

CALEDONIA BRIEFING No. 5

# Land Reform Draft Bill

How to Improve the Bill

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**Land Reform Draft Bill Part 2 - Community Right to Buy**  
**How to Improve the Bill**

**INTRODUCTION**

The Draft Land Reform Bill was published by the Scottish Executive on 22 February 2001. It covers three proposals for legislation namely a right of responsible access to land and water, a community right-to-buy, and a crofting community right-to-buy.

The following briefings analyse 10 issues arising from the community right-to-buy and 1 issue arising from the crofting community right-to-buy. They have been prepared to draw attention to some of the key aspects of the proposals and to reflect those areas which are most critical in creating a workable and effective piece of legislation.

Reading these briefings is no substitute for reading the Draft Bill. Throughout the briefings reference is made to Sections of the Draft Bill and other paragraphs in the Consultation Paper as follows: -

[S44(3)] refers to a Section (S) in the draft bill and (3) to a subsection.

[P6.18 p50] refers to a paragraph (P) in the consultation document on page (p) 50.

Consultation on the Draft Bill closes on 30 June 2001. Comments should be sent to: -

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Copies of the Draft Land Reform Bill can also be obtained from the above contact.

# 1. REGISTRABLE LAND

## 1.1 What is proposed?

The Draft Bill proposes that the right-to-buy shall be available over all rural land in Scotland. It defines rural land as being all land outside of settlements of more than 3000 people [P6.13-6.16 p49-50]. It is proposed that this definition will not be part of the Land Reform Bill but will be contained in a separate parliamentary order to be approved by Parliament after the legislation is enacted. The Draft Bill gives Ministers the powers to consider factors other than simply population [S41(3)]. The definition proposed thus allows land to be registered not only in classic rural locations such as forests, farms and open ground but in settlements of under 3000 population. The Draft Bill requires Ministers to publish the parliamentary order defining in a definitive way what land is excluded from the community right-to-buy.

The rights that can be registered include land, salmon fishings and, where in separate ownership, minerals [S41(6-7) & P6.18]. Such ancillary rights must be on or contiguous with the land to be registered (and thus cannot be registered as discrete rights unrelated to any registered land). Foreshore will also be included where it abuts registrable land [P6.16 p50].

## 1.2 Issues

*Is the basis of the definition appropriate?*

Rural land in the sense of farms, forests, hills and moorland is relatively easy to identify. What is more problematic is where to draw the line between urban and rural and whether or not to include small villages and towns within predominantly rural areas.

Population has been chosen as the criteria for drawing this line because it can be readily assessed against very recent survey work by the General Register Office for Scotland which has produced maps and tables delineating the population and boundaries of all Scottish settlements. It thus appears a sensible and definitive way of deciding what is urban (non-registrable) and what is rural (registrable)

*Is the threshold proposed (3000) appropriate?*

The figure selected for the threshold determines which settlements are included and which are excluded from the definition of rural (and thus registrable) land. At a figure of 3000, towns such as Dunbar, Dingwall, Banff, Kinross and Dalbeattie are excluded and towns and villages such as Callander, Moffat, Aboyne, Aberfeldy, Kingussie, Brora and Dunkeld are included. Should a lower threshold be chosen (say 1000) thus excluding larger towns and villages such as the foregoing (Callander..Dunkeld) but still including the smallest villages such as Dunning, Tobermory, Drumnadrochit, Aberfoyle and East Whitburn? As the proposals stand it will be possible to

register land and buildings in Callander (e.g. for community facilities or amenity purposes) but not in Dingwall. The only logic to this is the size of the settlement since the line needs to be drawn somewhere.

*What other factors (if any) should be taken into account?*

No indication is given of what other factors might be taken into account by Ministers in determining what land is registrable other than that it must appear to be rural [S41(3)(b)]. This implies that urban settlements of less than 3000 people may be excluded if they have an urban “appearance”. There is clearly scope for some dispute here which may be avoided by setting the population threshold at a lower level say at 500.

