

## Land Reform White Paper July 1999

Ministerial Statement by Jim Wallace QC MSP, Minister of Justice  
24 November 1999

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Published by the Land Programme of the  
CALEDONIA CENTRE FOR SOCIAL DEVELOPMENT  
15 December 1999

**BRIEFING No. 2**  
**15 December 1999**

**Ministerial Statement on Land Reform**  
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INTRODUCTION

- 1.0 This briefing is the second to be prepared under the Land Programme of the Caledonia Centre for Social Development - a programme which aims to promote informed analysis and debate about land reform. The first Briefing (No. 1) was prepared in August 1999 and analysed the community right-to-buy proposals contained in the White Paper on Land Reform published in July. This briefing provides an analysis of the Ministerial Statement made by Jim Wallace on 24 November 1999 in the Scottish Parliament in which important developments in the Government's thinking were announced.
- 1.1 The White Paper proposed that properly constituted community bodies be able to register an interest in the land where their members live and/or work. In the event that this land is offered for sale in the future, the community body would be able to exercise a right-to-buy at a price to be set by a Government-appointed valuer. The White Paper proposed reserve powers of compulsory purchase to deter landowners from evading their obligation to notify Scottish Ministers of their intention to sell land on the register.
- 1.2 This briefing highlights and analyses the key points made by Jim Wallace in a speech which announced in general terms Ministerial thinking on adjusting the community right-to-buy provisions. This new thinking is in response to submissions received during the White Paper consultation period. The next stage in the process is the publication of a draft bill sometime early in 2000. The full text of the Ministerial Statement and the debate which followed can be obtained on the Scottish Parliament website at:-

[www.scottish.parliament.uk/official\\_report/session99-00/or030902.htm](http://www.scottish.parliament.uk/official_report/session99-00/or030902.htm)

[www.scottish.parliament.uk/official\\_report/session99-00/or030903.htm](http://www.scottish.parliament.uk/official_report/session99-00/or030903.htm)

- 1.3 Caledonia Briefings are available on our website at:-

Briefing 1 [www.caledonia.org.uk/land/brief01.htm](http://www.caledonia.org.uk/land/brief01.htm)

Briefing 2 [www.caledonia.org.uk/land/brief02.htm](http://www.caledonia.org.uk/land/brief02.htm)

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- 1.4 The author would be happy to engage with any interested party in further discussions on any of the points raised and can be contacted by email at [andywrightman@caledonia.org.uk](mailto:andywrightman@caledonia.org.uk)

#### THE MAIN POINTS OF THE MINISTERIAL STATEMENT

- 1.5 Jim Wallace made 6 key points in relation to land reform, namely:-

- discretion for Ministers to decide whether a community body is representative or not
- a degree of discretion with regard to nearby land
- introduction of emergency registration procedures
- right-to-buy to apply to land as lotted by seller
- changes to the timing of the right-to-buy procedure
- crofter right-to-buy to be included in bill

#### **Discretion on whether a community body is representative or not**

- 1.6 On the first of these, Jim Wallace said,

*“In the light of comments from community interests—the people who will benefit from the legislation—I accept that, in making the legislation as watertight as possible, we were in danger of excluding cases that the legislation should be there to help. As a result, the legislation will give ministers a degree of discretion to decide whether a community body is sufficiently representative of and supported by the local community.”*

- 1.7 This statement appears to acknowledge that the definition of community contained in the White Paper (those who live and/or work on the land - i.e. tenants and employees) is too narrow and needs to be more flexible.

- 1.8 However, whilst the statement acknowledges the problem of excluding communities if the definition is made too tight, it does not make clear how this is to be resolved.

- 1.9 *“The legislation will give ministers a degree of discretion to decide whether a community body is sufficiently representative of and supported by the local community”*

What does this mean? It seems to be a more flexible approach to settling the 4th criteria under para 2.5 of the White Paper (the wording is identical), which in itself is ambiguous - what is the definition of community in this wider sense? Does the Ministerial statement imply that the definition of a community body (tenants and employees) could be changed in circumstances where it is not deemed to be representative of the local community (wider sense)?

