

CROFTING (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Crofting (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 9 May 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 31–EN.

POLICY OBJECTIVES OF THE BILL

Summary

2. The Bill addresses a problem which has arisen in relation to provision in the Crofting Reform (Scotland) Act 2010 (the “2010 Act”) which introduced a new category of “owner-occupier crofter” into the Crofters (Scotland) Act 1993 (the “1993 Act”). It has become apparent that an unintended effect of the provision is that it does not allow owner-occupier crofters to apply to the Crofting Commission¹ (“the Commission”) to decroft land unless the croft is vacant. The objective of the Bill is therefore to ensure owner-occupier crofters are in the position they were meant to be in, in respect of decrofting, following commencement of the provisions in section 19B of the 1993 Act on 1 October 2011 defining owner-occupier crofters, and that the Commission are able to give decrofting directions to owner-occupier crofters where they approve the application.

3. The Minister for Environment and Climate Change made a statement to the Scottish Parliament on 28 March 2013² setting out the Scottish Government's intention to bring forward at the earliest opportunity a Bill which would remedy that problem. The Minister also set out his intention to propose a timetable for the Bill that would enable the Scottish Parliament to consider carefully the proposed changes, while ensuring that the matter was resolved quickly. While the Bill will enable owner-occupier crofters to apply to the Commission to decroft land, it will also make retrospective provision in relation to the 159 decrofting applications already determined by the Commission and the 50 applications which had been submitted but had not been decided at the point the Commission announced that they could not give decrofting directions in the case of owner-occupier crofters. This will allow these applications, and any resulting decrofting

¹ A Non-Departmental Public Body which replaced the Crofters Commission from 1 April 2012.

² See Official Report of the Scottish Parliament for 28 March 2013 at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7901&i=71954&c=1445772&s=Decrofting>

directions, to be treated as competent and avoid the need for the applications to be resubmitted. This will benefit both the applicants and the Commission and avoid unnecessary bureaucracy.

4. The Scottish Government is committed to ensuring that, insofar as possible, all crofters are treated equally, while taking account of the differing status between tenant and owner-occupier crofters.

Background

Crofting and the Crofting Commission

5. Crofting was originally a form of statutorily regulated tenancy unique to the Highlands and Islands of Scotland until the introduction in 1976 of a crofter's right to buy, which then converted some crofters who exercised this right to ownership status. However, as these ex-tenant crofters now owned and worked the croft, and there was no tenant in place, they became "owner-occupiers", or "landlords of vacant crofts" for the purposes of crofting regulation, and could apply to decroft the land under section 24(3) of the 1993 Act relating to vacant crofts.

6. The Commission are the statutory regulator for crofting and their role is to regulate crofting, to re-organise crofting, promote the interests of crofting and keep under review matters relating to crofting.

7. One of the functions of the Commission is to consider regulatory applications to decroft land, that is, to remove land from crofting tenure and from the application of crofting legislation. Applications to decroft areas of croft land may be made, at present, by landlords and tenant crofters, as well as owner-occupier crofters when the croft is vacant. This can be for a variety of purposes, which include for the purpose of satisfying lenders over standard securities and giving banks confidence to issue mortgages to crofters to allow them to build houses. Applications may also be made in relation to freeing land from crofting regulation to provide sites for wind turbine renewable schemes and other development activity.

Decrofting generally

8. The legislation allows people to seek to have land removed from crofting tenure in order to develop parts of their crofts outwith crofting controls and to obtain clear title in order to raise financial support for development activities. An applicant can apply to decroft for any purpose. The Commission will grant a reasonable purpose application if it relates to the good of the croft, the estate, is in the public interest or in the interest of the local crofting community, and if the extent of the land to be decrofted is not excessive in relation to the purpose. In making this decision, the Commission may take into account the effect the stated reasonable purpose will have on the sustainability of:

- crofting in the locality of the croft or such other area in which crofting is carried on as appears to the Commission to be relevant;
- the crofting community in that locality or the communities in such an area;
- the landscape in that locality or such an area; and
- the environment of that locality or such an area.

