CROFTING REFORM ETC. BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Crofting Reform etc. Bill. It outlines the reasons for seeking the proposed powers and describes the purpose of each of the provisions for subordinate legislation in the Bill. All the powers contained in the Bill to make subordinate legislation are new. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE AND SCOPE OF THE BILL

2. The Bill implements the Executive’s Partnership Agreement commitment to implement a Crofting Reform Bill, while supporting the retention of a grants scheme for crofting counties, by 2007. It seeks to modernise crofting and create a new constitution for the Crofters Commission. There are measures within the Bill to allow the creation of new crofts, the simplification of crofting regulation, modernise conditions of tenure for crofters, clarify and extend crofters rights to use their land, facilitate energy development on croft land and create extended rights to appeal Crofters Commission decisions. The Bill will also provide a mechanism to allow new crofts to be created by means of subordinate legislation outwith the crofting counties and allow crofting community bodies to purchase the rights of the tenants in leases over the land which they have bought or are buying under the provisions of Part 3 of the Land Reform (Scotland) Act 2003.

RATIONALE FOR SUBORDINATE LEGISLATION

3. In considering whether matters should be specified on the face of the Bill or left to subordinate legislation, the Scottish Executive has weighed the importance of the matter against the need to:

- ensure sufficient flexibility in responding to changing circumstances and the ability to make changes quickly in light of experience without the need for primary legislation; and
- allow detailed administrative arrangements to be set up and kept up to date within the basic structures and principles set out in the primary legislation, subject to Parliament’s right to challenge the inappropriate use of powers.
4. We intend to provide the Subordinate Legislation Committee and Lead Committee with a draft Scottish Statutory Instrument in connection with the provision in section 10 of the Bill which would allow the Scottish Ministers to specify by order the circumstances in which crofts can be created outwith the crofting counties, during Stage 1 of the Bill’s passage.

5. This is the most urgent piece of secondary legislation required under the Bill and it is important for the Scottish Parliament to be able to scrutinise this while considering the general principles of the Crofting Reform etc. Bill.

6. The Bill contains enabling provisions and in the main body of this memorandum the nature and likely use of each delegated power is outlined in detail. It will not be possible to provide draft Scottish Statutory Instruments for each provision which requires secondary legislation during the passage of the Bill. Instead, we provide a detailed explanation of the intended use of the powers, the circumstances in which they might be used, and the policy objectives which the secondary legislation is intended to pursue, to both the Subordinate Legislation Committee and the Lead Committee.

7. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily. Affirmative procedure is used where the order or regulation making powers allow for the modification of any enactment or where there is significant public interest. Negative resolution procedure is used otherwise.

OVERVIEW OF DELEGATED POWERS

Section 2 - Particular duties and powers

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8. Section 2A gives the Commission power to set policies for separate local areas, with the proviso that the Commission must first consult with grazings committees as to where boundaries should be drawn and establish local policy panels to advise the Commission on local views and the needs of the area and to assist the policy proposals for that area. This section also provides that the arrangements for consulting on a scheme, preparing it and setting up local panels will be specified in regulations and that each scheme must be approved by Scottish Ministers.

9. Arrangements for consulting on a scheme, preparing it and setting up local groups are likely to be complicated. It also does not seem appropriate to put these in place without prior consultation on the detail with crofting interests and the Crofters Commission. This needs time and necessarily should involve the new Commission which this Bill proposes to create. For these reasons and because of the essentially uncontroversial nature of the proposed arrangements we consider it appropriate that this should be done by use of subordinate legislation.
10. As the contents of these regulations will be uncontroversial it is considered that negative resolution procedure is appropriate.

**Section 5 - Obtaining Commission approval or consent**

*Inserting new section 58A in the 1993 Act.*

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Affirmative resolution

11. New section 58A sets down the process by which the majority of applications to the Crofters Commission will be determined. This process provides that the Commission should consider the application where there has been an objection to it by a person with a right to object or where certain conditions for intervention arise. There are general conditions which apply to all applications set out in section 58A(9) and conditions which are specific to particular types of application. The latter are to be found in sections 13 (new section 4A(3)), 14 (new section 9(2)), 15 (new section 27(3)), 16 (new section 8(2)) and 28 (new section 23(3A)). Subsection (13) gives Scottish Ministers power to amend the general and specific conditions by means of a statutory instrument. Subsection (14) requires that any such statutory instrument must be approved by resolution of the Parliament.

12. The Commission will no longer be required to determine every application made by crofters and landlords, but will still have a responsibility to intervene where there is an objection or where an application which raised no objections invokes separate criteria requiring the Commission to consider and decide whether the application should succeed.

13. The power to amend the aforementioned general and special conditions by means of a statutory instrument will enable Scottish Ministers to make changes to these conditions if in future it is found that these conditions are not working, are no longer relevant or need to be changed to take on board changes to crofting circumstances in the future.