1.10 Attempts to clarify what is meant here have been unsuccessful. The Scottish Executive responded to a query on this point by saying,

*“Mr Wallace's speech on Wednesday announced in general terms Ministers' thinking on adjusting the community right to buy provisions. The form of words used by Mr Wallace was carefully chosen to send a strong and clear signal of the main adjustments to the terms of the White Paper. The purpose of such an announcement at this stage was to demonstrate that Ministers are indeed listening, and to ensure that those who had commented on the White Paper got general feedback on how their contributions had fitted into the bigger picture.*

*For further detail however, you will have to wait for the publication of the draft Bill itself. Bear with us: we are working as fast as we can to get the draft Bill into the public domain.”*

1.11 On this basis the statement might be interpreted as an indication that even if the definition of community is to remain narrowly defined as tenants and employees, this will not be a barrier to exercising the right-to-buy in circumstances where such a narrow definition is deemed to be unrepresentative of the local community (community in this sense has yet to be defined).

1.12 This issue lies at the heart of the problems with the White Paper and the effectiveness of any legislation which follows. The difficulties which the Executive have imposed upon themselves by defining community in such narrow terms appears to have led them to rely upon discretionary powers to widen availability of the right-to-buy in circumstances where the statutory definition is considered by Ministers to be inappropriate.

1.13 The problem with discretionary powers for Ministers is that they do nothing to extend statutory rights, relying instead on the judgments of Ministers. This approach can be viewed positively in circumstances where it is difficult to extend statutory definitions. But it is also problematic in that discretionary powers provide the opportunity for a government which is hostile to land reform to use such discretion to block the right-to-buy.

1.14 In response to the White Paper, suggestions were made to the Executive as to how a wider definition could be made to work. The current proposals are flawed since they try to define an eligible community on the basis of the land, rather than defining the eligible land on the basis of the community. It is this latter approach which needs to be adopted if communities are to have the flexibility to exercise the right-to-buy in their own particular circumstances. This approach could be legislated for on the following basis whereby:-

- membership of the community body would be based on adults on the voting role in existing civil parishes,
- the right to buy would be vested in this body (or any other which it chose to support),

- registration of land would be based on criteria designed to demonstrate the range of circumstances in which a demonstrable community interest could be shown (i.e land in which the community already has an interest such as a sports field, land over which the community already has a legal right or interest, all publicly-owned land, and land on which a majority of those who live and work are members of the registered community body).

1.15 The Ministerial Statement remains unclear on how precisely the Executive intend to overcome the self-imposed constraints which their narrow definition of community has created. In considering how to avoid excluding the legitimate aspirations of a wide range of circumstances, the Executive should rethink the whole question based on the kind of solution outlined in para. 1.14 above.

### **A degree of discretion with regard to nearby land**

1.16 The question of whether the right-to-buy should apply to “nearby land” was raised in the White Paper (para. 2.5). In his statement Jim Wallace said,

*“Another concern raised with me on visits and in consultation responses was the possibility for community bodies to register an interest in nearby land. Ministers will again have a degree of discretion to decide whether a community body has demonstrated a direct community interest in a piece of land, which will make it possible for community bodies to register interest in nearby land.”*

This issue is a direct consequence of defining community in such narrow terms - the concept of “nearby land” would not arise if community were to be defined in the broader geographic sense outlined in para. 1.14 above. The fact that the draft bill will still allow for registration of “nearby land” suggests that the definition is to stay the same but, as argued in para. 1.11 above, discretion will be used to allow for, in effect, a wider definition to be applied in certain circumstances.

### **Introduction of emergency registration procedures**

1.17 Jim Wallace said,

*“Our general approach is to encourage communities to take time to prepare before land comes on the market, as land ownership is an onerous responsibility. However, we recognise that there may well be circumstances where the idea of community purchase only arises when the opportunity unexpectedly presents itself. Therefore, we will add a procedure for community bodies to apply on an exceptional basis to register interest after land comes on the market.”*

1.18 This is a welcome response to concerns that the requirement for previous registration of interest might deny the right-to-buy to communities where, as the Minister states, *“the idea of community purchase only arises when the opportunity unexpectedly presents itself.”*

- 1.19 Obviously the terms under which such “emergency” or late registration may apply will need careful thought. The change does, however, plug a major weakness in the White paper proposals.

