

## **Legislating to Empower Communities: Comparing Community Asset Acquisition Law in the UK**

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### **ABSTRACT:**

*Across the UK legislation plays a variable role in facilitating the acquisition of land and other assets by communities, including legal rights to register assets as being of community value, rights for communities to pre-emptively bid for and buy such assets, and rights to force transfer of an asset, sometimes from an unwilling owner. The law has developed in different contexts, though there is a trend of conferring additional rights on community organisations linked to community empowerment and sustainable development, as well as to austerity cuts to public services. Whilst the case for expanding legal rights to community asset acquisition is actively argued, in practice most transfers occur through negotiation outside recent legislative frameworks. Research into factors supporting community asset acquisition, and challenges, reaches similar conclusions largely regardless of legal regimes. This speaks to broader questions about the variable roles of legislation in articulating procedures, providing concrete rights to communities, and catalysing cultural change within communities and public bodies in the context of sustainable development, wellbeing, and human rights. I conclude that community empowerment legislation does matter, but that such must be coupled with practical and financial resources for implementation and longer-term support.*

Across the UK legislation plays a variable role in facilitating the acquisition of land and other assets by communities, including legal rights to register assets as being of community value, rights for communities to pre-emptively bid for and buy such assets, and rights to force transfer of an asset, sometimes from an unwilling owner. The law has developed in different contexts, though there is a trend of conferring additional rights on community organisations linked to

community empowerment and sustainable development, as well as to austerity cuts to public services. In this article I set out the main legal regimes for community asset acquisition in the UK nations, identifying their policy contexts, key legislative requirements, impacts, and reform proposals. Whilst the case for expanding legal rights to community asset acquisition is actively argued, in practice most transfers occur through negotiation outside recent legislative frameworks.

Research into factors supporting community asset acquisition, and challenges, reaches similar conclusions largely regardless of legal regimes.<sup>1</sup> Financial support and capacity building have significant impacts on the number of asset transfers and their success, perhaps more so than do legal rights for communities to bid and buy. This speaks to broader questions about the variable roles of legislation in articulating procedures, providing concrete rights to communities, and catalysing cultural change within communities and public bodies in the context of sustainable development, wellbeing, and human rights. I conclude that communities do benefit from legal rights to acquisition, but that such must be coupled with practical and financial resources for implementation and longer-term support.

## **Community asset acquisition law and policy contexts**

The development of community asset acquisition in Scotland is most advanced and connected to the land question: ‘who owns Scotland?’<sup>2</sup> This has been influenced by rural experiences including the Highland clearances (evictions of tenants from the Highlands and Islands in the 18<sup>th</sup> and 19<sup>th</sup> Centuries) and the persistent concentration of land in the hands of private estates.

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<sup>1</sup> See e.g., Development Trusts Northern Ireland, *Shaping Community Asset Transfer* (2021); Carolyn McMillan, Artur Steiner and Clementine Hill O’Connor, *Asset Transfer Requests: Evaluation of Part 5 of the Community Empowerment (Scotland) Act 2015* (Scottish Government 2020); and House of Commons, Communities and Local Government Committee, *Community Rights: Sixth Report of Session 2014-15* (2015).

<sup>2</sup> See e.g., Andy Wightman, *The Poor Had No Lawyers: Who Owns Scotland (And How They Got It)* (Birlinn Ltd 2015) and <http://www.whoownsscotland.org.uk/geo/index.htm>

Despite legislative intervention, patterns of land ownership in Scotland remain among the most concentrated in the world.<sup>3</sup> Whilst the contemporary case for land reform did not start with devolution, reconvening the Scottish Parliament enabled proposals developed by a Land Reform Policy Group (LRPG) to be progressed.<sup>4</sup> The LRPG concluded that the existing system of landownership inhibited development in rural communities, causing natural heritage degradation resulting from poor land management.<sup>5</sup> Land reform in Scotland proceeded in stages, in turn informing the development of wider community asset acquisition law. In addition to new legislative rights for communities to buy land and other assets (under the Land Reform (Scotland) Act 2003 (as amended) and the Land Reform (Scotland) Act 2016), local authorities in Scotland can dispose of land and other real assets at below market value for community benefit following Regulations made by Scottish Ministers.<sup>6</sup> Given this general power, many local authorities in Scotland had developed policies and procedures on community asset transfer prior to recent legislation. This is also the case in England,<sup>7</sup> Wales,<sup>8</sup> and Northern Ireland,<sup>9</sup> where local authorities, and some other public bodies, are empowered to dispose of assets at below market value if such is likely to promote or achieve community benefits including economic wellbeing and/or regeneration, social wellbeing, or environmental wellbeing.

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<sup>3</sup> Rob McMorran et al, *Review of the effectiveness of current community ownership mechanisms and of options for supporting the expansion of community ownership in Scotland* (Scottish Land Commission 2018) p.6.

<sup>4</sup> McMorran et al (n 3); Malcolm Combe, "Legislating for community land rights" in Malcolm Combe, Jayne Glass, and Annie Tindley (eds) *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press 2020).

<sup>5</sup> Land Reform Policy Group, *Identifying the Problems* (The Scottish Office 1998); *Identifying Solutions* (The Scottish Office 1998) and *Recommendations for Action* (The Scotland Office 1999), see also McMorran et al (n 5) and MW Danson, and MG Lloyd, "The Land Reform Policy Group in Scotland: Institutional sponsorship for land reform?" (2000) 15(3) *Local Economy: The Journal of the Local Economy Policy Unit* 214.

<sup>6</sup> Section 74 of the Local Government (Scotland) Act 1973 as amended by section 11 of the Local Government in Scotland Act 2003, and The Disposal of Land by Local Authorities (Scotland) Regulations 2010.

<sup>7</sup> The Local Government Act 1972: General Disposal Consent (England) 2003.

<sup>8</sup> Local Government Act 1972: General Disposal Consent (Wales) 2003

<sup>9</sup> Section 79 of the Local Government (Northern Ireland) Act 2014, Local Government (Northern Ireland) Act 1972 and Department for Communities (Northern Ireland) Guidance for District Councils on Local Government Disposal of Land at Less Than Best Value (January 2021).

In England, community asset transfer has been a central government policy directed at local authorities' use of their redundant assets, operating on a discretionary basis. In 2006, the then Labour Government established a review of asset transfer powers and policies,<sup>10</sup> finding that sufficient legal powers existed for local authorities to transfer assets to community management or full ownership, but that a culture of using these powers regularly and effectively had not been established. The review's *Vision for the Future* was "recognition that optimising the use of public assets is not the primary objective: the over-riding goal is community empowerment".<sup>11</sup> Under the Coalition Conservative and Liberal Democrat Government, the Localism Act 2011 introduced provisions giving communities a right to identify a building or other land believed to be of importance to their social wellbeing; if the asset comes up for sale, the community is given a fair chance to bid to buy it on the open market.<sup>12</sup> The term 'asset' is not defined in the 2011 Act but includes land and other real assets.

Northern Ireland has no specific legislation providing communities with rights to acquire assets, but transfers occur under the general powers of public bodies. Policy frameworks seek to encourage and facilitate transfers, assisted by Development Trusts Northern Ireland (DTNI),<sup>13</sup> which has a formal role in the asset transfer process, along with the Northern Ireland Executive. A framework issued by the Northern Ireland Department for Social Development sets out how government can support community ownership and management of public sector assets and empower communities.<sup>14</sup> The framework is orientated towards facilitating community ownership or management of surplus public sector assets and encouraging such to become a mainstream option within normal disposal processes. When

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<sup>10</sup> Barry Quirk, *Making Assets Work: The Quirk Review of community management and ownership of public assets* (HMSO 2007) (Quirk Review).