### **1.3 Alternatives**

*Stick to population*

Ministers are suggesting the 3000 population formula as the basis of defining rural land for a wide range of public policy purposes. It is thus an attractive proposal since it will be consistent with definitions used for other purposes. It is also attractive since it is definitive, is based upon up-to-date data, and is derived using a logical method. There is scope, however, for taking into account other factors and there is the requirement that registrable land has to appear to be rural. This might be interpreted to exclude buildings in the centre of small settlements which would otherwise be counted as registrable land.

One alternative is therefore to restrict Ministers’ ability to define rural land to the population threshold and not to take account of other (possibly subjective) factors.

*Alter the threshold*

There is scope to change the threshold. Is 3000 the right figure? It could be lower and thus include only the smallest settlements (say under 2000, 1000 or even 500) as part of rural land. Or it could be higher and include larger settlements (say up to 4000 or 5000).

## **2. DEFINITION OF COMMUNITY**

### **2.1 What is proposed?**

The draft bill defines a community body and a community.

A community body is defined in the bill as a company limited by guarantee, the constitution of which includes the provisions set out in S41(1). Among these are that the company must have as its main purpose the sustainable development of the community, that the company must have at least 30 members, that the majority of members must be members of the community

A community is defined geographically as the polling district or districts in which the land to be registered is situated in, the members of which are all persons on the voter's roll.

## **2.2 Issues**

*Are all the criteria in Section 42 appropriate - should a community body be a company?*

There are other forms of incorporation than a company (trusts, co-ops, friendly societies) - should discretion be given to communities to decide for themselves how they should be constituted?

*Are all the criteria in Section 42 appropriate - should a community body be required to have 30 or more members?*

Some communities, especially in remote or sparsely populated areas, may struggle to obtain a membership of more than 30. In addition there are problems associated with partnerships or consortia where the local community decides to use an existing local organisation (e.g. a Residents Association) as the member of the community body (see Community Control - below).

*Are all the criteria in Section 42 appropriate - should a community be defined in terms of polling districts?*

The boundary chosen to define a community is the electoral polling district (being consistently the smallest unit for which data is publicly available). In some cases, particularly in sparsely populated areas, this will be a very large area and it may be unreasonable to expect residents in one part of the district to take any real interest in the affairs of those living in another part. In other more densely populated areas registered land may fall into two or more polling districts.

*Are all the criteria in Section 42 appropriate - should members of a community have control of the community body?*

The Draft Bill insists that "members of the company who consist of members of the community have control of the company". Partnerships between communities and other bodies (e.g. environmental bodies) are eligible so long as control of the constituted body lies with community members. What, however, is control? Existing partnerships (e.g. Eigg & Knoydart) work on the basis of each constituent interest having equal membership rights. Thus the Isle of Eigg Heritage Trust has only three members, namely the Isle of Eigg Residents Association, the Scottish Wildlife Trust and the Highland Council. On the board, however, the Residents Association has four seats. The other two member organisations have two each, and there is one independent chair.

Control of a company ultimately rests with the voting membership. However, the constitution of a company may be framed in such a way that the Board is made up of a different balance of interests than the membership. Effective control lies with the Board which is responsible for the day-to-day administration and management of the company assets.

For the community to have control of the company it would have to have the majority of members. Each individual member of the community would have to have individual membership. In such circumstances it is unlikely that the institutional partners would be happy with having equal membership rights as individual members of the community.

Community control is common in bodies which own community assets such as village halls but is uncommon in larger landownership structures.

## **2.3 Alternatives**

### *Self-definition*

An alternative to the prescriptive guidance proposed in the Draft Bill is to allow communities to define themselves (in terms of their structure, membership etc.) and require Ministers to recognise such bodies. The only grounds on which bodies could be rejected is if they clearly failed on representativeness or objectives. In other words specify the grounds for rejection rather than the grounds for acceptance. This would allow more flexibility.

### *Community Control*

Drop the requirement for communities themselves to be in control and require instead that the community body should be constituted for community benefit. Directors, regardless of which body nominates them, would then have a legal duty to serve this interest thus ensuring that the land is managed in the interests of the community. The community does not need to be in overall control to secure this objective.

## **3. REGISTRATION PROCESS**

### **3.1 What is proposed?**

It is a fundamental part of the land reform bill that community bodies who wish to exercise the right-to-buy must register the land they are interested in in advance. Provision is made for late or emergency registration but this will only be in exceptional circumstances [S47(2)].

