Where communities had achieved a registration but the owner had not put the asset up for sale this had a more gradual de-motivating effect, with maintaining the necessary energy for multiple re-registrations a challenge, leading to some communities failing to re-register and disengaging from the process.

Box 4.1 Community interviewees on the de-motivating effects of a failed CRtB

*“We spent literally thousands of hours on it, all volunteers, navigating bureaucratic obstacles, obfuscation, technical and legal delays over two years. It was utterly frustrating and demoralising and the trust eventually disbanded, we would not engage with that process again...it is still frustrating seeing the site lying derelict, it makes me angry”.*

*“It was unbelievably frustrating, to go through that entire process, achieve our registration and then have it overturned, very disheartening to have that taken away when we were trying to create something positive for the community...it made us feel like we had not been supported, that the process had failed us and after that the trust folded.”*

*“It was such a stressful process...rushing constantly to try to get the application in and then finding out, with the owner delaying the process that they had concluded a sale, just very de-motivating for those involved”.*

CASE 4.1: A successful challenge of a CRtB registration and community demotivation

A community in the south of Scotland attempted to acquire an area of land through CRtB in 2012/13. The site had been subject to a failed housing development (2009), after which the bank seized the site through a subsidiary property company. They subsequently attempted to sell the site at auction on multiple occasions and failed. In 2012, community members made enquires with the company and met with the local authority who were amenable to an altered planning application for affordable homes on the site. The group created a community company in 2013 to acquire the site with the aim of addressing a local shortage of affordable housing. The community company met the owners in 2013 to agree site boundaries and had their CRtB registration approved in April 2013.

The CRtB was subsequently challenged in early 2014 on the grounds that the application was not timeous, with the owner’s lawyers successfully arguing that the earlier enquiry in 2012, prior to the incorporation of the community company, was a competing expression of interest (despite acknowledging the individuals were the same). The application was deemed ‘late’ and the community body was required to submit a revised application, which resulted in the community successfully registering an interest to buy the land. The Scottish Government was subsequently challenged by the owner in the Sheriff Court on the basis that the community had not (in accordance with the Act) proven that *‘a significant number of members of the community has a substantial connection with the land’*<sup>19</sup> and therefore should not have been granted a CRtB registration. The community had argued they had a connection with the site, as it was centrally located and visually part of their community; however, ‘prior connection’ was not successfully demonstrated, due in part to a lack of clarity on the terminology within the legislation and the challenge was upheld and CRtB revoked.

Despite the owner having previously attempted to sell the site their challenge was viewed by the community as a deliberate attempt to: i) create a late application to delay the process to allow time for property prices to rise; and/or ii) to impede the CRtB completely to avoid a precedent being set in relation to their other properties. The group felt hugely let down by the process and lack of available legal support, after intensive volunteer input and a feeling of *“having to go it alone in a David and Goliath situation”*. The site remains undeveloped and housing remains a key challenge for the community.

<sup>19</sup> As an alternative under the Act the community can instead opt to prove *‘that the land is sufficiently near to land with which those members have a substantial connection and that its acquisition...is compatible with furthering the achievement of sustainable development’*. The community in this case opted for the first criteria as stated, making the second criteria redundant.

#### 4.3.6 Landowner relations and related barriers

##### 4.3.6.1 Unwilling sellers and challenging relations between communities and owners

Perhaps the most fundamental barrier to CRtB and community ownership generally remains owners who are unwilling to sell, or who withdraw their land/asset from the market during the process (see Case 4.3). Some communities argued that the ability of owners to withdraw from a sale, or fail to ever market the asset, is counter intuitive to the ethos of the legislation and the effort involved for communities: “*CRtB is really very limited...if the owner refuses to sell after all your hard work you have a black hole instead of a viable project*”. In some cases this had led to protracted and difficult negotiations between communities and owners (see Case 4.2). That being said, it should be acknowledged that the right of ownership will – in most circumstances – extend to an owner deciding when or if to sell an asset. Communities identified multiple factors which can negatively impact community-landowner relations (in addition to valuations, which are discussed in Section 4.3.6.3), including:

- Some estates having a paternalistic attitude and failing to understand the potential for communities to make their own decisions and acquire and manage assets;
- Vested interests, including existing tenants (e.g. farms or businesses) objecting to the CRtB or the landowners ambitions to develop the site;
- Personality clashes between landowners (or their representatives) and community members, difficulties of communicating via third parties and ‘difficult personalities’.
- Previous or current objections by the community to planning applications from the landowner (see Case 4.2) or planning applications submitted by the community relating to the owners lands (and the potential offence caused by this to the owner).

##### *CASE 4.2: Delays and challenging relations between community and landowner*

Following the purchase by a private investor in southern Scotland of a business recognised as a key local community hub, the business was closed and the new owner applied for planning permission for a housing development on the site. The community, which had been unaware of the sale, objected to the planning application, which was rejected by the local authority, with the owners subsequent appeal also rejected. With the aim of acquiring the site and developing it as a community hub, a community company was formed in 2007 and applied to register an interest in the site under CRtB in 2008.

The CRtB application was successful; however, this was followed by a challenging and sustained period of negotiation. The community viewed this as having been exacerbated by their objection to the planning application and the resulting difficulties for the owner. A period of delays followed, owing to the frustrations of the owner and uncertainty around the development potential of the site (owing to the failed planning applications). Additionally, the owner disagreed with the valuation, as he/she had paid above valuation and had to carry out essential maintenance following the acquisition. The owner agreed to sell part of the site to the community in 2012, subject to a requirement that the sale be completed by the end of the year. This represented a major challenge, with the community raising the required amount just before the deadline through an appeal. The owner attempted to sell the remainder of the site on the open market with planning for housing, but failed to find a buyer and subsequently agreed to sell to the community. The community acquired the remaining land in 2015 with support from the Scottish Land Fund and other funding streams.

The community highlighted maintaining energy/avoiding burnout through such a lengthy period of negotiation and fundraising as very challenging, with securing a development officer and development funding their key current challenges. The community felt their experience of CRtB and the negotiations was distinctly challenging and suggested additional legal support and advice be made available to communities in such cases.

While most interviewees recognised the role of the legislation in facilitating dialogue, a minority noted that for some owners a CRtB application represented a *“line in the sand, which made negotiations more difficult, as they viewed it as an adversarial challenge”*. This had the potential to create strained relationships, particularly where the landowner was a community member or ‘neighbour’. Two interviewees provided examples of communities that had failed to register an interest in land as they were concerned that this would affect their relationship with the owner. This was potentially exacerbated where landowners had limited awareness of CRtB and did not understand that it does not represent a compulsory right to purchase. Private landowner interviewees noted a number of challenging relational aspects of CRtB applications and some highlighted their inability to influence the process or participate in a meaningful way, as one stated *“the landowner is not really a stakeholder in the physical process”* [of CRtB] (see Box 4.2).

*Box 4.2 Landowner perspectives on CRtB and relations between communities and owners*

Some landowner and private sector scoping interviewees argued that the CRtB can impact negatively on the climate for negotiated transfers by making landowners more wary and protective: *“it has reduced good faith between landowners and communities through some communities and individuals using CRtB as a threat of further action”* with the legislation perceived as having created a *“predetermined hostility”* and an *“us and them”* mentality. As one intermediary interviewee noted: *“CRtB does not create a structure that affords the parties coming together and discussing...the environment is that one party is given rights and the other one is dragged into the deal, this creates a totally different dynamic. It is hard to achieve a genuinely amicable deal where neither party is disappointed”*. Key potential impacts and negative aspects of CRtB applications for landowners were noted as:

- Long-term periods of uncertainty during potentially very prolonged CRtB processes and feelings of being disempowered to influence the process on the part of some owners;
- A perception of the CRtB process as unbalanced in terms of the level of support and advice available to communities relative to what is available to landowners;
- The potential for sales to be halted/delayed, potentially causing financial losses/legal costs, with late registrations potentially resulting in the loss of a private buyer and a higher value sale;
- The sale of the land/property at a lower price than the open market might provide;
- The difficulty (in some cases) for landowners in communicating consistently with volunteers from the community body, delays in decision making and the ability to attend meetings by the community linked to a lack of community capacity;
- CRtB requests which were seen as overly large, unrealistic and potentially resulting in the loss of areas of land important to the landowners business, resulting in an unwillingness to sell (where a request for a smaller area of land may have resulted in a sale);
- Landowner concerns relating to the long term sustainability of community ownership of the asset/land;
- Conflict or communication breakdowns between the community and owner which did not previously exist, or with specific community elements should the landowner be perceived to be favouring one community group over another (by agreeing a sale to them); and
- Communities blocking arrangements to develop or sell land for development<sup>20</sup> by using CRtB to stop a sale (e.g. to a windfarm developer). In some cases this was linked to planning, with some communities perceived as having developed a CRtB request following a planning application by the landowner to block the potential development.

<sup>20</sup> It should be noted that owners can continue to develop their land regardless of any CRtB registrations as long as the land is not put up for sale (which triggers the CRtB). Should landowners build and develop houses (or substantially change the land use in other ways) the CRtB can be removed to facilitate a sale of the housing.

Three community interviewees noted the difficulty of balancing the pursuit of a CRtB application with the desire or need to approach the owner to discuss a negotiated sale (or to obtain necessary information). As noted by some community interviewees (e.g. see Case 4.1), approaching owners directly to attempt negotiations can alert them to the possibility of a CRtB, which was perceived as resulting in some owners putting their land on the market (making any CRtB application 'late' and therefore more onerous for the community) to avoid a sale to the community at the valuation price. Interviewees from the landowning, intermediary and scoping groups identified a range of specific concerns relating to the perceived negative impacts of CRtB registrations for owners, which are outlined in Box 4.2.

#### 4.3.6.2 Identifying the landowner(s) and communicating with owners

Communities (during interviews and workshops) frequently referred to difficulties and delays in identifying landowners and clarifying the boundaries of a site during the CRtB process (e.g. Cases 4.2, 4.3 and 4.4 and Section 4.3.3). This included cases where sites were under multiple ownerships (e.g. multiple family members) or divided into trusts under the same owner (or collective of owners) or where the property was held in an offshore trust.

##### *Case 4.3: Identifying ownership, conflicted valuation and owner withdrawal*

A rural community body in north west Scotland attempted to acquire a privately owned building and surrounding land in 2010 through CRtB. The building was no longer in use and the community viewed the site as offering potential for addressing the shortage of affordable housing and workshop space locally. Following a public meeting, which confirmed community support, the community body began the process of registering an interest in the site through CRtB as a timeous application.

The community had expected that the owner would be uncooperative and the community perceived aspects of the CRtB process as having assisted the owners in this. Firstly, whilst the beneficial owners were well known and lived locally, the CRtB process required only that the legal owners were identified – in this case an offshore company with corporate directors without any evident lines of communication to the beneficial owners. The CRtB process proceeded uneventfully but with no involvement from the beneficial owners despite correspondence having been sent to the legal owners. As the CRtB process requires that the District Valuer's valuation should be challenged or assumed to be accepted, when no challenge came from the owners the process moved on to the next stage. The community body suspected that the owners would delay their response and then claim their right under CRtB to withdraw from the process - with the owners subsequently withdrawing two days before the completion date claiming they had never been contacted about any aspect of the process and that they did not accept the valuation.

The community body has since been involved in several other acquisitions using legislative and negotiated routes. They have recently registered as a charity and have rewritten their constitution in order to comply with both charity regulations and CRtB. With little prospect of the owners acceding to community ownership, the community body opted not to renew their interest in the property when it came up for renewal after 5 years

The community highlighted the need for others to be aware of how voluntary effort can be futile where the owner is unwilling and obstructive. Despite this, they felt as a group that they had learned from the process and are now taking a more strategic and ambitious approach to asset acquisitions. The community also viewed the neglected/abandoned CRtB route as offering some potential for acquiring the site in the future.

Communicating with absentee or unknown owners was challenging, with some owners (when identified) unresponsive or only willing to communicate via an intermediary. As the land/property in question in many cases was not on the land register, this created further difficulties in mapping the ownership. As one community interviewee stated: “*we had a team of professionals and still it was hugely difficult determining and mapping the ownership of that site, surely we need to consider if community bodies can be reasonably expected to know more about ownership boundaries than the owners, the Registers of Scotland or private bidders*”. Complex ownership arrangements could be used to create delays and barriers to a CRtB application, or they may have existed for other purposes (e.g. tax avoidance). As evidenced in Case 4.6, ‘subdivision’ of a landholding can complicate CRtB, requiring multiple applications and surveys for one area. Given the complexity of ownership issues (see Section 7.1 for further detail), a number of scoping, intermediary and community interviewees questioned whether communities required further support to enable them to adequately determine ownership, obtain relevant information and contact owners<sup>21</sup>.

Additionally, communities referred to “*prevarication and delay tactics*” when attempting to contact landowners and when obtaining necessary information from landowners (e.g. Case 4.5), including financial information (to incorporate within business plans); which in at least one case had resulted in the landowner successfully selling their property on the open market before a registration could be completed<sup>22</sup>.

#### 4.3.6.3 Valuation

A number of intermediary interviewees recognised, from their experience of working with owners, that concerns around valuation were often central. As one stated, “*the biggest fear of an unwilling or reluctant seller is that the valuation by the District Valuer will not match their own perception of what they would be able to market their property for*”. Three scoping (including public sector) interviewees confirmed that completing a sale based on a DV valuation could result in a lower sale price than what the landowner could have (potentially) received from an open market sale. This was viewed by some scoping and community interviewees as exacerbated by land and property being held (speculatively) as investments, as opposed to being owner occupied and managed. In some cases the valuation had been perceived as fair by both parties; however, in a number of CRtB cases disagreement on the DV valuation was evident<sup>23</sup>. This had resulted in the withdrawal of the asset from the market in some cases (e.g. Case 4.3) and protracted negotiations (e.g. Case 4.2), with concerns around the potential valuation an underlying factor in some owners challenging a CRtB (e.g. Case 4.4 and 4.7).

#### 4.3.6.4 Challenges of CRtB on legal grounds

In a number of cases (e.g. 4.5, 4.6 and 4.7) community bodies had faced delays or failed applications as a result of challenges on legal grounds. As evidenced in Case 4.1, landowners have also successfully challenged CRtB applications on the basis of failing to demonstrate that the community had a ‘*substantial connection with the land*’. Challenges based on interpretation of subjective terminology (e.g. sustainable development) may also be relevant to any challenges of the emergent CRtB measures (see Section 4.4).

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<sup>22</sup> Notably the recent (2015) amendments to CRtB include a requirement for owners to make the Scottish Government aware of any changes to their contact details. (under the new Section 44A of the 2003 LR Act). Nevertheless, delays have been reported by communities in recent (post-2015) cases when communicating with owners.

<sup>23</sup> More commonly on the part of the landowner although cases were also identified where the community had disputed the valuation.

In an urban case a community body was challenged by the landowner's solicitors on technicalities, sustainable development grounds, competency of the group and existing negotiations between the owner and the local authority. The application was rejected on technical grounds (incorrect cross-referencing of a map) and resubmitted, but again rejected following the Scottish Government receiving input from the owners lawyers on further challenges based on technicalities, with neither of these issues raised previously in the process. The application was subsequently accepted at a very late stage; however, the landowner had concluded a sale of the land during the delays. A further urban case was also rejected on technicalities (the validity of one of the community body's directors), following a sustained period of challenges, after which a private sale was concluded.

*CASE 4.4: Landowner relations, delays and community definition*

An existing heritage group attempted to acquire a small site in an urban area in south east Scotland, with early efforts to acquire the site beginning in 2012. The site, a small area of greenspace with historic significance, was owned by an offshore trust. The existing owner holds the site as an investment, with an interest in developing the site; however, this is unlikely to reflect the area's conservation status or planning requirements and was perceived as having become an eyesore over time. The group's early efforts to acquire the site failed due to the owner being unwilling to negotiate. Driven by their concern around the future of the site the group began to develop a CRtB application and applied for planning permission (approved) for developing the site as a heritage attraction. The group was not a valid body under CRtB and a new community trust was established to take forward the application. Registration was achieved in 2018.