<sup>11</sup> Quirk Review p.3.

<sup>12</sup> Localism Act 2011, Part 5, Chapter 3 "Assets of community value".

<sup>13</sup> DTNI is a member-led organisation working with community and voluntary organisations to facilitate transfers.

<sup>14</sup> Urban Regeneration and Community Development Group, Department for Social Development, *Community Asset Transfer in Northern Ireland: Enabling and Supporting Community Ownership and Management of Public Assets* (Department for Social Development 2014) (Community Asset Transfer Framework NI).

published, the framework was said to support the Northern Ireland Executive’s commitment to “invest in social enterprise growth to increase sustainability in the broad community sector”,<sup>15</sup> and to contribute to delivery of its Economic Strategy. The Ministerial Foreword also states: “Community Asset Transfer can be a real catalyst to stimulate regeneration and greater community cohesion across Northern Ireland”, as well as “empowering communities”.<sup>16</sup>

Wales also has no express legislation giving communities pre-emptive rights to buy land or other assets. Welsh Government has developed a “best practice guide” through Ystadau Cymru,<sup>17</sup> established to enable, support, and encourage excellence in public sector collaborative asset management. The Ystadau guide situates asset acquisition in the context of an austerity driven disposal of assets by public bodies; stating: “Asset Transfers mean that the community can own and manage facilities that might otherwise be closed down if the Local Authority or other Public Authorities are unable to fund them any longer”.<sup>18</sup> In 2014 a Welsh Co-operative and Mutuals Commission recommended: “Welsh Government considers legislation to enable communities to list their community assets and have right of first refusal to bring assets into community ownership. In any such legislation, consideration should be given to include sports clubs as community assets”.<sup>19</sup> In response, the then Minister for Communities and Tackling Poverty concluded that English provisions fell short by not enabling communities to force sale of an asset,<sup>20</sup> yet no legislative action was taken. In early 2022 the Institute of Welsh Affairs (IWA) concluded that communities in Wales have fewer statutory rights to acquire land and other assets than those in Scotland or England, despite

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<sup>15</sup> Community Asset Transfer Framework NI (n 14) p1.

<sup>16</sup> Ibid.

<sup>17</sup> Ystadau was formerly known as the National Assets Working Group: <https://gov.wales/ystadau-cymru>

<sup>18</sup> Ystadau Cymru, *Community Asset Transfer Guide* (Welsh Government 2019) p.3.

<sup>19</sup> Welsh Co-operative and Mutuals Commission, *Report of the Welsh Co-operative and Mutuals Commission* (2014) recommendation 11, online at: <https://gov.wales/sites/default/files/publications/2019-05/report-of-the-welsh-co-operative-and-mutuals-commission.pdf>

<sup>20</sup> Lesley Griffiths, Minister for Communities and Tackling Poverty, *Written Statement - Assets of Community Value measures contained in the Localism Act 2011* (14 October 2014), online at: <https://gov.wales/written-statement-assets-community-value-measures-contained-localism-act-2011>

widespread support for at least the same level of community empowerment measures as in England, and with potential to go further.<sup>21</sup> In May 2022, the Senedd Cymru/Welsh Parliament Local Government and Housing Committee launched an inquiry into Community Assets.<sup>22</sup>

### **Community rights to register, bid and buy**

Key Scottish legislation is the Land Reform (Scotland) Act 2003 (the 2003 Act), the Community Empowerment (Scotland) Act 2015 (the 2015 Act) and the Land Reform (Scotland) Act 2016 (the 2016 Act). The net effect, as Malcolm Combe states, is:

four methods for a community to acquire land from a private owner, in a manner that...either forces that owner to deal only with the community as and when the owner decides to sell or forces that owner to sell to the community as and when the community wishes to acquire.<sup>23</sup>

For most procedures to asset acquisition under Scottish legislation, the status of the landowner is not especially important, however, the 2015 Act also introduced a new asset transfer procedure applying only to acquisition from public bodies.

The 2003 Act introduced a Community Right to Buy (CRtB), providing communities the opportunity to register an interest in land and to buy it at market value when offered for sale.<sup>24</sup> Initially the CRtB related to rural settlements of less than 10,000 people, later extended

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<sup>21</sup> Institute of Welsh Affairs, *Our Land: Communities and Land Use* (February 2022), online at: [https://www.iwa.wales/wp-content/media/IWA\\_Our-Land-Communities-and-land-use\\_v5.pdf](https://www.iwa.wales/wp-content/media/IWA_Our-Land-Communities-and-land-use_v5.pdf)

<sup>22</sup> Information online at: <https://business.senedd.wales/mgIssueHistoryHome.aspx?IID=39259>

<sup>23</sup> Combe (n 4) p.126.

<sup>24</sup> Land Reform (Scotland) Act 2003, Part 2: The community right to buy.

to the whole of Scotland.<sup>25</sup> The right covers land in which the community can demonstrate an interest, including land sufficiently near to land with which the community has a connection.<sup>26</sup> Legislation covers: registration of a community interest; exercise of a community right to buy; and appeals and compensation. Part 2 of the 2003 Act provides a general CRtB, whereas Part 3 covers crofting communities. Crofting is a specialised form of land tenure that exists only in the Highlands and Islands of Scotland. Under the latter provisions crofting communities creating a properly constituted crofting community body can have ownership of their croft land transferred on fair financial terms. The aim is to remove barriers to sustainable rural development by empowering crofting communities, enabling them to buy land at any time.

Whereas the Crofting CRtB can lead to an enforced sale, the Part 2 CRtB gives a relevant community body a right of first refusal once the land is put up for sale.<sup>27</sup> To acquire this right, a community must first publicly register an interest in the land it seeks to acquire.<sup>28</sup> If an owner decides to sell that land they should notify the Scottish Ministers, who then have seven days to notify the community body which has a registered interest, the community body then has 30 days to decide to exercise its right to buy.<sup>29</sup>

Additionally, Part 3A of the 2003 Act, introduced by the 2015 Act, gives community bodies a right to acquire “eligible land” if in the opinion of Scottish Ministers, it is wholly or mainly abandoned or neglected, or the use or management of the land is such that it results in or causes harm, directly or indirectly, to the environmental wellbeing of a relevant community. Scottish Ministers should assess for eligible status based on certain factors; “Abandoned or

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<sup>25</sup> On the first urban land transfer, which took place in Edinburgh see, John Lovett and Malcolm Combe, “The Parable of Portobello: Lessons and Questions from the First Urban Acquisition Under the Scottish Community Right-to-Buy Regime” (2019) 80 *Montana Law Review* 211.

<sup>26</sup> Land reform (Scotland) Act 2003, section 38.

<sup>27</sup> See especially Land Reform (Scotland) Act 2003, section 40(1): For so long as a community interest in land is registered the owner of the land, and any creditor in a standard security having a right to sell the land, is prohibited from— (a) transferring that land (or any land of which that land forms part); or (b) taking any action with a view to the transfer of that land (or any land of which that land forms part), except in accordance with this Part of this Act. (2) A transfer in breach of subsection (1)(a) above is of no effect.

<sup>28</sup> Land Reform (Scotland) Act 2003, sections 37 and 38.

