

# **CROFTING AND SCOTTISH LAND COURT BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Crofting and Scottish Land Court Bill introduced in the Scottish Parliament on 2 June 2025.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 71–EN);
  - a Financial Memorandum (SP Bill 71–FM);
  - a Delegated Powers Memorandum (SP Bill 71–DPM);
  - a Report by the Auditor General for Scotland (SP Bill 71–AGR);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 71–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Scottish Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### **BACKGROUND - CROFTING**

4. In 2021, the Scottish Government published a National Development Plan for Crofting<sup>1</sup>. Within a wide range of policies and initiatives aimed at strengthening communities and land use in crofting areas, the Plan restated the Scottish Government's intention to simplify crofting law.
5. Proposals for a Crofting Bill had been under consideration since 2017. A Consultation on the future of crofting law<sup>2</sup> had identified strong support for improvements to the existing

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<sup>1</sup> Scottish Government, *National Development Plan for Crofting*, March 2021. Retrieved from <https://www.gov.scot/publications/national-development-plan-crofting/>

legislation, albeit split between those who wanted modifications to the existing legislation and those who believed crofting law needed to be substantially rewritten, in one way or another. In 2018, the Government announced its intention to bring forward a Phase 1 Bill to correct known anomalies in crofting legislation, followed by a conversation to consider more fundamental changes. However, work on the Phase 1 Bill was unavoidably suspended in October 2019, because of Brexit preparations. The work resumed in the spring of 2022, as Scotland was emerging from the Covid-19 pandemic, and this Bill is the product of that continued and expanded work.

6. Ideas for the Bill came from many sources. Chief among these were ideas put forward for consideration by the Crofting Commission; a 2020 paper on crofting law reform<sup>3</sup> from the Law Society of Scotland; the Crofting Law “Sump”, published by the Crofting Law Group in 2014 as a compendium of recommendations on crofting law; and the Scottish Government’s own policies for rural communities and land use.

7. The crofting policy objectives for the Bill were confirmed following the 2017 consultation and refined following the subsequent inputs described above. They can be summarised as:

- to simplify legislation; streamline administrative processes; facilitate active crofting on the inbye croft and common grazings; make crofting regulation less onerous for active crofters; and make legislative changes for which there is consistent support across crofting communities. The Bill will introduce some immediate positive outcomes for crofters and their communities, and allow the Crofting Commission to better regulate crofting.
- to bolster and strengthen the role of grazings committees, giving them and individual shareholders more options for proposing and taking forward environmental initiatives on common grazings. This will encourage crofters and their communities to have a greater say in how land in their area is used.

These objectives are expanded in paragraphs 33-41, with the full detail of the provisions set out in paragraphs 47-182.

8. A Crofting Bill Group (CBG) was reconvened in 2022, comprising representatives of the main crofting and rural stakeholders, together with a number of solicitors with expertise in crofting law. The group comprises:

- Crofting Commission

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<sup>2</sup> Scottish Government, *Crofting Consultation 2017*, August 2017. Retrieved from <https://www.gov.scot/publications/crofting-consultation-2017/>

<sup>3</sup> Crofting Law Reform, Paper by the Law Society of Scotland, October 2020. Retrieved from <https://www.lawscot.org.uk/media/xalbxvez/20-10-20-croft-final-paper.pdf>

- Highlands and Islands Enterprise
- Scottish Crofting Federation
- National Farmers Union Scotland
- NatureScot
- Law Society of Scotland
- Scottish Land Court
- Scottish Land & Estates
- Registers of Scotland
- Highlands and Islands Agricultural Support Group – Shetland Islands Council
- Crofting Solicitors

9. The vast majority of the crofting proposals now included in the Crofting and Scottish Land Court Bill were discussed in depth with the CBG in a series of meetings from 2022 to 2024, with a consensus reached on a way forward for most of the issues.

## **CONSULTATION - CROFTING**

10. In June 2024, the Scottish Government published a consultation document on proposals for crofting law reform<sup>4</sup>. Almost all the crofting proposals in the Bill were tested with crofters and the wider public in the 2024 consultation, including the in-person events that supported the consultation. The exceptions relate to the roles of the Registers of Scotland ('RoS') and the Crofting Commission ('the Commission') in registration (sections 23, 25 and 27 of the Bill), largely administrative changes which were developed through discussion with RoS and the Commission following the consultation. Other proposals put forward in the consultation have been modified in the light of the consultation responses and after subsequent discussions with members of the Crofting Bill Group.

11. The consultation ran from 6 June to 2 September 2024, including 15 in-person stakeholder events around the crofting counties. Unlike the 2017 consultation, this document set out many specific proposals for change, based on the discussions in the Crofting Bill Group. The consultation received 163 responses, of which 136 were from individuals and 27 were from organisations. In addition, 257 people attended the consultation events at which the proposals were outlined and discussed.

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<sup>4</sup> Scottish Government, *Crofting Consultation 2024 – Proposals for Crofting Law Reform*, June 2024. Retrieved from <https://www.gov.scot/publications/crofting-consultation-2024-proposals-crofting-law-reform/>

12. Respondents were asked to consider the policy proposals for inclusion in the Bill by answering 70 questions - 49 closed questions, and 21 open free text questions. These were grouped across seven themes: entry to crofting; crofting communities; use of common grazings; strengthening residency and land use; enhanced Crofting Commission powers; simplifying crofting; and clarifications & corrections.

13. A report<sup>5</sup> on the analysis of the responses has been published, drawing on both the written answers to the consultation questions, and points made in the consultation events. Overall, respondents to the consultation generally welcomed most of the Scottish Government's proposals: of the proposals in the 49 closed questions, 17 were supported by over 80%, 14 by 70%-80%, and 14 by 50%-70%, of those answering the question; and just 4 split opinion more widely, with neither Yes nor No (or in one case none of the three options available) securing 50% support. However, some felt the proposals did not go far enough.