The community faced a number of challenges, including defining the boundaries of the community in an urban setting; balloting the entire town would have been challenging, with the eventual defined area also including some relatively hard to reach groups. The planning application submitted by the community was not seen favourably by the owners, potentially affecting their willingness to negotiate. Although the initial CRtB application was timeous, the owners stated they had an agreement in place to sell the land, resulting in the application being deemed as late. This increased the requirements and delayed the process; however, as the owner could not produce a signed sale agreement<sup>24</sup> the CRtB was deemed as valid (2018), with the late application requirements leading to a higher quality of application. Furthermore, this indication of an attempted sale by the owner meant that under the legislation they were deemed as having put the land on the market, thereby progressing the CRtB application, with the community subsequently completing a ballot and business plan and submitting these for a decision from the Scottish Ministers to purchase the land. Approval was received and the Community body sought to take the purchase forward with the knowledge that the owner could still refuse to sell the land.

The community felt that the CRtB process was a steep learning curve, with considerable scope for landowners to delay and further complicate the process. Nevertheless, they found that the civil servants managing the CRtB process had been helpful in guiding them through the application procedure, while maintaining strict objectivity. They were unsure if they could recommend this route to others and felt some communities are unlikely to be aware of the difficulties of acquiring an asset through this process. Controlling expectations is important to limit demotivation. They felt that the recently introduced neglected/abandoned RTB route might become necessary if they experienced delays in completing the purchase. However, although the community body understood the time-consuming procedures which would be involved, the members of the defined community may find it difficult to understand why it was necessary to repeat parts of the process for which they had previously given their support.

<sup>24</sup> A draft agreement was produced by the owner but this was unsigned by the potential buyer, which may have been due to the absence of any planning agreement (or planning application) in place for developing the site.

A further challenge some community bodies have faced relates to the existence of a contractual agreement to sell the land to a third party or 'option to sell' (see Box 4.3). In one case (4.4) the landowner claimed to have made an agreement to sell (perceived by the community as a blocking tactic), but did not have a signed contractual agreement in place (although this did result in the application being deemed late). As apparent from Case 4.5, should an option to sell not be determined beforehand, this can result in considerable wasted effort on the part of the community. Notably, in at least one case the option to sell agreement had been established just prior to the beginning of the CRtB application process (see Case 4.6).

*Box 4.3 Option agreements and the CRtB<sup>25</sup>*

An 'option to sell' represents a legal (time limited) contract between the owner of a property and a potential buyer, which grants the option holder the right (but not the obligation) to serve notice on the owner to sell the property. Although presented here (Case 4.6) as representing a potential barrier to CRtB, option agreements are a common mechanism in conveyancing<sup>26</sup>. Option agreements must include information on an agreed sale price, plans and details of the condition of the property, the price to be paid to the landowner to enter into the agreement (option fee) and the length of time the option will be in place for. Option agreements cannot be put in place for an area of land/property after a successful CRtB registration. If an option agreement existed prior to a CRtB application being received Scottish Ministers must decline to consider the application. Should Ministers become aware of a pre-existing option agreement after a CRtB has been approved for the same land/asset the CRtB subsequently becomes null and void (see Case 4.6).

The onus for determining the existence of any options under the 2003 Act lies with the community; however, following recent amendments the legislation now requires the landowner to notify ministers of any changes to their contact details and any information relating to an option agreement/secured creditor over the land. To be valid against third parties under Scots Law, the existence of any options must be on the public record, which can be achieved<sup>27</sup> by securing the owner's obligations under the option agreement with a standard security<sup>27</sup>. Meanwhile, heritable securities over the land itself must also be publicly registered (see Case 4.5)<sup>28</sup>. The applicant community body are made aware of the end date and any extension requirements of the option by Scottish Ministers. Assuming they are properly executed, option agreements cannot be avoided by a community body; however, should the property subject to the option be advertised the community body could submit a late CRtB application (or bid on the open market). Should the option agreement come to an end or be terminated, the community body (if aware of this) can re-apply to register an interest in the property or enter into negotiations. Additionally, should the property in question be transferred/sold to a third party, the community body can attempt to register an interest to buy the land from the new owner under CRtB.

Notably, in cases where a landowner has created separate legal entities and divided the ownership of his land/assets between them it is legally possible to establish an option to sell agreement between two of these entities. Furthermore, where an option to sell exists, the

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<sup>26</sup> Option agreements can also be utilised by community bodies where the current owner may be willing to sell to the community but has concerns around the time required for the community to be in a position to make an offer. An option agreement in this case can establish a timeline for the owner (and in some cases an upfront payment to the owner) and allow the community body time to raise the required funds and/or apply for planning permission in relation to the site.

<sup>27</sup> For further information see: Stewart, A. and Sinclair, E. (2016) *Conveyancing Practice in Scotland*. Bloomsbury, 7<sup>th</sup> edition. (Paragraph 6.6).

<sup>28</sup> Should the landowner (or the creditor/third party in any option to sell agreement) be '*unknown or cannot be found*' Ministers are relieved of their duties under the Act (subject to the community body advertising for two weeks locally and affixing a conspicuous notice on the property', with a creditor having 28 days to appeal a decision: Section 37 of the 2003 Act.

landowner can still legally agree to sell the asset to a third party subject to the agreement of the existing party to which the option relates. As one scoping interviewee stated: “a landowner can protect themselves from CRtB on a piece of land by granting an option-to-sell to themselves, family or friends through a secondary company or legal entity and yet still parcel it off as they wish to and sell it to others, who can then grant their own private options, the whole time insulated from any CRtB applications”. Nevertheless, three scoping (including two public sector) interviewees argued that option agreements did not represent a major obstacle to CRtB as: i) the cases affected so far have been limited in number; ii) options are time specific; and iii) their use to combat CRtB would represent a considerable effort given owners are unlikely to be aware of impending CRtB applications. Additionally, as one professional intermediary noted, should a landowner transfer his land to a subsidiary company and subsequently sell the shares in that company (as opposed to selling the land directly) this does not trigger any existing CRtB registrations.

#### *CASE 4.5: Secured creditors as a barrier to CRtB*

A village community in south west Scotland established a community company and successfully registered an interest through CRtB in 2005 to buy an area of privately owned land adjacent to the community. The aim was to create playing fields for the school, with the CRtB registration representing one of the earliest outside of the Highlands and Islands.

The landowner subsequently challenged the registration and sued the community and the Scottish Government, with the case centred on the existence of a heritable security (see Box 4.3). The owner also argued that he had proposed the site for inclusion as a housing site within the local development plan for the area and that the CRtB was being manipulated to block this development. The Scottish Government successfully refuted this second claim (as even had the site been included within the LDP this did not preclude it from a CRtB registration). The existence of the security had not been flagged by the landowner during the process and both the community and the Scottish Government failed to identify that it existed, although this would have been evident on the Register of Sasines (or, as the case may be, the modern Land Register of Scotland, as all securities must be registered to be valid in Scots law)<sup>29</sup>. As a result, the registration was overturned as the community body had not given notice of the security in its application.

The Scottish Government lawyers did not attend the sheriff court hearing to defend the case or challenge the terms of the heritable security and did not inform the community of their intention not to attend. The Scottish Government did not subsequently explain to the community why they had not defended the case. The experience was frustrating and highly demotivating for the community (with the trust subsequently disbanding), who felt that they had received no support from the Scottish Government or their local authority during the legal challenge. The community felt that other communities engaging in CRtB should be clear on their expectations and clarify the support they are likely to receive should they face a legal challenge.

As apparent from Cases 4.1, 4.5 and 4.6 and from comments made by community interviewees, communities often felt vulnerable to challenges on legal grounds. In particular, community bodies highlighted the potential cost of defending a challenge and the difficulty of matching a sustained (and costly) challenge from a large landowner or corporation. Communities that had faced legal challenges (and which had been involved in difficult

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<sup>29</sup> The land in question was not registered on the Land Register of Scotland and the community used the older General Register of Sasines to identify ownership. The Sasines Register is not map based and is more onerous to search as it requires that the property deeds are checked, in practice this process is often carried out by a solicitor or professional titles examiner. Notably, the recent (2015) amendments to the LR Act (2003) contain a specific requirement for landowners to notify ministers of the existence of any option agreements on the land in question, which may offset some issues in the future.

negotiations) argued that the financial support available for informed legal advice is currently limited. Furthermore, the community bodies in Cases 4.5 and 4.7 both argued that the Scottish Government had (from their perspective) failed to provide a sufficiently robust defence of the challenge to the legislation from the owner's legal advisors.

*CASE 4.6: Subdivision and options to sell as barriers to CRtB*

A rural community in south west Scotland began the process of attempting to acquire a (relatively small) area of privately owned land adjacent to the community in 2017. The CRtB was driven by concern relating to the loss of greenspace from any potential development (as the owners had attempted to develop the area previously) and a perceived need for the community to become more self-sufficient in terms of community infrastructure (e.g. community renewable energy and allotments).

The community encountered multiple challenges, including difficulties ensuring their articles of association were compliant with legislation and agreeing a suitable approach to defining the community to provide for the inclusion of engaged community members not living with the defined area. Upon submitting the application, the community body was made aware that the owner had recently completed a sale of part of the area, which necessitated that the community submitted two separate applications. While producing these, the community determined that the owner had acted in a way that further subdivided the second area of land, removing specific areas from the deed (owing to the presence of specific community infrastructure), requiring further amendments to the second application. This process rendered a straightforward application very complex, owing to a need to specify the interrelationships between the two applications and for accurate site surveys. As each application was required to stand on its own merits, rather than being considered in the context of the vision for the whole site, this was seen as having weakened the individual applications.

The CRtB application on the new owner was accepted, while the second application was refused subject to the existence of an option to sell (see Box 4.3). The option had been established two months prior to the community beginning the CRtB application process. On account of the option the community were unable to progress their plans or appeal the decision, which was hugely disappointing to the volunteer team following a very onerous application.

#### 4.3.7 Specific challenges related to application of CRtB in urban contexts

The application of CRtB to urban areas was universally seen as positive and recognised as providing opportunities for addressing dereliction and resulting in a shift in the types of assets community bodies were registering an interest in (e.g. buildings). Nevertheless, many of the challenges highlighted previously were recognised as potentially exacerbated in urban areas. Scoping and intermediary interviewees also noted the potential for incorrect use of CRtB, with some urban groups more engaged in protecting built heritage than delivering sustainable development. Community interviewees highlighted the difficulty of pre-empting sales and targeting assets for CRtB in urban settings (e.g. see Case 4.1). Owing to the speed of urban property markets and the ability of large organisations to market property quickly, interviewees recognised that many (often complex) urban CRtB applications are likely to be deemed late, or potentially rejected through no fault of the applicant. As two community bodies highlighted, the number of assets in urban areas made taking a strategic approach and focusing in on assets based on identifying community needs very challenging: *“CRtB is a very blunt tool and a very drawn out process to use in a strategic way in urban areas...you cannot put a registration on everything and without inside knowledge how do*

you select what to register in before they come up for sale?" These factors were seen as leading to a highly reactive approach to CRtB in urban areas.

Community definition represents a particular challenge in urban contexts, owing to the location of assets of interest relative to the location of the community members engaged in acquiring them. Community groups (particularly those attending the Central Belt workshop) commonly viewed the spatial (e.g. postcodes) basis for defining communities under CRtB as a constraint, as 'communities' in urban areas are more commonly built around interactions and common interests (i.e. *communities of interest*), with less interaction on a spatial/geographic basis relative to rural communities (i.e. you may live in one part of a city but affiliate with a different 'community'). One scoping interviewee outlined an existing case of a community group in a large town, with an ambition to regenerate derelict buildings in the town centre. The majority of the people involved lived in the town, but well outside of areas recognised as the 'town centre'. As the legislation is based around geographic communities (communities of interest are not recognised in the relevant scheme), to use CRtB the group would have been required to set up a community body with the entire town as their defined area. This would have presented major challenges and costs in terms of community engagement, mobilising support (e.g. the petition) and achieving the crucial minimum in the ballot owing to the size of the community and the level of disengagement and disconnect across the defined area (Cases 4.7 and 4.4 illustrate similar examples).

*CASE 4.7: Urban CRtB as a reactive demanding process with pressured timescales*

In response to the impending closure of their local bank in 2006, a community group from a town in Central Scotland met with the owners to investigate the possibility for a sale to the community. The owners informed the group that the bank was already for sale with a closing date set (although no local advertising or for sale sign was evident). As the community were not capable of an open market offer, they began to investigate the possibility of a late CRtB registration. The case was one of the first from outside of the Highlands and Islands and represented the beginnings of a shift towards CRtB applications from larger settlements and for commercial assets. The group drafted new articles of association to conform with legislative requirements. These were accepted (after revisions) and their late application was approved. The community subsequently secured the asset with Big Lottery support. Nevertheless, the community faced considerable challenges, including:

- i) **The ballot:** the community was the largest at that point to have pursued a CRtB and achieving turnout in an urban area at the height of the summer holiday period was challenging and they met the required minimum by less than ten votes (97% in favour), despite volunteers running a three day public ballot. The time period allowed for the ballot was also very limited due to the late status of the application.
- ii) **Compressed timescales and bureaucratic delays:** Scrutiny of the articles of association by the Scottish Government's solicitors delayed the process and the community received their application decision after seven weeks (the indicative decision period was 30 days), which could have closed the window to acquire the asset.
- iii) **Volunteer burden:** The reactive nature of the process was highly stressful owing to the potential for minor errors and delays to thwart the application owing to the pressured timescales. The process placed excessive demands on a small volunteer team.

The community recognised a need for CRtB to become part of a strategic process which links asset acquisitions to community development planning processes which consider the socioeconomic future of the whole settlement and the role of all parties (e.g. local authorities, agencies, businesses etc.). While recognising the value of CRtB, the group would be candid about the process if asked to advise others, but recommended all communities become aware of the land reform provisions and of the committing nature of CRtB.

In some cases (illustrated by Central Belt workshop attendees) urban communities of interest had undertaken a CRtB application by attempting to define themselves as a geographic community; however, the need to ensure a relatively tight community boundary (to avoid the issues outlined above) had led to the exclusion of some interested members of the community, resulting in an arbitrarily defined 'community area' and some decline in interest/support. Two of these cases had failed to achieve a CRtB registration partly on the basis of their community definition. A third community had achieved a registration, but as their boundary line bisected the main settlement, because of the requirement that 75% of all members be from within the defined community area, they had ceased recruiting members in the surrounding area owing to the need to recruit three from the defined area to balance every one recruited from the surrounding area. Additional issues raised by urban community groups included:

- Poor awareness of the ethos and rationale for CRtB within some urban communities, with some groups assuming it was the primary route for community acquisitions;
- Difficulties in mapping of the existing ownership in complex urban contexts which in some cases included multiple ownerships (see Section 4.3.6.2);
- A requirement for additional skillsets, including knowledge of urban planning, particularly for large urban assets;
- High post-acquisition development costs associated with some urban acquisitions, particularly older buildings;
- The lack of relevance of the 1M acre target for community ownership to urban areas, where the number of community groups or people affected by acquisitions were seen as more relevant as indicators.

#### **4.4 Narratives relating to the further (emerging) Community Rights to Buy Land**

All interviewees for this section were questioned on their views on Part 3A of the 2003 Act (the Community Right to Buy Abandoned, Neglected or Detrimental Land) and Part 5 of the 2016 Act (the Right to Buy Land to Further Sustainable Development) (see Box 1.1). The commentary on these aspects is recognised as speculative, but provides a useful barometer of opinion on their future potential implementation. In general, both routes were welcomed by the majority of those who commented on this aspect (with the exception of some non-community landowners and scoping interviewees who viewed the sustainable development RTB in particular with caution). While recognised as requiring time to 'bed down', the routes were seen as representing an important indicative shift towards forced sale/compulsory purchase. Scoping interviewees felt both routes offered potentially useful mechanisms for overcoming existing challenging cases (e.g. some of the long-term re-registration cases on the Register of Community Interests in Land) where a clear rationale for community ownership existed.

Critically, interviewees highlighted that both routes are not viable '*first options*' for communities, but rather backstop measures where negotiation and conventional CRtB applications had failed (e.g. for Part 3A applications communities need to have attempted Part 2 first). As one scoping interviewee stated: "*some communities are mistakenly holding back, waiting for these to come on line, but they need to have made earlier attempts to get the asset, to demonstrate the need for an alternative route*".