Registration can only be accepted from a community body as defined in S42 though some discretion is provided (though not fully explained) to recognise a company which does not meet all the criteria [S46(3)(a)].

In order to register land community bodies must be set up and must submit proposed registrations to Ministers [S45-51]. Ministers have to be satisfied that: -

there is a connection between the community and the land;  
that sufficient numbers of community members support the registration (10% with Ministerial discretion to accept lesser support), and;  
that the acquisition of the land would support the sustainable development of the community.

A defined parcel of land is then registered and entered on the public register. This registration lasts for 5 years before needing to be renewed. Land which is registered cannot be sold without allowing the community body the right-to-buy. There is provision for late or emergency registration which allows the right-to-buy to be exercised where the land has not been registered prior to being offered for sale. This power is only of course available where communities are aware that land is being sold.

### **3.2 Issues**

#### *Registration - is it required?*

The concept of registration was introduced in the White paper of July 1999. The idea is to allow the provisions of the right-to-buy legislation to be focussed only on land where a community interest has been registered. Thus (it is argued) a great deal of bureaucracy can be avoided.

The issue hinges on the desirability of having a mechanism that identifies communities and land parcels in advance of sale - that indicates which communities are interested in which piece of land. Critics have argued that such a mechanism will do little to empower communities since they are being asked to take speculative action. There may be little incentive to register land (and all that is entailed by doing so) if the right-to-buy may not be available for years, decades or even centuries. Ministers on the other hand feel that by having a registration process the bureaucratic processes necessitated can be restricted to registered land (as opposed to all rural land which comes on the market) and that communities need to show some commitment early on to the challenge of community ownership. Ministers also suggest that the process of registration might facilitate negotiations between the landowner and the community leading to a negotiated sale of land.

#### *Registration - the process*

The registration process is inevitably bureaucratic. Are the tests (connection with land, support of the community and sustainable development criteria appropriate. Should other tests be applied and if so what?

The registration process gives Ministers the power to accept or reject applications for registration. Should Ministers have such a power to judge a

community's aspirations or should such powers be placed in the hands of a more local structure such as the local authority?

### **3.3 Alternatives**

#### *No registration process*

Rather than require communities to set up a company and register land, all rural land could automatically be made the subject of the right-to-buy. Landowners would be obliged to notify their intention to sell and a community body would have to be set up at this point and decide whether to exercise the right or not.

#### *Register the body and not the land*

Community bodies could be registered with Scottish Ministers and, once approved, be accorded the right-to-buy all land within their geographical area. This would avoid the need to register every specific parcel of land and would enable a more flexible response to opportunities.

#### *A Universal Right of Pre-emption*

Rather than restrict the right-to-buy to communities, a new universal public right of pre-emption could be created which would be exercisable by Ministers and/or local authorities and/or communities for a wide range of public interest purposes. This would allow intervention in the land market at the point of sale for environmental, cultural, economic, social and recreational reasons as well as for community interests. The existing law on pre-emption would apply which allows a 21 day period for matching the best offer received for land or property sales.

#### *A Community right of pre-emption*

An alternative to the whole registration and right-to-buy procedure would be a right of pre-emption only for community bodies for the same purpose as the draft bill proposes. Community bodies would have 21 days in which to match the best price for land on the market.

#### *Simpler Registration Process*

Instead of the registration process proposed in the draft bill, a simpler and less onerous procedure could be adopted with simpler tests for community bodies, the ability to register land over a wide area, and no requirement to re-register every 5 years.

## *Local Authorities to Handle Registration Process*

Instead of registration applications being made to Ministers, Local Authorities, Local Enterprise Companies or other local organisations could be given the responsibility to administer the process.

### **4. LAND AS LOTTED**

#### **4.1 What is Proposed**

Although the draft bill does not make it explicit, the preamble makes it clear that the right-to-buy can only be exercised over registered land as lotted by the seller [P4.37 p30]. This is in response to landowners' concerns that community bodies could "cherry-pick" the best bits of a landholding and devalue the remainder as a consequence. Thus, if a community has a registered interest in 1 acre of land, the right-to-buy is over the parcel of land which includes the registered land. At one extreme this might involve purchasing a whole estate of, say, 10,000 when the registered interest is over a small area of, say 10 acres.