14. As noted above, there were significant differences in the level of support for different provisions. In particular, consultation responses were mixed on both the proposals in the consultation chapter on "entry to crofting", to allow two people to take on a dual croft tenancy, and to allow secured borrowing against the market value of a tenanted or owner-occupied croft. A majority supported both proposals and accepted that they could make a first croft more affordable for some. However, others, including the two main membership organisations, pointed to the increased complexity that both proposals could bring to crofting law, some potential downsides, and that relatively few, of the many who find it difficult to afford their first croft, would be helped. The Scottish Government has therefore concluded that these measures should be considered more carefully in the context of a debate about more fundamental crofting law reform in the future. This does, however, put more weight on the proposals to strengthen residency and land use enforcement, which is seen as a way of dampening an over-heated market in crofts, as well as important in its own right.

## **ALTERNATIVE APPROACHES - CROFTING**

15. This Bill does not attempt the fundamental reform of crofting that some consultation responses called for. Diverse and, in part, incompatible views were expressed by various consultation respondents and stakeholders, on further changes that might be desirable. Common themes included (a) tighter controls to depress the price of crofts to make them affordable to new entrants; (b) reducing crofting regulation to give crofters more control over their assets; and (c) a wholesale restructuring of crofting legislation to make it more easily comprehensible. The Scottish Government believes that there is a need for further conversations on crofting law and how it can complement future agricultural and environmental strategies. However, in line with

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<sup>5</sup> Scottish Government, *Crofting Consultation 2024 – Proposals for Crofting Law Reform, Analysis of Responses*, November 2024. Prepared for the Scottish Government by The Lines Between Ltd. Retrieved from <https://www.gov.scot/publications/crofting-consultation-2024-proposals-crofting-law-reform-analysis-responses/>

the decision of 2018, the Scottish Government has decided to bring forward a Bill which will make significant improvements to the current crofting system.

16. The legislative changes being brought forward in this Bill support and complement the Scottish Government's broader strategy for crofting as set out in the 2021 National Development Plan for Crofting.

17. Further detail on "alternatives considered" for some of the specific provisions are outlined in the "Policy Objectives: Specific Provisions" section of this Policy Memorandum.

## **BACKGROUND – LAND COURT AND LANDS TRIBUNAL MERGER**

18. The idea of amalgamating the Scottish Land Court (the Land Court) and the Lands Tribunal for Scotland (Lands Tribunal) is not new; there were discussions in the 1970s about absorbing the Land Court into the Lands Tribunal given that both bodies have a firm focus on land. There was however little support at the time for abolishing the Land Court and this was not progressed. Coming out of those discussions and, since 1978, the Chair of the Land Court has also been appointed as President of the Lands Tribunal; whilst this is not a statutory requirement, by convention since that time the two bodies have shared the same head. They also currently share premises and are both administered by the Scottish Courts and Tribunals Service, albeit each has its own administrative staff.

19. The primary jurisdiction of the Land Court is to deal with questions between landlords and tenants of agricultural land, including crofts under the Crofters (Scotland) Act 1993, the Crofting Reform etc. Act 2007 and the Crofting Reform (Scotland) Act 2010, smallholdings under the Crofters Holdings (Scotland) Act 1886, and tenanted farms under the Agricultural Holdings (Scotland) Acts 1991 and 2003. It also has a number of other jurisdictions. The Land Court is based in Edinburgh but holds hearings throughout Scotland.

20. The Lands Tribunal has an extensive range of jurisdictions, including determination of disputed compensation for the compulsory acquisition or loss in value of land under the Land Compensation (Scotland) Act 1963 and under the Land Compensation (Scotland) Act 1973; references relating to the accuracy of the Land Register under the Land Registration (Scotland) Act 2012; appeals against the valuation of land acquired under parts 2 and 3A of the Land Reform (Scotland) Act 2003 (the Community Right to Buy).

21. The Land Court has a long tradition of serving the crofting and wider agricultural community; the Land Court has a historical role as the protector of tenants' rights going back to the early days of crofting legislation and as such the proposal is to merge the Lands Tribunal into a newly expanded Scottish Land Court, thus retaining the tradition and history of the Land Court.

22. At present, the Chairman of the Scottish Land Court, judges of the Court of Session and sheriffs are eligible to act as judicial members of the Upper Tribunal for Scotland. Members of the Lands Tribunal for Scotland and other members of the Scottish Land Court are not eligible to act as judicial members by virtue of membership of either of those bodies.

23. The Tribunals (Scotland) Act 2014 (the 2014 Act) created a new, simplified statutory framework for tribunals in Scotland, bringing existing tribunal jurisdictions together and providing a structure for new jurisdictions. The 2014 Act created two tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland (Upper Tribunal), known collectively as the Scottish Tribunals. The First-tier Tribunal is organised into a series of chambers which deal with different subject matter. Chambers in the First-tier include the Local Taxation Chamber, the Social Security Chamber, the Housing and Property Chamber and the Tax Chamber. The Upper Tribunal generally deals with appeals on decisions made by the First-tier Tribunal for Scotland. Appellants must seek permission to appeal from the First-tier Tribunal to the Upper Tribunal. Cases in the Upper Tribunal are heard by judicial members (Court of Session judges, sheriffs) and other members who have certain specialisms (for example, legal or surveyor experienced members) and are known as legal or ordinary members of the Upper Tribunal.

24. The functions of hearing valuation appeals<sup>6</sup> were transferred from the Lands Tribunal to the Upper Tribunal in 2023 as part of the continuing implementation of the 2014 Act<sup>7</sup>. The members of the Lands Tribunal appointed to that body by virtue of experience in the valuation of land<sup>8</sup> were transferred to the Upper Tribunal in 2023 along with the functions. Members who were appointed to the Lands Tribunal by virtue of holding judicial office or by experience as an advocate or solicitor<sup>9</sup> did not transfer at that time, but were dealing with those kinds of appeal prior to the 2023 transfer, and accordingly would have the appropriate expertise and experience to consider them as judicial members of the Upper Tribunal. The Bill therefore provides that those members with suitable legal experience become eligible to act as judicial members of the Upper Tribunal upon the amalgamation with the Scottish Land Court.