### **Right-to-buy provisions to apply to land as lotted by seller**

- 1.20 Jim Wallace’s statement states,

*“We have listened to the concerns of the landowning interest. The main concern of landowners was about cherry picking. I understand their concern that, in some cases, that could have an impact on the value of the remaining land. We would much prefer that the seller and community body reach a voluntary agreement on the area for community purchase, but if they cannot do that, the community will have to buy the land as lotted.”*

- 1.21 The background to this is that the Green paper of January 1999 stated that the community right-to-buy proposal was to apply to land,

*“only at the point when the owner chooses to dispose of it. In addition, the right-to-buy would apply only to property on the basis the owner chooses i.e. not more or less or different from the lot(s) offered for disposal.”*

- 1.22 The White Paper made no mention of this issue although sources in the Executive confirmed to the Scotsman newspaper that communities would be able to register an interest in the parcels of land in which they had a direct interest. If and when the opportunity arose to exercise the right-to-buy, this could be done so as to secure only the specific parcel of land which was registered. The alternative approach in the Green Paper would have required a community interested only in a few acres for housing for example, to have purchased the whole estate or lot offered for sale of which the few acres formed a part.

- 1.23 The Ministerial statement makes clear that the Executive is minded to revert to the position in the Green Paper. This change is in response to the concerns of landowning interests that if community bodies could register an interest solely in parcels of land of interest to them, it could lead to the landowner being disadvantaged at the point of sale because the exclusion of registered parcels from the overall estate might reduce the overall value of the estate. The term used by landowning interests is “cherry-picking”.

- 1.24 The new position is, however, a gross over-reaction to pressure from landowning interests because it means that even in situations where there is no material disadvantage suffered by the seller (no cherry-picking), community bodies will still have to buy the land as lotted. However, as the Ministerial statement makes clear,

*“I understand their concern that, in some cases, (cherry-picking) could have an impact on the value of the remaining land.”*

If the concern is only over some cases (which is indeed the case), then the sensible response is to devise measures to compensate for any material disadvantage suffered in the limited number of cases where such effects

can be demonstrated. The proposal to require all registered land to be bought as lotted (except where voluntary agreement can be reached) represents an illogical response to the concerns of landowning interests and makes it much easier for the right-to-buy to be frustrated by lotting land in such a way that it is impractical for a community to purchase it.

- 1.25 The way to resolve this problem, therefore, is to introduce some form of compensatory device. One possibility would be to include in the valuation of registered parcels, the impact that the right-to-buy has on the overall sale of the landholding. The price paid by community bodies would thus provide compensation for the loss of overall value. There are other alternatives which could be developed. At the very minimum, community bodies should only be compelled to purchase land as lotted in situations where material disadvantage can be shown. Even this minimalist concession, however, would still permit intentional frustration of the right-to-buy if the seller includes the registered parcel in a lot which is beyond the aspirations or financial means of the community.
- 1.26 The key point is to ensure that the opportunity to exercise the right-to-buy is not lost as a consequence of inappropriate lotting of land and, that at the same time, no material disadvantage is suffered by the seller. Tying the right-to-buy to land as lotted places all the power in the hands of the seller of land. As things stand, the community must register its interest in advance of sale and the seller will have ample opportunity, if they wish, to frustrate the community's aspirations. It is ridiculous that a community wishing to purchase a field for a football pitch will have to buy a 10,000 acre estate to do so.

