

## **Submission to the Land Law Reform Group by Ewan G Kennedy**

I welcome the opportunity to offer a response although the terms of the LLRG's remit are so broad that the exercise could be somewhat overwhelming. For example does creating greater diversity of ownership types involve creating new legal concepts at present unknown in Scots law? The general aim of improving diversity of ownership of our rural land is certainly desirable, as early Twenty first Century Scotland probably bears a closer resemblance to pre-Revolutionary Russia than to much of the rest of contemporary Europe. In practical terms the problem is how to do something about it without necessarily starting a revolution. More realistically there are very severe legal constraints on what can be done to redistribute property. While one could describe a vision of what an ideal Scotland might look like it's a more valuable exercise to look at practical solutions that could be arrived at without too much upheaval or risk of challenge. I will try to offer a number of suggestions based on my own personal and professional experience and a critique of a number of areas where I believe that recent measures have not been working as well as they should.

I have taken the ten headings supplied and grouped my remarks under the seven of them on which I have something to comment.

- 1 Expand community ownership of land, housing and other assets in both town and country and in all parts of Scotland;**
- 2 Diversify and broaden ownership of land in Scotland, where more land is owned by fewer people than anywhere else in Europe; and**
- 3 Encourage (or oblige legislatively) owners of land to give local communities a greater say in how land is managed and used;**

### **Assessing community views**

I start with some words of caution about how views within a community can best be assessed and most accurately voiced.

A major aspect of the demographic in mid- Argyll, where I live, is the inward migration of active but retired people from the rest of the country. In-migrants to Argyll tend to come from a number of distinct groups. The smallest are returning locals on their retirement from work in the cities – in Kilmelford that would account for only one or two families in the thirty years or so in which I have spent time here. Next are army and naval officers and their families, who acquire houses during their service for eventual retirement at a relatively early age. The largest group consists of people from all over either retiring or looking for a change of lifestyle.

The impacts are by no means negative. Construction of new houses may add to local employment, provided local builders are involved. Incoming money can help to refurbish hotels and guest houses and to establish small businesses.

The negative aspects are well documented, for example the pressure on house prices, decline in primary school rolls in remote areas and outward migration of fit younger families to the cities.

Less studied is the extent to which such in-migrants dominate the agenda in the areas where they settle. People who have been used to running things in their active lives usually want to continue doing so. Some relish the idea of becoming seen as community leaders and easily gain positions on community councils, on which there are rarely sufficient numbers of candidates to fill the vacancies. Despite the guidance to community councillors to conceal their personal opinions these are frequently expressed forcibly at local meetings. Notoriously Kilninver & Kilmelford Community Council even agreed to become the proxy for a local landowner in applying for consent for a speculative housing development, negating its statutory role as a consultee, seemingly following successful lobbying of community councillors by the landowner.

Some community councils do appear to function impartially, but they depend on dedicated councillors committed to the spirit of these bodies. As an example I offer a recent case on Luing, where the proposal for an “Atlantic Centre” involving a mixture of museum, restaurant, tourist and community facilities split the population. The Community Council conducted a survey which showed the split and simply presented the results without comment to inform the planning process. This is how things should work, but I suspect it is the exception rather than the rule.

The Association of Scottish Community Councils (which now seems somewhat in abeyance) published admirable guidelines on how community councillors should behave and how best they can gather views, recommending the use of secret mail drops, anonymous surveys etcetera and discouraging the use of telephone surveys. The latter are not only very time-consuming; they inevitably involve the canvasser expressing his or her own view about the proposal, or putting out misleading information. Despite this it seems the telephone survey remains the preferred method.

The problem is that without real powers being on offer it's unlikely that community councils will ever attract candidates of quality and integrity in sufficient numbers. Doing the job properly is utterly thankless.

Regrettably matters aren't much better at the local authority level either.

Councils like Argyll & Bute and Highlands and Islands cover absolutely huge land masses with administrative centres at vast distances from the remotest settlements. This has led to a feeling of remoteness among the rural population which historically has led to widespread apathy and low turnouts. Larger towns like Oban tend to dominate the agenda, leaving rural residents feeling disempowered.

There may be an argument for economies of large scale, but ultimately that would suggest the whole structure should be swept away and all government centralised. After all to the parent of a primary school child on Tiree it would make no difference were the Director of Education to be based in Edinburgh rather than Lochgilphead.

The tendency throughout much of Europe and in particular in the smaller Scandinavian countries that closely resemble Scotland is for local communities to be much more in charge of their own affairs, with councils serving smaller populations.

With properly representative local authorities on a local scale that people could relate to there would be no need for community councils.

While it is beyond the present exercise there is a case for a review of how local government is structured. In the meantime assessing what a community really wants should be done with great caution.