#### **4.2 Issues**

The key issue here is whether communities should be obliged to purchase more land than that in which they have registered an interest. The reason advanced by the Scottish Executive is that the Human Rights (see Reference below) and compensation implications would be too great [P4.37 p30] if community bodies were allowed to purchase only registered land.

What this argument omits, however, is the fact that the remainder of an estate may or may not be devalued as a consequence of a community interest being registered. Indeed only in a minority of cases is devaluation likely to occur. Moreover, the proposal will in some circumstances oblige communities to purchase vastly more land than they wish (perhaps £1 million to purchase 10000 acres when they only want 1 acre) thus frustrating the central aim of the legislation.

#### **4.3 Alternatives**

##### *Allow the purchase of registered land parcels*

The straightforward alternative to the land as lotted proposal is to allow communities the right-to-buy the land that they have registered an interest in if and when it is put up for sale. This is the logical follow through to the process of registration. The difficulties posed by the European Convention on Human Rights and the possibility of having to compensate landowners will have to be overcome. This is best done by building in a mechanism to compensate landowners where the independent valuer (who is undertaking the valuation for the purposes of the right-to-buy) considers there to be a devaluation of the wider property.

This would open the possibility of landowners receiving compensation but it would only be in a small number of cases and the costs could be shared between the community body and the Scottish Executive. If the cost were excessive the community body could decline the right-to-buy. Such a mechanism is likely to impose far less costs on community bodies than the proposed obligation to purchase land as lotted which, in some cases might mean raising hundreds of thousands or even millions of pounds rather than tens of thousands of pounds.

## **Reference**

Article 1 of the European Convention on Human Rights 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.*

## **5. ANTI-AVOIDANCE & COMPULSORY PURCHASE**

### **5.1 What is Proposed**

Not all transfers of land will trigger the community right-to-buy. Those which do not (for example where land is transferred to another member of the same family) are listed in Section 52(4). (see also Section 53 for definitions of family). Such transfers are exempt from the provision of the draft bill. To protect against anyone exploiting these exemptions, there are anti-avoidance provisions included in the draft bill [S55].

In addition if a landowner transfers land in breach of the legislation (by failing to inform the community with a registered interest), Ministers can use compulsory purchase powers to reclaim the land for the community [S72].

### **5.2 Issues**

*Are such powers sufficiently robust?*

Ministers are keen to ensure that the legislation is as watertight as possible against attempts to evade the right-to-buy. However, land is owned in Scotland in a myriad of complex structures involving companies and trusts both in the UK and offshore that it is difficult to be sure that all scope for evasion is removed. Since any attempt to evade the legislation can only be countered by the gathering of evidence it follows that it is the issue of openness and transparency in land transactions which is key to ensuring that communities have the opportunity to exercise the right-to-buy.

## **5.3 Alternatives**

### *Declarations of Beneficial Interests in Land*

The Draft Bill provides for a register of Community interests in Land [S44]. Such a register could also include a declaration of the ownership structure and beneficial ownership of the registered land. The landowner could be obliged to sign such a declaration on an annual basis as evidence of its true ownership.

### *Declarations of Change of Ownership*

Where land is transferred under an exempt category (e.g. to a member of the same family) Section 55 obliges landowners to include a declaration of exemption in the legal deed stating which category of exemption covers the transfer and that the transfer does not form part of a series of transfers to avoid the effects of the Draft Bill. Such a declaration, however, is only required to be made in the legal documents transferring the land and will thus only be evident to someone making enquiries in the Registers of Scotland. More openness and transparency could be obtained by obliging landowners to declare changes of ownership of registered land in the Register of Community Interests.

## **6. VALUATION**

### **6.1 What is Proposed**

Where a community body wishes to exercise the right-to-buy, Ministers shall appoint a valuer to assess the value of the land. The views of the landowner and of the community body will be sought and the value to be assessed is the market value of the land on the date on which notice was given by the seller of their intention to sell. The relevant sections are Sections 63 and 64. Expert opinion has been taken in the drafting of these sections and the provisions are based on well-established existing approaches [P6.36 p53].