## **CONSULTATION – LAND COURT AND LANDS TRIBUNAL MERGER**

25. The Scottish Government published a consultation paper ‘The future of the Land Court and the Lands Tribunal’ on 27 July 2020<sup>10</sup>. The Scottish Government consulted on various issues relating to the Land Court and the Lands Tribunal. The main questions were whether the two bodies should be amalgamated and, if so, whether the resultant body should be a court or a

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<sup>6</sup> As set out in [section 1](#)(3A) to (3BA) of the Lands Tribunal Act 1949 (“the 1949 Act”)

<sup>7</sup> See [S.S.I. 2023/48](#)

<sup>8</sup> See [section 2](#)(2A)(a) of the 1949 Act

<sup>9</sup> See [section 2](#)(2A)(b) of the 1949 Act.

<sup>10</sup> [The future of the Land Court and the Lands Tribunal: consultation - gov.scot](#) Retrieved from <https://www.gov.scot/publications/consultation-future-land-court-lands-tribunal/>

tribunal. The other questions related to administrative matters relating to the Court and Tribunal including whether the statutory requirement that there should be a Gaelic speaking member of the Land Court should be retained.

26. A report<sup>11</sup> on the analysis of the responses has been published. The consultation produced an even split on the question as to whether the Land Court and the Lands Tribunal should be amalgamated. The main reasons given for supporting the merger were that it would mean a more efficient administration of the services that the Land Court and the Lands Tribunal currently offer. In particular, those that responded in favour considered that the sharing of resources and staff would be advantageous. Also, a merger would clarify and offer more certainty to those who presently use the bodies. Finally, some thought a merged body could form the basis for an environmental court.

27. The opposing views argued that the Land Court and the Lands Tribunal are quite distinct and that the resolution of the disputes in the two bodies requires different approaches.

28. As regards the question of whether a merged body should be a court or tribunal, 83.3% of those that answered the question thought it should be a court. The main reasons given were that a court has higher status and is more authoritative. Some considered that a court may be a more suitable for taking on extra functions if required in future.

29. The Scottish Ministers considered the responses to the consultation and decided that the Scottish Land Court and the Lands Tribunal for Scotland should be amalgamated to form an expanded Land Court and to retain the requirement for a Gaelic speaking member of the Land Court. Of the stakeholders who answered this question, 24 were in favour of keeping the requirement for a Gaelic speaking member, and 22 were opposed. 12 respondents did not answer the question. Of those in favour, many referred to the fact that for many crofters Gaelic is their first language. Further, there is a close relationship between the Gaelic language, the land, and crofting. Another argument in favour was that a change in statute would be contrary to the Scottish Government Gaelic Language Plan 2016-2021. Those who did not consider it necessary to retain the statutory requirement for a Gaelic-speaking member of the Land Court considered it to be a desirable requirement, but not necessarily practical; the requirement narrows the pool of suitable candidates for appointment and may exclude from appointment individuals who are otherwise highly qualified and eminently suitable. It was noted that in the absence of a Gaelic-speaking member an interpreter could be instructed to attend if appropriate. Having considered the responses, Scottish Ministers agreed that the statutory requirement should be retained.

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<sup>11</sup> [The Scottish Land Court and the Lands Tribunal for Scotland : A consultation on the future of the Land Court and the Lands Tribunal : Scottish Government analysis of responses](https://consult.gov.scot/justice/land-court-and-the-lands-tribunal/results/scottish-land-court-lands-tribunal-scotland-consultation-future-land-court-lands-tribunal-scottish-government-analysis-responses1.pdf)

Retrieved from: <https://consult.gov.scot/justice/land-court-and-the-lands-tribunal/results/scottish-land-court-lands-tribunal-scotland-consultation-future-land-court-lands-tribunal-scottish-government-analysis-responses1.pdf>

30. In respect of the Upper Tribunal for Scotland membership provisions, the policy intention to allow suitably qualified members of the expanded Land Court (and in the interim period before the merger, suitably qualified members of the Lands Tribunal) to act in the Upper Tribunal is supported by the President of the Scottish Tribunals. This will enable additional judicial resource to be utilised in the Upper Tribunal if required. Officials will continue to liaise with the President of the Scottish Tribunal, the Lord President and the President of the Lands Tribunal for Scotland/ Chairman of the Scottish Land Court, along with the Scottish Courts and Tribunal Service. Engagement with the President of the Scottish Tribunals indicates that the judiciary would find it helpful if the provision in respect of the Upper Tribunal for Scotland is implemented as soon as possible. This is facilitated by the transitory provision in respect of suitably qualified members of the Lands Tribunal for Scotland.

## **ALTERNATIVE APPROACH – LAND COURT AND LANDS TRIBUNAL MERGER**

31. An alternative approach would have been to retain the status quo and not take forward the merger of the two bodies. However, such an approach would mean that litigants would not benefit from the structural coherence, efficiency, and the better service that the merged Land Court can provide.

32. Another alternative would have been to take forward the merger of the two bodies, but with the resulting body to be a tribunal rather than a court. Of those who responded to the question in the consultation as to whether an amalgamated body should be a court or a tribunal, an overwhelming majority (83%) were in favour of a court. The main reasons given were to retain the status and authority of a court and to acknowledge the history and tradition of the Land Court, which has a historical role as the protector of tenants' rights going back to the early days of crofting legislation.

## **POLICY OBJECTIVES OF THE BILL**

### **Crofting**

33. The Scottish Government recognises the vital contribution that crofting makes to the population, economy and culture of Scotland. Crofting is at the heart of communities across many parts of the Highlands and Islands, in Argyll, the Hebrides, the Highlands and the Northern Isles. Crofters across these areas are cultivating land, tending livestock, diversifying into alternative land-based businesses, protecting the environment and biodiversity, playing a full part in their local communities, and maintaining the areas' heritage and culture. But the system needs to adapt to changing circumstances, to allow crofting to continue to thrive.

34. The existing legislation on crofting is mainly in the Crofters (Scotland) Act 1993 (as amended) and the Crofting Reform (Scotland) Act 2010. The 2010 Act made substantial amendments to the 1993 Act and also introduced a new body of legislation, mainly about the Crofting Register and the registration processes. *Virtually all of the crofting provisions in the*



**current Bill are to modify the 1993 Act or the 2010 Act, which will remain the two key Acts governing crofting and its regulation.** The Bill aims to strengthen crofting in seven key respects:

- Crofting communities
- Enforcement of crofters' duties
- Crofting Commission powers
- Common grazings
- The Crofting Register
- Electronic communications
- Simplifications and clarifications of crofting law.