<sup>29</sup> Land Reform (Scotland) Act 2003, section 49.

neglected land” forms one category, “detrimental land” another. Ministers must consider the land’s physical condition (which might include whether it is a risk to public safety or the wider environment); designation or classification; or use or management. For “detrimental” land, Ministers must consider use or management of land, and look at whether harm to environmental wellbeing in a technical sense has in fact occurred.<sup>30</sup> The community must have already tried to purchase the land before a forced sale can occur. Where the land acquisition turns on environmentally detrimental status, the community scheme must be capable of fixing the problem, and the community must have invited the relevant regulator to act. Assuming Scottish Ministers give consent, they will appoint an independent valuer to determine the market price, to be paid by the community body within six months. This is unlikely to be used as a first option for communities, but as a backstop where other methods of acquisition have failed.<sup>31</sup>

The 2016 Act introduced an additional right for communities to acquire land from private owners for sustainable development.<sup>32</sup> Assuming statutory tests are satisfied, and subject to payment of an independently valued price within six months of consent being granted by Scottish Ministers, transfer is compelled. Communities must meet substantial hurdles to exercise this right, including satisfying Ministers of sustainable development potential and significant community benefit.

In addition to the above rights to buy from private owners, Part 5 of the 2015 Act gives communities a right to request asset transfers from “relevant authorities”.<sup>33</sup> These are public bodies listed in Schedule 3, including the Scottish Ministers and local authorities, and other

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<sup>30</sup> The Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018.

<sup>31</sup> Jill Robbie, “Babes in the woods: the decision of the Scottish Ministers on the application of Helensburgh Community Woodlands Group to exercise the right to buy abandoned, neglected or detrimental land” (2021) 25 *Edinburgh Law Review* 347.

<sup>32</sup> Land Reform (Scotland) Act 2016, Part 5 Right to buy land to further sustainable development.

<sup>33</sup> Community Empowerment (Scotland) Act 2015, section 77.



entities e.g., National Parks, Scottish Enterprise, and Scottish Water. Communities can use this legislation to seek ownership of land or another real asset, or a right short of ownership such as a lease or right to manage. The right to request an asset transfer is subject to certain restrictions, but the relevant public authority must agree to a properly framed request unless there are reasonable grounds for refusing.<sup>34</sup> The request must state the asset to which it relates, the reasons for making the request, the benefits which the community transfer body considers will arise, and the price that the community would be prepared to pay.<sup>35</sup> The relevant authority is prohibited from selling the asset until it considers the request<sup>36</sup> based on the legislative scheme including economic, social and environmental factors.<sup>37</sup> These provisions do not specify how relevant authorities should facilitate transfers, although Scottish Government guidance makes good practice recommendations.<sup>38</sup>

For England, Part 5 of the Localism Act 2011 enables a suitably constituted community interest group to nominate local assets to be listed as assets of community value.<sup>39</sup> For such listed assets, should they come up for sale, there is a moratorium period during which community interest groups with a legal identity can submit an intention to bid.<sup>40</sup> Local authorities in England are required to maintain a list of assets of community value.<sup>41</sup> For the purposes of Chapter 3 of Part 5, whether a particular building or other land in the local authority's area is of community value depends on the local authority's opinion as to whether it furthers the social wellbeing or social interests of the community and could be realistically expected to continue to do so.<sup>42</sup> The owner is prevented from disposing of the asset unless

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<sup>34</sup> Community Empowerment (Scotland) Act, section 82(5).

<sup>35</sup> Community Empowerment (Scotland) Act 2015, section 79.

<sup>36</sup> Community Empowerment (Scotland) Act 2015, section 84.

<sup>37</sup> Community Empowerment (Scotland) Act, section 82.

<sup>38</sup> *Community Empowerment (Scotland) Act 2015: asset transfer guidance for authorities*, online at: <https://www.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-relevant-9781786527493/>

<sup>39</sup> Localism Act 2011, Part 5 Community empowerment, Chapter 3 Assets of community value.

<sup>40</sup> Localism Act 2011, section 95.

<sup>41</sup> Localism Act 2011, section 87.

<sup>42</sup> Localism Act 2011, section 88.

certain conditions are satisfied, including that the owner must notify the local authority in writing of their wish to dispose, and that a relevant moratorium period has ended. Specifically, that an interim moratorium period (of six weeks) has ended without the local authority receiving a written request from a community interest group for the group to be treated as a potential bidder, or that a full moratorium period (of six months) has ended.<sup>43</sup> The moratorium on sale under the Localism Act 2011 gives communities a right to bid for an asset before the owner can transfer to anyone else, whereas the Scottish CRtB requires that a transferring landowner sell land to the community at an agreed or set price if that community has registered its interest in land appropriately. The Scottish CRtB land requires the owner to decide to sell, and research suggests that a barrier to achieving community empowerment through the legislation continues to be where owners are unwilling to sell to community bodies.<sup>44</sup>

### **Defining community**

The first step under Parts 2 (CRtB) and 3 (Crofting CRtB) of the Scottish 2003 Act is incorporation of a suitable entity, a “community body”<sup>45</sup> or “crofting community body”.<sup>46</sup> For the general CRtB, a community body may be a company limited by guarantee whose articles of association must be tailored to have no fewer than ten members, provide that at least three quarters of the members of the company are also members of the local community (and that those members have control of the company), and provide that any surplus funds or assets of the company are to be applied for the benefit of the community.<sup>47</sup> As originally enacted, the

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<sup>43</sup> Localism Act 2011, section 95(6) specifies the moratorium periods.

<sup>44</sup> Ciaran Mulholland et al, *Impact Evaluation of the Community Right to Buy* (Scottish Government Social Research 2015), and McMorran et al (n 3).

<sup>45</sup> Land Reform (Scotland) Act 2003, section 34.

<sup>46</sup> Land Reform (Scotland) Act 2003, section 71.

<sup>47</sup> Land Reform (Scotland) Act 2003, section 34(1).

2003 Act obliged communities to incorporate as a company limited by guarantee, following the 2015 Act they may form a Scottish charitable incorporated organisation<sup>48</sup> or a community benefit society.<sup>49</sup> Similar rules then apply as regards such an entity's constitution, membership, and application of any surplus generated. In all cases, the body must have been recognised by Scottish Ministers as having a main purpose consistent with furthering the achievement of sustainable development.<sup>50</sup> A "crofting community body" is similarly defined with respect to legal status, membership and so on, but with idiosyncrasies due to the specific nature of crofting communities and their tenancies. Aside from crofting communities, for all other rights to buy, a community is defined by reference to either one or more postcode units or a "prescribed type of area" (specified by Scottish Ministers).<sup>51</sup> A community comprises persons from time-to-time resident in that postcode unit, or in one of those postcode units, or in the prescribed type of area, and entitled to vote at a local government election in a polling district which includes the unit(s) or area.<sup>52</sup> Whilst the geographical condition has been extended from postcode units only, to prescribed types of areas, it still risks not having full regard to diverse factors demonstrating community, such as culture and language. Malcolm Combe refers to the postcode condition as defining "a people united by proximity as opposed to common cause".<sup>53</sup> In contrast, community asset transfers from public bodies under Part 5 of the 2015 Act can be made to communities of interest. An eligible "community transfer body",<sup>54</sup> is defined as either a "community-controlled body" or a body designated as such by Scottish Ministers. A "community-controlled body" is a body (whether corporate or unincorporated) with a written constitution defining: the community to which it relates; that the majority of members must be

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<sup>48</sup> Land Reform (Scotland) Act 2003, section 34(1A)

<sup>49</sup> Land Reform (Scotland) Act 2003, section 34(1B).