14. In recognition, therefore, that this power enables Scottish Ministers to amend primary legislation, an order made under this subsection would be subject to scrutiny and debate through the affirmative resolution procedure in the Scottish Parliament.

**Section 8 - Maps and scheme of charges**

*Inserting new section 41A in the 1993 Act*

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution

15. Section 41A(1) allows Scottish Ministers to make regulations to confer on the Commission power to require maps of crofts to be supplied to the Commission. Section 41A(2) requires these regulations to specify when and in what circumstances the Commission can
require maps to be supplied and in what format. Section 41A(3) specifies that these maps shall be held on the Register of Crofts.

16. The Commission already has a general power to regulate their own procedure in paragraph 11 of the existing Schedule 1 to the 1993 Act, but it is considered necessary that the Commission be given power to regulate procedure in connection with the Register of Crofts. The requirements of what map-based data and other data must be provided, and the form and scale of maps would be provided for in an order to be made by the Scottish Ministers. It is intended that the mapping requirements be compatible with the Land Register’s mapping system and for there to be provision to allow exchange of information between the Land Register and the Register of Crofts in the future. It is considered that the technical and detailed nature of this requirement would be better dealt with by regulation than on the face of the Bill.

17. As this requirement is uncontroversial in nature, full scrutiny associated with affirmative procedure could place a disproportionate burden on the Parliament and negative resolution procedure is therefore considered appropriate.

**Section 8 - Maps and scheme of charges**

**Inserting new section 41B in the 1993 Act**

- **Power conferred on:** The Scottish Ministers
- **Power exercisable by:** Rules made by statutory instrument
- **Parliamentary procedure:** Negative resolution

18. Section 41B(4) gives Scottish Ministers, after consultation with the Commission, power to make an instrument that will be subject to negative resolution of the Scottish Parliament, containing the rules governing fees to be charged by the Crofters Commission for searching in the Register of Crofts, for providing information from that Register and for providing extracts from the Register.

19. The intention is that the Commission will not be expected to bear the cost of the provision of a map, or map-based data and other data from the Register. The intention is that the charges should be fixed at a level which will ensure that the cost associated with providing such data shall fall either to the person disposing of a croft or the person acquiring a croft. This provision enables Ministers to specify by statutory instrument a reasonable fee to be charged by the Commission for searching or providing information or extracts from the Register of Crofts. The inclusion of this rule-making power ensures that fees can be fixed from time to time as necessary to fulfil this need. Furthermore, Ministers will be able to ensure that fees charged are reasonable. It is intended that arrangements whereby the Commission should charge for these services should not be put in place until after the arrangements for including map based data on the Register are operational (i.e. after the regulations which section 41A(1) empowers Scottish Ministers to make have come into operation).

20. As this is in the nature of an administrative requirement which will be necessary from time to time we do not therefore consider it desirable to require a higher level of parliamentary involvement than that afforded by the negative resolution procedure.
Section 10 - New crofts

Inserting new section 3A in the 1993 Act

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution

21. New section 3A(1) empowers the Crofters Commission to constitute land as a croft in response to an application to that effect from the owner of the land in question. New section 3A(1)(b) provides that this can only be done outwith the crofting counties in an area specified by an order, the instrument for which is approved under subsection (12) of section 3A by resolution of the Scottish Parliament.

22. Section 3A(2) empowers the Crofters Commission to constitute a holding as a croft in response to an application to that effect from the tenant of a holding to which section 32 of the Small Landholders (Scotland) Act 1919 applies or to which any of the provisions of the Small Landholders (Scotland) Act 1886 to 1931 apply. It also provides that this can only be done in an area specified by an order the instrument for which is approved under subsection (12) of section 3A by resolution of the Scottish Parliament.

23. By providing that areas outwith the crofting counties in which crofts can be created must be specified by order the legislation ensures that crofting can be extended in situations where it can make a real contribution to local social, environmental and economic needs. The flexibility that the order making power conveys will make it possible to respond to future needs. The only realistic alternative would be to extend crofting tenure across the whole of existing Scotland now. However that approach would complicate the pattern of landholding across the whole of Scotland and add greatly to the workload and cost of operating the Crofters Commission.

24. It is expected that this provision may generate some debate as to the extent of areas to be designated as croft land and as it amends primary legislation, it is considered desirable that the Scottish Parliament should be afforded the opportunity through the affirmative resolution procedure to scrutinise and debate any change to the extent of crofting tenure throughout Scotland.

Section 12 - Complaints as respects breach of the statutory conditions

Inserting new section 5B (10) and (11)

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution

25. New section 5B(10) and (11) gives Scottish Ministers the power to amend by affirmative order the definition of “neglects” specified in section 5B(7).
26. The current definition of “neglects” refers to regulation 4 of and the Schedule to, the Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Regulations 2004 (SSI 2004 No. 518). This provision allows Scottish Ministers to amend the definition of “neglects” in the event that the provisions of the regulations to which it refers become redundant, are superseded or are substantially modified. It reflects the fact that the minimum standards expected of agricultural enterprises are likely to change over time to reflect changing priorities.

