

CALEDONIA BRIEFING No. 3

Land Reform Draft Bill

Part 2 - Community Right to Buy

An Analysis

by Andy Wightman

andywightman@caledonia.org.uk



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1 INTRODUCTION

1.0 This briefing is the third to be prepared under the Land Programme of the Caledonia Centre for Social Development - a programme that 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 1999. The second briefing (No. 2) provided an analysis of the Ministerial Statement made by Jim Wallace on 24 November 1999 in the Scottish Parliament in which important developments in the Governments thinking were announced. This briefing provides an analysis of the community right-to-buy proposals contained in the Land Reform Draft Bill published by the Scottish Executive and launched in Aberfoyle by Justice Minister Jim Wallace and Environment Minister Sam Galbraith on Thursday 22 February 2001.

1.1 This briefing highlights provisions contained in Part II of the Draft Bill and analyses the scope, impact and value of the measures. The next stage in the process is the publication of a bill sometime in Autumn 2001 which will be considered by the Parliamentary process and become an Act probably by Spring 2002. The full text of the Draft Bill and accompanying notes is available on the Scottish Executive website at: -

www.scotland.gov.uk/consultations/landreform/lrdb-00.asp

1.2 Caledonia Briefings are available on our website at: -

www.caledonia.org.uk/land/

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1.3 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.

2 BACKGROUND TO THE DRAFT BILL

- 2.1 Labours manifesto for the 1997 General Election made a commitment to initiate a study into the system of landownership and management in Scotland. In October 1997 the Land Reform Policy Group (LRPG) was established. It published two consultation papers and a final report, namely:
- *Identifying the Problems* (the Brown Paper) in February 1998
 - *Identifying the Solutions* (the Orange Paper) in September 1998
 - *Recommendations for Action* (the Green Paper) in January 1999
- 2.2 The Green Paper contained the final recommendations of the LRPG and formed the basis of the Labour Partys manifesto for the Scottish elections in May 1999 and was subsequently adopted as part of the Partnership for Scotland agreement between the Liberal Democrats and Labour.
- 2.3 Implementation of the Green Paper will be in stages throughout the 1999-2003 Parliament. Already the Government has passed Acts abolishing the Feudal Tenure system and establishing National Parks. In July 1999 the Scottish Executive published a White Paper which contained the outline of a Bill on community right-to buy and access. In November 1999 Jim Wallace announced that the Draft Bill would also contain the crofting community right-to-buy.
- 2.4 The Draft Bill has now been published and is subject to public consultation before being introduced to Parliament in the Autumn (See Chapter 8 of the Consultation Document).
- 2.5 The Draft Bill is presented as part of a 200 page Consultation Document which provides a very useful and well-presented guide to the policy background (Chapter 1 pp. 3-12), the results of consultations on the White Paper (Chapter 4 pp. 21-37), and helpful notes on the issues Ministers would particularly welcome views on (Chapter 6 pp. 49-55). The Draft Bill itself is contained in Chapter 7 with Part II (community right-to-buy) covered by Sections 40 - 74 pp.113-153.
- 2.6 All these chapters need careful reading in order to construct a meaningful and useful response. It is worth paying particular attention to the outcome to the consultation exercise (Chapter 4) and the issues flagged up in Chapter 6 where pointers are given to where further work and thought are required. These pointers provide a vital context to understanding the body of the bill.

3 HOW WILL THE COMMUNITY RIGHT-TO-BUY WORK?

3.1 The following sections describe the proposals contained in the Draft Bill. In summary, Part II of the Draft Bill: -

- defines registrable land (current thinking is to exclude all land in settlements of over 3000 people),
- defines community bodies (a company limited by guarantee whose membership is those on voters roll in polling district within which land is situated),
- outlines the process of registration (10% of community to agree),
- provides for a process of late or emergency registration,
- allows for community bodies to exercise their right-to buy land in which they have a registered interest at a price set by an appointed valuer (to be assessed as the market value of the land),
- determines that the right-to-buy shall oblige community bodies to purchase all the land being marketed in the same lot as the registered land,
- exempts certain types of land transfers from the right-to-buy (intra-family transfers and transfers to family trusts and companies),
- outlines the procedure required to obtain community approval for exercising the right-to-buy (50% to vote - or less at Ministers discretion - and a simple majority to agree),
- allows Ministers to decide which body (if more than one is registered) shall have the right-to-buy,
- allows Ministers to decide that where crofting land is involved, a crofting community body shall have the prior right-to-buy,
- provides for an appeals procedure,
- provides for a power of compulsory purchase where Ministers are satisfied that an owner has transferred land in breach of the terms of the Act (e.g. failed to notify the community with a registered interest and thus denied them the right-to-buy),
- prohibits a community body which has acquired land under the Act from transferring it further unless such a transfer is for the purpose of the sustainable development of the community, involves less than 10% of the land owned, and Ministerial consent has been obtained. The only way a community can dispose of land it owns is by winding

up the company in which case land must be transferred to another community body approved of by Ministers or to Ministers themselves.