Multiple scoping interviewees recognised the potential for initial applicants to both routes to face lengthy (3-5yr) legal challenges as the legislation and (subjective) terminology is tested and clarified in court, similarly to the challenges faced by those attempting the Crofting CRtB. As three scoping interviewees noted, test cases were costly, with public sector bodies

unlikely to be in a position to support many communities involved in complex legal challenges with no clear outcome. Additionally, many scoping interviewees highlighted the potential additional indirect effects of the new legislation, while recognising these could be both positive and negative in terms of negotiated sales.

Community, scoping and intermediary interviewees also raised further concerns, including:

- The definition of abandoned, neglected and detrimental land was recognised as currently limited and subjective and open to challenge, with communities concerned that existing owners may be able to combat an application by implementing basic maintenance, negating the prior history of neglect for a site<sup>30</sup>.
- The acquisition of neglected sites was seen as potentially further exacerbating the issue of limited availability of development funding post acquisition – with many neglected urban sites requiring major investment to ensure they become viable units.
- A perceived mis-perception by some communities that the CRtB for sustainable development relates to changing land use, where in fact the landowner must be shown to be clearly obstructing sustainable development.
- The addition of new routes to ownership was viewed as adding to an already complex and confusing landscape of routes to ownership, necessitating clear future guidance and advice on the most suitable approach on a case by case basis.

Notably, the CRtB and related legislation has been subject to a number of (widely welcomed) recent amendments (Section 1.2). Many of the cases (and perspectives) in this section relate to experiences of CRtB from before the 2015 amendments and this should be taken into account, particularly in relation to comments on timescales and ballot arrangements and (to an extent) eligible community bodies. Nevertheless, this section has highlighted a range of challenges relating to CRtB, many of which remain relevant post-amendments and some of which do not directly relate to legislative change.

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<sup>30</sup> This point reflects further concerns of community representative bodies raised during a meeting of the Environment, Climate Change and Land Reform Committee (May 18<sup>th</sup>, 2018) (p25-35) by Claudia Beamish (MSP) relating to the removal of additional criteria for what constituted 'detrimental' following consultation, despite support for the original proposals. The relevant aspects of the (then draft) legislation included the extent to which the management of the land has, or is likely to have any detrimental effect on: i) the amenity and prospects of the relevant community; ii) the preservation of the relevant community or its development; and iii) the social development of the relevant community.  
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11568&mode=pdf>

## 5. THE CROFTING COMMUNITY RIGHT TO BUY

This section provides a brief summary (including one case study) of the findings from the interviews and workshops related to the Crofting Community Right to Buy (Part 3 of the 2003 Act). Only two communities have submitted applications under the Crofting CRtB to purchase land in which they had an interest, both in 2005 (with one revised and resubmitted in 2010). As such, the evidence base is limited in relation to this legislative pathway and not recent, with previous studies (e.g. Macleod et al 2010) having discussed many of the relevant constraints relating to these cases in detail. Both cases occurred prior to the recent amendments to the 2003 Act (which for the Crofting CRtB have not yet been implemented) and in some cases the specific challenges discussed have, to some extent, been addressed through these recent amendments to the legislation. Additionally, many of the broader challenges (capacity, landowner relations etc.) reflect those detailed in the previous CRtB section and in the cross-cutting themes section (Sections 4 and 8). Taking these factors into account this section is presented as a brief summary of key issues only, rather than a comprehensive review of the Crofting CRtB.

### 5.1 Starting points and key strengths

Relative to the CRtB the Crofting CRtB represents a little used legislative mechanism, with a very limited number of cases having attempted to acquire their land using this route. In one case the community submitted a right to buy application but subsequently withdrew their application after negotiating an amicable agreement with their landowner. In the second case the application was subject to a lengthy legal challenge, with the revised application approved in 2011 (with submission of the initial application in 2005). A key strength of the Crofting CRtB is that it represents a mechanism by which crofting communities can acquire and control the croft land where they live and work and to acquire the interest of the tenant in tenanted land. It represents an absolute right to buy and therefore a key underlying element of wider and more recent land reform legislation and a background factor in other crofting buyouts. In the two cases which have attempted this route, the key drivers related to the potential for job creation, income generation (including through renewable energy development) and a reversal of out-migration and the long term survival of crofting communities and heritage. Critically, the crofting CRtB also stood the test of sustained legal challenge and scoping interviewees recognised the potential for crofting community buyout applications to be (somewhat) less onerous in the future owing to the advances in the mapping of crofts.

### 5.2 Key challenges

A number of scoping interviewees and a small number of relevant community interviewees identified a number of key challenges relating to the application of the Crofting CRtB in practice which are also evident from Case 5.1. These can be summarised as:

- The Crofting CRtB was widely recognised as having been highly complex in practice, particularly in relation to the requirement for mapping all croft holdings, requiring an extensive amount of work to be conducted as part of the application process. Scoping interviewees noted that there was unlikely to be any other situation in property transfers requiring a similar level of detailed information. In practice this resulted in substantial delays, resulting in huge frustration and demotivation on the part of the volunteers facilitating the application process.
- Limited availability of support for the process (both in financial and advisory terms) despite the huge complexity of the task, as well as inconsistent support and feedback during the process and a lack of awareness among civil servants of the local context and specific related challenges.

## Review of the effectiveness of current community ownership mechanisms and of options for supporting the expansion of community ownership in Scotland

- Limited scope or necessity for further use of the crofting CRtB measures in the near future owing to i) the perceived complexity of the route; and ii) the reluctance of many crofting communities to take on the ownership of management of their estate where the landlord is relatively benign and 'non-interfering'.
- The difficulties related to the disparate nature of multiple townships across the relatively large holdings in question, creating considerable difficulties in terms of unifying the dispersed 'community' around a buyout.
- The distinct and complex nature of crofting tenancies in their own right and resulting additional complexities relative to an estate with no tenancies or crofts.
- A specific issue pertaining to the Crofting CRtB legislation and the subsequent use of the CRtB. Specifically, in the Crofting CRtB legislative requirements (Part 3) the applicant body needs to be a crofting community body; however, once this organisation has been established it is not an acceptable form of community body under the CRtB provisions and therefore cannot utilise the CRtB provisions (Part 2). Part 3 bodies (crofting community bodies) could not currently buy land which is not under crofting tenure. In practice this would require the community to establish a new organisation to apply to register an interest in land under CRtB.
- A misalignment of existing funding streams and the Crofting CRtB in terms of the requirement of the SLF for funding entire communities as opposed to specifically 'crofting communities'.

*CASE 5.1: A crofting community buyout in the Outer Hebrides*

A steering group was formed in 2001 with the aim of purchasing a large crofting estate in the Outer Hebrides which included some twenty two crofting townships and 2000 residents. The estate was under private ownership at the time with minimal management input or investment. Community interest in a buyout had been driven by the desire to reverse community decline and facilitate sustainable community development, with the potential windfarm development capacity of the site also a background factor (with a major windfarm development proposed for the land at the time). A feasibility study was undertaken by the community to explore potential development options (the estate had limited income streams due to having been asset stripped previously) and meetings were held with local businesses and the township grazing committee. The community applied for Scottish Land Fund (SLF) funding to support a buyout and balloted the local community (with 85% in favour of a buyout). The trust was awarded SLF support in 2006 and through fund raising and further support from Highlands and Islands Enterprise they achieved the buyout in 2007.

The community trust had attempted the buyout via Part 3 (the Crofting CRtB) of the 2003 Act and completed the related requirements, many of which were challenging and relatively complex, particularly the mapping of croft titles, which took considerable time, with a major requirement for time input from the team of volunteers over this period. The owners had initially declined to discuss a sale, partly due to them having established an agreement with an energy company for a lease for the provision of an area for part of a very large windfarm (and agreement from which the crofting tenants would have also benefitted financially). The community trust subsequently agreed a separate deal with the then owners to reimburse them a percentage of the income from a smaller renewable energy development which was proposed as part of their development plan. The sale was eventually concluded as a negotiated settlement and the community have established a business centre and wind turbines and now have five full-time equivalent staff (and two additional shared staff).

The community trust faced a range of challenges during the buyout process and afterwards, with the immediate requirement to run the estate like a business (post-buyout) made difficult by the lack of viable income streams and a lack of any meaningful post-acquisition development funding. This delayed the initial development of income streams, with no initial funding for a development manager acquired, resulting in the process being wholly volunteer run in the first three to four years after the buyout. During this period the trust achieved planning permission for the wind turbines, with subsequent staff funded with income from this development. The trust recognised the support of Highlands and Islands Enterprise (HIE) but recognised that the level of support available can depend on the awareness and skills of the specific advisors assigned to your case, with some less aware of the local context and related challenges and capacity within HIE limited. Following the development of consistent income streams and the establishment of a development officer and further staff expansion development has progressed more rapidly. Nevertheless, the community has had to undertake major investment and revenue funding remains a challenge, particularly due to the large scale of some projects which occur in a remote island setting, which has additional cost implications. Additionally, the crofting context often brings specific challenges and requires the ongoing development of specific related knowledge on the part of the trust.

## 6. TRANSFER OF CROFTING ESTATES (SCOTLAND) ACT 1997

This section summarises the findings from the interviews and workshops related to the Transfer of Crofting Estates (Scotland) Act 1997 legislative route where the crofting landlord is the Scottish Government. The 1997 Act enables the government to dispose of publicly owned crofting estates (or parts of such estates) and other relevant property in the crofting counties to approved crofting bodies.

### 6.1 Starting points

A very limited number of communities have attempted to acquire their land using the Transfer of Crofting Estates (ToCE) legislative route. As a result, the legislation remains relatively untested. In the cases that have attempted this route, the key drivers reflect those of other ‘buyouts’, with a particular emphasis on reversing out-migration, job creation and ensuring continuity of local heritage. The need for a community hub has also been a central aspect in these cases (see Cases 6.1 and 6.2). For those who have attempted this route, witnessing wider successful community buyouts has been a factor and the increasing number of cases and evidence base for community ownership outcomes may have some potential for influencing this area in the future.

#### *CASE 6.1 A small acquisition through the Transfer of Crofting Estates pathway*

A crofting township on a Scottish Government estate formed a trust in 2009 to establish a community hub and heritage centre as a focal point for residents and visitors, with the aim of addressing out-migration (through job creation) and ensuring the survival of crofting heritage. To achieve this, the trust began the process of acquiring one hectare of common grazings land from the government (via the ToCE route) in 2015. The group has commissioned a feasibility study and business plan, with the building plans being submitted to the local authority, after which they are required to inform the Scottish Land Court the planning process has begun, with the court subsequently informing them as to whether they can proceed with the sale.

Despite a willing buyer and seller, the trust has faced substantial challenges throughout this process, including lengthy delays *“because to an extent we are guinea pigs and it is not a well-tested route, no one is ever certain of the way forward”*. The trust has been on a steep learning curve, with frequent unforeseen challenges. They have received support from Community Land Scotland, with the Scottish Government’s Community Land Team and local senior agricultural officer also providing helpful advice and guidance.

A key delay has been the time required for the trusts lawyers to obtain the crofting (and common grazing) titles (900 deeds) from the Scottish Government’s legal team, who were not in agreement that all the titles needed to be checked. The trust is required to fund the bulk of the process itself, including a requirement to pay the Scottish Government’s legal fees and the (potential) £8,000 purchase price (discounted owing to the public benefits associated with the proposed development).

The community are gradually moving towards an acquisition; however, the process has taken over three years and is not yet complete or certain. The trust recognises a need for greater support for communities using the legislation, greater clarity on what is required and a key contact to guide communities through the process. They recommend that communities attempting this route be persistent and patient, commit to the process and seek development officer funding at an early stage. Should they acquire the land, obtaining development funding is likely to be the key immediate challenge.

## 6.2 Key strengths

In principle the Scottish Government are very willing to sell crofting land to crofting communities and townships. The Scottish Government crofting estates therefore represent a potential opportunity, in terms of increasing the area of land under community ownership, with over 95,000 hectares of crofting land currently under public ownership<sup>31</sup>. As public benefit costing becomes increasingly normalised the potential for discounted sale prices was also recognised as likely to increase. Despite the relatively low current interest in transfers from communities on public crofting estates, existing crofting buyouts (of government and privately owned land) and the support provided to these communities, offers clear potential for demonstrating the potential outcomes of community ownership. The government is recognised as a benign, but also inactive, landlord and further cases are likely to exist where community ownership offers the potential for releasing community development benefits.

## 6.3 Key challenges

As noted by scoping and crofting community interviewees a key reason for the lack of uptake of this route is the common perception of the Scottish Government as a satisfactory and benign landlord. As a result, crofters on government crofting estates often did not see a strong logic for them to acquire the land, particularly as they benefitted from crofting tenancies, which had a high degree of long-term security. Some stakeholders raised the issue of crofters concerns in relation to their crofting rights and whether this security of tenure might be affected by community ownership. In some cases crofting groups also viewed acquiring the estate (and the associated workload) as beyond their capacity, with Case 6.1 partly addressing this through a small-scale acquisition for a community hub (as opposed to taking on the entire estate). Scoping interviewees highlighted that awareness of this route among communities was low, particularly in terms of whether it differs from other routes and why a crofting community might want to pursue it.

In the cases where this route has been attempted, it has proved a slow, complex and challenging pathway to ownership. Despite the Act being relatively short (but also open to interpretation), these cases have been subject to a large amount of binding contractual obligations and regulations. In some cases (as noted by one intermediary interviewee in relation to a current ToCE case) the Scottish Government has superimposed specific requirements under the Land Reform legislation (e.g. community body and ballot requirements), further complicating the process. Despite the process involving a willing seller (the Scottish Government), based on the existing cases it can take 3-4 years to achieve ownership (slower than many buyouts from private estates). Stakeholders and intermediaries with experience of the process noted the potential for communities to encounter unforeseen hurdles that can introduce major delays, including the need to collate large numbers of crofting titles (see Case 6.1), with the Scottish Government lawyers viewed by some as unnecessarily delaying the process further. Communities and intermediaries who had been involved identified a lack of experience of the legislative pathway within the Scottish Government, resulting in a lack of capacity to deliver clear guidance and a straightforward route to ownership via the Act.

Additionally, the requirement for communities to pay for the transferred land (and in at least one case cover the government's legal costs) and the introduction in at least one case of clawback provisions (see Case 6.2), reflects a lack of a joined-up approach within the Scottish Government to delivering ownership through ToCE. This is further reflected in a lack of clear alignment between community body requirements under ToCE and those required

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<sup>31</sup> <http://www.gov.scot/Topics/farmingrural/Rural/rural-land/land-management/SGcroftingestates>

under CRtB requirements. Relevant scoping, intermediary and community interviewees collectively argued that the original ethos of the Act was to encourage straightforward transfers with minimal cost, but the current situation fails to reflect this and suffers from a lack of clarity. In particular, it is currently unclear whether the ToCE route represents the preferred route for the Scottish Government or whether either asset transfer or the Right to Buy pathways represent more useful routes for communities to acquire government owned crofting land.

*CASE 6.2: A whole estate transfer via the Transfer of Crofting Estates pathway*

A crofting community on a Scottish Government crofting estate began the process of acquiring the estate (over 7000ha) through the ToCE route in 2007, with the aim of addressing out-migration through housing provision, job creation and inward investment. The estate had been acquired by the government in the 1930s/40s to provide settlement opportunities and had suffered from a long period of decline owing to a lack of emphasis on development and housing provision (with no public housing locally). The community had been offered the land under the ToCE Act in 1997, but, partly owing to the lack of community ownership at the time, the community could not see the value of taking on the estate. This changed with the community buyout and development of a neighbouring estate in 2003, which visibly demonstrated the potential benefits of ownership. A public meeting followed in 2007 and a feasibility study, leading to a community ballot in 2008, with 77% in favour of the acquisition. The group went on to become the first community to purchase their estate from the Scottish Government in 2010.

Despite the outcome, the trust faced considerable challenges throughout the three year transfer process, including bureaucratic hurdles and a lack of clear guidance on the process. A lack of continuity in government staff dealing with the case also resulted in inconsistencies; despite early reassurances that 'clawback' would not be required, when the relevant documents were received they included a clawback provision, stipulating that any future development not identified at the feasibility stage would be required to pay a proportion of income generated to the government. This was seen as evidencing limited awareness of the community sector, as additional income would have been used to further development, with any clawback seen as a tax on success and innovation. Additionally, the Government required the trust to pay the full market valuation. The government argued state aid requirements prevented a low-cost transfer, despite local authorities often transferring assets at no cost and the Scottish Government estates collectively losing over £150,000 a year (arguably a state aid).