27. In recognition, therefore, that this power enables Scottish Ministers to amend primary legislation, an order made under this subsection would be subject to scrutiny and debate through the affirmative resolution procedure in the Scottish Parliament.

Section 30 - Use of common grazing

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution

28. This section introduces a number of changes connected with common grazings and their uses. One of these changes is to insert new section 50A on joint forestry ventures on common grazings involving crofters and their landlords. New section 50A(8) defines planned natural regeneration and specifies that this includes regeneration which is undertaken in accordance with the conditions of grants funded by the Scottish Executive or other grants that may be prescribed. The power in section 50A(8)(b)(ii) enables Scottish Ministers to specify in a statutory instrument grants which will be relevant to determining whether a regeneration project is planned regeneration for the purposes of section 50A.

29. It is necessary to specify these grants by means of statutory instrument as it is expected that new grant schemes will be created from time to time and that existing schemes may also end from time to time.

30. Negative resolution procedure is considered appropriate in this case in view of the technical nature of the changes and as these changes are uncontroversial in nature and may be required fairly frequently, full scrutiny associated with affirmative procedure is considered inappropriate.

Section 36 - Regulations concerning loans

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution

31. Section 36 adds a new section 46A to the 1993 Act which provides for Scottish Ministers to make regulations governing the provision of loans to crofters, cottars and owners of holdings specified in section 46(2) (holdings sharing some of the characteristics of crofts). New section 46A(2) provides that these regulations may specify who would be eligible, the amount that can be lent, the circumstances under which a loan may be given, the terms and conditions,
arrangements for recording details of the loan and arrangements for recovery or assignation of liability for the loan on the death of the borrower.

32. There are no current plans for providing loans to crofters. The provision is required in order to allow for creation of a flexible regime for future potential uses. By use of subordinate legislation loan arrangements can be put in place to suit future circumstances and the nature and function of any loans which are to be offered.

33. Negative resolution procedure is considered appropriate in this case in view of the technical nature of the changes and the fact they are uncontroversial in nature, full scrutiny is therefore inappropriate.

Section 45 - Transitional provision etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative or affirmative resolution

34. Section 45(1) of the Bill gives the Scottish Ministers powers by order made by statutory instrument to make supplementary, incidental, consequential, transitory, transitional or saving provision as they consider necessary for the purposes, or in consequence, of the Act. This power is required because it is expected that a range of ancillary provisions are required. It would not be a good use of Parliamentary time to have to return to Parliament to make these when this should be properly dealt with in this Bill. Section 45(3) provides that such an order may make different provision for different purposes and may modify any enactment, instrument or document. Section 45(4) provides that regulations under section 45 which add to, replace or omit any part of the text of an Act is to be made by way of affirmative resolution procedure. All other regulations under this provision can be made by way of negative resolution procedure because the conditions outlined in paragraph 7 for the use of affirmative procedure do not apply.

Section 47 - Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: None

35. Section 47 provides for the provisions of the Bill to be brought into force by way of an order made by the Scottish Ministers. Such an order would be a statutory instrument but, as is normal practice with a commencement order, it would not be subject to any Parliamentary procedure. Different parts of the Bill may be commenced at different times.
Schedule 1 3(1)(d) and 3(2) - General powers

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution

36. Paragraph 3 gives the Commission power to charge for services. Paragraph 3(1)(d) gives power to Scottish Ministers to prescribe charges for regulatory activities and 3(2) gives power to Scottish Ministers to prescribe what constitutes regulatory activities for which a charge can be levied.

37. This provision enables Ministers to specify by statutory instrument a reasonable fee to be chargeable by the Commission for carrying out regulatory functions. The inclusion of this regulation-making power ensures that fees can be fixed as necessary to fulfil this need. Furthermore, Ministers will be able to ensure that fees charged are reasonable. This provision reflects the fact that the role of the Crofters Commission is in part about delivery of a service to crofters and landowners in relation to the transfer of crofting property. Under other forms of land tenure some of these services carry a cost to the owner and tenant and as the circumstances of crofting change so might the justification for providing these services at no cost to the user.

38. Regulatory activities are not defined but could encompass the range of issues on which crofters and landlords require the consent or approval of the Commission or a decision of the Commission. In practice it is likely that charges would be levied in circumstances where the applicant might benefit financially and there is invariably significant administrative costs. For example in connection with the granting of an apportionment of common grazing for the exclusive use of the applicant.

39. As these regulations are simply specifying amounts charged and listing regulatory activities all of which may change from time to time, it would be inappropriate to require full scrutiny and debate in Parliament. Negative resolution is therefore considered appropriate.
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