### **Changes to the timing of the right-to-buy procedure**

- 1.27 Jim Wallace's statement made the point that,

*“Landowning interests have also expressed concerns about the delays that could result from the exercise of community right to buy. Delays are in no one's interests and we wish to minimise them. Therefore, we have accepted the suggestion that the 30 days for community bodies to confirm their interest in buying should be prior to the property going on the market. Clearly, that implies an obligation on the landowner to give prior intimation to a registered community body.*

*A further change to speed up the process markedly will be that the period of six months for community bodies to come up with funding will run from the date on which the body notifies the landowner that it will exercise its right to buy. To make that possible, the various processes will go forward simultaneously rather than consecutively; and deadlines will be set for each stage in the process.”*

- 1.28 This change can be seen as a relatively modest change to the overall timetabling of how the right-to-buy can be exercised. However, problems will arise if communities have to start to raise finance before a price has been set, before a local ballot has been conducted and before the right-to-buy has been approved by Scottish Ministers. This could cause

considerable problems both for the community and for potential funders. Any change to the timetabling arrangements will therefore need careful thought in terms of its impact on the ability of communities to effectively exercise their right-to-buy. It should be noted in passing that the ability of communities to raise finance depends on an appropriate timetable not only as regards the legislation but also in terms of the particular proposed funding body, namely the Scottish Land Fund.

### **Crofter right-to-buy to be included in bill**

1.29 The ministerial statement reads,

*“I will now address the prospects for including provisions to create a crofting community right to buy in the forthcoming bill, rather than waiting for the crofting bill that Ross Finnie will bring forward in about two years’ time. When we launched the consultation paper at Abriachan in July, we said that we wanted to include a crofting community right to buy if we could.*

*We have consulted on that separately and listened to what crofting communities and other interests had to say. In the light of that consultation, I am pleased to announce today that the draft land reform bill will indeed include provisions on giving crofting communities a special right to buy. That will mean a short delay, possibly up to a couple of months, in introducing the draft land reform bill. That is a price well worth paying to give crofting communities the right to buy now. I am sure that all those in the crofting community and those members who have expressed an interest in this area will warmly welcome this announcement.”*

1.30 The proposal that crofting communities should have the right to ownership of their croft land on the same basis as already available to tenants of the Scottish Ministers’ Crofting estates under the Transfer of Crofting Estates (Scotland) Act 1997 was included in the Green Paper in January 1999. The significance of the Ministerial statement is that it incorporates the legislation to achieve this in the forthcoming bill rather than wait for the Crofting bill in about two year’s time.

1.31 The inclusion of this particular measure as an addition to those covering community right-to-buy and access strengthens the overall bill but does not in itself represent anything new. It is perhaps worth highlighting once again that the proposed right will interact with the community right-to-buy provisions in areas of land under crofting tenure. As outlined in Briefing No.1 in August 1999,

*“There is the potential for the community right-to-buy to conflict with the crofting right-to-buy where the definition of community in each case is different. As the proposals stand, the community right-to-buy is focussed on tenants and thus there may be little conflict. If the definition of community is extended, however, there will need to be clear guidelines on how, and in what circumstances, each right can be exercised.*

*In practice it is assumed that the crofting right-to-buy will take precedence since it is proposed that this can be exercised at any time whereas the community right-to-buy is only available when the land is offered for sale.”*

- 1.32 Of all the measures contained in the Scottish Executive’s land reform programme for the first Parliament, the crofting right-to-buy is by far the most radical in terms of its potential impact as it offers the potential for crofting communities to take ownership at any time of up to 2 million acres of Scotland in the Crofting Counties.

### **Concluding thoughts**

- 1.33 What is the effect of this Ministerial Statement on the overall scope of the proposals? There is no doubt that bringing forward the crofter right-to-buy strengthens the overall package. On the community right-to-buy, the discretionary powers for Ministers and emergency procedures for nonregistered land represent welcome, if modest, adjustments which overcome some of the weaknesses in the White Paper. However, the two most significant conclusions are:-
- 1.34 Firstly, more attention needs to be given to making sure that the definition of community is broadened and that registration of land is focussed on the interests of the broad community (based upon civil parishes as recommended in para. 1.14).
- 1.35 Secondly, if proposals to restrict the right-to-buy to land as lotted are incorporated into the draft bill, this will more than outweigh the modest benefits introduced as a consequence of the other Ministerial announcements. This proposal has the potential to utterly frustrate the aims of the community right-to-buy legislation.