Chapter 1 - General Extent of Community Right to Buy (Sections 40-44)

- 3.2 Section 41 deals with registrable land, i.e. the land that communities will be able to register an interest in. Given that the right-to-buy is intended to be restricted to rural land, a definition of rural has to be agreed. The Bill proposes that Ministers prepare a separate Parliamentary Order that will delineate which land will not be eligible. All other land will be registrable.
- 3.3 Current thinking is to exclude from the community right-to-buy all settlements with a population of more than 3000. On this basis, a list of those towns that would be excluded is provided on pages 62-64 of the Consultation Document. All land (including urban land in settlements of less than 3000 people) will thus be open to registration by community groups. This means that vacant land, buildings, houses, and office premises will all be registrable as well as open countryside outwith settlements. In addition, salmon fishings and mineral rights (though not oil, coal, gas, gold or silver) are registrable and adjacent foreshore can be included as registrable land.

Comment: Defining rural land in this way provides an exact method of determining which land can be registered and which cannot. However, what is the magic of 3000, or 2000, or 300? The community right-to-buy is intended to provide opportunities for rural communities. Perhaps it is the community that should be defined rather than the land. The community in and around Tain will be unable to register land in Tain (pop. 3460) even if it delivers exactly the same kind of community benefits that the community of Grantown-on-Spey will be able to enjoy by registering land in Grantown (pop. 2380).

- 3.4 Section 42 deals with the definition of community bodies that are eligible to register and subsequently buy land. The key proposals are that to be eligible, community bodies must be: -

- companies limited by guarantee

whose main purpose is:-

- the sustainable development of the community (defined as development calculated to provide increasing social and economic advantage to the community

and whose provisions must include the following: -

- a definition of the community to which the company relates (to be the persons from time to time entitled to vote in the polling district within which the registered land is situated)
- a power to exercise the right-to-buy under the Act
- membership to be not fewer than 30 persons
- majority of members to be members of the community

Comment: this appears unduly restrictive. It is not clear why community bodies must be Companies. Provided they are membership based, have a written constitution and are democratic it is surely up to the community to decide on the best form of structure (trusts, co-operatives etc.)

- 3.5 Ministers shall have discretion to direct that different definitions may apply. This allows for straightforward subsequent changes to the definition without amending the Act.
- 3.6 Section 43 proposes that Ministerial consent must be obtained where any community body that has registered or bought land under the Act wishes to change its memorandum or articles of association (its constitution under the Companies Act) whilst it has a registered interest in land or owns land purchased under the Act.
- 3.7 Section 44 proposes that Ministers shall set up and keep a Register of Community Interests in Land which shall be open to public inspection and outlines what such a register must contain. Information detailing the land use plans of a community body or its financial arrangements can be withheld from the Public Register and held by Ministers separately (though there is no obligation on community bodies to supply such information nor on Ministers to require it). Finally, Ministers can modify what must be kept in the Register and the circumstances in which information may be withheld from the public.

Chapter 2 - Registration of Interests (Sections 45-51)

- 3.8 Section 45 outlines the arrangements for registering an interest in land. The owner of the land must be notified and Ministers shall then invite the owners views on the proposed registration. Any response will then be passed to the community body for it to respond. Ministers will then take all such views into account. More than one community interest can be registered in respect of the same parcel of land and any community interest may be registered in more than one parcel of land. Once a decision has been made Ministers must notify the community body and the landowner.