The trust has gone on to deliver a wide range of development, including a community enterprise centre with office spaces, renewable energy and low carbon schemes, multiple affordable housing units and plots and camping sites. Nevertheless, the ToCE process caused the trust considerable stress and frustration and was seen as having required the group to spend excessive effort on acquiring the land as opposed to putting development into action. As a result the trust would not recommend other communities use this route to acquire their land without sufficient changes being made to the system to ensure it facilitates favourable transfers rather than hindering the process.

Currently the ToCE route represents a little used and poorly understood pathway to ownership with considerable associated challenges. The establishment of Asset Transfer under the Community Empowerment Act has arguably increased this lack of clarity.

## 7. ASSET TRANSFER

This section summarises the findings from the interviews and workshops related to asset transfer legislation under the Community Empowerment (Scotland) Act 2015, as well as earlier transfers of public assets to communities. Many of the challenges discussed in this section relate to all public asset transfers but have either been exacerbated or arisen in reaction to the 2015 Act.

### 7.1 Starting points

Many of the groups included in this section were steered into the formal Asset Transfer process as a result of their attempts to acquire an asset. A number of groups had started (and rarely, completed) their asset transfer request before the 2015 Act came into force. Not all groups were aware of the 2015 Act and its context for their opportunity to buy, nor that this creates a new opportunity for asset transfer to a community of interest. The 2015 Act does not appear to have stimulated a great change in the numbers of groups looking for asset transfers. In some cases, the community groups wanted to acquire the asset, and only became aware of the new legislation when they sought advice on how to go about this. Some groups which had started their efforts before the Act came into force, found that the processes and paperwork required became significantly more challenging while they were still in that process. At least one group remained unaware of the 2015 Act until discussed during the interview for this research.<sup>32</sup>

Some asset transfer requests were driven by a threat, or perceived threat, of loss. Groups were motivated by a wish to 'save' an asset, including 1000 ha of (former and potentially restorable) Caledonian pine forest listed to be sold by Forest Enterprise Scotland, and a late Victorian castle on a Hebridean island, currently falling into disrepair. Others were triggered by awareness that an asset was to be put on the market<sup>33</sup> and by awareness of a vacant building, seen as an opportunity for community development. There were other cases where a range of assets had been built up to support community sustainability and address depopulation (Case 7.1).

Other groups have taken a route to purchase because they can attract investment and funding which the local authority does not have access to: *"The area was losing shops and businesses and people were moving away. The aim was to bring people back into [the town] by putting in something that related to the history and culture of the place. Through Asset Transfer the community could take ownership and apply for grants the Council did not have access to"*. Some had found that former arrangements with local authorities were no longer working and were advised that purchase was the best way to address particular restrictions.

Others saw a neglected asset, or a vacant site which could be improved and developed for community use, including:

- a vacant farmhouse within city limits - *"we bought a derelict farmhouse from [the Council] in a socially deprived area of the city"*;
- a disused play park - *"it's in a big old Council estate, blocks of flats are being knocked down, left derelict. This was one open space transformed into a play area but it had experienced vandalism, the equipment taken out"*;
- a former primary school - *"it was derelict for many years. An eyesore"*.

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<sup>32</sup> Disposal of Land by Local Authorities (Scotland) Regulations 2010 still applies for willing sellers/surplus assets <http://www.gov.scot/Publications/2010/07/26124543/7>. It does not provide specifics for protecting communities relating to timescales and appeals however.

<sup>33</sup> This was particularly the case with Forestry Commission Scotland which publishes lists of so-called 'disposals' each year: see <https://scotland.forestry.gov.uk/managing/work-on-scotlands-national-forest-estate/land-and-building-sales>.

*CASE 7.1: “From football team to pensioners”: motivations for multiple land transfers to support sustainability in one community*

One community interviewee described five asset transfers, mostly from the public sector and mostly before 2015. The community had assembled a suite of assets through different routes, and explained: *“We had young people wanting to settle down but no properties available in the village, just a lot of holiday homes. When they came on the market, people didn’t have the salary to buy it. So we went down the route of buying community land for crofts (from a public agency), at least it would be a site for young people to hold land cheaply. But then the government did away with the crofting house and grants scheme. So in 2006-7 we decided we need to take our future in our hands ... working with HIE, land fund, and the crofters union, we set up [the community] Trust. The first directors were from the football team. Young people who could envisage getting cheap land.”*

*“It was driven by the need for housing. In the end we are far short of our targets. We have to be reasonable - although we have achieved much there is an underlying current of failure. We’ve alerted the Council, they are aware of the need for housing. They are putting a pittance out into rural areas to address this. We are losing population. We have lost most of that football team because there was no housing.”*

*“It has gone to the opposite end of the scale, pensioners are now forming the basis of the Trust. We have a community shop, the existing shop shut down in 2014 because of the Post Office de-commissioning, pensioners took over the situation, commandeered the football pavilion and told me they were doing a shop.”*

Inevitably these motivations are combined in several cases. For example, in one Highland community: *“They had already mobilised and unified quite effectively to kick out a planning application for an industrial biomass plant for the site, which nobody wanted on their doorstep. So they had already had a number of public meetings, and there was a very strong unified group used to talking about this plot of land. When they were then offered the chance to express interest in buying it, definitely some people thought, we had better take this chance and buy it otherwise we might get something else built on our doorstep that we don’t want. However others in the community were more open to the idea that community woodlands can do great things, so it was not just NIMBY-ism”.*

As well as the motivations outlined above, there were also strong reasons put forward for not going ahead. Apart from a striking level of resistance from some local authorities (described further below), in a few cases groups decided not to go forward with applications for other reasons. These included the unwillingness of church groups to accept Lottery funding; and unexpectedly high valuation of land, for example where potential value for wind turbine development put it out of the perceived reach of the community<sup>34</sup>.

## 7.2 Key strengths

The 2015 legislation on asset transfer was widely welcomed by scoping interviewees, and while this report focuses specifically on challenges, the emphasis was predominantly on difficulties with implementation, not criticisms of the 2015 Act itself. Interviewees from all groups emphasised that relevant authorities and communities are on a steep learning curve. In many cases, relevant authorities have now listed their assets, and a few have developed a rigorous process for processing asset transfer requests. Some relevant authorities (two local authorities and one national agency) were highlighted as generally supportive and

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<sup>34</sup> At a time when the Scottish Land Fund was not available.

approachable. Key points highlighted by scoping interviewees emphasise in particular the rigour and transparency introduced by the process (Box 7.1).

*Box 7.1 Views from scoping interviewees on strengths of asset transfer [a range of points made by individuals not all of whom would agree with each other]*

- The legislation was viewed positively and seen as the best route to acquire a public asset, with the process recognised as delivering assets and benefits to communities. Community asset transfer (both pre and post-2015) has been a catalyst for development for community groups, including through social enterprise.
- Public Bodies now have to list their assets publicly and are now required to say why a community group should not get an asset – they need to justify their position
- Communities need to present a robust case for the associated public benefit and value of their asset transfer – *“there is a rigorous process for this, which tests community capacity for ownership and gives communities the right of appeal and a fixed timescale.”*
- Asset transfer was viewed by some as presenting opportunities for local authorities to rationalise their assets, with some local authorities holding a backlog of community facilities, some of which were not well maintained.

Some local authorities were recognised as having been more proactive than others – often as a result of the efforts of individuals. There are opportunities for shared learning from this. On the whole, however, most community interviewees felt that the process has not yet settled down, few relevant authorities have integrated asset transfer into their existing structures and practices, and that the legislation is much more attractive in principle than in its implementation. *“It’s still bedding in and will take some time to settle”* [Scoping interviewee].

Undoubtedly there are examples where asset transfer has worked well, in the hands of strong community organisations and, where available, a competent development officer. Some positive views are summarised in Box 7.2, but it should be noted that community interviews tended to comment on the importance of ownership, rather than the legislation behind it.

*Box 7.2 Views from community interviewees on strengths of asset transfer*

*“There is a huge opportunity, it’s very empowering for communities to take on these assets. Certainly with the pier we are going to do far far more with that than the Council would have done.”*

*“The main benefit is we can borrow, re-mortgage, so as we look to the next asset, ... the fact that we now have two buildings that we can secure investment against is the biggest thing for the trust. It has also given the trust confidence. Until then we’d been a 3 year project, now we have an asset base and the trust can’t just fold. There is a sense of permanency, our business planning is done on a 40 year cycle. It has changed the way the trust thinks internally.”*

*“As currently drafted, the concept of independent review is good, moving from officers to a panel is good, but the ... decision needs to be independent. I like the idea that there is a safety valve that it can be reviewed by ministers.”*

Land-rich national agencies have gone further than most local authorities, in not only establishing a register of assets but also proactively informing community groups of intention

to dispose of particular assets (groups interviewed noted this with Scottish Water and Forest Enterprise Scotland).

The longer history of the National Forest Land Scheme provides some positive examples where community ownership of assets has provided access to capital, income and community self-esteem that has generated further community development. Forest Enterprise Scotland's Community Asset Transfer Scheme builds on this experience, and was recognised by scoping and community interviewees, as a model of good practice for translating the 2015 Act into a transparent and accessible procedure (Case 7.2).

*CASE 7.2: Buying woodland: a relatively smooth asset transfer from Forest Enterprise*

The case is based on a well-used 50ha woodland that attracts dog walkers, runners, cyclists and horse riders. The mainly coniferous wood is surrounded by treeless agricultural land, within a few miles of the boundary of a city. For the community, *"it's a precious place for many people as you can go for a nice, quiet walk and see plenty of nature."* There are lots of paths in the wood and a car park at the entrance. Volunteers from the community have worked for 14-15 years with Forest Enterprise Scotland (FES) to improve the paths.

The acquisition was triggered in February 2017 when the FES manager phoned the convenor of the volunteers' group to let him know that they planned to sell the land and to explain the opportunity for the community to buy through the CATS process. As the volunteer group was not constituted, the Community Council convened a meeting, and 35 people attended to discuss the sale. *"It was a unanimous 'yes'".* In Feb/Mar 2017 they surveyed people coming to the wood (94 responses over two days) to *"get a good feel for who used it and for what"*.

When it came to constituting, the group experienced some problems around the type of legal structure that should be used to take things forwards; after conflicting advice, their constitution was rejected by the Office of the Scottish Charity Regulator (OSCR). It then took three months to get charitable status as a Scottish Charitable Incorporated Organisation (SCIO). They had to fill in an FES CATS template which they felt to be *"a well thought-out form"*. Initially they thought they could do a lot themselves but in the end they used SLF Stage one funding to employ a consultant to do the feasibility study and business plan. *"He knew what we wanted and asked the right questions"*.

The group was surprised by some valuation issues. At the group's request, FES provided them with their 'book value' of £205,000 but pointed out that this was likely to be very different from the current market value. Nevertheless the valuation from the District Valuer was £377,000, *"which was a shock"*. This valuation was valid for six months but it took over a year to get to the point where FES had agreed to the sale so an updated valuation was needed (costing a further £470). FES agreed to a discount, based on intended community benefits worth £28,000. *"It's a bit of a black art to me, how they do it – they look at everything we're going to do and how it will benefit the community and then they put a value on that"*.

The CATS application was sent off in March 2018, just over a year after the initial conversation with FES. *"It took a lot longer than we ever thought it would take"*. However the final decision, based on a recommendation from an independent panel, came faster than expected.

Another case highlighted as positive, also involved a willing seller (Case 7.3), in this instance a local authority.

*CASE 7.3: A community trust buys a hostel and museum from a local authority*

The community trust was set up because a number of key services in the village were under threat of closure – including the youth hostel and the museum. Asset transfer was “*proving to be a bit of a wade through treacle*”, but when the new development officer started, the asset was running well, and the staff managing well, so he was able to focus on getting the asset transfer moving.

*“It definitely felt like the Council wanted us to have the asset as much as we wanted it. It was a meeting of minds. By the time we got it we’d been cooperating with them for over two years so the assets were kind of ours, it was just a formality.*

*We were knocked back twice – on the basis that the business plan wasn’t robust enough. There is obviously a huge reputational risk to the Council to hand over the asset. There were frustrating moments but ultimately it was quite a big deal for our community so I completely appreciated that we had to go in with our eyes open.*

*When we finally got the asset transfer, it didn’t feel like the big moment that it should have done. It was before my time, but going on the reports and photos there was a lot more community engagement in the operations when we took on the lease. We were absolutely flat out on [another] project by the time the paper work for the purchase was signed, and this felt like a formality.”*

## **7.3 Key challenges**

### 7.3.1 Legislation

#### 7.3.1.1 Political will

Overall, most interviewees from all sectors concurred that implementation of the Asset transfer legislation is not working as well as envisaged. Scoping interviewees felt that it is unclear whether what is in place now is delivering fully on the intention or ‘spirit’ of the legislation. They viewed the purpose of the legislation as providing an easier route to acquiring and using an asset, but felt that some public bodies have over-complicated the process and in some cases asset transfer can take longer than Community Right to Buy for a community to achieve ownership. Local authorities were viewed as inconsistent in applying asset transfer legislation, and some were noted as having turned down cases which looked viable. Scoping interviewees attributed this failure partly to how public bodies and local authorities are approaching the issue and partly to how the Scottish Government are leading it as an agenda: ‘culture change needs real leadership from the top and much more could be done by the Scottish Government to lead on asset transfer and communicate clearly to local authorities and public agencies what exactly is expected of them in relation to asset transfer’.

#### 7.3.1.2 Local authorities

Inevitably the 2015 Act legislation has placed a focus on local authorities. Engaging with the new legislation has been challenging for many of them (Box 7.3), and this is further reflected in some very challenging experiences of communities attempting to acquire assets from local authorities (Box 7.4). Community interviews reflected a mixture of bafflement, exasperation, and disillusionment, while local authority views reflect struggles with resources and process; concerns with the impact on the local authority (of the loss of the asset); and a degree of concern about the capacity of communities to take on assets.

*Box 7.3 Local authority perspectives on the challenges of asset transfer*

Local authority interviewees recognised that the process for asset transfer at local authority level required a balance between speed and robustness and how off-putting it was for communities. It was seen by some as potentially overly complex, with one local authority interviewee noting that *‘there is a need to match the correct route to each case. Many applications are for leases, and these would previously have been less complex.’* The process was also seen as more complex for higher value urban assets (e.g. requiring a business plan) and requiring a challenging decision making process, with local authorities required to consider transfers from multiple dimensions, including future site security and safety and strategic aspects – including (for example) increased future demand for affordable housing sites, increasing demand for early years childcare. Additional challenging aspects of asset transfer raised by local authorities included:

- Poor existing integration of internal local authority departments which work on community asset transfer (including property, legal and community teams), with the legislation requiring greater cross-departmental working;
- The costs of the asset transfer process, with all asset transfers resulting in some legal costs for local authorities and communities also often ask for local authority support for paying their costs. As one local authority interviewee stated: *“these costs are not balanced by cost savings, as the requests are often for small assets, and it does not save the council much money. Community units in councils are stretched”*;
- Unrealistic demands and expectations from communities on councils, with communities perceived as often expecting the local authority to actively take on the asset transfer application process on behalf of the community, with local authorities stressing that *“the process requires considerable community input”*. Community expectations therefore required careful management as the community *“may not get the asset and it’s a demanding process”*;
- The challenging nature of community politics: *“there is no such thing as a single community view, some groups are blinkered, and it is challenging to get them to think more broadly”*;
- Conflicts of interest for local authorities, with local authority staff recognised as being *“out in the communities providing support, but also decision maker for applications; and the review panel also comes from the local authority”*;
- An insufficient amount of support and guidance on asset transfer currently available for communities

*Box 7.4. Negative community perspectives on attempting asset transfer from their local authority [quotes from four different groups in four different local authority areas]*

*“The Council are too distant from [this] community. They are not from there and don’t have the same connection as the people that live there.”*

*“It’s a cat playing with a mouse. The Council is used to authority and control and power. They don’t want to relinquish it.”*

[The Board took the decision to pull out because] *“what is the point of trying to negotiate with a party that wasn’t willing to come to a decision. If you are dealing with somebody you need to have to have confidence they will do what they say.”*

*“It’s the nature of our Council. They don’t work with the legislation properly. The officers run the show, and rarely do the Councillors hold them accountable. People know that Councillors don’t have much impact. It’s almost like a corporation that’s running amok.”*

### 7.3.1.3 Arm's Length External Organisations (ALEOs)

Increasingly, local authorities are diversifying into a range of semi-private arrangements which constitute challenges for asset transfer legislation. An important grey area was identified in connection with Arm's Length External Organisations (ALEOs), and with public private partnerships and joint venture companies with the private sector.<sup>35</sup> As identified by one scoping interviewee, ALEOs are not subject legally to asset transfer requests in the same way as local authorities. However Scottish Ministers can designate them as relevant authorities under the 2015 Act. It was felt that this issue will need to be addressed in the future.