9. The Commission may also consider the sustainability of the social and cultural benefits associated with crofting. Where a reasonable purpose application is made that relates to the development of the croft and has associated planning permission, the Commission may still take account of the effect this will have on the croft, the estate and the local crofting community. When it issues a direction to decroft for a reasonable purpose, the Commission normally imposes conditions relating to the use of the land.

10. When considering applications to decroft land for a purpose other than a defined reasonable one, the Commission have discretion to refuse where it is established there is a local crofting community whose interests would be adversely affected. The Commission must take into account the demand for a croft tenancy of the land subject to the decrofting application. Demand can be from any person who might reasonably be expected to obtain the tenancy if the croft (or part croft) were available for letting at that time.

11. Special provision is made for dwelling houses in the decrofting process. The Act provides that, if an application relates to the site of the dwelling house only and a crofter is entitled or has been entitled to a conveyance of that site, the Commission **must** decroft the site if the extent of the garden within the site is appropriate for residential purposes. Such a right is limited to only one house site on the croft per crofter.

Owner-occupier crofters and decrofting

12. The 2010 Act introduced a new category of “owner-occupier crofter” into the 1993 Act from 1 October 2011 and defined both the “owner-occupier crofter” and what constituted an “owner-occupied croft”. An “owner-occupier crofter” is a crofter who meets the criteria in section 19B of the 1993 Act, i.e.:

- the person is the owner of a croft;
- before becoming the owner, the person was the tenant crofter who exercised the right to buy the croft, the nominee of such a crofter or an individual who purchased the croft from the landlord who created the croft (or a successor in title to any of these persons); and
- the croft has not been let to any person as a tenant crofter since it was acquired from the landlord or constituted as a croft.

13. Before section 19B came into effect, people who owned and worked their crofts were described as “owner-occupiers”. They were most commonly a former tenant crofter who had acquired the croft from the landlord. Other owner-occupiers could include those who own distinct parts of the same croft. The 1993 Act now distinguishes between an owner-occupier (who owns and works the croft but does not meet the conditions in section 19B) and an owner-occupier crofter (who does meet those conditions).

14. It has become apparent that the provisions of the 1993 Act do not work as intended in relation to owner-occupier crofters. The effect of section 24(3), as read with section 23(10) and (12A), of the 1993 Act is that an owner-occupier crofter can apply to decroft only “where a croft is vacant”. However, owner-occupier crofters are required to be resident on, or within 32 kilometres of, the croft and section 23(10) states that the croft is not vacant where it is occupied

by the owner-occupier crofter. This means that almost all owner-occupier crofters are unable to apply to the Commission to decroft their land, and the Commission does not have the power to approve such applications. However, other owner-occupiers of crofts were unaffected and can still apply to decroft land as if they were the landlord of a vacant croft. Also, a tenant crofter occupying a croft can apply to decroft land under section 25 of the 1993 Act, prior to exercising their right to buy the croft, or part of the croft consisting of the house site and other croft land. The Bill will therefore allow owner-occupier crofters to, similarly, decroft land while they occupy the croft.

15. The Commission ceased processing any new decrofting applications from owner-occupier crofters following receipt of legal advice on 1 February 2013 that these applications were not competent. From October 2011 until February 2013 when the Commission received legal advice to the effect that they were acting outwith legal authority in issuing decrofting directions to owner-occupier crofters who occupied their crofts, the Commission issued 159 decrofting directions to owner-occupier crofters. In addition, at the time the advice was received the Commission were in the process of considering a further 50 applications submitted by owner-occupier crofters. Decisions on these cases have been held in abeyance while legal remedies were being explored. The Commission published a note on their website stating their position on 25 February 2013³.

Bill provisions

16. The provisions of the Bill are narrowly focused on the key issues relating to allowing owner-occupier crofters decroft their croft land whether the croft is vacant or not; to provide powers and criteria for the Commission to make decisions on owner-occupier crofter decrofting applications; and to determine the effect of a decrofting application.