### **Community Buy-outs to date**

It's interesting to read the history of community right to buy (crtb) and to remind ourselves that most of the transfers to date have been by agreement rather than compulsion. Andy Wightman's chapter in "The Poor had no Lawyers" on the politics behind crtbt and the costs involved deserves careful study. Perhaps the major benefit in crtbt has been a change in culture, with people being encouraged to believe that transfers from the feudal model to community forms of ownership are indeed possible, by whatever means.

Looking at various concrete examples of transfers, however they have come about, suggests a slightly mixed picture.

Few would now argue that the Gigha Heritage Trust has been anything other than a great success story. To summarise the situation on Gigha there is an openness and willingness to encourage in-migrants with their ideas and money which has brought great benefits to them and the indigenous population alike and created a cohesive cheerful community. The use of a relatively standard intelligent architectural style has allowed new housing to go in without destroying the island's amenity. I have been a visitor to Gigha before and after the buy-out and the change has been astonishing.

By comparison Jura is seriously depressed. Right now locals are watching the new young Australian owner of much of the island, who recently closed the famous gardens to the public and is now building his own private golf course, anxious to see what will become of the local economy and what their future will be like.

With buy-outs everything seems to depend on the personal qualities of those who lead the communities involved. Where they have been less happy one hears of dictatorial attitudes, occasional litigations between community groups and individuals, creating the suspicion that the new "landlord" isn't much different from the old one, but without the consolation of being an obvious hate figure.

What is clear is that in almost all cases conditions are much better for communities once they break free from the feudal model. Scotland's islands and remote corners have suffered greatly at the whims of the often eccentric individuals who have been attracted from all over the world. We need to discourage potential owners from treating their purchases as personal fiefdoms and enforce social responsibility as an aspect of ownership. This could be done via the planning system, access rights and, possibly, taxation, but there are problems with each of these. Ultimately some form of compulsion may be required.

### **Ownership versus Planning**

The best way to stimulate local economies and grow communities is by encouraging businesses. Regrettably most landowners don't want to develop business space, preferring instead the short term benefit of selling plots for housing, if they sell at all.

Historically in the battle for control of land ownership has usually won out over planning. The planning system can seek to designate a site for business, industry or whatever, but nothing will happen unless the landowner wills it.

It is very instructive that in the immediate post-war period, when there was a collapse of heavy industries and a need to create employment and encourage new enterprises one of the most successful steps was the invention of the industrial estate, where public finance was used to provide affordable business units for rent. Later the private sector realised that such estates were very profitable as, in particular, small units for start-up businesses could be provided at minimal cost and an acceptable rent provided a good return on capital to the landlord. It is doubtful however if anything would have happened without the public sector taking the first step.

Something similar continues today with the WASPS organisation providing small studios and workshops for artists, craft-persons and small supporting businesses in various parts of the country, but not presently in Argyll & Bute. They support about 750 artists throughout Scotland in 17 studio complexes. Of these six are outwith the major cities, namely those in Fife, Irvine, Kirkcudbright, Nairn, Selkirk and Shetland.

Just now Argyll is home to an incredibly large number of professional artists, as Artmap Argyll demonstrates each year. Mostly they are working out of old buildings in remote locations in quite difficult conditions. Outside of arts and crafts a number of enterprise types lend themselves to the rural environment and enhance the experience of visitors. I would include in this small-scale furniture makers and other wood-workers, makers of clothing, boat-builders, bakeries and producers of specialised foodstuffs and the great success story of our times, the micro-brewery.

The amount of space required can be quite small. We should be willing to contemplate a modest amount of compulsory purchase of land in suitable areas to provide it.

## **Access Rights**

Formalising access rights has been a bit of a mixed blessing. The advantage lies in giving people who know about the Access Code a piece of paper to demonstrate the entitlement which they always already had. The disadvantage is that landlords have become very aware of the restrictions in the code and use these to good effect. I give some local examples.

In April 2010 I was on a walk with a group of friends when we came across a padlocked gate and were challenged by the young landowner who tried to stop us exercising our rights, referring to advice she claimed to have had from her insurers, the NFU. After some discussion we were reluctantly allowed to proceed. I duly complained to our local access officer, who told me that other complaints were

pending against the same owner. Many months later the padlock was removed. While the code worked in this case I suspect that for most of that summer visitors, particularly from outside Scotland, would have turned back. I got the impression that the access officer was seriously overworked. The LLRG could usefully gather some statistics about caseloads.

Other landowners locally seem to have been advised to rely on the Snowie and Gloag cases to exclude visitors far beyond what those cases would warrant.

In a number of locations notices have appeared on gates stating "There is no public right of way along this path," which while correct legally is of course misleading and will cause many walkers to turn back.

One suspects that legal advice has been involved in all of these cases. If so it is highly regrettable that members of the legal profession may be conniving with their clients to defeat access rights rather than educating them about the duties that go with the territory.