- 3.9 Ministers decide firstly whether to consider the land for registration and secondly to accept the land for registration. Ministers can refuse to consider an application on technical grounds (subsection 8). The criteria for deciding whether to accept the application for registration are outlined in Section 46. Briefly these are that: -
- the land is registrable
 - a significant number of the members of the community body....has a substantial connection with the land or,
 - that the land is sufficiently near to land with which those members have a substantial connection and that its acquisition will support sustainable development of the community
 - where salmon fishings or minerals are involved, that land to which these rights relate is already owned by the community body or is registered or is in the process of being bought whether under the Act or privately.
 - there is sufficient support within the community (normal threshold 10% but Ministers can use their discretion to recognise less than this)
 - the registration is in the public interest
- 3.10 Subsection 3 provides a fair degree of discretion for Ministers to recognise bodies which are not strictly community bodies and to accept land for registration with which community members have no substantial connection.
- 3.11 Section 47 requires that to be eligible to exercise the right-to-buy, Ministers must have received a community's application before any action is taken by the landowner to sell the land (advertising, entering negotiations, informing the community of intention to sell - see Section 52 (5) for definitions of what constitutes an action).
- 3.12 Nevertheless Section 47 allows for late registration where Ministers are satisfied that there is good reason for the application being late, that there is a strong level of support within the community, and that there is a strong public interest case. In such circumstances any application must be received before a closing date is set for offers to buy the land or before a contract for sale has been concluded. Section 48 allows Ministers to prohibit an owner in these circumstances from proceeding further with any sale or transfer for a period of 30 days or, where a closing date has subsequently been fixed, to postpone that date for a period of 30 days.

Comment: this is the provision which allows for late or emergency registration in circumstances where a community wishes to exercise a right-to-buy but has not previously registered an interest. It provides a flexible discretionary power to allow the right-to-buy where circumstances are deemed by Ministers to warrant it.

- 3.13 Section 49 provides that any transfer or sale of registered land that has taken place in breach of the requirements of the Act will be illegal.
- 3.14 Section 50 provides that any registration of land shall have effect for five years but may be renewed within the 6 months before the expiry of that period. Communities will have to re-register under the same process as before, which will involve a re-balloting of community members. Ministers have the power to refuse if any material changes have taken place. There is no limit to the number of times an interest can be re-registered.

Comment: there is no indication of whether, if a registered interest lapses (the 5 years is up), an application to re-register will be allowed. Not being explicitly ruled out, one assumes that such a re-registration will be possible.

Chapter 3 - Activation of Right-to-Buy (Sections 52-57)

- 3.15 This is an important chapter that outlines how the right-to-buy is activated and the circumstances under which it shall not apply (exemptions).
- 3.16 Section 52 provides that certain transfers of land will not trigger the community right-to-buy. These are where land is transferred as a gift, to another member of the same family (including family trusts and companies), by order of a court (e.g. divorce proceedings), to a crofting tenant of croft land, between companies in the same group, by compulsory purchase, or to a person for bankruptcy proceedings (but presumably not including subsequent disposal).
- 3.17 If shares are transferred then any transfer which has the effect of transmitting effective control of the company will be considered a sale of land and will trigger the right-to-buy provisions.

Comment: there is no reference to land held by companies where shares are traded individually and collectively from time to time but never involving the transfer of majority control.

- 3.18 The right-to-buy is activated when any action is taken by the owner with a view to transferring title. This includes advertising the land, entering negotiations with a view to a transfer or notifying the community body that a transfer is intended.

- 3.19 Section 55 provides that Ministers shall be authorised to use compulsory purchase powers where land is transferred under any exempt category (e.g. to another member of the same family) and where the Lands Tribunal (on an application made to it by any person) determine that the main purpose in doing so is to avoid the requirements of the Act. This is in addition to the compulsory purchase powers available (Section 72 - see below) where Ministers are satisfied that a transfer has simply taken place illegally rather than by any attempt to hide it by exploiting exempt forms of transfer.
- 3.20 Section 56 obliges an owner to notify the community body and Ministers if they intend to take action to transfer any registered land. Section 57 gives community bodies a maximum of 30 days in which to decide whether or not to exercise their right-to-buy. The right-to-buy applies has to be exercised over all the land (or the lot of land) that is being offered for sale of which the registered land forms a part. In other words, if the registered interest is over 2 acres of a 20,000 acre estate and the estate is offered for sale as a whole then the community will be obliged to purchase the whole estate in order to secure the 2 acres in which they have a registered interest

Comment: communities will be forced to purchase land they do not want, to raise money for land they do not want, to accept restrictions on the use of land they do not want, and be barred from subsequently selling land they do not want (see Section 73) all because of fears of the European Convention on Human Rights (ECHR).

Chapter 4 - Procedure after Activation of Right-to-Buy (Sections 58-62)

- 3.21 In order to exercise the right-to-buy a community body must conduct a ballot of the local community (all those eligible to vote in the polling district in which the registered land is situated) and obtain the consent of Ministers. Section 58 requires that at least half the members of the community body must vote and that a majority of those vote in favour. Ministers have discretion to accept a lower turnout.
- 3.22 Ministers must be satisfied not only that the proposal has the support of community, but that other conditions are met relating to the continued eligibility of the body, the plans for the land in question, and the public interest of the sale. A community body can withdraw from the community right-to-buy process at any time.
- 3.23 Section 61 states that where more than one community body has registered an interest in the same piece of land, Ministers shall decide which one is to be granted the right-to-buy. Finally Section 62 outlines the process for making the offer for the land.