17. The criteria for dealing with owner-occupier crofter decrofting applications reflects the criteria already applying to decrofting applications from tenant crofters and landlords. However, some criteria do not apply to owner-occupier crofters, such as section 25(4), which allows a decrofting direction to be made where a tenant crofter is proposing to acquire croft land or the site of the dwelling house.

ALTERNATIVE APPROACHES

Do nothing

18. Some crofters are already being directly disadvantaged by their applications being held in abeyance at the Commission awaiting a legislative solution. While some issues can be taken forward in the interim, such as initial discussions with planning authorities on potential planning applications, the absence of a legislative solution will continue to cause concern amongst those wishing to decroft their land in advance of securing funding for development. Known issues awaiting a legislative solution include satisfying lenders over standard securities and giving banks confidence to issue mortgages to crofters and their families for house building or improvements, as, for example, in the absence of decrofting the land on which some properties have been built may be valued on the basis of agricultural use and not residential use. Other

³ Crofting Commission statement of 25 February 2013: <http://www.crofting.scotland.gov.uk/news.asp>

issues include freeing land from crofting regulation to provide sites for wind turbine renewable schemes and other development activity.

19. The Scottish Government's view is that taking no action would be an inappropriate response to the problem which has arisen in relation to the ability of owner-occupier crofters to decroft, and therefore primary legislation is required.

20. The Bill therefore makes provision for all approved applications to be treated, retrospectively, as if the provisions allowing owner-occupier crofters to decroft had commenced at the time the definition of owner-occupier crofter was introduced by the 2010 Act on 1 October 2011. The Scottish Government considers that this provision is necessary to address concerns that directions have been made outwith the Commission's powers, which could impact on third parties, such as banks and other lenders, who have given loans on the land.

Require owner-occupiers to re-apply

21. The main alternative to the approach taken in the Bill would have been not to apply retrospective provisions to decrofting applications already made by owner-occupier crofters which the Commission have granted since the provisions inserted by the 2010 Act came into effect, and those currently held in abeyance by the Commission. However, the Scottish Government believes that this would have been unnecessarily burdensome on both owner-occupier crofters in having to re-apply and on the Commission in having to reconsider all 209 decrofting applications (159 directions issued and 50 applications held in abeyance). It would also cause unnecessary delay and concern for all parties involved.

22. The retrospective approach also presumes that the decisions already taken by the Commission should stand and limits the potential for different decisions being reached by new administrators considering these applications anew. The Commission, as crofting regulator, have already considered the applications taking into account statutory requirements and criteria, none of which have been appealed on the basis that the applications were incompetent.

23. The effect of the retrospective provisions will be to ensure that all 209 applications are treated as having been validly made under the new provisions to be inserted into the 1993 Act. Conflicting views have been expressed on whether or not owner-occupier crofters can already apply to decroft land under the existing provisions in the 1993 Act and the Bill will therefore put this beyond doubt by providing stand-alone provisions specifically for owner-occupier crofters for this purpose.

24. The Bill will also make transitory provision in relation to the Crofting Register, which was introduced in Part 2 of the 2010 Act. Registration provisions were introduced on a voluntary basis for the first year of the Register becoming available, until 30 November 2013. The requirement to register croft land subject to a regulatory application to the Commission (including decrofting) will commence on 30 November 2013. Transitory provision in the Bill will therefore provide for decrofting applications to "trigger" registration only from that date and, until then, registration will be on a voluntary basis.

25. The Bill also places time limits for registration of the decrofting direction, which equally apply to other crofting directions. Where the croft is not registered in the Crofting Register, the Bill requires an application to register the croft to be submitted within 6 months of the decrofting application for that application to be considered. Where the croft is already registered, the Bill requires an application to register the direction to be submitted within 3 months, otherwise the direction falls. There is nothing to prevent further decrofting applications being submitted following the Commission's refusal to consider an application or a decrofting direction falling.