I am aware that we are in the early days of the new legislation. The remedy to the problems is probably a campaign to raise public awareness of the right to roam, particularly among our visitors from outwith Scotland, who often come from places where access is denied.

#### **4 Make it easier and cheaper for Forestry Commission land and other land in public ownership to be transferred to others**

It's not entirely clear what lies behind this suggestion. Where the Forestry Commission has sold off land in Argyll the consequences have not obviously been beneficial. The Forestry Commission has deserved criticism over the years for lack of imagination and sensible direction but latterly it seems to have opened up to the idea of public access.

The harvesting of timber has to be done in ways which do not overload the local infrastructure, including country roads that are usually built on peat without proper foundations. The Forestry Commission is aware of this and claims to adopt practices that avoid excessive loading of local roads etcetera, although transporting timber by road is a major hidden cost and danger to public safety.

An illustration of what can happen when estates are sold off could be seen recently at Raera Wood, where the private owners agreed to lease the land to a windfarm company, involving the immediate clearance of a substantial area of woodland. Effectively thirty years of planned extraction would have been carried out over eighteen months, resulting in the already overloaded road system coping with a timber lorry every few minutes. The scheme was turned down on other grounds, but the example shows that there is no effective control over an important matter such as extraction policy once an estate is in private hands.

Locally we have seen soil erosion and flooding when trees have been felled without due care. Changes to taxation in recent years have lessened but not eliminated the

enthusiasm of wealthy celebrities for covering our hillsides with conifers. A large stretch of countryside where I live is currently threatened with afforestation, which will create an alien landscape for a generation and effectively defeat the public's rights of access.

## **5 Improve the supply and lower the price of land for affordable and other housing in both town and country**

The policy requiring developers to allow for 25% of a project to be affordable has been running for some years. It is to be welcomed as a way of increasing the housing stock, but has also been subject to the law of unintended consequences.

It is by no means always going to be the case that a development site will be located in a hot spot of demand for the affordable housing, as developers will seek out sites on the basis of the marketability of the 75% that is to be sold. Locations without good public transport are pointless for people without cars.

A further problem is that of allocation. As housing associations allocate houses on a points system across their areas there is a possibility that an applicant with a high score will be offered a house away from his or her existing location and possibly far from supporting friends, family and work. Further, that applicant may be ahead of someone already in that area, homeless but with fewer points. This has happened in mid-Argyll, causing resentment among established workers when newcomers have obtained houses ahead of them.

Solutions might involve modifying the points system in suitable cases, or apply the policy on a developer rather than a site basis so that the affordable element could be located in an area where the need is most pressing. The latter would only work if both sites were in control of the same developer, or he could arrange a land swap.

## **8 Replace Council Tax and Business Rates with a tax on land values**

I am not qualified to express a specific view on tax reform. In principle it is unjust that owners of large estates are effectively exempt from all taxation, with the result that the families who own Scotland today are probably largely the same as those who did one or two hundred years ago. A major difficulty is the lack of information about who actually owns the country, despite years of effort by researchers such as Andy Wightman. I suspect that few other advanced countries allow anonymous owners to shelter behind artificial entities while exerting considerable control over the lives of all of us.

As a start there should be a simple change requiring the beneficial owner of land to be identified on the face of the Land Register of Scotland. I can think of no good reason why the owner of a large piece of land should be legally entitled to conceal his identity not only from the people who live on it but also from the State. Only once we know who owns the country can we start to do something about creating a fair system of taxation.

## **10 Change the law of succession as it affects ownership of land.**

It's not realistic to imagine that any change in the law would produce wider or more equal ownership of land. The problem lies not in the law but in the habits of the landed classes in favouring their eldest sons. Apart from this the use of devices such as offshore companies and trusts will always defeat the intentions of the legislator.

## **Appendix**

### **Curriculum vitae of Ewan G Kennedy**

I was born in Glasgow in 1948, graduated LLB (Hons, First Class) at Glasgow University in 1968, served an apprenticeship with Professor John M Halliday and then worked as a solicitor in general legal practice in Glasgow until May 2009. I held a part time appointment as a lecturer in law at Glasgow University from 1968 until 1981, latterly teaching conveyancing in the Diploma in Legal Practice. I held an appointment as a member of the Rent Assessment Panel for Scotland from 1978 to 1996, during which time I obtained a detailed knowledge of the private rented housing sector. I have retained an interest in housing law since.

I have been concerned about land use issues in Glasgow and in 2004 I was involved in forming the Glasgow Green Spaces Trust, which campaigned against destruction of playing fields by developers in the city. In connection with that I was one of a group who petitioned the Scottish Parliament seeking reform of the planning system.

My wife and I have been resident in mid-Argyll part-time from 1984 and full-time from my retirement in 2009. I interest myself in local planning matters and am taking part in the current local development plan consultation.