Chapter 5 - Valuation of Land (Sections 63-67)

- 3.24 Chapter 5 outlines the procedure for valuing the land. Ministers will appoint a valuer who shall act impartially in assessing the value of the land to be purchased. The value to be assessed is the market value of the land which as the Draft Bill makes clear is the value (the land) would have on the open market as between a seller and a buyer both of whom are, as respects the transaction, willing, knowledgeable and prudent' (Section 63 (6)).

Comment: the value of the land is a critical element of the overall right-to-buy package. In insisting on the value being set at market levels, Ministers are keen to avoid any challenge under the ECHR. The aim is to ensure as far as possible that landowners do not suffer material disadvantage in terms of the price they receive for the land they are selling.

- 3.25 In assessing the market value of the land the valuer cannot take account of the impact that registration itself may have had, the period of time during which the land would otherwise be advertised, any unlawful use of the land, any depreciation of other land owned by the seller or the expenses of the valuation process. The valuer shall, however, take account of any factor attributable to the known existence of a person who...would be willing to buy the land at a price higher than other persons because of a characteristic of the land which relates peculiarly to that person's interest in buying it.
- 3.26 Section 66 allows for any other rights such as pre-emption rights or housing right-to-buy to be suspended for the duration of the right-to-buy process being reinstated if the community withdraws from the sale process and being extinguished if the community takes ownership.

Comment: the requirement that a valuer take into account any characteristic of the land which relates peculiarly to a known individual's interest in buying it seems bizarre and can only contribute to the perpetuation of the inflated value of much rural land, particularly of Highland Estates, to the disadvantage of communities - particularly so when set against the obligation to buy land as lotted.

Chapter 6 - Appeals (Sections 68-71)

- 3.27 Section 68 allows for appeals to be made to the Sheriff by both the landowner and the community body against any Ministerial decision on registration of land or any Ministerial decision on the granting of the right-to-buy. However, any appeal against the exercise of Ministerial discretion in these matters can only be made on technical and procedural grounds and not on substantive grounds. In other words a community body cannot dispute Ministers' interpretation of, for example, whether registration of

land would contribute to the sustainable development of the community or whether the right-to-buy is in the public interest.

- 3.28 Section 69 allows for an appeal to the Lands Tribunal against the valuation by either the community body or the landowner.
- 3.29 Section 70 allows for compensation to owners as a consequence of the operation of the Act. Appeals can be made to the Lands Tribunal against levels of compensation awarded by Ministers.

Comment: The lack of any appeal rights other than on technical and procedural grounds means that Ministerial discretion is an all important and powerful part of this process.

Chapter 7 - General and Miscellaneous Provisions (Sections 72-74)

- 3.30 Section 72 provides a power of compulsory purchase for Ministers to use where they are satisfied that land has been transferred in breach of the provisions of the Act (i.e. avoided their obligations and prevented a community from exercising their right-to-buy)
- 3.31 Section 73 prohibits a community body disposing of land after they have purchased unless such a disposal is for the purpose of the sustainable development of the community, does not exceed 10% of the land purchased, and has the consent of Ministers. If a community body disposes of land in breach of these terms, Ministers can acquire the land by compulsory purchase.

Comment: this is ridiculous. If land has been bought at market value, what conceivable justification can Ministers have to interfere in the future management of the asset? In particular, if a community had been forced to buy land it does not have any interest in because it was lotted with registered land it will be unable to recover its financial outlay by selling the unwanted land.

4 THE LIKELY IMPACT OF THESE MEASURES

- 4.1 In order to assess the impact of these proposals it is useful to consider what the Scottish Executive intends that they should achieve.
- 4.2 The Land Reform Policy Group which first thought of the idea asserted that the community right-to-buy would greatly empower communities and effect rapid change in the pattern of landownership (page 23 of *Identifying the Solutions*). The Consultation Paper suggests that the right-to-buy will add impetus to the drive for greater diversity (in the way land is owned and used) and community involvement (in the way land is owned and used).
- 4.3 To understand whether such goals will be achieved, it is worth contemplating the circumstances in which community ownership of land

