Land Reform (Scotland) Bill
Written Evidence to Justice 2 Committee
from Andy Wightman, Caledonia Centre for Social Development
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INTRODUCTION

I welcome the opportunity to provide written evidence on the Land Reform (Scotland) Bill. I will concentrate on Part II since, although I have an interest in Part I, there are others who are taking an active and substantial interest in the topic - similarly for Part III. In light of the extensive involvement in the whole process of land reform, I beg the Committee's indulgence to overshoot their proscribed maximum of 4 pages.

As background I would draw Committee Members' attention to the Briefing Papers prepared at various stages in the history of this Bill: -

Briefing I (White Paper of July 1999)	http://www.caledonia.org.uk/land/brief01.htm
Briefing 2 (Ministerial Statement Nov 1999)	http://www.caledonia.org.uk/land/brief02.htm
Briefing 3 (Draft Bill)	http://www.caledonia.org.uk/land/brief03.htm
Briefing 4 (Also on Draft Bill)	http://www.caledonia.org.uk/land/brief04.htm

I submitted no formal response to the Draft Bill but Briefings 3 & 4 were sent to the relevant Ministers and civil servants for information.

Finally, Members attention is also drawn to *Scotland: Land & Power* (Luath Press, 1999) in which I discuss some of the political ideas behind current interest in land reform more thoroughly. Free copies were sent to all MSPs at the time of publication.

BROAD PRINCIPLES

FIRST - Evidence has yet to reveal a country anywhere in the world with a more concentrated pattern of private landownership. This simple fact, allied to the remarkably liberal and unregulated market in rural land, is at the heart of the problem of landownership in Scotland.

No community can develop its full potential when decision-making is in the hands a few owners of local estates, no matter how well run the estates might appear to be. Development is about liberating and empowering people. Arguing that well-run estates do this is Victorian paternalistic cant. A small-scale pattern of landownership allied with communal ownership, in contrast, disperses power, creates less potential for abuse (which if it does occur is over a much smaller area and impacts on far fewer people), and less scope for disinterest and apathy. In short, more landowners and more real involvement through ownership means more diversity, more investment, more opportunities, and more accountability.

Presenting the community right to buy as the "essential core of land reform" (Policy Memorandum para.22) is thus to treat the symptoms of the problem and not the causes. Perhaps the single greatest cause of the concentrated pattern of private landownership is the law on succession which lags some 200 years behind the rest of Europe in denying any inheritance rights (beyond the family home) to children or spouses.

SECOND - There are two goals identified in the Policy Memorandum as necessary to achieve the objective of land reform. These are: -

- increased diversity in the way land is owned and used: in other words, more variety in ownership and management arrangements (private, public, partnership, community, not-for-profit) which will decrease the concentration of ownership and management in a limited

number of hands, particularly at local level, as the best way of encouraging sustainable rural development; and

- increased community involvement in the way land is owned and used, so that local people are not excluded from decisions which affect their lives and the lives of their communities.

Will this Bill achieve these goals? In terms of the pattern of landownership, Scotland already has an incredibly diverse array of landholding types. What is needed is not greater diversity but a fundamental shift in favour of certain *aspects* of that diversity - namely community, not-for-profit and individual ownership. The goal talks of private, public, partnership, community and not-for-profit - 5 different arrangements for landownership - and yet the Bill aims to advance only one of those, namely community ownership. There is nothing in this bill to promote the other 4.

THIRD - The terminology is confused. Although Part III of the Bill can be considered a right-to-buy, Part II is not. Instead, it provides a form of pre-emption right. The title of the community right-to-buy should thus be changed so as to more accurately reflect its purpose before the public become further confused.

FOURTH - It is worth noting in passing that many of what I regard as the wider failings of this bill are due, not to failings in the consultative process of the Scottish Executive, but to the failings of its predecessor, the Land Reform Policy Group and the Scottish Office. Donald Dewar, in his 1998 McEwen Lecture in Aviemore on 4th September 1999 stated quite categorically, “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”. This statement was made as he launched the consultation document outlining 75 proposals for land reform. Clearly the community right-to-buy was preordained and any subsequent analysis which revealed deficiencies or problems could not, without a political u-turn, properly influence the development of public policy on the matter from that point on.

NOTWITHSTANDING the above, I welcome this bill as a sincere effort to *begin* the process of land reform. This Bill, whilst modest in scope and ambition, will be of some use and will provide for a shift in the balance of power between landowners and communities. Radical land reform would, however, dramatically erode the power of landowners per se by securing a wider distribution of property rights among private, not-for profit, public, and partnerships in addition to community groups.