<sup>50</sup> Land Reform (Scotland) Act, section 34(4).

<sup>51</sup> Land Reform (Scotland) Act, section 34(5)(a)

<sup>52</sup> Land Reform (Scotland) Act, section 34(5)(b).

<sup>53</sup> Combe (n 4) p.132.

<sup>54</sup> Community Empowerment (Scotland) Act, section 77.

members of the community and that community members must control the body; that membership is open to any member of the relevant community; a statement of the aims and purposes of the body including promotion of community benefit; and that any surplus is to be applied for community benefit. A community could be any group feeling they have something in common, which could be living in the same area, but also shared interests or characteristics. Such ‘communities of interest’ can include faith groups, ethnic or cultural groups, people affected by a particular disability, sports clubs, conservation groups and heritage associations. This could range from local groups to national or international bodies with thousands of members.<sup>55</sup>

Under Part 5 of the 2015 Act, where a community body seeks to acquire ownership, it is required to be embodied as a suitable legal personality. Acceptable personalities again include a company limited by guarantee, a Scottish charitable incorporated organisation, and a community benefit society, although here the legislation requires a minimum of 20 as opposed to 10 members. Some bodies with fewer than 20 members are enabled to acquire assets where a community body approved for another right of acquisition later seeks an asset transfer.

For England, under the Localism Act 2011, assets may only be included in the list of assets of community value in response to a community nomination or where otherwise permitted. Community nominations are defined as nominations made by a Parish Council or a voluntary or community body with a local connection.<sup>56</sup> A body other than a Parish Council has a local connection with land or assets in a local authority’s area if the body’s activities are wholly or partly concerned with the local authority’s area, or with a neighbouring local authority’s area. Voluntary community bodies that can nominate assets for listing include neighbourhood forums under the Town and Country Planning Act 1990, Parish Councils,

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<sup>55</sup> See e.g., Scottish Government, *A step-by-step guide for community bodies on asset transfer as part of the Community Empowerment (Scotland) Act 2015*, online at: <https://www.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-community-9781786527509/pages/5/>

<sup>56</sup> Localism Act 2011, section 89(2)(b).

unincorporated bodies with at least 21 individual members which do not distribute a surplus to members, charities, companies limited by guarantee and industrial and provident societies that do not distribute a surplus to members, and community interest companies.<sup>57</sup> Unincorporated bodies, companies limited by guarantee, and industrial and provident societies will be considered to have a “local connection” if any surplus made is wholly or partly applied for the benefit of the relevant local authority’s area, or for the benefit of a neighbouring local authority’s area.

These provisions can be summarised; for community rights to register/list an asset as being of community value, and to exercise a pre-emptive right to buy or bid for that asset, communities in both Scotland and England are referable to geographical location (postcode, other type of area, local authority area), whereas to request a community asset transfer (under Scots law) a community is determined by shared interests. In order to bid for, and to potentially take ownership of assets, community organisations must have a more formal legal status than is required to nominate an asset as being of community value, or than is required for a lesser interest in the asset such as a lease.

In England (outside the 2011 Act), and in Wales, the individual policies of local authorities determine what kinds of bodies the local authority will entertain an asset transfer request from. The Ystadau guide notes that community asset transferees could be town and community councils, third sector organisations, or community groups (whether well-established or recently formed).<sup>58</sup> In Northern Ireland, the Community Asset Transfer Framework indicates that voluntary and community sector groups, faith-based organisations, community enterprises and social enterprises can all seek asset transfers provided they are

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<sup>57</sup> Localism Act 2011, section 89(2)(b)(iii) and The Assets of Community Value (England) Regulations 2012, regulation 5.

<sup>58</sup> Ystadau (n 17) para 2.1 Potential Applicants.

incorporated, constituted for social benefit, and demonstrate an ‘asset lock’ such that the asset is retained for community benefit.<sup>59</sup>

### **Democratic procedures**

In Scotland, rights to register an interest in, and to buy land, require local support. For the general CRtB Scottish Ministers must be satisfied that the proportion of members of the community who have voted in a ballot on the question of whether the community body should buy the land is, in the circumstances, sufficient to justify the community body’s proceeding to buy the land; and that the majority of those voting have voted in favour of the proposition that the community body buy the land.<sup>60</sup> Here the community is determined by postcode unit(s), or other prescribed type of area, and entitlement to vote in local government elections.

The right to buy abandoned (etc) land also requires community approval, which can be achieved where at least half of the members of the community have voted, or where fewer than half have voted but the proportion is sufficient to justify the community body’s proceeding to buy the land, and the majority of those voting have voted in favour.<sup>61</sup> The same criteria apply to the community right to buy land for sustainable development under the 2016 Act.<sup>62</sup> These recent rights to buy have some parallels to compulsory state acquisition for development, albeit that the community body is the catalyst for expropriation consent given by the state then followed by transfer to the community body.<sup>63</sup> Here the ballot procedures might constitute a safeguard against potential exploitation. John Lovett also considers the ballot provides “a

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<sup>59</sup> Department for Social Development (n 14) p.13.

<sup>60</sup> Land Reform (Scotland) Act 2003, section 51(2). Specific provisions in relation to democratic procedures for crofting communities are under Land Reform (Scotland) Act 2003, section 75.

<sup>61</sup> Land Reform (Scotland) Act 2003, section 97J(1).

<sup>62</sup> Land Reform (Scotland) Act 2016, section 57(1).

<sup>63</sup> John Lovett, “Towards Sustainable Community Ownership: A Comparative Assessment of Scotland’s New Compulsory Community Right to Buy” in Malcolm M. Combe, Jayne Glass and Annie Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press 2020).

meaningful opportunity for local democratic decision-making in a political system that tends to favour centralised authority”.<sup>64</sup> The existence of ballot procedures in legislation relating to the right to buy land from private owners, but not in other community asset transfer legislation and/or guidance, introduces a democratic element that is perhaps already ‘baked in’ to other law and guidance relating to transfer from public bodies, and could also be seen as indicative of the value (both financially and symbolically) of land.

### **Wellbeing and social interests**

The right to buy abandoned (etc) land requires Scottish Ministers to agree that eligible land is either mainly abandoned or neglected or that “the use or management of the land is such that it results in or causes harm, directly or indirectly, to the environmental wellbeing of a relevant community”.<sup>65</sup> In this context “harm” includes adverse effects on the lives of persons comprising the relevant community.<sup>66</sup>

For Ministers to consent to the right to buy land for sustainable development, in addition to the request furthering sustainable development and being in the public interest, Ministers must be satisfied that the transfer is likely to result in significant benefit to the community, that it is the only, or the most practicable, way of achieving that benefit, and that withholding consent is likely to result in harm to that community.<sup>67</sup> Ministers must consider the likely effect of granting or withholding consent with reference to economic development, regeneration, public health, social wellbeing, and environmental wellbeing.<sup>68</sup> These matters must also be taken into account by a relevant authority deciding whether to agree to a

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<sup>64</sup> Lovett (n 63) p.158.

<sup>65</sup> Land Reform (Scotland) Act 2003, section 97C(2)(b).

<sup>66</sup> Land Reform (Scotland) Act 2003, section 97C(3)(i).

<sup>67</sup> Land Reform (Scotland) Act 2016, section 56(2)(c) and (d).