might be necessary or desirable. There are three main circumstances, namely,

- need
- opportunity
- threat

- 4.4 Communities need land in order to develop community facilities and amenities. In some cases, if voluntary release of land is not possible, the local authority will have powers of compulsory purchase that can be used. In other cases, where a community is faced with barriers to obtaining land, there are no current provisions. The kind of land needed is likely to be small parcels for communal use (amenity ground, village halls, sports facilities etc.) or small parcels to address a shortage of private housing or social housing. In such circumstances the proposed right-to-buy is only likely to be of any use if it has the effect of persuading a reluctant landowner to part with land through voluntary agreement. If not, the right-to-buy will be of little use. The needs of communities are, by definition, generally concerned with the here and now rather than the speculative and indefinite future.
- 4.5 Communities can also exploit opportunities presented by land and its management. Many communities in recent years have, for example, become involved in community woodland initiatives that have yielded a number of opportunities for employment, recreation, education and environmental improvement. Opportunities will be created by the right-to-buy but they will only become available if and when a landowner decides to sell land. Given that land turnover can be slow and communities must register speculatively, it is unlikely that many opportunities will be created by this legislation. It is also unlikely that communities will have foresight and display the kind of commitment that the Draft Bill demands since they will not know when such opportunities will arise.
- 4.6 The third category is the threat situation. This is where land is being managed or comes to be sold in circumstances that a community perceives to pose a threat to the future. This has been the motivation for most recent high profile cases (Eigg, Knoydart, Great Cumbrae). Where such threats appear there will be scope for exercising the community right-to-buy under the emergency registration procedures (Section 47).
- 4.7 In the most extreme cases where action is necessary (threat) the right-to-buy may be of some use. In the equally important but much more prevalent case (need) it will be of limited use. In the situation which Ministers are most keen to help communities exploit (opportunity), the right-to-buy seems peculiarly ill-equipped to deliver.
- 4.8 Overall, it is unlikely that the right-to-buy will have any significant impact in terms of empowering communities or in terms of effecting a rapid change

in the pattern of landownership. In addition, because of the detailed requirements of the proposals, the right-to-buy may be frustrated in those circumstances where it could be of most use (e.g. by forcing communities to buy land they do not want to - see 3.20 above)

- 4.9 It is interesting to note that under the proposals as they exist few, if any, of the community land initiatives applauded by Ministers would have got off the ground. The Isle of Eigg Heritage Trust fails under the provision that a majority of members of a community body must be members of the community (Section 42(1)(e)). The Isle of Eigg Residents Association has 4 out of 9 seats on the Board of the Trust. The Knoydart Foundation would fail for the same reason.

5 WHY HAS SUCH A MEASURE GOT THIS FAR?

- 5.1 Looking back on the whole process of policy development two features become increasingly clear. Firstly, Ministers committed themselves to the principle of a community right-to-buy before either putting the idea out to consultation or thinking fully through the consequences. The evidence for this lies in the statement that Donald Dewar, then Scottish Secretary, made in the McEwen Lecture in Aviemore on 4 September 1998. On the day that the consultation paper was issued suggesting (among possible solutions to the problems land reform was being designed to address) the community right-to-buy, he stated quite categorically that,

“I wish to be absolutely clear that I regard this right (the community right-to-buy) as an essential prerequisite of land reform. The problems must be overcome and the right must be established.”

Jim Wallace, in his speech at Aberfoyle where he launched the Draft Bill even saw fit to quote this passage despite the obvious contradiction between that statement and the Ministers claims in the Foreword to the Consultation Document that

“From the outset the land reform policy development process has been an unprecedentedly open one.”

It may have been open but it was also pre-determined.

- 5.2 As a consequence of this, the link between the rationale for the community right-to-buy and the likely impact of the measure has never adequately been scrutinised. The reality is that the measure will not empower communities and change the pattern of ownership. Indeed, it is likely that this was never the intention in the first place.
- 5.3 Closer analysis of what Ministers and civil servants are saying suggests that the community right-to-buy is of itself not designed to achieve the outcomes claimed (empowering communities and effecting change in the pattern of ownership). Instead it is hoped that the right-to-buy will be part

of a hierarchy of measures designed to achieve this outcome. This hierarchy consists of the following: -

- a voluntary code of good practice which will deal with bad landlords
 - pressure (created by the existence of the right-to-buy) on landowners to enter into voluntary sales of land where communities wish to obtain access
 - an ultimate right-to-buy as proposed in this legislation
- 5.4 In other words the community right-to-buy is of itself not designed to achieve very much in terms of empowering communities beyond putting pressure on landowners to enter voluntary agreements to sell land.
- 5.5 Given that the majority of privately owned rural land in Scotland has not been exposed to the kind of transfer which would trigger the right-to-buy for all of the 20th century it is difficult to see how the legislation as proposed will either empower communities or achieve any modest (never mind rapid) change in the pattern of landownership.