IMPACTS OF THE BILL

FIRST - Given claims that this Bill will “effect rapid change in the pattern of ownership”, it is worth noting that most privately-owned land in Scotland has never been exposed for sale for over 100 years. It is estimated, for example, that at least 25 % of estates of over 400 ha have been held by the same families for over 400 years. Even in parts of Scotland where turnover is higher such as the Highlands, over 50 per cent of private land has never been exposed since the war and 25 per cent has not been exposed at any time in the 20th century.

Recent data derived from the Highland Council Landownership database shows that, in the period Dec 1998 to June 2000, an average 3.5% (74 670 ha) of the privately-owned rural land changed ownership per year. Of this, 43 583 ha (58% of the total) changed hands via routes that would not trigger the right-to-buy (inheritance, intra-family/company transfers etc.). The remainder (31 086ha), representing 1.5% of of the privately-owned rural land, changed hands via sales for value and thus might be available for community purchase. However, the majority of this land area is made up of large farms, forestry holdings and sporting estates which in normal circumstances are unlikely to be candidates for community ownership.

In reality therefore, an extremely modest areal extent of land is likely to be of interest to communities. Of this a small proportion is likely to be actually registered and, of this, a small

proportion is likely to be actually purchased. We are perhaps looking at a total area of around 2-5000 ha per year as an informed estimate of the extent of land changing hands each year.

SECOND - Given the aspiration to change patterns of landownership it is interesting to read the Executive's own assessment of likely uptake as highlighted in para 324, p.39 of the Explanatory Notes. After Year 1, the forecast level of uptake is 5 registrations a year and 2 community purchases. If these are accurate the bill will clearly fail in its goal. My own view is that these figures seriously misrepresent the likely level of uptake. Why?

Part of the evidence comes from the Scottish Land Fund which has awarded 15 grants since April 2001. Of these,10 were for buildings or building plots, 2 were for development and amenity land (20-30 ha each), one was a 1.5 ha acre croft, one for a 40 ha woodland and one for the 1378 ha Isle of Gigha. In the space of 8 months over 20 community acquisitions have been funded across Scotland.

Importantly, this bill provides an opportunity to rural communities not to *buy* land (that's determined by landowners choosing to sell registered land), but to *register* land. Communities would be well advised in such circumstances to register any and all land likely to be of possible future use (including land that is the subject of existing negotiations) in order to protect the community interest. I know of one community group alone ready to register over 5 parcels of land. The right to register land is the most immediate and potent power given to communities. The likely level of registration would seem to me to be possibly of the order of hundreds per year - not 5.

OPERATIONAL PRINCIPLES OF THE BILL

Definition of Community (Section 31)

It is a paradox of this Bill that a number of the high profile community buyouts that would appear to have inspired it would not be able to take place under the Bill as currently drafted. In particular, the Eigg and Knoydart buyouts are not community buyouts but partnership buyouts. The Isle of Eigg Heritage Trust has 3 members, one of which is the Community Association. The Knoydart Foundation likewise has 6, one of which is the local Community Association.

What this demonstrates is that the public interest in land often extends beyond the local community as typified by recent attempts to secure land of significant public interest (e.g. Glen Feshie Estate in the Cairngorms and Castle Tioram in Moidart). There is, as the final paper of the Land Reform Policy Group (LRPG) paper, *Recommendations for Action*, makes clear (para 1.3), a series of wider definitions of community of the sort which were involved in the attempts to purchase Glen Feshie, Mar Lodge, and Castle Tioram. Of 46 not-for profit landowning organisations reviewed in a recent report, only 14 complied with the Bill's proposed definition of community.

To facilitate the goals of the Executive's land reform programme (more variety in ownership by private, public, partnership, community, and not-for-profit organisations) and to reflect the original intention of the LRPG, mechanisms should also be developed to enable wider community partnerships to purchase land. It seems unreasonable to deny communities the right to buy if they wish to avail themselves of such opportunities. It is worth noting that even in partnerships such as the Knoydart Foundation, Board members are obliged by Company law to serve the interests of the Company and not their sponsor body. Thus such an ownership model is to all intents and purposes community ownership - the community have simply chosen to share the burden with other sympathetic parties.

Registration (Chapter 2)

Experience suggests that there are three main circumstances in which communities take an interest in land, namely need, opportunity and threat. This is discussed more fully in Briefing 3 paras 4.3 to 4.6. In order to be able to secure the right-to-buy, a community needs to be able to

anticipate the future: this it cannot do. Thus to obtain the maximum benefit from the legislation and to provide for unknown future circumstances, a community would be well advised to register as much land as possible. Given that the right-to-buy may not be available for decades, this is no more than a prudent safeguard.

The process of registration is a complex administrative process which requires to be repeated for each parcel of land and repeated every 5 years. In view of the likely demand, this appears an onerous and cumbersome procedure for voluntary community groups to go through merely in anticipation of the possibility that they might, at some indeterminate point in the future, be able to exercise a right-to-buy.