### **6.2 Issues**

#### *Is market value appropriate?*

Community interests have argued that open market values of land in Scotland are consistently inflated above the economic value (the ability of the land to yield an economic return). Since communities wish to conduct rational economic activity they should not be expected to pay inflated prices for land. The problem with such an approach is that paying a landowner less than they might reasonably expect to receive on the open market runs the risk of breaching the European Convention on Human Rights. If an economic value were to be assessed there would probably have to be compensation provided to the seller.

### *Account of peculiar factors*

Section 63(7)(a) allows a valuer to take into account “any factor attributable to the known existence of a person who (not being the community body which is exercising its right to buy the land) 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.” This is not an obligation on the valuer but simply an option. In taking account of any such factor the value of the land is likely to be inflated.

## **6.3 Alternatives**

### *Adopt Economic Value*

Adopt an economic value basis for valuation and let the courts determine whether this is in breach of the European Convention on Human Rights.

### *Account Taken of Valuation*

The Draft Bill states that in valuing land no account shall be taken of the fact that land is registered [S63(7)(b)(i)]. The Bill could be amended such that the registration must be taken into account for valuation purposes since this is an indication of the public interest in such land and the European Convention on Human Rights allows for the public interest to override the right to property (see Reference below).

## **Reference**

Article 1 of the European Convention on Human Rights 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.*

## **7. APPEALS**

### **7.1 What is Proposed**

Section 68 sets out the grounds for appeals against Ministers. Landowners may appeal against a decision by Ministers to register land and to approve the right-to-buy. Community bodies may appeal against Ministerial decisions not to register land and to refuse consent to exercise the right-to-buy. In addition, any member of the community has the same rights of appeal as the landowner. Appeals are made to the sheriff and, importantly, can only be

made on the grounds that the proper procedures were not followed by Ministers or that the land is not registrable land. There are no appeals allowed against the exercise of Ministerial discretion (e.g. whether or not registration of land would facilitate the sustainable development of the community).

Appeals against the valuation of land can be made to the Lands Tribunal by both the landowner and the community body.

## **7.2 Issues**

### *Appeals on substantive grounds*

Ministers have discretion in a great many of the provisions of the Draft Bill. Exercising this discretion involves subjective judgments about matters such as the public interest and sustainable development. In exercising this discretion Ministers will be guided by guidelines drawn up by Civil Servants. Nevertheless the decisions they come to are likely to be political decisions which directly affect the extent to which the community right-to-buy is capable of delivering real benefits to communities. The Draft Bill proposes that these decisions are not capable of being appealed (although as with most decisions by Ministers there will be scope for Judicial Review).

## **7.3 Alternatives**

### *Appeals on substantive grounds*

Appeals could be allowed on substantive grounds, i.e. whether the Minister's interpretation of the "public interest" or of "sustainable development" was appropriate in the circumstances.

## **8. FUTURE DISPOSALS**

### **8.1 What is Proposed?**

The Draft Bill [S73] 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. No sanction is laid down if a community body disposes of land in breach of these terms. However, Ministers can acquire the land by compulsory purchase if a community body has disposed or has attempted to dispose of land in cumulative parcels.

### **8.2 Issues**

#### *Freedom to sell*

In other statutory right-to-buy powers (e.g. council houses, inbye croft land) there are time bars to disposal of property bought under such terms. This is in recognition of the special nature of such purchases and in order to prevent

profiteering. However, after a set period of time, the constraints are lifted and the owner is free to dispose of the property as he/she sees fit. Since the community right-to-buy will be at an open market value there appears to be no equivalent logic to the post purchase constraints. Moreover, the inability to do so is at odds with one of the two central planks of land reform policy, namely “increased diversity in the way land is owned and used”.

### *Sustainable Development*

The ability to realise assets and sell parcels of land is central to the sustainability of many landholdings (not just community-owned ones either). In the case of community organisations, the not-for-private-profit constitution of such bodies would ensure that the proceeds of such sales are re-invested in securing the objects of the organisation.