6 KEY ISSUES

There are a number of key issues in the Draft Bill that deserve close attention, namely:-

- ministerial discretion
- registrable land
- other interests in land (cultural, environmental)
- avoidance through offshore trusts
- land as lotted
- valuation
- post-purchase constraints
- appeals

Ministerial Discretion

- 6.1 A wide range of discretionary powers is proposed for Ministers. One might legitimately query whether discretion,
- to define excluded land by order [Section 41(2)]
 - to change the definition of community bodies [Section 42(3)]

- to consent to changes in the constitution of community bodies [Section 43(1)]
- to alter the content of the Register of Community Interests in Land [Section 44(6)]
- to accept an application from a community body which does not follow all the criteria in Section 45(1)
- to make decisions on late applications for registration [Section 47(2)]
- to delete community interests in land [Section 51]
- to modify Sections 52(4) and (5) and 53
- to determine whether the right-to-buy shall be granted to a community body [Section 58]
- to arbitrate between competing claims of community bodies [Section 61]
- to appoint a valuer [Section 63]
- to purchase land compulsorily [Section 72]
- to consent to transfer of land bought under the right-to-buy [Section 73]

contributes much if anything to the process of empowerment of communities.

- 6.2 Such discretion has been introduced in order to avoid overly-prescriptive legislation that would inhibit flexibility in how the right-to-buy could be exercised. However, in providing greater flexibility, Ministerial discretion also increases the powers of politicians, some of whom may not be entirely sympathetic to land reform (this legislation must outlast any particular political party in power). Alternatives might be to give this discretion to locally-elected bodies, citizens juries or similar such mechanisms

Registrable Land

- 6.3 The Draft Bill empowers Ministers to define what land is eligible for registration and what is not. They will do this by means of a Parliamentary Order which allows the definition to be changed from time to time without amending the Act itself. Currently Ministers propose to exclude from eligibility all land within settlements of more than 3000 people (See paras 6.13-6.16 in Consultation Document). This means that land in the middle of Turriff, Callander, Thornhill and Portree can be registered but not land in Banchory, Forres, Peebles and Fort William.

- 6.4 Is this an adequate definition given that it includes urban land in small towns (Turriff and Thornhill but excludes urban land in an otherwise rural environment (Peebles and Fort William)?

Other Interests in Land (Cultural, Environmental)

- 6.5 The Draft Bill restricts the right-to-buy to community bodies as defined and states that in any such body community members must be in the majority. There are two important issues that arise from this. The first is that where partnerships are formed by community bodies such as in the case of the Isle of Eigg (Residents, Scottish Wildlife Trust and Highland Council) or Knoydart (Residents, environmental groups, Highland Council, Highlands and Islands Enterprise and other landowners), these will not be able to register land and exercise the right-to-buy.
- 6.6 A more appropriate way to secure community interests and at the same time to allow partnerships would be to enshrine such interests in the constitution such that Directors appointed by partners have a legal duty to act at all times in the community interest *as well as* in the interests of the environment etc.

The second issue is that there is substantial public interest in acquiring land of cultural or environmental reasons. In recent years attempts have been made to acquire Castle Tioram in Moidart (a cultural site) and Glen Feshie in the Cairngorms (an environmental site). Both these attempts failed despite there being an obvious public interest. Both involved local community interests. Should the right-to-buy be so narrowly defined when there are wider public interests involved in the land market?

Avoidance through Offshore Trusts

The Draft Bill contains provisions to deter and retrospectively deal with landowners who have attempted to evade their responsibilities under the proposed legislation by, for example, secretly selling land in which there is a registered community interest. These provisions, however, depend on Ministers being satisfied that actions have been taken by landowners that are in breach of the Act. In order to be so satisfied Ministers will require evidence of a fairly high order in order to invoke powers of compulsory purchase.

- 6.8 If, however, land is registered either as a trust or a company in an offshore jurisdiction such as Liechtenstein, Panama, the Bahamas or Bermuda, then such evidence will be next to impossible to obtain without recourse to the services of MI6. The easiest thing to do to avoid the obligations of this Act is to transfer land into a company in which the landowner or close family have the majority shareholding (thus being a transfer to which the right-to-buy does not apply) and to locate this company in an offshore jurisdiction. Any subsequent transfers of ownership will be concealed and

unable to be traced and thus cannot be subjected to the anti-avoidance provisions of the Draft Bill.

Land as Lotted

- 6.9 The draft legislation obliges community bodies to buy land as lotted. In other words, if a community registers an interest in 10 acres of land that is part of a 10,000 acre estate, they will have to buy the 10,000 acres if the landowner sells the estate as a whole. Yet on p.23 of the Consultation Document it states that

“Ministers believe that in many cases it is the smaller pieces of land that may most attract community interest.”