The registration process needs to be made simpler. One alternative is that instead of communities having to register discrete parcels of land they could register their organisation. Such bodies could then exercise either the right-to-buy as defined in the Bill OR a straightforward right of pre-emption over land within their geographical area. At the time of registering the organisation they would be required to delineate land which they did NOT want to have a right of pre-emption over. Furthermore there would be no requirement to re-register and the right of pre-emption would be perpetual.

Given that so much of the demand for land by rural communities is for small parcels and given that such demand is often to address immediate social and economic needs, it would actually be far more appropriate to create a more flexible and dynamic power of compulsory purchase. This is available, for example to local communities in Norway where, with many more landowners and a flexible power of compulsory purchase, communities are able to develop far more easily.

Land as Lotted
I welcome the changes introduced to enable communities to purchase only that land in which they have a registered interest. This is a vital change necessary to avoid farcical situations arising (e.g. having to buy 10,000 ha in order to obtain 1 ha). See Briefings 2-4, in particular Briefing 3 paras 6.9 to 6.22.

Appeal (Section 57)
I welcome the extension of the rights of appeal to include substantive as well as procedural matters. An argument in support of this is given in Briefing 3 (para 6.28) and Briefing 4 (para 7.1 to 7.3).

Disposal
I welcome the lifting of the perpetual paternalistic gaze of Ministers whose consent was required in the Draft Bill before a community landowner could dispose of land. See Briefing 3 paras 6.26 and 6.27.

Valuation (Section 55)
Section 55 (7)(a) gives rise to the concern that the valuation of land will be inflated as a consequence of the possibility of taking into account any factor attributable to the known existence of a person etc. This power is open to abuse by a landowner seeking maximum return on a sale. Furthermore, there is some confusion between the Explanatory Notes to the Bill (which in para. 154 states that Subsection 7 *requires* the valuer to take account etc.), and the Bill which states that account *may* be taken etc.

Avoidance
I argued in Briefing 3 that there remains plenty opportunity for landowners to frustrate the community right-to-buy. For example, where land is transferred to a company in an offshore jurisdiction such as Liechtenstein, Panama, or the Bahamas, in which the landowner's family have the majority shareholding, 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. There is nothing that can be done to overcome this so long as it is legal to vest titles in offshore tax havens.

Triggers (Sections 37 & 38)
There is no mention in the Bill of two important situations which arise quite frequently in land sales and where, it would appear, registered land can in effect be sold without triggering the right-to-buy.

The first of these arises where land is held by a Company Limited by Shares and where the shares rather than the title are transferred. Some 1.2 million ha of land (over 16% of all privately-owned rural land) is held by such companies and the shares are regularly traded. Since title to the land itself is never sold, some provision needs to be made in the Bill to ensure that share trading can trigger the right-to-buy (at least of that share). The Draft Bill allowed for this where effective control was being transmitted (Section 52(6) & (7)). The present Bill, however, has dropped any such reference and thus the right-to-buy is easily evaded by transferring ownership to a family Company Limited by Shares and then proceeding to sell the shares incrementally.

The second is where land is held by more than one person, each holding pro indiviso shares. Such shares can and are sold independently of one another. I have not carried out any analysis of the extent of land owned in this manner but it is sufficiently common to justify some mention in the Bill since the sale of such shares and the potential for evasion are similar to the situation with a Company Limited by Shares.

Compulsory Purchase of Community Land by Ministers (Section 32)
Section 32 compels community bodies to seek the consent of Ministers to change their Memorandum and Articles of Association and provides Ministers with a compulsory Purchase power. This is a retrograde power which constrains the democratic functioning of community bodies. It should be deleted. Communities should be free to follow their own best interests just like any other landowner.

Andy Wightman is a freelance writer and researcher specialising in land tenure and rural development and is a leading advocate of land reform in Scotland. He acts as an advisor to a number of organisations and individuals both private and public. Currently he is engaged in analysis and research on land reform and is a member of the Scottish Office Consultative Panel on Land Ownership. He is an Honorary Research Fellow at the University of Aberdeen and a Research Associate at Moray House Institute of Education, University of Edinburgh (undertaking a study of Highland Sporting Estates). He is the author of Who Owns Scotland (Canongate, 1996) and Scotland: Land and Power (Luath, 1999). In 1999 he delivered the Sixth John McEwen Memorial Lecture entitled Land Reform: Politics, Power and the Public Interest. Andy is a Specialist Adviser to the Scottish Land Reform Convention and to Land Reform Scotland. He is Director of the Caledonia Centre for Social Development's Land Programme and a member of the New Opportunities Fund's Scottish Land Fund Committee.

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