### *Compulsory Purchase*

There is no sanction against a community body disposing of land in breach of their obligations not to do so. Ministers’ powers are restricted to clawing back land if they are of the opinion that it is being disposed of incrementally. If landowners face compulsory purchase if they breach the terms of the Draft Bill, equity might demand that community bodies are faced with similar sanctions. However, whereas the purpose of Ministers purchasing land from a landowner is to transfer it to the community body, it is unclear what purpose is served (or would be served) by purchase from a community body. Would Ministers place such land on the open market?

## **8.3 Alternatives**

### *Land as Lotted Compatibility*

If, as the Draft Bill proposes, community bodies will be obliged to purchase land as lotted by the seller and if, as a consequence, they come to own far more land than they originally wished to, there would appear to be an argument for relaxing post-purchase constraints at least as they apply to the “extra land”.

### *Drop Post-Purchase Constraints*

Since communities will be buying land at the open market value it could be argued that there should be no post-purchase constraints imposed by legislation. Funders may of course impose clawback arrangements in the event that land purchase which they had supported is subsequently sold. Funders have obvious reasons for ensuring that financial support they provide can be recouped in the event of a sale so as to fund other projects. That is a separate and distinct matter, however, from whether the legislation should impose any legal (as opposed to financial) control on future sales.

## **9. MINISTERIAL DISCRETION & APPROVAL**

### **9.1 What is Proposed?**

Many of the provisions contained in the White Paper of July 1999 were considered too prescriptive. In response, the Draft Bill allows for Ministerial discretion on a great number of issues. Ministerial approval is also demanded for many of the stages in the right-to-buy process. The Draft Bill states the grounds on which such powers will be exercised but at the end of the day many of these decisions are political decisions which will be made by Ministers who will be guided by guidelines drawn up by civil servants. The only right of appeal provided against the decisions of Ministers is on procedural grounds.

### **9.2 Issues**

*Is discretion a good idea?*

The community right-to-buy is designed to provide opportunities in a wide range of circumstances. To be successful in this there needs to be flexibility in the way the legislation is interpreted. Powers to exercise discretion in interpretation are thus sensible. The drawback is that discretion can be used to restrict as well as to expand the scope of the right-to-buy.

*Who should exercise this discretion and upon what basis?*

The secret to successful discretionary powers may be to ensure that they are exercised locally and openly thus ensuring accountability and transparency.

### **9.3 Alternatives**

*Publish and consult upon Ministerial guidelines for exercising discretionary powers*

It would be helpful to have the Ministerial guidelines published and consulted upon so that the public could be aware of the basis upon which Ministerial discretion was being exercised.

*Discretion to be exercised by local authorities, Local Enterprise Companies or other local organisations.*

Local authorities, for example, already administer much environmental and planning law. They will in addition have other statutory functions under Part I of the draft bill on access.

*Discretion to be exercised by local land tribunals*

There is the opportunity of creating new local fora to exercise decision making which is currently in the hands of Ministers. Such local fora will be set up to

facilitate Part I on the Draft Bill (Access Fora) and their powers could be extended to cover the right-to-buy. A key characteristic of any local fora should be openness and transparency in decision making. Ideally evidence would be heard in public and decisions would then be made.

## **10. BALLOTING**

### **10.1 What is Proposed?**

At the time of registration an indication of support from 10% of the community is given as the guideline for Ministers accepting that there is support for registration [S46(2)]. No ballot is required at this stage, however, and the implication is that a petition or even a show of hands at a public meeting would be adequate.

A ballot of all the members of a community (all those entitled to vote in the polling district(s) in which land is situated) is required at the point when the right-to-buy becomes available. This is to ensure that the community approves the purchase of registered land by the community body S58-59.

In order for approval to be granted, 50% of those eligible to vote in the polling district within which the registered land is situated must turn out and vote and a majority must vote to go ahead with purchase. If there is less than a 50% turnout, Ministers nevertheless have discretion to approve a buyout so long as the majority vote to go ahead with purchase.