<sup>68</sup> Land Reform (Scotland) Act 2016, section 56(12).

community asset transfer request under the 2015 Act.<sup>69</sup> These factors can be seen as “at once multifaceted and yet open-textured”<sup>70</sup> allowing significant ministerial discretion in decision-making. Various accounts of the nature of property could be engaged here, with an economic conception of community ownership, including for regeneration and sustainable development purposes, being raised alongside a ‘human flourishing’ conception accounting for wider social benefits.<sup>71</sup> Jill Robbie notes that Scottish Ministerial decisions provide insight into these approaches: “one which considers the land as purely a financial investment and the other which has a more holistic appreciation of the value of the land to the local community”.<sup>72</sup> Robbie concludes that whilst the hurdles for community bodies under the newer rights to acquire are substantial in terms of indicating financial viability, nevertheless, increased momentum towards a more holistic vision of ownership is evident in Ministerial decision-making.<sup>73</sup>

Outside specific land and community empowerment legislation, local authorities in Scotland may dispose of their assets for less than best consideration if the disposal is likely to contribute to the promotion or improvement of economic development or regeneration, health, social wellbeing, or environmental wellbeing of the whole or any part of the local authority area or any persons resident or present there.<sup>74</sup>

In England, for assets to be listed as being of community value under the Localism Act 2011, the relevant authority must be of the opinion that use of the asset furthers social wellbeing or social interests, or did so in the recent past, and will realistically continue to do so, or could

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<sup>69</sup> Community Empowerment (Scotland) Act 2015, section 82(3).

<sup>70</sup> Lovett (n 63) p.155.

<sup>71</sup> Lovett (n 63) p.145-151.

<sup>72</sup> Robbie (n 31) p.348.

<sup>73</sup> Robbie (n 31) p.352-353.

<sup>74</sup> The Disposal of Land by Local Authorities (Scotland) Regulations 2010, regulation 4(1), references to wellbeing are to be construed as for the purposes of section 20 of the Local Government in Scotland Act 2003, which provides a power for local authorities to do anything considered likely to promote or improve the wellbeing of the area and/or persons in that area, including power to incur expenditure, enter into agreements, and so on. This section does not, however, define “wellbeing”.



do so within the next five years.<sup>75</sup> “Social wellbeing” is not defined in the 2011 Act, whereas “social interests” is defined as including cultural, recreational, and sporting interests.<sup>76</sup> Upper Tribunal decisions interpret some of these provisions, although what constitutes “social wellbeing” and the “local community” is, as the Tribunal has put it, a “highly contextual question, depending upon all the circumstances of the particular case”.<sup>77</sup> For asset transfers outside the 2011 Act express Ministerial consent is not required for the disposal of any interest in land (or other assets) which the authority considers will help it to secure the promotion or improvement of the economic, social, or environmental wellbeing of its area.<sup>78</sup> The General Disposal Consent (Wales) 2003 provides the same for Welsh local authorities.

In Northern Ireland, a council cannot dispose of assets other than at the best price without Ministerial approval. A Northern Ireland Executive framework document assists council staff dealing with the disposal of assets at less than best price.<sup>79</sup> The Department for Communities has also published Guidance stating that section 96(5) of the Local Government (Northern Ireland) Act 1972, requiring Ministerial approval for disposal, provides the basis for district councils to justify the disposal as being for the wellbeing of the district.<sup>80</sup>

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<sup>75</sup> Localism Act 2011, section 88(1) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and (b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

If the asset does not meet these requirements, it might still be of community value if, in the opinion of the authority: Section 88(2) (a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and (b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

<sup>76</sup> Section 88(6) “social interests” includes (in particular) each of the following – (a) cultural interests; (b) recreational interests; (c) sporting interests.

<sup>77</sup> *Crostone Ltd v Amber Valley Borough Council* [2015] UKFTT CR/2014/0010 (GRC) at [17].

<sup>78</sup> The Local Government Act 1972 General Disposal Consent (England) 2003

<sup>79</sup> Department of Finance, Land & Property Services, *Disposal of Surplus Public Sector Property in Northern Ireland* (2018), online at: [https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/Disposal%20of%20surplus%20public%20sector%20property%20in%20Northern%20Ireland%20-%20guidance%20-%20Nov%2018\\_0\\_0.pdf](https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/Disposal%20of%20surplus%20public%20sector%20property%20in%20Northern%20Ireland%20-%20guidance%20-%20Nov%2018_0_0.pdf)

<sup>80</sup> Department for Communities, Local Government & Housing Regulation Division, *Guidance for District Councils: Local Government Disposal of Land at Less Than Best Price* (2021), online at: <https://www.dtni.org.uk/wp-content/uploads/2021/01/DfC-Guidance-on-Less-than-Best-for-District-Councils.pdf>

## Sustainable development and human rights

The Scottish community rights to buy require Scottish Ministers to be satisfied of the community body's commitment to sustainable development, and, where relevant, that the transfer is either compatible with furthering the achievement of sustainable development, or likely to achieve such development in relation to relevant land. The term sustainable development is not defined in the legislation. Douglas Maxwell considers there to be "almost no guidance on the weight to be allocated to differing factors that might constitute sustainable development".<sup>81</sup> Andrea Ross, on the other hand, argues that legislative techniques have begun to "set out a more bespoke interpretation or approach to sustainable development which acknowledges and perhaps prioritises certain factors and recognises how the tensions inherent in sustainable development are likely to play out in any given context".<sup>82</sup> For example, she notes that the right to buy land that has been abandoned (etc) limits the scope of sustainable development to the sustainable development of land, and that the right to buy land for sustainable development requires ministerial satisfaction that the community's proposal *will* further sustainable development, rather than be *compatible with* furthering sustainable development. Other means to nuance the framework, through which an ultimately political interpretation of sustainable development can be reached, include the types of information that must be provided to Ministers, and whose interests Ministers must consider.

In Wales "sustainable development" in public body decision-making is defined by law. Under the Wellbeing of Future Generations (Wales) Act 2015 (WFGA) "sustainable

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<sup>81</sup> Douglas Maxwell, "Disputed property rights: Article 1 Protocol No.1 of the European Convention on Human Rights and the Land Reform (Scotland) Act 2016" (2016) *European Law Review* 900, 915.

<sup>82</sup> Andrea Ross, "The Evolution of Sustainable Development in Scotland: A Case Study of Community Right to Buy Law and Policy" in Malcolm M. Combe, Jayne Glass and Annie Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press 2020) 170,196.

development” means the process of improving the economic, social, environmental, and cultural wellbeing of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the wellbeing goals. The sustainable development principle “means that the [public] body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs”. This principle originated with the 1987 Bruntland Report<sup>83</sup> and has also been referenced by bodies seeking to interpret sustainable development under Scots law. The WFGA places public bodies in Wales under a duty to carry out sustainable development, which must include setting and publishing wellbeing objectives that are designed to maximise a public body’s contribution to achieving wellbeing goals, and by taking all reasonable steps (in exercising its functions) to meet those objectives. The goals are: (1) a more prosperous Wales; (2) a resilient Wales; (3) a healthier Wales; (4) a more equal Wales; (5) a Wales of cohesive communities; (6) a Wales of vibrant culture and thriving Welsh language; and (7) a globally responsible Wales. Crucially, the Future Generations Commissioner for Wales does not see the goals as potentially conflicting matters to be balanced, but rather as forms of flourishing each to be achieved to the highest degree possible in any given context.