**35. Crofting Communities (cross-cutting theme, including sections 3 and 19 of the Bill):**

Crofting has an important community dimension, and the legislation reflects this by balancing the rights of individual crofters with the rights of the communities of which they are part. However, the Law Society of Scotland's 2020 paper pointed out some circularity in the definition of crofting community, and some inconsistencies in the way the current legislation covers this. Section 19 clarifies the definition of a crofting community as the crofters holding crofts and/or grazings rights in a particular township, with the townships being those recorded in the Register of Crofts. The Bill (Schedule 2) will also require the Crofting Commission ('the Commission') to consider a wider area – the parish – when they are weighing up pressures on the sustainability of crofting. Section 3 will give subtenants and landlords, along with the crofters themselves, the right to report suspected breaches of duty to the Commission, while removing the grazings committee's duty to do this wholesale.

**36. Enforcement of crofters' duties (sections 1-7):** All crofters<sup>12</sup> have a legal duty to reside within 32km of their croft and to ensure their croft land is cultivated or put to another purposeful use. Crofters' adherence to these duties are vital for the strength of crofting communities, and for population retention and land use in remote areas. The legislation gives the Commission powers to enforce adherence to the duties, and the Bill aims to streamline and improve this legislation to give the Commission more power to act. The Commission will be entitled to require that questions about crofters' adherence to their duties can be resolved before their other applications are considered. In addition, under section 10, the Bill will prohibit future transfers of owner-occupied crofts to legal persons such as a limited company or incorporated charity. This will help ensure over time that every owner-occupier crofter is, like a tenant crofter, a natural person (human being) directly responsible for complying with the crofting duties.

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<sup>12</sup> In the legislation, the word "crofter" means a tenant crofter. However, throughout this Policy Memorandum, the word is used to mean either a tenant crofter or an owner-occupier crofter, unless the context implies otherwise.

37. **Crofting Commission powers (sections 8-14):** The Commission is the key public body charged with promoting the interests of crofting. The Bill will make changes to give it stronger autonomy, in particular relating to decisions on applications to decroft land. The Bill will also give the Commission additional powers with which to resolve issues for individual crofters or crofting communities, in particular the power to award owner-occupier status when it is merited, and to adjust the boundaries of crofts with consent from all interested parties.

38. **Common Grazings (sections 15-18):** Two thirds of all crofting land is on common grazings, the upland areas shared by most members of the local township(s) and by other shareholders. In common with upland areas not in crofting tenure, common grazing land is increasingly recognised as having great potential for peatland restoration, forestry, habitat restoration and renewable energy schemes, as well as traditional grazing of livestock. The Bill aims to bolster and strengthen the role of Grazing Committees, giving them and individual shareholders more options for proposing environmental initiatives on common grazings. It also aims to protect the connection between inbye croft and grazings shares, by preventing the unintended separations of grazings rights, which have happened many times when crofts have been purchased, and by providing new flexibility for owners of common grazings, and the Commission, to reallocate vacant shares.

39. **The Crofting Register (sections 22-27):** The Crofting Register, held and managed by Registers of Scotland (RoS), was introduced by the 2010 Act. The Crofting Register complements the information held by the Commission in their Register of Crofts, in particular by including in the Crofting Register a map of each registered croft. A number of provisions in the Bill refine the processes for registration of crofts in the Crofting Register, including the interaction between the Commission and RoS in handling first registrations, and more flexibility for both RoS and the Commission to correct errors in the Crofting Register.

40. **Electronic communications (sections 28-30):** The Bill includes provisions to modernise and broaden the methods available to crofters and the Crofting Commission for serving notices, giving public notifications, and holding meetings.

41. **Simplifications and clarifications (sections 19-21 and 31-33, and Schedule 2, Part 1):** The Bill makes a range of simplifications and improvements to the way crofting is administered, including more flexibility for the Scottish Ministers in the appointment of Crofting Commissioners; and makes corrections and clarifications to the legislation as recommended at various times by the Scottish Land Court, or suggested by the Crofting Law Group.

## **Land Court and Lands Tribunal Merger**

42. The policy objective of the Land Court provisions within the Bill is to merge the Scottish Land Court and the Lands Tribunal for Scotland into one cohesive body, the Scottish Land Court. The newly merged body will offer structural coherence, efficiency, and the delivery of a better

service to litigants. The newly expanded Scottish Land Court will have the ability to deploy personnel flexibly so that each case is dealt with by people with the appropriate expertise and skills. Whilst this is primarily administrative in nature, the Scottish Government recognises the historical importance of the court to the agricultural and crofting communities and the opportunity has therefore been taken to reproduce the provisions of the Scottish Land Court Act 1993 with some changes to ensure parity for judicial office holders of the new body.

43. It is important that the flexibility of the Land Court and Lands Tribunal to hear a case in the most appropriate location should not be lost. It is the intention that the Scottish Land Court will continue as before, meeting in Edinburgh but also throughout Scotland including in the crofting counties.

44. As noted above, the Bill seeks to merge the Land Court and the Lands Tribunal. The Bill provides for suitably qualified members of the merged Scottish Land Court (and in the interim members of the Lands Tribunal for Scotland) to act as judicial members in the Upper Tribunal. The policy intention is to ensure that sufficient numbers of judicial members are available to assist with managing fluctuations in volumes of appeal cases and improving resilience in the Upper Tribunal. The merger of the Land Court and the Lands Tribunals provides an opportunity to widen the judicial membership of the Upper Tribunal to include the legally qualified members of that expanded body. To ensure suitably qualified members are available to the Upper Tribunal quickly, transitory provision is also made for suitably qualified members of the Lands Tribunal to act as judicial members of the Upper Tribunal.