These issues manifested in community experiences. Two community groups highlighted difficulties with identifying the owner, because the Council had passed management responsibility for the asset to an ALEO who then behaved as if they were the owner. One community group found themselves in competition with an ALEO which had alternative development plans. Another community group found their asset transfer request rejected by a local authority which elsewhere was developing similar assets in a public-private partnership. These situations were variably interpreted by community interviewees as unnecessarily confusing, or in worse cases, as a conflict of interest on the part of the local authority.

### 7.3.1.4 Conflicts of interest

Four cases in particular highlighted perceived concerns about the objectivity of those making decisions about asset transfer requests, including:

1. Where Councillors are also directors or trustees of companies which were perceived as having competing interests;
2. Where Councillors supported officers' decisions without meeting community members, visiting the site or assessing group capacity<sup>36</sup>;
3. Where Councillors and officers appeared to want to keep a site for future income generation, although to do so they would potentially be making use of the plans developed using the community's voluntary time, and rejected by the Council;
4. Where a Council was perceived as shifting its messages about what it will charge for. *"We still don't know what the costs will be because the Council is talking about charging fees for this that and the next thing. Seems that the Council will charge their legal costs .. there is a level of anxiety that this is a gravy train. There is also a gain to them in that they will get capital coming in"*. [community interview]

Cases 7.4 and 7.5 illustrate two of these examples of conflicts of interest. In the first (Case 7.4), the community group felt that their submission of an expression of interest prompted the local authority to put the building on the open market. In the second (Case 7.5), elected representatives were also trustees of competing interests.

In contrast the process established by Forest Enterprise Scotland for its Community Asset Transfer Scheme, which follows on from the experience of managing the National Forest Land Scheme, uses an independent panel to assess applications and make recommendations to FES on whether to agree to a transfer. This was highlighted by some

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<sup>35</sup> Also known as Arm's Length External Organisations (ALEOs), Arm's Length Organisations (ALOs), and Local authority trading companies (LATC). These may be for trading purposes or simply for delivery of statutory services. <https://www.unison.org.uk/content/uploads/2013/06/On-line-Catalogue212753.pdf>

<sup>36</sup> Although it is recognised this is not a specific requirement of the asset transfer legislation.

scoping interviews as a more robust approach which helps to avoid such conflicts of interest (or suspicion of such conflicts).

*CASE 7.4: Community attempt to buy a vacant building is thwarted by Council refusing to engage and then selling the building on the open market*

A community trust in the west of Scotland wanted to buy a building that the Council intended to close. The community wanted to create a central community space, to raise awareness of heritage and generate income. This was part of a strategy to cope with population decline in recent years, as house prices have increased beyond the reach of locals and young people.

The Trust has been established for 15 years and is experienced in project development having taken on management of another significant site, and secured £750,000 to make it a visitor attraction for more than 15,000 people annually. They also have an investment in a wind farm which will generate income in future.

Four active directors guided the project development through feasibility and the business plan. They asked for the asset to be transferred to them when the current use ended. The only response from the Council was they were taking it through due legal process before it could be declared excess to requirements. The community trust continued to ask for a response throughout the next 18 months. At the end of 2016 they were told that they couldn't have the building as it was being prepared for open sale. After the Community Empowerment Act went live in Jan 2017, the Trust submitted an Expression of Interest and were told that someone would be in touch about a full Asset Transfer Request. No-one responded to them. The building was put on the market and sold in May 2017. Since then it has been minimally refurbished and at August 2018 remains empty.

The Council described it as an 'unsolicited Asset Transfer Request'. The group were told there was a policy related to this but were never given a copy of the policy. When it became clear that the asset was being prepared for open market sale the Trust requested the survey and valuation. They were refused so submitted a Freedom of Information request. This came back with all the financial information redacted because the Council said it was commercially sensitive. They were also told to go through CRtB not asset transfer. They put in a request for a review but as the original request didn't go to committee there was no decision-making process to review.

*CASE 7.5: Town centre land to revive cultural life conflicts with the personal interests of Councillors*

An urban group constituted a SCIO in 2014 to buy and develop a 'prominent, derelict, piece of land' in the centre of a lowland town. The town had 'lost its heart' and a group was formed to take forward the idea of buying land to develop a cultural centre. The asset is currently owned by an ALEO, established by the Council. If the community asset transfer goes ahead, the land will be transferred from the ALEO to the Council and then from the Council to the community trust.

In the early stages of the group's investigations they felt that they were encouraged but since late 2014, the group has faced constant resistance from the Council. The SCIO has continued with their plans and are working towards submitting a full asset transfer request. They feel it is 'the right thing' because it is based on research into solutions for town centre improvements and community benefit, including a feasibility study, and fits with a Council-commissioned study into regeneration of the town centre. The consultation received 2000 responses with a 90% endorsement for the project.

When the relationship with the Council changed from encouraging to resistant, the SCIO decided to put the design out to tender. They held a pre-launch and invited the Council, businesses, and the community, but none of the Council officers attended. Various high profile activities by the group gave the project proposal lots of publicity but the Council did not support them. The huge support from the community and the alignment with the published Council document kept them going. Resistance from the Council caused "*pain, anger, frustration, the whole gambit of emotion*". The SCIO trustees described themselves as "*successful business people, with considerable skills, who behave in a professional way and had never been treated like that in any meeting.*"

Following another meeting with the Council, one of the Councillors attending told them that he also sat on the board of an ALEO set up by the Council, and that the community proposal was seen as the competition.

### 7.3.1.5 Local authority culture

Clearly some community groups are having more positive experiences with asset transfers than others. Many of the challenges associated with asset transfer were attributed by community and scoping interviewees to a fundamental difference in culture between community groups and local authorities.

At least four groups from four different local authority areas felt severely undermined and unfairly treated by their local authority (see Box 7.4). Others found the process tedious and confusing but were less critical of the fairness of the process. A range of community views are highlighted in Box 7.5.

The interviews with local authorities did not reflect this divide. One interviewee who acted on behalf of a community group, but is also a council employee, noted the challenges of dealing with the council, especially for "*people who can be quite angry at society already*". The cultural divide and lack of trust thus appears to be exacerbated by both lack of awareness of its impact by the local authorities, and by negative expectations and experience on the part of community groups. This appears to constitute a serious problem which needs to be addressed if the intentions of the 2015 Act are to work well in practice.

*Box 7.5: Community views on local authority culture affecting asset transfer [four community groups in four different local authority areas]*

*“It’s an ‘us and them’ culture. As new people come into Councils you see the fresh and positive attitude but that changes and there comes a point where you see they no longer have a feel for the community.”*

*“Dare I say, there is a bullying culture in [this Council] and they like to target individuals. In a couple of emails that were sent from the Council to Councillors, our Development Officer was targeted but because he doesn’t work for the Council, and is independent, he stood his ground. If you worked for the Council you definitely wouldn’t take it further. We’ve had people on the [community] forum who have been cautioned at work. It happens all the time.”*

*“It’s a case of ‘Don’t shoot the messenger’ as the staff we were speaking to had no power to make decisions. It’s too frightening for employees to deal with, it needs willingness from managers.”*

*“[being supportive is] not their job. Their job is to find their way through something new to them as well. It’s a struggle for them...you are asking naturally cautious people to take unprecedented and untested steps to devise processes that are I suppose entrepreneurial and have inherent risk or challenge. And that is not why by-and-large people work for local authorities. It’s a culture conflict. Entrepreneurial people in communities dealing with plain face bureaucracy. You can understand but that doesn’t make you able to deal with it.”*

#### *7.3.1.6 New legislation leading to increased formality and resistance*

Some community interviews indicated that in some local authorities, the 2015 Act has prompted some entrenchment and a slow-down of processes. Some perceived local authorities as being less strategic, adaptive and flexible as a result of legislation, and in some cases processes which had already been established, have been retracted; processes which used to be negotiated are now much more bureaucratic; and leases which used to be nominal (or ‘peppercorn’) are now more likely to be set at commercial rates. As evident from Box 7.6, some scoping interviewees perceived the Asset Transfer legislation as having potentially discouraged negotiated sales as well as having shifting the focus away from nominal leases towards full asset transfers, resulting in additional costs for communities, increased bureaucracy, and a degree of community disempowerment.

In support of these views, several groups reported a ‘sudden change’ in the Council, from encouragement to resistance (see Case 7.4). One felt the 2015 Act had improved matters even though it caused a delay: *“Halfway through the process the Community Empowerment Act came in and the Council obviously had to review and revise their asset transfer policy. So we’d gone through half of the process under one set of rules, then halfway they changed the rules. The change was ultimately in our favour, it made things easier but at the time it caused a few headaches.”*

Scoping interviewees also saw a need for improved collaboration between local authorities and communities around assets. Several wanted to see local authorities be more strategic, to avoid reactive and over-hasty applications. When decisions are made to sell public assets, they are often sold quickly so it would be helpful to engage with communities to ensure they become aware of opportunities at an early stage.

*Box 7.6 Negative impacts on community-council collaboration/reversal of empowerment – comments from scoping interviews*

*“Local authorities have always done asset transfers - and these (and subsidised leases) should remain important and the legislation should not discourage that from happening.”*

*“If asset transfer were structured differently it would be encouraging more negotiated sales. That should be the objective but that’s not how local authorities see it.”*

*“The Community Empowerment Act has shifted focus from nominal leases, and free asset transfers, towards full asset transfer but at a cost to communities. There are likely to be higher purchase costs in urban areas and also larger urban assets.”*

*“There is some reversal of empowerment as a result of implementation of the Community Empowerment Act measures, driven by the challenging economic context, need to derive a return from transfers, with some councils putting leases through asset transfer and requiring businesses plans as a result. Councils don’t want to give up income and may prefer not to act than risk a hit.”*

*“Some local authorities have changed terms on some leases since the Community Empowerment Act, with the result that the new terms may require that the community has responsibility for full repairs and maintenance. This is driven by the economic context and public sector funding.”*

*“Local authorities are reverting to bureaucratic processes if they are available – previously they had to get permission of the ministers for a no-cost sale, but now they have this authority but lack skills and confidence to make decisions relating to assets in some cases.”*

Even where the local authority is not seen as obstructive, the shift to an asset transfer process under the terms of the 2015 Act was seen as having prompted much emotional wear and tear on community groups, partly because of the uncertainties involved.

### 7.3.2 Process

#### 7.3.2.1 Unclear and ad hoc process

While scoping interviewees welcomed the clarity and rigour of the process in theory, experiences showed that the process is very different in practice. Many communities expressed exasperation and exhaustion with their experience of the process (Box 7.7). Several community groups (and one local authority) reported an experience of being passed from one department to another. Scoping interviewees tended to agree, stating that *“Lots of local authorities are not ‘on the ball’”*, naming one local authority *“a disaster zone”* while also noting that implementation varied widely and some authorities are ahead of the game and have been outstanding.

More commonly the experience lies between the two extremes: *“The Council wanted the group to get the land, it’s just the management of the process. It’s one individual whose name is the contact. [It’s putting] too much on one person, if they want to focus they are going to need a couple of members of staff.”* [community interviewee who is also a Council employee].

*Box 7.7 comments from community groups on experience of process. Note that because of the length of the process not all are fully attributable to the 2015 Act.*

*“At no point when I took on this journey did anyone tell me how difficult the process would be. It’s the correspondence. There’s no answer to phone calls. They were asking me to submit documents to go to panels, we would wait then they would come back and say ‘you didn’t submit XYZ’ but they never asked for that in the first place.” [community interviewee who is also a Council employee]*

*“The process took 8 years with a lot of ups and downs.”*

*“The Council have put another delaying thing in. They are insisting that we put in an EoI prior to making an asset transfer request. Our development officer had a stand-off with them, said it is not in the legislation.”*

*“The new budget for [our Council] indicates that they want more community groups to go for Asset Transfers. They are going to have to sharpen up their act. You go through, you do all this paperwork, you go out and... we done door to door surveys. Then it goes to the Strategic Asset Transfer management committee. The High Heidyins of the Council land then asked – is that the best use of the Council land. Then it is signed off and goes to board of local Councillors. Once that passed, they said the legal department is getting a lease.”*

*“The legal process took 15 months. We couldn’t believe how slow the Council were. We did everything, our solicitors did everything they could, the Council’s legal department tried every trick to get in little things. For example, we had to agree to keep the condition of walls in good nick. Little caveats.”*

Many groups are juggling multiple processes simultaneously: community consultation, the asset transfer request itself, business planning, funding applications, building design and permissions. Those buying buildings, or land on which they intended to build, were attempting to gain planning permission at the same time as, or before, their asset transfer request.

A number of relevant authorities have instituted an initial “expression of interest” stage. Insofar as this facilitates early discussion of proposals between community bodies and relevant authorities (as recommended by guidance) this is to be welcomed. However, whereas in some cases it is clear that this is an optional stage for mutual benefit and to enable the development of stronger requests, in other cases the expression of interest is presented as part of the formal decision making process.

#### *7.3.2.2 Review and appeal*

A particular feature of the 2015 Act is that it provides the opportunity for decisions to be reviewed. This process is still relatively untested, and several interviewees questioned the value of an appeals process that was assessed by the relevant authority itself.

For example, one community group decided to seek a review of the decision but felt that the Councillors did not have an open mind on the situation: *“Officials turned it down and then the councillor rushed out this press release saying all the four councillors backed the decision. We felt that the press release prejudiced our review. The councillors are on the review panel, but they had publically said they endorsed the officers’ decision.”*

The 2015 Act also allows for the community to take that review to the Scottish Government level. One group interviewed is doing so, but feels the process is unclear (Case 7.6).

Another was urged by other groups to do so, to test the process, but in the end decided it was too much work for uncertain return. In their case they felt the local authority undermined their confidence: *“One of the council officials was pouring scorn, saying it is very difficult for the Scottish Government to tell a local authority what to do.”*

*CASE 7.6: An attempt to buy land for a community sports facility goes to Scottish Government appeal*

This case describes an island community which has for many years wanted to develop a small piece of land opposite the local school to create an all-weather pitch. It has been a frustrating process for the community, and has gone from local authority review to Scottish Minister appeal. They feel the process is *ad hoc*, biased and demeaning.

There is a long history to the plans for an all-weather pitch on the island, dating back 35 years. In 2014 planning permission was granted following a feasibility study on future sports facilities for the island. *“We’d applied for planning permission, a draft lease was circulated but local opinion was therefore that a lease was not the best way”*. They had seen situations on other islands where the community access was limited both financially and physically as a result of public private partnership contract. Local management of the asset is considered to be the best way forward, and *“there is a lack of belief in the Council that they will deliver.”*

*“We submitted the asset transfer request and we thought the Council would be supportive, with the planning application having been approved and a draft lease circulated. But suddenly the Council’s attitude changed. They now insist they need the land for a construction compound and temporary classrooms. The request was submitted in August 2017; it was not acknowledged until November, although the Extract of Minute of Meeting of Asset Management Senior Officers Group dated 31<sup>st</sup> October 2017 indicates the decision was made in October. “When we met the CE in November he didn’t say the decision had already been made and only at the start of January did they make it public.”* The community decided to appeal.