Whilst recognising its proven record in catalysing cultural change, WFGA has been criticised as lacking sufficient clarity to provide much in the way of legally enforceable rights for individuals and communities. Trends in Welsh legislation disclose an emphasis on imposing strategic duties on public bodies without creating specific legally enforceable rights for individuals and communities.<sup>84</sup> In relation to asset acquisition, the IWA found that communities in Wales have fewer statutory rights than communities in Scotland and England,

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<sup>83</sup> *Report of the World Commission on Environment and Development: Our Common Future* (1987), online at: <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

<sup>84</sup> Sarah Nason, “The ‘new administrative law’ of Wales” [2019] *Public Law* 703; Lord Thomas of Cwmgiedd, “Thinking policy through before legislating – aspirational legislation” Statute Law Society, The Lord Renton Lecture, Institute of Advanced Legal Studies, 21 November 2019, online at: <http://www.statutelawsociety.co.uk/home/lord-thomas-text-aspirational-legislation-21-11-19/>

seemingly at odds with “conceptions in Welsh political circles of Wales as a ‘communitarian’ nation”.<sup>85</sup>

A specific commitment to sustainable development is not part of the legislative conditions for communities requesting an asset transfer from Scottish public authorities under Part 5 of the 2015 Act, nor for English communities exercising the right to list and to bid under the Localism Act 2011. The term “sustainable development” is not expressly used in the context of UK local authorities’ general powers to dispose of assets at less than best consideration. However, in all these contexts, matters that legislation and related guidance require decision-makers to account for are facets of sustainable development. For example, promotion or improvement of economic development or regeneration (prosperity and resilience), health, social wellbeing, or environmental wellbeing, and social interests including cultural, recreational, and sporting interests. Sustainable development, through the prism of wellbeing, is then relevant to all legal bases for transferring land or other assets to communities discussed in this article. With respect to Scottish community rights to buy legislation, Ross argues that sustainable development might “most usefully be viewed as a framework or forum for sometimes complementary but often conflicting, factors to be raised”,<sup>86</sup> and that how such factors are articulated within legislation and guidance can be purposefully nuanced and context specific. This might already be evident within existing legislation and guidance, perhaps across all UK nations, though it isn’t clear that such articulation has always kept pace with broader government policies in relation to sustainable development across land and asset use.

The notion of land ownership as an asset to be used to serve the common good is embedded in international human rights law, which places relevant state parties under obligations to ensure progressive realisation of social and economic rights such as rights to

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<sup>85</sup> IWA (n 22) p.7.

<sup>86</sup> Ross (n 82) p.188.

adequate housing and food. Reflective of this, the first principle of the Scottish Land Rights and Responsibilities Statement is:

The overall framework of land rights, responsibilities and public policies should promote, fulfil and respect relevant human rights in relation to land, contribute to public interest and wellbeing, and balance public and private interests. The framework should support sustainable economic development, protect and enhance the environment, help achieve social justice and build a fairer society.

The ECHR Article 1 Protocol 1 right to property, incorporated into domestic law by the Human Rights Act 1998 (also underpinning the devolution Acts), has been seen as limiting the progress of reforms seeking more diversified land ownership in Scotland.<sup>87</sup> In relation to the Crofting CRtB, the Scottish Government justified expropriation of privately owned land based on the need to support communities located in the most fragile areas where the potential for a bad landlord to do real harm is greatest.<sup>88</sup> Also, crofting land is inherently blighted by strict tenure conditions such that the owner cannot act in a way which undermines strong crofting use rights. In *Pairc Crofters v The Scottish Ministers*,<sup>89</sup> the Court of Session held that legislative procedures for Ministers to balance competing interests when making decisions about crofting community rights were compatible with article 6 ECHR (right to a fair hearing); that weight given to the landowner's interests is pre-eminently a matter for Ministers; compensation is a material consideration; and the court will only require that ministerial assessment of the public interest is not "manifestly unreasonable". Maxwell describes this approach as "highly

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<sup>87</sup> Debates discussed in Maxwell (n 81) and Frankie McCarthy, "Property Rights and Human Rights in Scottish Land Reform" in in Malcolm M. Combe, Jayne Glass and Annie Tindley (eds), *Land Reform in Scotland: History, Law and Policy* (Edinburgh University Press 2020) 170.

<sup>88</sup> Scottish Executive, Land Reform (Scotland) Bill, Policy Memorandum (2001) para 25, online at: [https://archive2021.parliament.scot/S1\\_Bills/Land%20Reform%20\(Scotland\)%20Bill/b44s1pm.pdf](https://archive2021.parliament.scot/S1_Bills/Land%20Reform%20(Scotland)%20Bill/b44s1pm.pdf)

<sup>89</sup> [2012] CSIH 96.

deferential”. He is also concerned that absent any legislative definition of sustainable development, the provisions might not satisfy the criterion for an interference with rights to be prescribed by law.<sup>90</sup>

Exercises of the right to list an asset as being of community value in England under the Localism Act 2011 have also been challenged under ECHR A1P1, in cases given “short shrift” by the First-tier Tribunal.<sup>91</sup> The statutory right to compensation for relevant losses experienced by an owner has been seen as a significant factor in assessing whether any person affected bears a disproportionate and excessive burden, albeit that the right to compensation is not itself determinative.<sup>92</sup>

As concerns social, economic, and cultural rights, both Scotland and Wales are exploring legislative devices to respect, protect and fulfil such rights (under devolved competence in relation to compliance with the UK’s international obligations).<sup>93</sup> For example, through imposing obligations on public bodies to have “due regard” or to “take into account” international obligations in their decision-making. This can be seen in the Scottish 2016 Act, which requires Ministers to “have regard” to the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) when making certain decisions.<sup>94</sup> Scotland and Wales have also brought into force section 1 of the Equality Act 2010, which requires public authorities to have due regard to the desirability of exercising their strategic functions

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<sup>90</sup> Maxwell (n 81).

<sup>91</sup> Simon Adamyk, *Assets of Community Value* (Wildy, Simmonds and Hill Publishing 2017) p.157.

<sup>92</sup> Ibid p.158.

<sup>93</sup> See e.g., for Scotland, <https://www.gov.scot/policies/human-rights> and for Wales, Simon Hoffman, Sarah Nason, Ele Hicks and Rosie Beacock, *Strengthening and Advancing Equality and Human Rights in Wales* (Welsh Government Social Research 54/2021) and Welsh Government response (May 2022), online at: <https://gov.wales/strengthening-and-advancing-equality-and-human-rights-wales-research-report-welsh-government#description-block>

<sup>94</sup> Under section 56 of the Land Reform (Scotland) Act 2016, when deciding whether to consent to an exercise of the right to buy land for sustainable development, Scottish Ministers must have regard to “relevant non-Convention human rights” which means rights other than those within the meaning of section 1 of the Human Rights Act 1998 (in effect rights not incorporated into UK law by the 1998 Act). Such non-Convention rights are those considered by Scottish Ministers to be relevant, as well as those contained in any international convention, treaty or other international instrument ratified by the UK including the United Nations International Covenant on Economic, Social and Cultural Rights. The 2016 Act also requires Ministers to have regard to the desirability of encouraging equal opportunities.

in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.