In which case why should a community have to buy 10,000 acres for £1 million when it wants 10 acres for £1000 (and why should they wait for years, decades or even centuries)?

- 6.10 The answer appears to be that to do otherwise risks breaching the European Convention of Human Rights. The key text in the Convention is Article 1 which states that,

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

- 6.11 However, no-one is being deprived of their possession under Part II of this Draft Bill. There is no involuntary sale but simply a sale at market value to community bodies rather than to the person of the landowners choosing. Why not allow communities then to simply buy the registered land they want and deny compensation to the owner for alleged depression in value of the rest of the estate?
- 6.12 The ECHR states that No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law Given that no-one is being deprived of their possessions, it is hard to see the strength of ECHR constraints on allowing communities to purchase solely the registered land. Indeed it is also hard to see the strength of ECHR objections to allowing inheritance to be a trigger for exercising the right-to-buy (see para. 4.36, p.29-30).
- 6.13 Let us pose the example of a community body having registered an interest in 10 acres of land that is part of an estate of 10,000 acres. If the

landowner decides to sell the estate s/he might do so in a number of different ways.

Option A - Landowner decides to sell whole estate

Community must buy whole estate at market value. Valuer must value whole estate at market value. Landowner not entitled to any compensation

Option B - Landowner decides to sell 5,000 acres including registered land.

Community must buy 5,000 acres at market value. Valuer must value 5,000 acres at market value and cannot take account of any depreciation in the value of the 5,000 acres not being sold.

Option C - Landowner decides to sell whole estate with the registered land identified as one discrete lot

Community can buy 10 acres of registered land at market value. Valuer must value the registered land at market value and cannot take account of any depreciation in the value of the remaining 9,990 being sold.

- 6.14 If the valuer cannot take any account of any depreciation in the value of the remaining land under Options B & C in determining market value and still be acting in accordance with ECHR, why would the community under Option A be in breach of ECHR if it were accorded the right-to-buy over just the registered land?
- 6.15 The answer is because where depreciation is the consequence of the landowners actions no account can be taken of any depreciation of non-registered land but depreciation as a consequence of any Act of Parliament entitles the landowner to compensation under ECHR. In other words landowners cannot be compensated for the consequence of their own decisions but can be compensated as a consequence of the decisions or enactments of Parliament and other public bodies.
- 6.16 The consequence of the land as lotted proposal is that where the sale of registered land as a discrete parcel would devalue the remainder of the estate, landowners will be motivated to market the estate as a whole since they will then receive the market value of the estate as assessed by the valuer. The community will be forced to buy 9990 acres of land it does not want and pay a price that is orders of magnitude greater than it wishes to.
- 6.17 Conversely, where the sale of registered land as a discrete parcel would *increase* the value of the whole estate, the landowner will be content to lot the estate and identify the registered land as a discrete parcel. Either way the landowner loses nothing but the community is faced with having to buy land it does not want where the isolation of the registered parcel would lead to a devaluation of the remainder of the land.

- 6.18 The basic flaw in the proposal is that it assumes that there will be automatic depreciation in non-registered land. This is not necessarily the case. Indeed it is common for land to be sold in lots precisely to maximise proceeds from a sale. Thus no assumptions can be made regarding the impact of allowing communities the right-to-buy only registered land.
- 6.19 Requiring communities to buy more land than they have registered an interest in appears to be a reaction to pressure from landowning interests concerning cherry-picking (See para. 4.37. p. 30 in Consultation Document). This was made clear by the statement from Justice Minister Jim Wallace in Parliament in November 1999,
- “I understand their concern that, in some cases, (cherry-picking) could have an impact on the value of the remaining land.”*
- 6.20 However, as the Minister stated, such a concern is only legitimate in *some* cases. The sensible response is thus 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.
- 6.21 The way to resolve this problem, therefore, is to give communities the right-to-buy only the land in which they have registered an interest and to amend Section 63 (assessment of value of land) such that account must be taken of any depreciation of remaining land as a consequence.
- 6.22 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, the seller suffers no material disadvantage. 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.

Valuation

- 6.23 When a community wishes to exercise the right-to-buy, a valuer appointed by Scottish Ministers will set the value of the land in question. Concern has been expressed that setting the value as the market value will push the price beyond the reach of communities. Conversely, Ministers have argued that to do anything other than assess the market value would lead to ECHR and compensation implications (para 4.42, p. 31 of Consultation Document).