### **10.2 Issues**

#### *Is a ballot necessary?*

A ballot is designed to seek the approval of the wider community for a proposal by the community body to exercise the right-to-buy. Such a ballot will involve the community body seeking support from members of the community who are disinterested in the proposal and who would not vote one way or another. Given that many community projects are initiated by small numbers of motivated people and given that any community body must be open to members of the community to join, it could be argued there is no justification for such a wider ballot and that a decision by the voting membership of the community body should suffice.

#### *Turnout*

Should the turnout in a ballot be a determinant of whether a community body can exercise the right-to-buy? Although discretion is given to Ministers to accept a majority vote in favour on a turnout of less than 50% it is not guaranteed that such approval will be granted. In practice a community body will be under pressure to gain a 50% turnout. This may be difficult and the difficulties will be exacerbated in some cases if the community is defined as all those who, live in the polling district.

## **10.3 Alternatives**

### *Community Body Decides*

A community body which has been accepted by Ministers as the body eligible to exercise the right-to-buy and which is open to all members of the community is, arguably, the body to determine whether or not they should exercise the right-to-buy. A resolution to the effect that the body should go ahead could be put to a Special General Meeting. Provided sufficient notice is given to all members of the community of their eligibility to join as members of the community body and, as a consequence, to vote, this would avoid the need for a ballot whilst preserving local democracy.

### *Turnout*

If a ballot is to be conducted, references in the Draft Bill to turnout figures could be deleted and a simple majority of those voting be deemed to be approval of the community.

## **11. CROFTING COMMUNITIES - DEFINITION**

### **11.1 What is proposed?**

The Draft Bill provides in Part III for a crofting community right-to-buy [S75-103]. Since 1976 crofters have had the right to buy their own individual croft. In 1997 the Transfer of Crofting Estates (Scotland) Act gave crofting tenants on the Scottish Office-owned estates the right to buy the whole estate. The proposals in the Draft Bill extend the provisions of the 1997 Act to private land and provide a right for crofting communities collectively to purchase all the land under crofting tenure in the township of which they are a member. They will be able to do so at any time and against the wishes of the current landowner. One of the most contentious aspects of the Draft Bill is the definition of a crofting community.

The proposed definition is based on the community right-to-buy definition [S78]. A crofting community is all those persons entitled to vote in local government elections who reside in the crofting township. However, if Ministers feel this is inappropriate, they can define it in "such other way as Ministers approve".

### **11.2 Issues**

#### *Legitimacy of Definition*

The definition of community has been criticised by crofting interests for not being rooted in existing crofting law which confers statutory rights on crofting tenants and certain functions on grazings committees and the like. The definition appears to be an adaptation of the community right-to-buy and fails

to make any distinction between crofters and non-crofters. This has led some commentators to suggest that crofters could be out-numbered and over-ruled on proposals to exercise the crofting community right-to-buy.

#### *Involvement of non-crofters*

Existing crofting law provides no statutory role in crofting affairs to non-crofters. The Draft Bill changes that and implies that their involvement in the ownership of croft land should be on a par with crofters. It is important to remember, however, that the crofters' interests as crofters remain the same and that any new crofting community landowner inherits the same legal responsibilities, opportunities and constraints as the previous one. One assumes, however, that they will exercise these more actively in the interests of the crofting and wider community. It should be stressed that crofters will still enjoy all their existing rights as crofting tenants including the right-to-buy under the 1976 Act.

### **11.3 Alternatives**

#### *Make crofters central to definition*

To put crofters at the heart of the reforms, crofting tenants could be confirmed as sole statutory beneficiaries of the right-to-buy. The involvement of the wider community would be an option for the crofting community body. It could be argued that many community buyouts will not happen without the active participation of non-crofters and hence their motivation to become involved does need to be considered.

#### *Crofters Control*

Alternatively the legislation could be framed so as to ensure that crofters either have a statutory minimum representation (e.g the power to nominate 30% of the Board) or have a guaranteed controlling interest (the power to appoint the majority of Board members). Non-crofters would still have full membership rights but not be able to exercise overall control. Alternatively the Board could be elected by an electoral college. One such arrangement could be that one third of Directors are elected by the open membership, one third by the crofting tenants and one third appointed by the Grazings Committee. Candidates need not be crofting tenants and thus the Grazings Committee, for example, would be free to appoint non-crofters.