It can be argued that, rather than acting as a barrier to land reform, the engagement of ECHR A1P1 opens space for broader analysis. If one adopts a ‘citizenship’ conception of property as including obligations inherent in property ownership, as opposed to a ‘castle’ conception focusing only on the owner’s rights, there is scope for those examining whether the burdens of ownership are unjustified in any given context to consider wider values underpinning relevant systems of property law.<sup>95</sup> This account is supported by Scottish legislation expressly referencing rights beyond the ECHR such as those under ICESCR. Ross concludes that this approach is operationalised through “statutory guidance incorporated into the wider sustainable development equations for all land use decisions including the community rights to buy regimes”.<sup>96</sup> Statute and guidance, then, deploy various mechanisms to infuse Ministerial decision-making with the flavour of social, economic, and cultural rights, and various facets of sustainability (including the compartments of wellbeing) but without formally defining sustainable development or rendering any further rights, beyond ECHR A1P1 itself, directly justiciable. For some this is a positive development, others are concerned that it embeds over-emphasis on socio-political considerations to the detriment of economic and environmental factors and “to the detriment of building any coherence in the law”.<sup>97</sup>

### **Impact of legislation**

Since 1990 the total area of community owned land in Scotland has increased more than fivefold.<sup>98</sup> However, most acquisitions occur through negotiated transfers outside new

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<sup>95</sup> McCarthy (n 87).

<sup>96</sup> Ross (n 82) p.202.

<sup>97</sup> Maxwell (n 87) p.915.

<sup>98</sup> McMorran et al (n 3) p.5.

legislative procedures.<sup>99</sup> Research for the Scottish Land Commission (SLC) found that legislation provides a backdrop facilitating transfers, with communities using part of the legislative routes to establish a clear pathway and negotiating mechanism, later switching to negotiated sale.<sup>100</sup> However, the SLC also highlighted communities and/or landowners having attempted negotiated transfer with the express aim of avoiding the legislative routes, which were seen as drawn-out, costly, and adversarial. Conversely, other respondents considered the legislation “created an environment for negotiation through a repositioning of communities and the dynamic between landowners and communities, with power now existing ‘on both sides’”.<sup>101</sup> Despite limited use, the Crofting CRtB as a right of compulsory purchase withstanding legal challenge, was viewed as having important indirect effects relating to wider legislation. The right to acquire abandoned (etc) land and the right to acquire land for sustainable development “were seen as representing an important indicative shift towards forced sale/compulsory purchase”.<sup>102</sup> Overall, it can be maintained, as Lovett puts it, that “land reform legislation does matter”.<sup>103</sup>

The community asset transfer process under Part 5 of the 2015 Act was widely welcomed by respondents to the SLC research, though implementation was seen as falling short of the original vision for a transparent and robust process.<sup>104</sup> Some perceived the 2015 Act as having hardened attitudes, prompting local authorities to abandon simpler routes or to try to limit asset transfer. Local authorities were viewed as inconsistent in applying asset transfer legislation,<sup>105</sup> and as “less strategic, adaptive and flexible as a result of legislation”, with procedures becoming more bureaucratic, and leases which used to be nominal (or

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<sup>99</sup> Report of the Land Reform Review Group, *The Land of Scotland the Common Good* (Scottish Government 2014) and McMorran et al (n 3).

<sup>100</sup> McMorran et al (n 3). Yet there was still a minority view that the legislation actually had a negative impact on negotiated transfer by having “altered the tone of discussions for the worse” (p.19).

<sup>101</sup> McMorran et al (n 3) p.23-24.

<sup>102</sup> Ibid p.9.

<sup>103</sup> Lovett (n 63) p.143.

<sup>104</sup> McMorran et al (n 3) p.iv.

<sup>105</sup> Ibid p.50.



‘peppercorn’) more likely to be set at commercial rates.<sup>106</sup> Some relevant authorities were failing to comply, others were doing so against the spirit of legislation and guidance. Legislative and funding processes were seen as having created challenging timeframes for submission of bids and valuation, and groups whose asset transfer requests had been rejected reported confusion around the process for reviews and appeals. Research respondents also felt the range of legislative pathways to community asset acquisition were misaligned, for example, in relation to constitution and membership eligibility requirements for CRtB land on the one hand, and community asset transfers on the other.<sup>107</sup> The addition of new routes to ownership in the 2015 and 2016 Acts was seen as adding to an already confusing landscape.<sup>108</sup>

Despite these challenges, the researchers found “a clear and continuing need for robust legal mechanisms to support community ownership”.<sup>109</sup> The tenor of the legislation continues to be significant. As Combe puts it:

The real innovation, and the real shift in the power balance for community ownership, is that the public sector body *must* agree to a properly made [asset transfer] request unless there are reasonable grounds for refusing it...In this regard, a certain resonance with the new right to buy to further sustainable development found in the 2016 Act is evident: if an application is for a strong purpose, it *must* be granted.<sup>110</sup>

Other research, specifically evaluating Part 5 of the 2015 Act, found an increase in asset transfer activity between 2017/18 and 2018/19.<sup>111</sup> All authorities sampled were employing guidance documents and legislation to support the design of processes. Some had processes

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<sup>106</sup> Ibid p.55.

<sup>107</sup> Ibid p.70-71.

<sup>108</sup> Ibid p.39 and p.70.

<sup>109</sup> Ibid p.72.

<sup>110</sup> Combe (n 4) p.137.

<sup>111</sup> McMillan et al (n 1).

pre-dating the 2015 Act and were incorporating new legislation to ensure compliance. Others did not have pre-existing procedures and were working to introduce them.<sup>112</sup> Concerns were reported around a lack of resources to support and raise awareness of the 2015 Act, linked to authorities being overstretched.

In England, Co-operative Group Limited and Locality research, based on local authorities responding to FOI requests, found the volume of CATs to be approximately 1/12<sup>th</sup> the volume of sales on the open market, representing less than 1% of the total asset portfolio of local authorities.<sup>113</sup> The FOI also revealed that 45% of councils responding had a CAT policy in place, either as a standalone policy or embedded in another strategy. However, one third had not been updated within the last five years (2014 to 2019) and 28% of CATs had been completed by councils without a policy. Councils without a CAT policy were more likely to transfer assets on shorter leases and most were not currently identifying assets available for CAT in the future.

In Northern Ireland, DTNI research found that: “Many of the weaknesses and challenges of the current CAT process would remain even if new legislation was enacted”.<sup>114</sup> These challenges can be classified as concerning economic viability, division and conflict in the community, limited social capital, limited resources and assets, and that CATs are often under-capitalised and reliant on external funding.<sup>115</sup>

Transfer processes are still seen as bureaucratic, with specific concerns around whether timescales are sufficient for communities to secure funding and obtain professional advice to develop their proposals. Managing perceptions and expectations can also be difficult, with communities naïve to processes and success rates; good relations and communication with the

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<sup>112</sup> Ibid p.29.

<sup>113</sup> Co-operative Group Limited and Locality, *In community hands: lessons from the past five years of Community Asset Transfer* (2020), online at: [https://locality.org.uk/wp-content/uploads/2020/03/COP33979\\_In-Community-Hands\\_2020.03.18.pdf](https://locality.org.uk/wp-content/uploads/2020/03/COP33979_In-Community-Hands_2020.03.18.pdf)

<sup>114</sup> DTNI (n 1) p.24.

<sup>115</sup> McMorran et al (n 3).

asset owner are also crucial. Lack of communication between departments and actors within public bodies is also problematic. There are unique challenges in urban contexts where property sales complete more quickly, and CATs are more common in areas where average residential property prices are lower. The future sustainability of the community body and the asset itself are also important, and there can sometimes be little merit in taking on an asset transfer without also securing development rights. The experience and capacity of communities varies widely, with frequent reliance on a core group of older volunteers. Training and support post-acquisition can be patchy especially in terms of financial and asset management, and less advantaged communities are not well-supported to undertake asset transfers or to exercise rights to buy, with potential to re-entrench inequality.