Two MSPs and an MP wrote to the Council and said there would be a lack of confidence in the process if a site visit didn’t take place, but nobody from the appeals hearing had visited the site. For the appeal itself the community members were asked to go to [the town where the Council sits]. *“That would have been a three day round trip for us and no expenses paid. So it took place by video conference, but all the rules were set by the Council and in their favour. We had to say who was attending, request for permission to speak, submit all evidence beforehand, whereas we had them giving long spiels based on no evidence.”*

*“Only the panel was allowed to cross-examine against evidence and we knew that some of the evidence was ill-informed. But we weren’t able to cross examine. The minutes are a farce. There should be an independent clerk taking a note. The minute just states that both parties were given an opportunity to present their cases – there was plenty that was challengeable but we were not allowed to challenge it. However if it had been written down we could have challenged. They brought no new evidence. We took 77 pages of evidence!!”*

Now they are taking the appeal to the Scottish Government. *“We don’t even know where to send it, or who to. There are no proformas or templates. It has been very ad hoc.”*

### 7.3.2.3 Timeframes

Many interviewees highlighted the huge burden on voluntary effort and the time needed to review the legislation and work out how to engage with the appeals process (Case 7.6; Case 7.7). Some saw the fixed timeframe as adding rigour to the process (as noted in the strengths section above), while others felt that a good relationship required some give and

take. As one scoping interviewee noted: *“They [communities] have a lot to do in the time set – it only tends to work to time if people know what they are doing and the community is already formally organised.”*

*CASE 7.7: Buying an asset before the asset transfer legislation: six years of negotiations and unwelcome surprises*

*“The farmhouse was derelict, we found out it was owned by the council ... eventually when we found out who the property officer was, we put together a long proposal, we thought we’d put in lots of work, but we met with them, got a pat on the back, ‘very nice and we’ll let you know when we’re thinking of selling it’. So we went about slowly building our volunteer committee, consulting, engaging with local communities in different ways.*

*Then three years in, the ‘For Sale’ sign went up, no warning – despite what the council had said. This was two weeks before Christmas, the closing date was end of January. We didn’t have any money to do the valuation! We also needed an up to date survey, a detailed business plan which outlined how we would run a social enterprise, and our feasibility study. Somehow, we submitted our proposal, about 500 pages of documents.*

*Our bid was for an asset transfer of £1 based on the principle of keeping the land within public and community hands. I phoned up the Council estates office about a month after bids went in, and the officer said ‘we’ve decided to sell it to the highest bidder.’ So that’s when the next stage of the journey, about two-and-a-half years starts. We had to get them to agree that this is a matter of public interest, so councillors had to be involved. From an international perspective, it shows how lucky we are to have that level of democracy. They recognised that deciding who the property should be sold to, and price, was still up for debate.*

*5-6 months later a date was set for a public councillors’ committee meeting and we didn’t know what was going to come of that. The papers were only released a week before. The recommendation from council officers was to sell to the highest bidder. We asked them to overturn this and consider our bid. We faced a bit of grilling from one councillor but they then unanimously agreed to give us a licence to use the building for a year and to come back. We had one year to raise the funds, get planning permission etc.- and they would consider whether to sell to us.*

*One year later the decision goes back to public councillors committee for sale of the asset. Despite now having over £1.1 million promised from funders, running a year of community activities, and developing a wide range of support, the council recommended that the property was not to be sold to us unless we paid the full market value (£215k). We were told we would not get the funding promised if we had to pay full market value. We were not told this a year before when we submitted our bid for £1.*

*Another long campaign ensued, where we were not told what was being discussed and recommended behind closed doors. We again had to give a deputation to challenge the recommendation to only sell it to us at full market value. Luckily the councillors agreed to overturn this and transfer the property to us as an asset transfer for £1. We all agreed to keep the land secure, that it must forever only be used for the purposes of a community centre, so as to avoid it going into private hands or other use. This was the first burden on the title deeds. The legal transfer took 14 months to complete; we also had to pay the council’s legal fees and do a lot of negotiation over additional burdens that were proposed within the details of the disposition/legal documents by the council.”*

Many communities felt that they had experienced unnecessary delays: *“The Council says confirmation is imminent. That’s a sliding imminent. It was imminent in November”*

[community interview conducted in May of the following year]. Some also questioned whether the timeframe allowed is appropriate. There were contrasting views on this point – depending on how much the community organisation was required to do before putting in an offer.

Under the 2015 legislation, timescales can be extended through written mutual agreement but many groups did not seem to be aware of this. For example, one community group which had to assemble planning permission and funding approval, felt that six months was much too short; while another felt that it was too long and just gave the local authority an excuse to put the issue on the back burner. Others felt more time was needed, to reflect the challenges of an urban application: *“The gap between end of SLF 1 [Scottish Land Fund Stage one application] and applying for SLF two is not enough. It needs to be a year to allow time for the asset transfer stage two [a two part process introduced in some local authority areas], which particularly in urban environments is so untested.”* Even where the process is transparent the process is not easy: *“it was a lot of sweat and time. We would have hit the ground running on day one [if we had already been constituted]. We came in with our eyes shut.”*

Scoping interviews put forward a rather different perspective, with some interviewees feeling that communities did not understand the pressure on the local authorities and had unreasonable expectations.

#### 7.3.2.4 Valuation

The guidance accompanying the 2015 Act provides a steer on valuation, but as interviewees from various sectors acknowledge, the valuation process is not well understood by communities, nor by relevant authorities.

There is very wide variation in attitudes to valuation, with many community interviewees feeling that they should not be paying to take on something which is currently a liability or cost to the local authority. Several were expecting to pay a nominal sum, but at the same time seeking a ‘dowry’ or investment support from the Council, in recognition that they were either taking on a liability, or relieving the Council of the need to oversee a development project. Several community interviewees pointed out that even where an asset is transferred at an apparently nominal sum, there are significant costs associated with the process, which have to be funded by the purchasing community group (Box 7.8). Many justified this ‘nominal value’ on the grounds that they were taking on a liability, or that they would be adding social and environmental value. Some said they would like to see a *“formal means of discounting the price for community ownership. Recognising the value added by the community owning it.”* This is a component of the guidance accompanying the 2015 Act, and it was clear that many community groups were not aware of the general guidance on valuation.

In contrast some assets are valuable and productive. However as intermediary interviewees pointed out, land values are currently highly inflated. One group had bought an asset that turned out to be overvalued – the timber in the forest was not able to support the business plan. As a result they felt *“It’s a poisoned chalice. If the value hadn’t been set so high, hadn’t been indicated as high value, SLF would have turned it down because it wouldn’t stand on its own feet financially.”*

In these cases, where the asset was to be sold at a price set by the district valuer (or some other objective process), several groups found it frustrating that the valuation (a process costing up to £2000) was only valid for six months. The asset transfer process usually takes longer than this so further valuations may be required. Several community interviewees were unhappy with the relevant authority about this requirement, but this appears to be based on

a widespread misunderstanding as it is the funders (e.g. the Scottish Land Fund) who currently require an updated valuation even when both parties are happy with the initial valuation.

*Box 7.8 Costs associated with purchase at non-market values [from community interviews]*

*“We had a consultation, funded by an Awards for All award. We secured some funding from HIE which paid for the legal bill. In total it cost £13-14k just to spend that £1.”*

*“We didn’t pay the Council for the assets. We had a bit of funding from HIE to do the conveyancing, £5-6k. It took an awful lot of my time, 30% of my time for a year. So that was a cost to the Trust.”*

*“We also did an asset transfer for the Council for the old Primary School and that was a bit of a hassle because they listed a [token] price of £100 but the legal costs were £4500.”*

*“We were asking to buy it off them for a nominal sum, about £1000. We were putting in the economic benefit to a fragile community. They had set aside £400 000 to develop the site, that was minuted in two committee meetings in black and white.”*

*“We have offered £1 to buy the asset. This has not been accepted yet. [The relevant authority] have welcomed the letter, have helped to fund appointment of consultants. But the asset must come with a dowry, to deal with really quite serious problems ... flooding in basement, dry rot. We are looking for £2 million - .. if we don’t get enough we won’t proceed.”*

#### 7.3.2.5 Costs

Many community interviewees were surprised or overwhelmed by the way that costs mounted up, simply to put together an asset transfer request. These included, collectively: planning costs, topographical surveys, quantity surveyors; design; valuation fees; feasibility studies; VAT advice. To community groups, it was not always clear what the costs would be (Box 7.9). They also often seemed to feel it was unfair to pay a local authority’s costs. Local authorities quite reasonably felt that they should not cover the costs of losing an asset. The more practical issue appears to be that these costs are unexpected and if known or planned, could have been included in fundraising applications.

*Box 7.9 Community comments on unexpected costs [and compare with Box 7.8]*

*“We don’t know but we believe that if title deeds are drawn up the Council will make us pay for them; and we don’t know if SLF stage two will pay.”*

*“Only now it’s completed they’ve told us we need a solicitor, now need to tell the group they need to raise £1000 - if they had told us we could have fundraised.”*

*“We had to pay the Council’s legal fees. We weren’t told [this]. So we ended paying £10k for the property [legal fees], we didn’t have it built in to the lottery application.”*

#### 7.4.2.6 The role of development officers in the process

Both intermediary and community interviewees highlighted the value of a development officer in putting forward large asset transfer requests. The intermediaries noted however that there were pros and cons to be taken into account. DTAS, HIE and SLF provide funding for development officers; where these are already in place one of the tasks they can take on is to develop an asset transfer bid. Alternatively, some groups get funding via Stage one SLF to get contractors to do a lot of the early stage work or apply for funding e.g. Awards for All

to employ a contractor to take on management of the detail of the project. Major asset transfers often rely on the time, experience and skill of a development officer employed by the community organisation (Box 7.10). Development officers are often a great resource for community groups and in many cases have been essential to progress but they do not necessarily have experience of asset transfer/acquisition (and are unlikely to have used the new processes). Regardless of the level of development officer input community volunteers are still required to undertake a significant workload to manage the process and the employee. Having a development officer can therefore be a double-edged sword. They have more time during working hours to engage and push the process forward but volunteers still need to engage fully to understand the implications of what they are doing and make the right decisions.

*Box 7.10 Views from communities on the role of development officers*

*“It would have been even worse if we hadn’t had the development officer – if he hadn’t been here pushing them on the legislation and deadlines we’d still be waiting.”*

*“Legal/administrative aspects of the transaction went smoothly - down to the quality of the staff [i.e. the development officer]. It’s about understanding the process. When we tendered we had the experience to know what tender to put out. I can guarantee there are communities who say they just want legal advice and run up a huge bill. I’m very specific on what outputs I want.”*

*“I came out of the private business sector. That’s something that is massively undervalued, to pay someone £25k give them a one year contract. I had a portfolio of £3-4 million. You are responsible. It’s just insane. You can’t even get a mortgage. If you are trying to recruit someone ... you are expecting them to deliver something that takes 5 years minimum.”*

*“I made a big personal commitment, moved my family from Glasgow, we live in the village; I was optimistic that it would work. I earn £23k which is rubbish for the level of responsibility. But I’m hugely committed [despite all the problems that have emerged] and not going to walk away ... we’ve made a life here.”*

### 7.3.3 Beyond ownership

Many interviewees highlighted that ‘ownership is not the end point’: *“if there is a real political will that recognised the social and economic and environmental benefits of community groups developing land, there has to be support in place for the next step.”* Some groups had tried leasing the asset before buying it, which gave them and the relevant authority the confidence to transfer it. Others felt that ownership was not desirable and over-emphasised as a headline objective. Uncertainties over the quality of business plans, feasibility studies and the availability of post-purchase funding created uncertainty and anxiety (Box 7.11).

*Box 7.11 consequences of ownership without development support*

*“That was quite a success, all of a sudden we had this asset. Then we ran up against: ‘so what do we do now, can we get the funding to do what the community wants to do with this?’ There was no business plan, and we would have to spend a significant amount of money, which would have only benefited about 17 people - so who in their right mind would spend £150k!?! You need a sustainable business plan, show how you will maintain it.”*

*“You can’t keep selling of bits of land here there and everywhere if there is not the funding to develop each and every bit of land. If that is a competition some communities will lose out.”*

*“It is going to be difficult to start from zero. If anything major went wrong we would struggle [because we didn’t ask for a maintenance grant].”*

Furthermore, many felt that owning the asset was too often portrayed as the end point, 'box ticked', but that the bigger challenge still lay ahead for the community group (Case 7.8), with communities learning continually through a very challenging process. As community groups identified, the process requires considerable patience, motivation, sider support and ensuring you have a strong business case (Box 7.12).

*CASE 7.8: Community trust fails to secure expected development funds and is left with a derelict school*

This case describes a successful community purchase of a school, and the complications that followed when they could not take forward the plans for developing it. The community undertook significant consultation and there was unanimous support for the purchase and development of the disused buildings. They were asked what they would like to see become of the school buildings. There were 28 options put forward. It was decided that the project should prioritise: (a) meeting as many of the community needs as possible; and (b) generating revenue to ensure sustainable development, and maximising benefit to community.

*“Over a quarter of a million pounds was spent purchasing the land and buildings and developing plans for the school. The purchase was relatively straightforward. The Council was willing to sell. We progressed to a stage where the building warrant, and all the detailed business and operational plans in place. Everything was laid out and the total project (including purchase and development) would cost £1.9 million to deliver. We secured over £900k, and then went to the Lottery’s Growing Community Assets Fund, for £1.2 million. We had been encouraged by the funder to apply for £1.2m (the maximum available being £1m) and had already secured development funding from them; this indicated there was strong support for the project however the application was turned down and we were unsuccessful. The feedback from the funder suggested that they didn’t like that we were going to commercially lease the building. They wanted more community involvement, they would have preferred for the community to run it rather than lease it to a commercial operator.*

*The community saw the proposal which they had submitted as the least risk option. If you are relying on volunteers to run an asset, they only have finite resource. The community knew they didn’t have the capacity to do it [on a voluntary basis]. By leasing the building commercially the community could ensure there was limited competition with other businesses and ensure the maximum return in revenue to the community.”*

*Now the community is left having spent £¼ million, having invested three or four years of project development. Now the building is falling down ... The current situation is that people are frustrated with the lack of progress. The Board were falling out with each other, and there is a lot of misguided tension. Some members of the community see it as failure because they didn’t get the funds. The real picture is that the community have successfully purchased and delivered detailed and professional plans for an important asset. The plans include full planning permission and building warrant. To reach this stage is far from being a failure. Given the amount of work, effort, time and commitment it would appear to be folly to simply to walk away just because you didn’t get one grant - but if there are no other sources of funding available where does the community turn?”*

Box 7.12 Community group comments on advice for other groups

*“Ownership of an asset is about being able to develop it and develop against it. It is not just a community feel-good factor, there is a business case behind it. If you can lease for a £1 and the responsibility for maintenance is someone else’s [why wouldn’t you]. If it is just being driven by the other side who want shot of it, you should push for a lease. But if you have an asset that is right for development and the asset gives you the opportunity to borrow or remortgage, do it.”*

*“Don’t do it on your own. Get people you know and trust then form a strong group. The project then gets owned by the community.”*

*“You need to believe in it passionately.”*

*“Understand that there will be peaks and troughs. The troughs will pass, and don’t think when you are on a high it’s done.”*

*There will be ups and downs, you will fall out with people, there will be issues in the communities.*

*“Don’t see yourself in a bubble. Be aware that there are organisations out there that can support communities. There is guidance.”*

*“Don’t believe what officers tell you. It needs to be in writing but even then don’t believe them.”*

*“Familiarise yourself with the public body’s CAT [community asset transfer] policy.”*

*“Be patient and have awareness that it will take years rather than months. It’s not something you want to rush.”*

## 8. CROSS CUTTING THEMES

This section reviews *additional* key strengths and challenges which relate to a greater or lesser extent to all legislative and non-legislative routes to community ownership and which have not been covered in detail in the preceding pathway sections.

### 8.1 Cross-cutting strengths

The routes available to communities for pursuing the acquisition of private and public assets have developed considerably in recent years. Critically, negotiated transfers, legislative development and key buyout ‘success stories’ have had a considerable collective impact in delivering growth across the sector (see Section 1.2.2) and facilitating wider dialogue for encouraging negotiated transfers (see Section 3). In a number of cases communities recognised the positive emotional impact of a successful acquisition and the resulting impacts on community motivation, cohesion and pride: *“We felt huge pride. When we had the big opening there were tears of joy. We’ve just had really significant community build, across ethnicities, social class, nationalities, something really worked for and genuinely achieved.”*

Considerable further opportunities for increasing community ownership exist, including in relation to transfer of publicly-owned land in rural and urban areas. Furthermore, key examples of progressive landowners facilitating transfers, local authorities with an established track record of well-developed asset transfer, and previous successful transfer schemes (e.g. the National Forest Land Scheme) provide opportunities for informing existing and future processes relating to all legislative and non-legislative routes.