45. Given the policy intention as noted at paragraph 44, the proposal does not enable members of either body to act in the First-tier Tribunal. Appropriate requirements are also maintained for judicial membership of the Upper Tribunal, similar to existing provision for other judicial members<sup>13</sup>. Suitability of members of the Scottish Land Court for judicial membership of the Upper Tribunal is determined in the first instance by the Chair of that Court, and a member may only act as a judicial member of the Upper Tribunal with the authorisation of the President of the Scottish Tribunals, the approval of the Lord President and the agreement of the person concerned. Equivalent provision is in place in respect of members of the Lands Tribunal who act as judicial members of the Upper Tribunal by virtue of the transitory provision.

46. This will enable the Upper Tribunal to have access to a broader range of expertise and knowledge when hearing appeals. It is intended that these authorised members would only be used where there is a need for a particular expertise which is not readily available from the existing membership of the Upper Tribunal. The proposal will add further resilience to the Upper Tribunal, by allowing this additional resource to be utilised if required.

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<sup>13</sup> See [section 17](#)(3), (4), (6) and (7) of the Tribunals (Scotland) Act 2014

## **POLICY OBJECTIVES: SPECIFIC PROVISIONS**

### **Crofting Communities**

47. The key proposals on crofting communities are covered in the various sections below. See in particular the clarifications of the definition of crofting community, township and parish (section 19); the rights for landlords, subtenants and short leaseholders to report breaches of duty (section 3); and the requirements for the Commission, in considering decrofting applications, to have regard for the sustainability of crofting and crofting communities across the parish (Schedule 2, Part 1, paragraph 1(10) and 1(11)). Other changes in Schedule 2 remove previous issues with the clarity of the definitions.

### **Enforcement of crofters' duties**

#### ***Revisions to crofters' duties (section 1)***

##### *Issues*

48. The duties of a tenant or owner-occupier crofter are: 1) to be ordinarily resident within 32km of the croft; 2) not to misuse or neglect the croft; and 3) to cultivate (or put to another purposeful use) and maintain the croft. Cultivation is defined as including horticulture, the keeping or breeding of livestock, poultry or bees, the growing of fruit or vegetables, or use of the land as woodlands.

49. No change is proposed to the residency duty.

50. However, there is a case for making a change to the duty to cultivate or otherwise make purposeful use of the croft. Currently, a tenant crofter has to obtain consent from the landlord or the Commission to put the croft to any "purposeful use". In an era when land use for environmental purposes is becoming increasingly important, it is odd to require tenant crofters to seek permission for an environmental use of the croft. Owner-occupier crofters, who own the title to their croft, already have freedom to decide on any purposeful use without requiring to seek consent from the Commission.

51. In other respects, the duties have met the test of time and no material changes are needed.

##### *Provisions*

52. The Bill will revise the 3<sup>rd</sup> duty (cultivate and maintain) to provide that the crofter must either cultivate the croft, put it to an environmental use, or put it to an alternative purposeful use. The tenant crofter will only require to seek consent for an "alternative purposeful use".

53. A definition of environmental use is included in the Bill, with the power for the Scottish Ministers to make changes to it by secondary legislation. This power is considered necessary as

the understanding of environmental land use continues to develop. Importantly, the definition of environmental use requires that it must be done in a planned and managed manner – to rule out neglect masquerading as “rewilding” – and that the use must not adversely affect adjacent land.

54. The definition of good agricultural and environmental condition is updated, to refer to extant agricultural regulations.

#### *Alternatives considered*

55. Following a suggestion by the Law Society of Scotland, the June 2024 consultation also asked whether the duty to cultivate or otherwise use the croft should be reframed, so that it was clear that the crofter did not have to do the work on the croft, if members of their family were doing it. However, some consultation respondents argued that there was no need to make that change, because it is recognised right across the crofting counties that a crofter’s family often does the work on the croft; and that a change to the legislation might encourage more crofters to pass the croft work to more and more distant relatives or acquaintances. That would be undesirable, and so the Bill does not include such a change.

### ***Reporting suspected breaches of duty (section 3)***

#### *Issues*

56. A particular issue is the rights given to members of the local crofting community to object to an application for Commission consent, by one of their neighbours; and to report to the Commission a suspected breach of duty by a neighbouring crofter, which requires the Commission to investigate. The question was raised whether a wider group of people should be given these rights, in the interests of having more community checks on the activities and choices of individual crofters. The Scottish Government’s view is that limiting these rights to those in the same township – who are most directly affected - creates the right balance; but that the reporting of breaches could helpfully be extended to others within the locality.

#### *Provisions*

57. The Bill proposes no change to the rights to object to a neighbour’s crofting application; these will continue to be only for members of the local crofting community. However, the Bill will entitle a wider range of people to report suspected breaches of duty. While these rights will be kept local, the right to report will be extended to subtenants and short-leaseholders of crofts, and also to the landlords of crofts, in addition to local crofters. This will open up new avenues for important information to be submitted to the Commission. Grazings committees will still have the right to report breaches of duty but will no longer have a duty to do so every 5 years. (More about this latter change is included in the **Common Grazings** section of this Memorandum.)

### ***Streamlining the enforcement process (section 4)***

#### *Issues*

58. A cornerstone of the crofting system is the requirement for each crofter to comply with the crofting duties. In particular, the crofter must be ordinarily resident on, or within 32kms of, their croft, not neglect or misuse their land, and put the land to cultivation or another purposeful use. The health of crofting communities, and of the broader rural and island communities of which they are part, depends on crofters fulfilling these duties.

59. Enforcement of these duties is a key responsibility of the Crofting Commission. The processes (almost identical between those for tenant crofters and for owner-occupier crofters) for investigating and enforcing adherence to the duties are set out in detail in the 1993 Act. The processes are designed to give any crofter, whom the Commission consider may be in breach, ample opportunity to rectify the position by complying with the duties themselves, or by transferring the croft, temporarily or permanently, to another person. However, the process is lengthy, and capable of being streamlined without unfairness to the crofter concerned.

60. Existing legislation sets out the actions the Crofting Commission must take if it is notified of a suspected breach of duty by a tenant or owner-occupier crofter:

- i) The Commission writes to the crofter to inform them of a suspected breach of duty and gives them 28 days to respond.
- ii) If, having considered any response, the Commission decides there is a breach, it writes to the crofter again, inviting them to give an undertaking to resolve the breach and to confirm this with the Commission within 28 days.
- iii) The Commission will then consider any undertaking that is given and may accept it, with or without setting conditions.
- iv) If an acceptable undertaking is not provided, or if it is provided but not fulfilled, the Commission may proceed to terminate a croft tenancy or to require an owner-occupier crofter to let the croft to a new tenant crofter.