Funding and practical support is available in all four nations, from Development Trusts<sup>116</sup> as well as from government<sup>117</sup> and charitable sources, though research suggests additional resources are required, with funding seen as a more important driver of community acquisition than legislative pathways.<sup>118</sup>

## **Further reforms**

The Scottish Government aims to introduce a new Land Reform Bill by the end of 2023. Proposed measures include strengthening the Land Rights and Responsibilities Statement, introducing compulsory management plans, and ensuring the public interest is considered on

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<sup>116</sup> In England (through Locality), and the Development Trusts of Scotland, Northern Ireland and Wales.

<sup>117</sup> E.g., the Scottish Land Fund, funded by the Scottish Government and delivered in partnership by The National Lottery Community Fund and Highlands and Islands Enterprise; the Northern Ireland Social Investment Fund; the Welsh Community Asset Loan Fund; and the £150 million Community Ownership Fund established by the UK Government in 2021 as part of its 'levelling up' agenda.

<sup>118</sup> McMorran et al (n 5); Co-op and Locality (n 112); DTNI (n 1); McMillan et al (n 1).

transfers of large-scale.<sup>119</sup> The consultation includes various proposals for further ancillary measures around community acquisition and the transparency of land ownership and use.

For England, the Locality Report proposed extending assets of community value legislation to cover other local assets such as amenities and services (similar to the 2014 Welsh Co-operatives and Mutuals Commission recommendation to include sports clubs).<sup>120</sup> Locality also recommends a “Community Right to Own” that would give first refusal to communities who seek to buy assets of community value on the open market, with a one-year moratorium for communities to mobilise and fundraise, expanding and strengthening the right for communities to “bid” for such assets. It also recommends new powers for communities to force the sale of neglected high street assets that are derelict and leading to local decline, and legislative protections to safeguard existing assets in community ownership from private sale.

In Northern Ireland, research for the DTNI acknowledged that legislation elsewhere “provides a source of learning”,<sup>121</sup> and stakeholders supported calls to establish a legislative basis for community asset acquisition, particularly to facilitate a cultural shift. However, the research also found that creating further legislative rights could encourage community organisations to submit non financially viable proposals and confer a sense of entitlement to acquire assets regardless of the strength of their case, and that unevenness in the take up of rights could amplify religious and political divisions.<sup>122</sup> The DTNI scoping paper nevertheless favoured additional community rights legislation, to be drafted such that it “balances the opportunity for community ownership with shared government and community objectives”.<sup>123</sup> In practice this would include community empowerment and investment provisions so that

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<sup>119</sup> Scottish Government, Land Reform in a Net Zero Nation: Consultation paper (Scottish Government 2022), online at: <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2022/07/land-reform-net-zero-nation-consultation-paper/documents/land-reform-net-zero-nation-consultation-paper/land-reform-net-zero-nation-consultation-paper/govscot%3Adocument/land-reform-net-zero-nation-consultation-paper.pdf>

<sup>120</sup> Welsh Co-operatives and Mutuals Commission (n 19).

<sup>121</sup> DTNI (n 1) p.27.

<sup>122</sup> Ibid p.24.

<sup>123</sup> Ibid p.28.

community organisations can acquire assets to address their needs (based on geographical area or community of interest); a community right to register an interest to buy public and privately owned assets of community value (similar to, but potentially stronger than, the Localism Act 2011); related appeal rights if registration is refused; and rights to acquire registered assets once they come to market.

In Wales, IWA research roundtables universally supported legislating for community rights, up to and including a community right to buy land from private owners.<sup>124</sup> A 2022 report of Cwmpas (formerly the Wales Co-operative Centre) also recommended Welsh Government should introduce a Community Ownership and Empowerment Act, giving community organisations more statutory powers to acquire, or otherwise control, land and other assets.<sup>125</sup> The Future Generations Commissioner for Wales recommends Wales learn from how community anchor organisations and Development Trusts in Scotland use relevant community rights legislation as a force for change, and that Wales moves to a position where “community ownership of assets should be the normal and realistic option for communities to acquire land and assets”.<sup>126</sup>

The background to the legislation is important to consider here. The stronger Scottish community rights to buy relate largely to land (as opposed to other assets) and have developed as part of a package of land reform. It remains questionable whether these stronger rights to buy, sometimes from an unwilling owner, are appropriately transferrable to other assets, and to other UK nations, where land, planning, housing, and local government systems will be differently calibrated.

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<sup>124</sup> IWA (n 22) p.13-14.

<sup>125</sup> Casey Edwards, *Community ownership of land and assets: enabling the delivery of community-led housing in Wales* (Cwmpas 2022).

<sup>126</sup> In her document *A Journey to A Wales of Cohesive Communities*, <https://www.futuregenerations.wales/wp-content/uploads/2019/09/Cohesive-Wales-Topic-4.pdf>

Whilst Scottish legislation developed as part of wider reforms to ownership of private and public assets, now anchored in sustainable development and human rights policies, approaches in Northern Ireland and Wales have been reactionary in the context of public body disposals of surplus assets and austerity impacts. More recently, community empowerment across the UK is part of a ‘levelling up’ moral, social, and economic programme based on tackling geographical inequality. In May 2022, the UK Government introduced a Levelling-up and Regeneration Bill. This includes provisions for setting levelling-up missions and reporting on progress in delivering them, provisions about local democracy and a Community Infrastructure Levy, as well as various planning and regeneration aspects. It does not directly address community asset acquisition rights, but it could lead to additional funding and support for communities, and further community engagement in planning processes.

Legislation giving strong rights to communities can catalyse cultural change, including shifting the balance from a situation where owners must at least consider community asset transfer, to one where they must sell to community bodies unless doing so would be unreasonable.<sup>127</sup> Asset acquisition legislation has had an impact on community bargaining power including in negotiated sales taking place outside new procedures. However, various phases of legislative development have not always been well-aligned, leading to multiple pathways to acquisition variously of land and other assets, and arguably to excessive bureaucracy, which owners reluctant to transfer to communities can use to their advantage.

The clarity of legislative drafting has also been subject to scrutiny, particularly when the law relating community acquisition of land and other assets is used to express frameworks through which policy goals of sustainable development, wellbeing, and promoting human rights can be achieved, but where these concepts are not explicitly defined in the legislation. More formal, but contextually nuanced, legislative definitions of these concepts and/or more

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<sup>127</sup> See e.g., McMorran et al (n 3) and Combe (n 4).

detailed guidance could be beneficial. Whilst in Wales there is promotive legislation and policy concerning community empowerment, sustainability, and human rights, the lack of specific rights for communities (and indeed for individuals in some contexts) is a factor contributing to an identified ‘implementation gap’.<sup>128</sup>

Legislation giving stronger rights to communities, especially that which invites expropriation of property from private owners, requires more extensive judicial supervision, including scrutinising political balancing of various facets of wellbeing, sustainable development, human rights, and public interest. Those seeking to enact or reform community empowerment legislation must grapple with these matters, as well as the most appropriate definition of community (including for urban and rural acquisitions), what ‘democratic procedures’ are required, and how should land and other assets be valued. Currently, however, most community asset transfers occur through negotiated sale outside legislative procedures. Extra funding and longer-term post acquisition support for communities is needed, and local authorities across the UK have considerable scope to learn from each other to improve their policies and practices. For the time being this is likely to be more impactful than legislative reform.

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<sup>128</sup> See e.g., Hoffman et al (n 93).