### 8.2 Cross-cutting challenges

A fundamental challenge for the community ownership agenda remains the unwillingness of some land and asset owners to sell to or engage in negotiations with communities, a factor which has been discussed in detail in previous sections (Sections 3-7). As highlighted in Section 4, relations between communities and landowners (including landowning public bodies and NGOs) can be affected by a variety of factors (e.g. conflicting valuations) and the existence of legislative mechanisms can have both positive and negative impacts on the potential for negotiated sales and asset transfers (see Section 4.3.6 and Section 7). A critical challenge therefore remains to balance the need for creating a climate for negotiation and positive dialogue, with a requirement for employing legislative mechanisms (potentially including emerging compulsory purchase routes) to address challenging cases and to facilitate sustainable community development.

As identified in Sections 3-7, difficulties in identifying and contacting owners, and the complexities of mapping ownership, can affect all ownership pathways (e.g. Section 4.3.6.2). The ownership of public assets by Arm’s Length External Organisations (ALEOs) is an issue in relation to asset transfer in particular (Section 7). Further challenges relating to all routes include: the complexity and process timescales of current routes to ownership; and the challenge for communities in deciphering the most relevant route in each specific case (Sections 3-7).

#### 8.2.1 Funding

The availability of funding was widely recognised as fundamental for enabling community acquisitions, with many interviewees arguing that this is a more important driver than the existence of relevant legislative pathways.

Over time, community acquisitions have occurred in direct relation to the availability of funding, as opposed to the development of legislation or associated measures<sup>37</sup>. The Scottish Land Fund (currently £10M a year) was highlighted (by all groups) as hugely important for acquisitions and broadly seen very positively, with interviewees stakeholders and communities acknowledging the balanced and efficient approach of the application and decision-making process. The two-stage SLF application process was viewed as having increased the robustness of applications (e.g. under CRtB and CAT), owing to the structured approach and increased availability of pre-acquisition financial support for communities (e.g. for commissioning feasibility studies, development plans etc.). The potential for obtaining support for a development officer post (for up to two years) from the SLF was viewed as critical, particularly given the reliance on volunteers during the purchase process and requirement in many cases to develop further income streams post-purchase.

Critically, the inclusion of urban areas under CRtB and implementation of asset transfer under the 2015 Act (combined with other factors such as declining local services) has led to a shift in the funding balance, from a previous emphasis on funding purchases of large areas of rural land, towards an increasing emphasis on funding urban acquisitions and a consequential increase in the total number of projects being funded (although many applicants are not purchasing through legislative routes). The increase in urban applications has also increased the number of applications to fund the purchase of buildings, necessitating a greater requirement for Stage one funding (as urban applications often require considerable preparatory work). A large number of projects are currently receiving Stage one funding (relative to the number receiving Stage two funding), with a relatively long time lag between the initial project idea and the submission of a full Stage two funding application. Additionally, some scoping interviewees argued that the current requirement for revenue funding to be a maximum of 20% of SLF funding created challenges due to higher numbers of Stage one applications.

The mechanism of transferring the SLF funds for the acquisition can also have cost implications for the purchasing community. Currently SLF pay the funds to the community, which then remits the full amount to the selling body. This has the effect of increasing turnover for the year in which funds are received, and for some groups this will mean their income exceeds the threshold for audit (£500,000), bringing additional expense, both in terms of the additional accountancy costs and the additional staff time required to service the audit.

Although the amount of funding available for acquisition was often seen as (currently) sufficient, the assets being acquired are often not 'fit for purpose' and have high immediate development/management costs. As the SLF does not cover these costs, this was recognised as placing increasing pressure on development funding streams (e.g. Big Lottery). Critically, a majority of interviewees (all groups) thought that the lack of any significant increase in available development funding is the most significant challenge for delivering wider sustainable community ownership in Scotland in the future. The declining availability of development funding was viewed as linked to four key factors: i) a reduction in the amount of funding available through key (e.g. BLF/HLF) schemes<sup>38</sup>; ii) an increased number of applicants (increased demand); iii) a significant number of community bodies seeking funding for development related to previous acquisitions (i.e. a backlog of applicants); and iv) an increase in confidence in community bodies, which results in ambitious development plans that require significant investment. Additionally, most fixed

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<sup>37</sup> Analysis (unpublished) of applications and purchases under the Land Fund from 2001 (and GCA 1+2) evidences that the number of acquisitions was highest in 2002, the year after the Land Fund (30 acquisitions) and declined following the passing of the Land Reform (Scotland) Act 2003.

<sup>38</sup> Former largescale acquisitions relied strongly on BLF Growing Community Assets; the replacement BLF Community Assets has more limited resources, narrower eligibility criteria and a lower application success rate.

funds are limited to a two-year timeline and there is a lack of available funding for investment in community infrastructure. Scoping and community interviewees in particular argued for a greater recognition at political levels of the need to resource the development of *sustainable community ownership* and development, as opposed to a political focus on increasing community ownership.

Scoping and community interviews also highlighted the difficulty of navigating the development funding landscape, with most funding packages consisting of a mix of different sources and applications. Additionally, although the SLF collaborates with key development funding schemes, communities may be successful in acquiring SLF funding (and therefore acquire the asset) but fail to acquire development funding via the Big Lottery's Community Assets Fund. Failing to acquire development funding following acquisition was noted as leading to substantial delays in developing a viable community project (see e.g. Case 7.8).

Notably, the number of applications seeking funding for publicly-owned assets has increased substantially in recent years<sup>39</sup>. Some interviewees argued that this represented inefficient use of public funding streams and an unnecessary circularity of public funding.

Additionally, both scoping and community interviewees argued that certain communities find it more difficult to acquire funding (and indeed to navigate the whole acquisition process), including disadvantaged communities with limited available capacity, where in fact the need for funding may be particularly high.

#### 8.2.2 Wider support frameworks and professional advice

A key strength widely acknowledged across interview groups was the existence of an established support framework for aspiring and existing community owners. This included the Scottish Government Community Land Team, who were praised by the majority of community groups for their fairness and "*going above and beyond the call of duty*". HIE and DTAS (including COSS) were also repeatedly acknowledged as vital for providing advice, guidance and funding to support community groups in overcoming key hurdles across all ownership pathways. In forestry cases, similar recognition was made of the expertise of the Community Woodland Association. The establishment of the Scottish Land Commission was highlighted by three scoping interviewees as a potential strength, particularly in relation to future opportunities for providing impartial facilitation. Furthermore, it was recognised that the expansion of community ownership has created a substantial and growing pool of experience, which provided communities with opportunities for networking and knowledge sharing as well as providing moral support and confidence. These opportunities are seen to have increased with the establishment of Community Land Scotland.

Nevertheless, scoping and community interviews highlighted the perceived variability in support across Scotland, with no clear equivalent to HIE (and specifically their Community Assets Team) in the South of Scotland<sup>40</sup>, which creates a disparity in the support available to communities attempting to acquire assets. Several community interviewees felt they had only discovered how much help was available, rather late in the process: "*Nobody told us they existed. I had to cobble things together from first principle.*" They also highlighted difficulties in determining the most suitable source of advice, with the agency and wider support network viewed as dispersed and complex for inexperienced volunteers to navigate

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<sup>39</sup> The full SLF 'pipeline' (i.e. organisations at different stages of the application Phase 2 application process) includes approximately 200 organisations that have not purchased, approximately one third of which relate to asset transfer requests.

<sup>40</sup> It should be noted that HIE's community asset team does operate across Scotland although there are some disparities in relation to funding availability between regions. Additionally, some interviewees highlighted the need for a support framework which specifically recognised the different regional context in the South of Scotland and was not based on extending the focus of an agency with a predominantly highland remit.

as it *“is not a one stop shop situation when you are going about this”*. Additionally, scoping and community interviewees viewed the support available from local authorities as highly variable (e.g. for CRtB and asset transfer applications), with some highlighting the short-term focus of local authorities as opposed to focusing on long-term downstream benefits of engaging and supporting communities in relation to asset acquisitions.

Professional consultants were widely used by communities to support applications and acquisition processes (all pathways) and generally viewed as a key part of the process to ensure increased professionalism, particularly for feasibility studies and business plans. Nevertheless, the suitability and quality of consultants was repeatedly noted by interviewees in all groups as widely variable, which affects the quality of feasibility studies and business plans. In some cases, a shortage of available consultants was recognised, particularly outside the Highlands and Islands. This was recognised as affecting the quality of feasibility studies and business plans and, in some cases, resulting in uninformed advice being provided to communities (potentially raising community expectations unrealistically) and grant funding being used ineffectually. In contrast, some intermediary interviewees argued that consultants were often tasked with creating feasibility studies and development plans for poor quality assets with limited income potential and in some cases operating without a clear and focused brief from the community body. Some scoping interviewees noted that rural consultancies (although more frequently used by landowners) were increasingly well-informed about community development. As two scoping interviewees noted, the use of land agents offered some potential (in rural cases) to negotiate for the community on detailed land-related and legal aspects and add weight to a community’s efforts to acquire land. Others noted that the use of a lawyer instead of a land agent had caused unnecessary stress when it came to conveyancing: *“I felt that they weren’t getting the right advice on quite standard land issues, that became a big issue for them”*.

The costs associated with consultants and advisors was noted as higher in urban areas, resulting in the available funding for professional fees being insufficient in some urban cases.

The provision of a part-time legal advisor through COSS (the Community Ownership Support Service, provided through DTAS) was highly valued by communities, and available, informed legal expertise was seen as gradually increasing. Nevertheless, scoping and community interviewees recognised a number of challenges relating to the availability of legal advice for communities (Box 8.1).

*Box 8.1 Challenges relating to the provision of legal advice for community bodies engaged in acquisitions (community and scoping interviewee perspectives)*

- A gap in legal knowledge within the legal profession in Scotland in relation to experience of land reform legislation, with some legal advisors reverting to their knowledge on property law. Some community groups perceived as having received poor legal advice.
- A limited set of test cases and practical experience of legal challenges of land reform pathways.
- High legal costs for test cases and the limited scope of public bodies to become involved in multiple cases (a concern linked to use of compulsory CRtB routes).
- The costs of legal support for communities, particularly in prolonged and conflicted negotiated transfers and/or CRtB cases. It is also difficult to predict costs and acquire the necessary financial support before any costs are incurred.
- A perception that some legal advisors and land agents/agencies are more aligned with the private sector and their interests.

Finally, while not providing technical support, many community interviewees reported that they had sought the support of MSPs and MPs: *“Thanks to lobbying, [our MSPs] had always been supportive.”* However some felt that their political representatives did not understand the legislation: *“Our local MSP seemed a bit ignorant of the legislation.”*

### 8.2.3 Community capacity and volunteer burnout

A positive element of *“learning through the process”* was generally evident among community interviewees across all pathways (albeit often a highly stressful learning process). In particular, community interviewees highlighted the value of building networks and sharing experiences, both within their own community and with other communities with experience of attempting to acquire land/assets. The requirements in most acquisitions for developing a business plan and feasibility study and for engaging the community, were recognised as highly informative for community bodies. A number of community interviewees noted that going through the acquisition process has increased their ambition to own assets and led to them considering local assets more strategically.

Nevertheless, scoping and intermediary interviewees highlighted considerable differences in capacity and skills and experience between communities, which affected their ability to engage with processes such as CRtB and asset transfer. Interviewees in all groups commonly noted that community bodies tend to rely on a limited core group of proactive, engaged volunteers. This can affect long-term momentum as volunteers are affected by volunteer fatigue and burnout over time. *“I’m on the edge [of burnout]. I wouldn’t be speaking out of turn, if you asked others they’d say, I’ve personally given a lot to it.”*

Three intermediaries highlighted the challenge of balancing the need for continuity with the need to recruit new volunteers such as board members (particularly those with some governance experience), especially as the skills and mindset required to begin the process were often different from those needed for delivering a long term project (referred to as ‘founder syndrome’). As some landowners argued, communities were often required to learn new skills rapidly, including land management, governance and property refurbishment.

Communities often referred to feeling *“out of their depth”* during application processes for CRtB and asset transfer and commonly referred to the need for extensive skillsets. As one interviewee who had been involved in a CRtB application relating to an aspirational affordable housing development (which included a detailed planning application) stated: *“the process needs a lot of skills, our group included experienced councillors, an architect, a quantity surveyor and people with community development experience, it would not have been possible otherwise and still we did not get the site”*. While many volunteers are retired, other key volunteers often have full-time jobs and other commitments: *“three of our most important volunteers are young and have families and some are involved in other community activities”*.

Communities stressed the need for volunteers to be aware of *“what they are taking on”* and managing community expectations in terms of the time pressures and responsibilities, with some assets potentially becoming major liabilities should sourcing funding and support prove difficult. There is often a high cost particularly in emotions and energy, in preparing and submitting an application. Where this is unsuccessful, community interviewees often viewed it as having been a waste of their time, and of public and other funds, as well as resulting in an undermining of trust. Several community groups flagged up frustration and concerns about wasting public funds in preparing cases that were rejected: *“It’s a waste of public money – £14-15k has been spent on the options appraisal; it’s a waste of his time, and officials’ time.”*

Several community interviewees also noted that, regardless of the outcome, volunteering for community bodies was often a ‘thankless task’ with a high emotional cost, with local authorities and community councils sometimes challenging and obstructive leading to some communities feeling let down by the process. As one community interviewee stated: *“the community council are obstructive and while most of the community support us, some rivalries have developed...people’s outlooks can be affected by politics, not everyone likes the idea of community ownership”*. In some cases, the barriers encountered by communities left them feeling a deep sense of betrayal: *“It was systemic institutional abuse”*. *“The Council has used every opportunity to put up an obstacle and as you knock the obstacle down they have something else behind it. They are playing games. They are playing divide and conquer.”*

Some scoping interviewees agreed with community groups that relevant authorities often under-estimated community capacity, with challenges perceived as related to capacity often more often related to energy and time capacity, than to lack of availability of skills. Several community interviewees reported that local authorities questioned whether communities had the capacity to manage assets, even where they had already demonstrated a track record of this. They disagreed with the view that *“If they had better capacity the process might move faster”*. Interviewees from community groups often felt they had been underestimated or belittled by the relevant authority. One pointed out *“[The relevant authority] couldn’t give us any accounts for the [asset] but one of our members is a retired investigative auditor.”* Another reported that *“The Council is always saying, oh how is the community trust going to do it? But we have board members with construction backgrounds, who [have shown how the] Trust can do things a lot cheaper and better. Our proposal would have been a good deal for taxpayers.”*

#### 8.2.4 Mis-alignment of legislative pathways and lack of strategic approaches

Community and scoping interviewees noted that communities are often unaware of property sales until relatively late in the process, owing to sales occurring through informal marketing or communication channels which the community are unaware of (e.g. auctions outside of the area or private sales). As three intermediaries noted, significant areas of land are held in corporate structures and private trusts, with many transactions completed without the land going to the open market. There was also recognition within this interviewee group that private landowners are increasingly utilising this route. In practice, this results in communities taking a very reactive approach to asset acquisitions (or missing an opportunity completely). Consequently the momentum (e.g. for a CRtB application) is triggered by the sale in process, as opposed to being part of a strategic approach to community development. Sales in some urban contexts proceed particularly quickly – e.g. see Section 4.3.7). This could perhaps be addressed by making multiple strategic registrations but the CRtB process was recognised as poorly suited to this, owing to the need for communities to identify and focus on specific assets and the workload involved in each application.

These issues were seen by some as further compounded by a lack of clear alignment between existing legislative pathways, including constitutional and membership eligibility requirements for CRtB and asset transfer; and between funding streams and legislative pathways. A number of scoping interviewees noted the disjointed nature of advice from local authorities, public agencies and the Scottish Government and the ‘separation’ of CRtB and asset transfer in terms of information transfer and promotion of the two routes by the Scottish Government. This was linked (in part) to the fact that different government departments are responsible for different legislative routes to ownership and the somewhat piecemeal nature of the legislation (see Sections 4-7). This was related to wider confusion around which legislative route or ‘community right’ to use in any given situation. Additionally, as apparent from Sections 4-7, existing established organisations have often faced greater

challenges (i.e. requiring a revised constitution) than newer bodies created solely for the task of taking on an asset through a specific legislative route.