61. At various stages in the process the crofter can appeal to the Scottish Land Court if they do not agree with the decision the Crofting Commission has taken, and the Commission is not able to proceed to the next stage until the 42-day appeal period has expired. Therefore, if stages 1 to 3 run to their full timetable, even if no appeals are actually made, the basic stages extend for over 6 months before any decisions are made on the way forward. This is not conducive to efficient resolution of breaches.

#### *Provisions*

62. The Bill will restructure the initial stages of the enforcement of duties process. The Commission's initial letter will invite the crofter, within 28 days, either to give representations

why they do not consider they are in breach of duty, or to accept that they are in breach and give an undertaking to resolve it. For those, currently the majority, who readily accept that they are in breach, this will cut an unnecessary delay out of the process, in effect, by combining stages (i) and (ii) of the current process described in paragraph 60.

63. The current provisions which require the Commission's letters to set out the options available to the crofter and the consequences of choosing to accept the fact of the breach by offering an undertaking, will be expanded in the light of the changes set out above. All this information will now need to be set out in the Commission's initial letter.

64. The Bill provides separate new sections for the 1993 Act to detail what happens if the crofter makes representations contesting the breach; what happens if the crofter makes an undertaking; and what happens if they do neither. These provisions are modelled on the existing legislation, so that the existing safeguards will remain, within the streamlined process.

### ***Commission power to terminate a sublet or short lease (section 5)***

#### *Issues*

65. Where a crofter has sublet their croft – which requires the consent of the Crofting Commission - they are deemed to comply with the residency and land use duties (other than not to misuse) if the sub-tenant complies with the duties. The same applies to an owner-occupier crofter who has let out their croft on a short lease.

66. Many crofters and owner-occupier crofters who are not able to fulfil the duties for a period of time, use sublets or short leases as a way of ensuring that the croft is occupied and used in the meantime. However, if the subtenant or short leaseholder is themselves not ordinarily resident within 32 km of the croft, or not cultivating and maintaining the croft, it is not clear what remedy is available to the Crofting Commission. Legislation currently prevents the Commission from taking enforcement action to terminate the tenancy where the Commission has consented to the sublet or short lease.

#### *Provisions*

67. The Bill will give the Commission the power to revoke a consent and terminate a sublet or short lease, in circumstances where the subtenant or short-leaseholder is not fulfilling the duties of a crofter, or where another condition is not being met.

### ***Administrative sanctions (sections 4 and 6)***

#### *Issues*

68. In connection with regulation, crofting legislation gives a number of responsibilities to crofters and owners of croft land. This principally relates to crofters' duties but extends to other

matters. For example, crofters are also required to complete the annual census, and both crofters and owners of croft land are in certain circumstances required to provide information to the Commission to enable it to regulate effectively.

69. It is in everyone's interest that obligations are complied with, and that information required to properly regulate and support crofting is provided promptly and in full. In order for that to happen there should be effective, dissuasive and proportionate sanctions for regulatory breaches.

70. Current legislation applies a variety of sanctions in cases where a crofter or owner has not complied with the requirements, including in some cases making this failure a criminal offence. Criminal sanctions will remain appropriate in cases of fraud (for example, fraudulent claims of crofting grants or subsidies), but there is rightly a high threshold to be met before any breach is the subject of court proceedings. For more routine breaches, it is more appropriate for the Commission to be able to apply sanctions administratively, at its own hand, in the interests of encouraging crofters' compliance with the various obligations they have.

#### *Provisions*

71. The Bill will provide that, where the Commission has issued a notice to a crofter stating that it considers the crofter to be in breach of the crofting duties, the Commission should have discretion to pause work on any applications by, or involving, that crofter, pending resolution of the duties issue. In some cases, such as an assignation to a new crofter, the Commission may choose to process an application as well as taking action to remedy the breach. In other cases, perhaps a decrofting application, it should be open to the Commission to decide which case should be progressed first, and if appropriate pause the crofter's application until a way to rectify the breach has been identified.

72. The Bill will similarly provide that if the Commission has exercised its power to require information from a crofter, including the Crofting Census, and if the remission of that information is overdue, the Commission may decide to pause processing of any applications from, or involving, that crofter until the missing information has been provided.

#### ***Removing timescales for deciding purposeful use and consent to be absent applications (Section 2)***

#### *Issues*

73. Current legislation sets deadlines for two particular Commission decisions. The Commission is allowed 28 days to decide on an application to admit a purposeful use on croft land, and for an application for consent to be absent. Lawyers have pointed out a problem with this legislation – the Act does not specify the consequence if the Commission were to fail to meet these deadlines. They are also arbitrary: the vast majority of Commission decision-making has



no statutory deadlines. While the Scottish Government and the Commission's leadership are committed to improving customer service standards, it is considered that the inclusion of these deadlines in legislation detracts from, rather than enhances, efficient use of the Commission's resources.

#### *Provisions*

74. The Bill will remove the two arbitrary deadlines for Commission actions.

### ***Statutory conditions (section 7)***

#### *Issues*

75. The Law Society of Scotland (LSS) paper recommended changes to the statutory conditions in Schedule 2 of the 1993 Act, which relate to the relationship between a tenant crofter and their landlord. The LSS pointed to scope for clarifying these and for removing duplication between the statutory conditions and the broader content of the Act.

#### *Provisions*

76. The Bill will make some minor changes to the Statutory Conditions for a tenant crofter, to clarify that the landlord has no responsibility for the provision of fixed equipment, and to remove the condition about division of the croft, which is covered by section 9 of the 1993 Act.