CONSULTATION

26. The Scottish Government, and others who have contributed to the debate on decrofting by owner-occupier crofters, share the view that the unintended consequence of the 2010 Act needs to be addressed quickly. This view was supported in Parliament on 12 March 2013, during a crofting debate on Motion S4M-04411⁴ and more widely. While there has been insufficient time during the development of the Bill to conduct a formal consultation, ongoing discussions took place during the development of the Bill provisions with key stakeholders, including the Commission, the Registers of Scotland and the Scottish Land Court. Further discussions will also be arranged with key stakeholders around the introduction of the Bill to the Scottish Parliament to inform them of the Government's intentions and to provide them with the opportunity to inform the development of the Bill's provisions.

27. Prior to the above discussion, the Scottish Government intends to circulate to stakeholder attendees a paper setting out the proposals. This should ensure stakeholders have sufficient time to consider the Bill proposals and encourage informed discussion and open debate in advance of the Bill's Parliamentary process. While there would be no opportunity to invite written responses, stakeholder will be given the opportunity to express their views during the discussion. These views will be taken into account in the Government's further considerations on the Bill.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

28. The Bill focuses on the ability of owner-occupier crofters to apply to the Commission to decroft land and provides a similar opportunity already afforded to landlords of vacant crofts and tenant crofters. The Bill therefore promotes equality by directly addressing the unintended consequence of the 2010 Act which presently, and unfairly, prevents owner-occupier crofters from applying to decroft their land unless the croft is vacant. The Bill's provisions do not discriminate on the basis of gender, race, marital status, religion, disability, age or sexual orientation.

Island communities

29. The interests of crofting are fundamental to the sustainability of the Highlands and Islands, particularly in relation to population retention in the more remote and fragile highland

⁴ See Official Report of the Scottish Parliament for 12 March 2013 at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7811&i=71225&c=1432292&s=decrofting>

and island communities. The ability of owner-occupier crofters, as well as tenant crofters and landlords, to apply to the Commission to decroft land is, in some cases, essential where land is required to develop, for example, affordable housing to ensure local people and future generations are able to remain in the community. Whether land should or should not be decrofted is a matter for the Commission; however, it is equally important that owner-occupier crofters are able, at least, to apply to decroft their land, as tenant crofters and landlords.

Local government

30. The Scottish Government does not anticipate any impact on local government.

Human Rights

31. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights. There are retrospective provisions in the Bill to ensure legal certainty for owner-occupier crofters and any person to whom such a crofter proposes to convey, or has conveyed, the land in question. The legitimate aim of the retrospective provisions is curative to restore the position of owner-occupier crofters and purchasers, and their respective secured lenders, to what they previously thought was the position in law and is considered a proportionate means to the aim being pursued. It is the only means by which legal certainty can be restored. The retrospective provisions of the Bill are necessary in the public interest to ensure legal certainty for those that have undertaken transfers of property in good faith. Provision is made within the Bill to protect the Article 6 rights of persons who may have relied upon the Commission notification published on 25 February 2013. The effect of the Bill is to put owner-occupier crofters in parity with tenant crofters and landlords in being able to decroft so that there is no longer any difference in treatment. Accordingly, no issues under Article 14 arise.

Sustainable development

32. The Bill provides flexibility for the Commission to determine an owner-occupier crofter application as they presently do with other decrofting applications where, for example, the proposed use appears to be for a reasonable purpose and there would be no negative effect on the sustainability of crofting in the locality of the croft, the crofting community, the landscape, the environment or the social and cultural benefits associated with crofting (section 25(1A) and (1B) of the 1993 Act refer). This allows the Commission, as crofting regulator, to determine whether croft land should be decrofted or retained in crofting tenure and continue to contribute to the sustainability of crofting for generations to come. This is particularly important in the more remote and fragile areas.

33. In some cases, however, it may well be advantageous for the land to be decrofted where wider public benefit may be delivered, such as in the development of affordable housing to allow local people to remain within the community. The Bill therefore provides for these issues to apply equally to the consideration of owner-occupier crofter applications.

This document relates to the Crofting (Amendment) (Scotland) Bill (SP Bill 31) as introduced in the Scottish Parliament on 9 May 2013

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