This lack of alignment between the two main routes was generally seen as conflicting with a wider requirement for community bodies to be effective and strategic 'anchor organisations' capable of identifying and engaging with a range of opportunities, as opposed to being created for the singular purpose of acquiring one asset through one legislative route. As one community interviewee stated: *"you end up just reacting to the opportunity because how can you know about it beforehand... and creating your organisation to comply with the legislation...but communities should not be doing this in a box, they should be creating community anchor organisations which are capable of taking a more strategic approach to community development across the piece, acquiring assets through different pathways and engaging in different types of projects, developing income streams"*.

Scoping and intermediary interviewees also related the reactive approach to the absence of a well-resourced and well-developed structure for local-level community planning and identifying community needs in Scotland. Instead, community trusts are seen as *"filling the gap on an ad-hoc basis"*. Some community interviewees also argued that local authorities often fail to work proactively with communities to identify shared opportunities and identify strategic long-term opportunities for asset transfer and joint-working.

## 9. CONCLUSIONS AND RECOMMENDATIONS

This section contains overarching conclusions and recommendations of relevance to all community ownership pathways.

### 9.1 Conclusions

A wide range of pathways, negotiated and legislative, to community asset ownership are now available to community groups in Scotland. Despite the political attention this issue has received, uptake of these pathways has often been relatively low. Furthermore, as apparent from this review, communities often report challenging, frustrating and exhausting experiences: relationships with public and private asset owners are at times undermined; compliance with legislation is inadequate; and attempts to acquire assets via legislative routes either take many years to accomplish, or are unsuccessful.

Community motivations for asset acquisition vary according to asset type and community context, but whether intended to deliver employment, housing, education, recreation or amenity, asset ownership is typically a means to an end: addressing community decline and furthering sustainable development.

Negotiated sales and transfers are widely considered the preferred route to ownership, with legislative routes seen as mechanisms to be employed where negotiations have been unsuccessful. However, as apparent from the findings presented throughout this review, it appears that too often communities are channelled towards formal legislative processes: more could be done to facilitate negotiated sales by supporting public and private landowners to explore the potential for negotiated transfer.

Nonetheless, there is a clear and continuing need for robust legal mechanisms to support community ownership. The legislative framework for supporting community ownership has expanded considerably in Scotland, but as identified in Sections 4-7 the various elements are not always well-understood and it is apparent that many relevant authorities are not always complying with the prescribed legislative procedures.

The development of legislation over the last fifteen years has produced a suite of processes that are not well-integrated in a number of respects and considerable scope exists for improving the alignment of processes, through both legislative amendments and the provision of enhanced guidance and support. In particular, there is a need to ensure that the eligibility requirements of different legislative mechanisms are not mutually exclusive, to allow community bodies to engage with multiple legislative routes over time without constitutional change.

As apparent from Sections 4-7 there is a widespread perception that the processes of community acquisition are still unduly complex, onerous and time-consuming, and present a significant barrier to increasing community ownership. This may represent an even greater concern for some of Scotland's most disadvantaged communities. This should be addressed by further simplification of the legal mechanisms and guidance, and the continued evolution of appropriate support for communities.

The availability of funding has been identified as particularly crucial (see Section 8.2.1), and has historically been the strongest determinant of the rate of community acquisition. The extension of the Scottish Land Fund beyond 2020 is critical for the continued expansion of community ownership, with some amendments to Scottish Land Fund processes and timescales required to align better with the legal mechanisms.

The introduction of the asset transfer provisions and the extension of the Community Right to Buy to all of Scotland's communities is changing the balance of asset types acquired by communities and there is a growing demand for post-acquisition development funding linked to clear recognition at political levels that community ownership is 'not the end point' of the land reform process.

This aspect is critical to ensure the long-term sustainable development of the assets (and the communities that own them) and may be of particular importance in the most disadvantaged communities where asset values may be lower but where repair and development needs may be greater.

The current processes and mechanisms often result in asset acquisitions occurring in a reactive and *ad hoc* way. There is considerable scope to develop a more strategic approach to community asset transfer as part of local community planning and development processes. This requires a shift in thinking at governmental, wider stakeholder and community levels, in relation to asset acquisitions and the implementation of the legislation, to facilitate a more joined-up and proactive approach to community acquisitions.

Finally, legislative processes are only one part of the picture: the growth rate and nature of community ownership reflects the wider fiscal and policy environment related to land ownership and use. It is widely recognised that the current framework of grants and subsidies, tax incentives and exemptions drive the price of land ever-upwards. This reinforces existing patterns of land ownership and inhibits community ownership and sustainable development.

## **9.2 Recommendations**

This section presents recommendations to address the key findings presented in this review. Where the Scottish Government is referred to, this should be understood to include the relevant divisions of the core Scottish Government and all relevant agencies/non-departmental government bodies, including the Scottish Land Commission.

### **9.2.1 Negotiated transfers**

To encourage negotiated transfers wherever possible (i.e. sales and/or transfers to communities outwith the legislative mechanisms), all stakeholders should work towards creating and maintaining an environment for respectful and constructive dialogue between communities and landowners across Scotland, to ensure both parties feel able to investigate the potential for, and engage in, negotiations confidently and without prejudice (relating both to ownership and/or other arrangements such as long-term leases or partnerships). This should build on existing approaches that support the engagement of communities in land use decision-making<sup>41</sup>. More specifically:

Guidance to relevant authorities should clarify that negotiated transfers should be the default method for the transfer of public assets to communities where the following apply:

- The community is seeking to extend / continue an existing arrangement (e.g. renewing a lease), or
- The community is seeking a short-term lease, or
- Where the asset (market) value is low (below £10,000), or
- Where the relevant authority has notified the asset for disposal and the community is not seeking a discount against market value.

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<sup>41</sup> Including the 'Guidance on Engaging Communities in Decisions Relating to Land'<sup>41</sup> (Scottish Government 2018) and potential revision of this guidance to include specific advice for communities.

In addition to enhancing the support available to community bodies (discussed in more detail below), the Scottish Government should give consideration to measures to support private landowners to explore negotiated transfers, including:

- Provision of additional guidance and templates, building on, and increasing awareness of, the Protocol for Negotiated Sales developed by Community Land Scotland and Scottish Land & Estates.
- Provision of a dedicated staff resource to support landowners in engaging in negotiated transfers (potentially hosted by the Community Ownership Support Service (COSS) and Highlands and Islands Enterprise (HIE)). To include provision, where required, of a neutral third party (or support to acquire one) or intermediary to assist with working towards a mutually agreed outcome where communications have become challenging.

### 9.2.2 Robust and effective legal mechanisms

The Scottish Government should take measures to ensure that existing mechanisms operate effectively.

#### ***Cross-cutting***

The Scottish Government should take measures to improve the quantity and quality of information on land and land ownership available to communities. This should include greater development of the underlying information base and increased use of cadastral mapping<sup>42</sup>.

#### ***Asset Transfer***

The Scottish Government should:

- Ensure that all relevant authorities, including its own divisions, are aware of their legal obligations under the 2015 Act to publish asset registers and annual reports. The Act does not include provision for sanctions for non-compliance, but the publication of a list of those relevant authorities not in compliance might provide a useful stimulus to action. Annual reporting should also include negotiated transfers to communities (including those occurring outwith the 2015 Act's measures).
- Review its decision not to maintain a list of relevant authorities' asset transfer websites. If it is decided to uphold this decision then the guidance for relevant authorities and for community bodies should be revised.
- Revise the guidance for relevant authorities, clarifying best practice around non-statutory elements, such as the provision of a single point of contact and the signposting of communities to support services to ensure a transparent and consistent approach for asset transfer requests.
- Revise the guidance for relevant authorities to recommend the involvement of independent persons in the decision-making and internal review processes.
- Revise the guidance for relevant authorities and community transfer bodies to clarify that any 'Expression of Interest' process established by relevant authorities is entirely optional and has no statutory basis.
- Clarify the scope of the asset transfer provisions with respect to Arms-Length External Organisations (ALEOs) and produce clear guidance as to the circumstances under which such organisations are not within the scope of the 2015 Act.
- Ensure that when reviews of decisions are concluded, case studies are produced and any lessons learned are disseminated / written into guidance.

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<sup>42</sup>Cadastral mapping is currently used by the Registers of Scotland: <https://www.ros.gov.uk/services/registration/land-register/faqs/cadastral-mapping-overview>

### **Community Right to Buy**

The Scottish Government should:

- Specify the information required from community bodies to demonstrate proper financial arrangements.
- Clarify whether it is the specific duty under the legislation for the Scottish Government to provide detailed comments on business plans to the community.

#### 9.2.3 Alignment and improvement of legislative mechanisms

The Scottish Government should take measures to align and improve existing legislative mechanisms wherever feasible. These include:

#### **Cross-cutting**

- Develop overarching guidance covering all routes to community ownership (including negotiated transfer), which include identification of relevant support mechanisms.
- Create a single team within the Scottish Government to deal with community assets issues.
- Create a single web portal for guidance, templates and supporting documentation relevant to all routes to community ownership.
- Clarify eligibility provisions for community bodies e.g. the 'winding-up clause' requirements, and if necessary amend the 2003, 2015 and 2016 Acts accordingly.

#### **Community Right to Buy**

- Amend Parts 2 and 3A of the 2003 Act to insert clauses allowing the Scottish Government to designate community bodies and classes of community bodies as eligible.
- Amend Part 5 of the 2016 Act to insert clauses allowing the Scottish Government to designate community bodies and classes of community bodies as eligible.
- Amend the 2003 Act to remove the requirement for 75% of the membership of a community body to be from within the defined community area (reverting to original requirement that a majority of the membership be from the community area).
- Amend the 2003 Act to give communities the right to respond to landowners' comments on late registrations.
- Amend the 2003 Act to extend the period for which expressions of community support are valid (or enable a pause in the timing related to this in cases where feedback from the Scottish Government and/or the decision making process are delayed).

#### **Asset Transfer**

- Make further orders to increase eligibility for asset transfer (e.g. permitting Community Bodies with pre-2015 Act Community Right to Buy constitutions to use the asset transfer provisions).

#### **Part 3A / Part 5**

- Amend the 2003 and 2016 Acts to add an additional stage in the Part 3A and Part 5 processes, enabling communities to submit an initial application to Scottish Ministers prior to making the offer to buy to the landowner or balloting the community, and which if accepted would lead to a prohibition on sale or other actions (including subsequent establishment of an option agreement by the landowner).

#### **Transfer of Crofting Estates**

- The Scottish Government should clarify the status of the Transfer of Crofting Estates (ToCE) route. If ToCE is considered to have been superseded by asset transfer then it can be repealed. If there are circumstances where ToCE is advantageous for the

community then these should be clarified and the process streamlined by the Scottish Government and appropriate clear step-by-step guidance produced.

### ***Crofting Community Right to Buy***

- Alignment of the Crofting CRtB and CRtB provisions for qualifying community bodies, or provision of a derogation for a community body designed to benefit from the Crofting CRtB, to facilitate crofting community bodies to undertake a CRtB application should the need arise.

#### 9.2.4 Promotion and Support

The establishment of wider understanding of community land ownership mechanisms at political levels to ensure parliamentary representatives have the capacity and awareness for responding consistently to community requests for support. To be linked with the measures specified below.

The Scottish Government should take measures to promote all the various routes to community asset acquisition across Scotland, to normalise / mainstream these processes, and reduce negative and adversarial perceptions and mis-interpretations. This should include increased awareness-raising (for communities and landowners) around the purpose/objectives, applicability, relative merits and potential outcomes of all potential routes to ownership (including negotiated transfer).

The Scottish Government should take a range of actions to promote and facilitate sharing best practice for communities, public and private landowners, and external advisors. These should include:

- Commissioning and publishing a series of clearly-structured, detailed yet accessible case studies covering successful and unsuccessful attempts at community acquisition using various pathways.
- Updating existing guidance as best practice develops.
- Developing additional guidance and/or training for specific groups (e.g. land agents and legal advisers) in relation to the relevant legislation/pathways.
- Developing and disseminating further model documents and templates as required, e.g. Forest Enterprise Scotland is currently developing an 'offer to buy' template for communities which could be made available to other relevant authorities.

The Scottish Government should support networking and knowledge-sharing between relevant authorities (e.g. by creating a forum for relevant authorities to discuss experiences of asset transfer) and between community bodies, (e.g. by continuing to support the Scottish Community Alliance Community Learning Exchange).

There is a need for consideration of wider measures by relevant authorities to facilitate cultural and structural change relating to asset management and community development. This could potentially include improvements in internal structures and integration between relevant departments (property, legal, community), or the development of cross-departmental groups.

#### 9.2.5 Funding

The Scottish Government should extend its commitment to the Scottish Land Fund beyond 2020.

The Scottish Government should direct the Big Lottery Fund and Highlands and Islands Enterprise (HIE) to ensure that Scottish Land Fund processes and timescales align with the relevant legal mechanisms.

- Stage One funding to be made available even where the seller appears unwilling, or where intention is for long-term lease or partnership, to facilitate further exploration of these options.
- Consideration of allowing an increased proportion of Scottish Land Fund funding to be available for revenue funding.

Provision of additional support for communities to obtain independent legal advice and expertise, particularly in the case of a legal challenge, or during challenging negotiations with landowners (i.e. unforeseen legal costs).

The Scottish Government should ensure greater availability of post-acquisition development funding (and better linkage with the Scottish Land Fund).

The Scottish Government should seek to ensure a 'level playing field' across Scotland with respect to funding and support (i.e. that groups outwith the Highlands and Islands Enterprise area have the same access to funding as those within). This should include the development of a specific community-led economic development component (incorporating support for asset-based community development) within the proposed South of Scotland Development Agency.

#### 9.2.6 Strategic thinking

The Scottish Government should encourage the development of strategic thinking by communities (including, for example, through the provision of community engagement officers) with respect to identifying their needs and a coherent vision for their community, including in relation to proactive asset acquisition, e.g. consideration of community assets should become a key component of Local Place Planning.

Consideration within the Scottish Government of processes relating to valuation and disposal of public assets to communities, to adequately recognise public benefits delivery and reduce inefficient (circular) public funding to purchase public assets through all potential routes to ownership.

#### ***Asset Transfer***

The Scottish Government should:

- Strongly encourage relevant authorities to publicise asset disposal to communities and community representative bodies (i.e. as Forest Enterprise Scotland does).
- Encourage relevant authorities to involve communities in discussion around the selection of assets for disposal.

#### ***Community Right to Buy***

Paragraph 44 of the Community Right to Buy guidance should be rewritten to allow / encourage multiple registrations of similar assets or land parcels where a Local Place Plan (or similar document) has identified the acquisition of such an asset (or the acquisition of a piece of land for the purpose of establishing an asset) as in the community interest. If necessary, Section 67 of the 2003 Act should be amended to facilitate this.

Consideration should be given as to how private landowners could be required to notify communities of intended sale of assets (above threshold value / size, excluding house sales, etc.), including the potential for a requirement to advertise sales in local media and/or a duty

to be placed on landowners who are negotiating a private sale to publicise the impending sale to the local community for a fixed period prior to being allowed to register the sale.

#### 9.2.7 Fiscal and Wider Policy Framework

The Scottish Government should review the impact of the broader fiscal and policy framework of grants and subsidies, tax incentives and exemptions for land ownership and use in relation to community asset acquisition (e.g. incentivising landowners to dispose of assets) and seek, where possible (recognising that not all are currently within the remit of the Scottish Parliament), to align these with furthering sustainable development. This should include consideration of:

- Agricultural and Rural Development Funds (e.g. Pillars 1 and 2);
- Exemptions from non-domestic rates;
- Capital Gains Tax;
- Inheritance Tax;
- A potential Land Value Tax.

#### 9.2.8 Monitoring/Indicators

The establishment by the Scottish Government of a new indicator for assessing progress relating to community ownership to account for factors beyond the total area of ownership, to include in particular the number of community organisations owning land and/or assets.

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