### **Crofting Commission powers**

### ***Fast-track family assignments (section 8)***

#### *Issues*

77. Crofting legislation sets out in considerable detail the steps that the Crofting Commission is required to take in its regulation of crofting. The majority of application types seek the consent of the Commission (to assign, sublet, short-lease, enlarge or divide a croft, etc). Section 58A of the 1993 Act provides that such applications for consent have to be advertised by the applicant crofter or owner-occupier crofter. After that, members of the crofting community and the landlord (if there is one) have a right to object, and the Commission must weigh up their decision, taking into account objections, the interests of the crofting community, the interests of the estate, and the public interest, among other criteria. Should the Commission not be able to evidence that it has taken all of these matters into consideration, it renders their decision vulnerable to being struck down, on appeal, by the Land Court.

78. This manner of legislating the processes of regulation, specifically assignment applications, means the Crofting Commission is constrained in how it operates, and it limits the extent to which the Commission can seek efficiencies in its processes or choose priorities among different aspects of its work.

79. Majority crofting opinion is thought to be generally supportive of prescriptive specification of regulatory requirements. However, at the same time, there appears to be a degree of consensus that for some regulatory applications, the requirements of the current legislation may be unjustifiably onerous, slowing down regulatory decision-making and adding to the costs of both the Commission and the crofters. In particular, many crofters recall that within-family assignments used to be subject to a fast track process, with approval by the landlord rather than by the Commission.

80. Assignations are the most common application-type to the Crofting Commission, and legislative change to simplify and accelerate decision-making on assignations would benefit the Commission, the applicants, and the crofting system in general. However, any such changes would need to guard against weakening the effectiveness of regulation. Accordingly, the changes being brought forward in this Bill will have effect only in assignation applications where key criteria are satisfied.

#### *Provisions*

81. The Bill will introduce a fast-track assignation process, with an automatic consent from the Commission, whenever the following 4 conditions are met:

- a) The proposed assignee is a member of the crofter's family – with the definition of "family member" being limited to close relatives in accordance with the existing s61(2) of the 1993 Act.
- b) The proposed assignee fulfils the residency duty or will do so directly on the assignation taking effect.
- c) The proposed assignee is not already a holder of a crofting interest in 3 or more crofts.
- d) The landlord has been given a 28-day opportunity to object to the assignation and has not done so.

82. There is no right for the crofting community to object to an assignation that goes through on this basis. However, if the Commission is not satisfied that all of the four conditions are met, then the fast-track process cannot happen, and the applicant would need to follow the normal process for an assignation.

#### *Alternatives considered*

83. The June 2024 Consultation had proposed a much more extensive change of this nature. The fast track system proposed for assignations in that document would have been based on only the 3<sup>rd</sup> and 4<sup>th</sup> conditions above, and so not limited to family members who were ready to fulfil the duties immediately. There would have been a similar fast-track application process for sublets and short-leases under 5 years' duration, unless (in the case of a sublet) the landlord objected. Conversely, the Consultation document also proposed to introduce, for the first time,

regulatory controls on sales over owner-occupied crofts where the purchaser already had three or more crofts.

84. The consultation highlighted two perceived merits of this package of proposals: that it would free up significant resources that the Commission could put into enforcement of duties; and that it would create a near-equivalence between the regulatory controls over assignments of tenanted crofts and sales of owner-occupied crofts. Around 60% of respondents supported each element of the package, but there was also strong opposition from some quarters. Some feared the disruption and delays that regulating selected sales of owner-occupied crofts would cause. Conversely, others were strongly opposed to a perceived weakening of crofting regulation, especially the removal of a crofting community's right to object to a proposed incoming tenant crofter. This latter group were also unconvinced that resources put into duties enforcement would be more effective, at securing active crofters, than maintaining a strong scrutiny of assignments. In view of this opposition, the Bill only includes a very partial element of the original proposal, which it is hoped will command widespread consensus.

### ***Owner-occupier crofters (sections 9 and 10)***

#### *Issues*

85. It has long been the case that every tenant crofter must be a “natural person”, the legal term for a human being, rather than, for example, a limited company or a charity. The duties of a crofter – to live within 32 km of the croft and to use and look after the land – make sense when they are duties for natural persons.

86. However, there has been no such control over who can own an owner-occupied croft, and be a crofter in that sense. There are some owner-occupied crofts that are held by limited companies, and the effect of that for compliance with the duties is uncertain.

87. There are other concerns with the definition of an owner-occupier crofter, which were highlighted in the 2014 Crofting Law Sump and the 2020 paper by the Law Society of Scotland. The definition of an owner-occupier crofter in the Act is inflexible, and there are many hundreds of people who bought the title to crofts, intending to live and work as a crofter, who do not have owner-occupier crofter status because of a technicality, which may depend on the distant history of the croft and its ownership. People in this position are technically “owner-occupiers of vacant crofts”, and they are unable to access crofting grants. Nor are they subject to enforcement of duties, because in law they are not crofters. The Commission does have the right to require them to let the croft to a tenant, but the Commission itself has recognised that it would be inappropriate to use this power for a person, living as a crofter, in this position.

88. There are also potential legal difficulties with the requirement that an owner-occupier crofter must be the owner of all of the croft. In particular, it is not clear what this means if the crofter has a right to use common grazings.

#### *Provisions*

89. The Bill will provide that all new owner-occupier crofters must be natural persons. It will no longer be possible for a non-natural person, such as a company or charity, to buy an owner-occupied croft. Those that are already owned by a non-natural person must be sold to one or more natural persons, the next time the croft is sold.

90. The Bill will also give the Crofting Commission the power to award owner-occupier status to “owner-occupiers of vacant crofts” who apply for it. In taking these decisions, the Commission will take all the relevant information into account, including the history of the croft and the circumstances that led to its current status. There will, however, be no right of local crofters to raise an objection. That is felt to be unnecessary, and potentially costly in terms of time.

91. The Bill will provide that the Scottish Ministers may, after consulting the Crofting Commission, make regulations that modify the meaning of ownership within the definition of an owner-occupier crofter. This power is proposed in order to be able to clarify the meaning of ownership for that purpose, say following a court decision which requires clarification.

92. The Bill will also confirm that where, for example following a bequest, a person owns a croft on an uncompleted title or midcouple, this still counts as ownership for the purposes of the definition of an owner-occupier crofter.