- 6.24 Such an argument is, on the face of it, perfectly sensible. However, what justification can there be for requiring that a valuer take into account .. any factor attributable to the known existence of a person.....willing to buy at a price higher than another persons because of a characteristic of the land which relates peculiarly to that persons interest in buying it (Section 63(7) (a)?
- 6.25 Not only does this embed the speculative market in land; it runs the risk of collusion between seller and buyer to achieve a higher price form the community. Such a risk is identified by Ministers themselves in ruling out the proposal from landowning interests that the community purchaser should have to match the highest bid on the open market (See para 4.43, p.31 of the Consultation Document). If there is, in the words of Ministers, Scope (indeed incentive) for price manipulation by means of collusion between seller and prospective purchaser if price is set on the basis of the highest bidder, then surely the same applies where a valuer must take account of any factor... etc. as proposed in Section 63(7)(a).

Post-purchase Constraints

- 6.26 In Chapter 4 of the Consultation Document great play is made of the fact that all landowning bodies should be treated equally under the new legislation (there were those who thought that charitable bodies etc. should be exempt). Yet the proposed legislation, although embracing such a principle in so far as no class of landowner will be exempt, actually creates a new class of landowner who is anything but equal. It is reasonable in the circumstances to create some hurdles for community bodies to cross if they are to be afforded a unique right-to-buy. However, it is questionable if any further hurdles should be placed in their way once they have exercised such a right. Should they not be left alone to get on with their affairs like other landowners? Section 73 places community bodies under the perpetual paternalistic gaze of Ministers. Not only are bodies to be severely limited in their freedom to dispose of land in future, but Ministers have the power to acquire their land by compulsory purchase (Section 73(7)) at any point in the future where attempts are made to sell land without authorisation. If a market price has been paid for the land there is no reason to further constrain the community and to extend Ministers powers over their affairs.
- 6.27 Furthermore, it seems unreasonable that communities are obliged to buy land they do not want, to raise money they do not need, and then to be prohibited from selling the land in which they had never registered an interest! If the reason for forcing sale as lotted is to avoid claims from landowners for compensation then as a quid pro quo, communities should be free to dispose of that land as they see fit (subject of course to the constraints of any funders).

Appeals

- 6.28 Appeals on Ministers decisions to exclude land from registration or to refuse consent to buy can only be made on procedural grounds and not on substantive issues (See Section 68). This weakens the right-to-buy and strengthens the hands of Ministers. Given that Ministerial discretion covers such issues as the interpretation of the term sustainable development and decisions on what constitutes the public interest, it would be sensible if some form of appeal were to be allowed on these more substantive grounds.

7 CONCLUSIONS

- 7.1 Under the proposed legislation, the greater power remains in the hands of existing landowners - they choose whether to sell, what land they will sell, when they will sell, and how they will sell. Considerable power is also given to Ministers. Very little power by contrast is given to communities. The hurdles put in the way of communities are formidable not least because they are expected to jump through a significant number of hoops simply in order to have the right at some point in the indeterminate future
- 7.2 Communities have to jump through a series of bureaucratic hurdles to establish this tenuous right. As stated in para. 1.9 on p. 4 of the Consultation Document, to be successful in registering and interest, community bodies will have to be properly constituted; be representative of the local community; demonstrate that the bid has community support; and demonstrate that registration of their interest would be in the public interest Furthermore, they have to do this every 5 years. Arguably folk have enough to do in their lives without having to do all this for an eventuality which may never arise!
- 7.3 Scotland has the most concentrated pattern of private landownership in the world. Fully half of the privately-owned rural land in the country is owned by just 343 landowners and it is their attitudes, motivations and circumstances that will determine whether anything at all changes as a consequence if this bill

8 POSSIBLE WAYS OF IMPROVING THE DRAFT BILL

- 8.1 To achieve the outcomes Ministers desire, a much more radical and far-reaching agenda is required addressing inheritance law, the land market, absentee landlordism, compulsory purchase, land monopolies, land values and taxation issues. To make the community right-to-buy simpler and more effective, what is needed is a public right of pre-emption and a more flexible and powerful right of compulsory purchase.
- 8.2 A universal right of public pre-emption would allow any sale of land to be pre-empted by public interest bodies. This in effect replicates the community right-to-buy (which in any case is not a right-to-buy but a right of pre-emption).

- 8.3 Instead of communities having to register discrete parcels of land they could register their organisation. Such bodies could then exercise the right of pre-emption over land within their geographical area when land came up for sale. Other land could also be bought through the same public right of pre-emption by other bodies for cultural and environmental purposes for example.
- 8.4 In addition, strengthened compulsory purchase powers would enable community needs to be addressed immediately rather than waiting years, decades or even centuries. Such a combination would deliver everything that Ministers want far more efficiently and effectively.