#### ***Restrictions on assignation or purchase of croft which has been let by the Commission (section 11)***

##### *Issues*

93. When a vacant croft requires a new let, following duties enforcement by the Commission or for other reasons, the new tenant is normally selected by the landowner with the consent of the Crofting Commission; but when the landowner does not make acceptable proposals for letting the croft, the new tenant may be selected by the Crofting Commission. On these occasions the Commission selects a tenant in the interests of the crofting community and the public interest, letting the croft to the person whom they believe will make the best contribution to crofting in the locality.

94. This may mean that a croft with a potentially high resale value is made available to a new crofter for little or no financial cost. To protect the public interest, it is necessary to restrict the

new tenant's options for taking the value of the asset out of the system, in the initial years of their let.

#### *Provisions*

95. The Bill will suspend for ten years, following a let by the Commission, the normal rights of the tenant crofter to assign the croft or to acquire title to it compulsorily from the landowner, after an application to the Land Court.

96. A crofter who, within ten years, becomes unable to work the croft as they had originally intended, will still have the option of applying to sublet the croft or, of course, to renounce it.

#### ***Decrofting (sections 12 and 13)***

##### *Issues*

97. Decrofting is a legal term for the process that removes land from crofting tenure by a direction of the Crofting Commission. The applicant is normally the crofter or owner-occupier crofter of the croft in question. A landlord of a vacant croft can also apply for a decrofting; but where a landlord wishes to take land out of crofting tenure, the more common process is an application to the Scottish Land Court for a resumption, which will include compensation paid to the crofter(s).

98. In addition to the controls on decrofting applications where the applicant is in breach of duties, covered under “administrative sanctions” above, it has also been raised by crofting stakeholders that there needs to be increased scrutiny on decrofting applications where there have been multiple decroftings from the same croft.

99. There has also been criticism of the legislation from the Land Court, who pointed out that it is illogical to have parallel processes for a decrofting application which does not have a purpose. The standard approach should be the one normally used, where the merit of a decrofting is assessed on the basis of its “reasonable purpose”.

##### *Provisions*

100. The Bill will remove the provision in the 1993 Act which allows a decrofting application to be made without specifying any purpose for the decrofting.

101. The Bill will require the Crofting Commission to have regard for the decrofting history from the croft, when taking its decision on a new decrofting application. For a decrofting application on an owner-occupied croft, this will include any past decroftings which took place while it was still tenanted. The Commission may also take account of their Policy Plan and anything else it considers relevant. The consequence is that the Commission will have greater

flexibility to refuse some decrofting applications, including where the application is for decrofting a croft house site and garden ground.

102. One further anomaly regarding decrofting will be removed from the legislation, concerning decrofting applications for crofts under perpetual leases, granted under section 17 or 18 of the (now repealed) 1955 Act. These are very small crofts where the crofter has a right to a whole-croft decrofting; yet the legislation currently requires such a crofter to register the croft on the Crofting Register before immediately decrofting it. This requirement will be removed.

### ***Boundaries adjustment and boundary remapping (section 14)***

#### *Issues*

103. One of the more significant powers of the Crofting Commission is the power to “reorganise” crofts within a township, that is, to reallocate the land within a township for the benefit of the whole township. Typically, this involves adjusting the boundaries of crofts to make each croft more self-contained with coherent boundaries, while ensuring that the adjustments are fair to all the crofters involved.

104. The Commission generally uses this power only where there is consensus between all the crofters in the township and the landowner(s) as well, and this means it is rarely used. However, instances do arise where there is a desire to adjust boundaries between two neighbouring crofts, or a small number of crofts. Examples can include:

- a) A small number of neighbouring crofts on the same estate, where the historic boundaries are illogical, and their redrawing would be of benefit to all the crofters concerned.
- b) Cases where a small amount of land between two crofts does not belong to either, but it is agreed desirable to add it to one or both of the crofts.

105. For such cases and similar situations, the Bill will create new powers for the Crofting Commission to change the boundaries of one or more registered crofts, on an agreed application submitted by all the parties involved, namely all the crofters whose croft boundaries would be changed, and all the landowners whose land would be affected by the changes. The onus would be on the applicants, not the Commission, to work out the details of the changes they proposed.

#### *Provisions*

106. The Bill will introduce two new application types to the Crofting Commission:

- “boundaries adjustment” where no land is taken into or removed from crofting tenure; and
- “boundary remapping” where some land becomes, or ceases to be, croft land.

107. In both cases a consensus is required by all the interested parties, but the provisions require greater checks in the case of a boundary remapping, including notification of neighbours and the right for others to object. The Commission will take the decision on each such application in the usual way and can turn down an application – even if supported by all parties – if it is not in the public interest; for example, if it might create future access problems to one of the crofts.

108. Registration, or updates to existing registrations, of the croft boundaries will be required for all approved boundary adjustments and remappings, and if any applications (for example, adjusting the boundaries of two owner-occupied crofts) required change of land ownership, conveyancing would need to be organised by the parties, at their own expense, with consequential registration in the Land Register as well. The applicants will be collectively responsible for effecting the approved changes by registering them.

### **Common grazings**

#### ***Stronger rights for crofters to use common grazings for environmental or other innovative purposes (section 18)***

##### *Issues*

109. Common grazings are a significant asset to crofting, crofters, landlords, and crofting communities. There are around 1,000 common grazings in crofting areas, covering approximately 550,000 hectares, which account for two-thirds of all croft land. Crofters who hold an interest in common grazings are shareholders in those grazings, giving them certain rights and responsibilities set out in legislation.

110. Common grazings are usually managed by a grazings committee, and approximately half of all grazings currently have a committee in office. Grazings committees make regulations to control the use and assist in the management of the grazings. Active grazings committees are the best way to ensure that common grazings are used effectively.

111. However, despite the commitment and hard work of hundreds of crofters and others on grazings committees across the crofting counties, for many years there has been a decline in the use of common grazings. Although raising livestock remains the most common crofting activity undertaken by crofters, livestock numbers are declining. Currently, the law restrains alternative uses for common grazing land and makes it difficult for new projects or initiatives to be implemented, due to the processes which the law requires for demonstrating agreement among shareholders and landlords. At a time of climate and biodiversity crises, it is particularly important to make it easier for initiatives that enhance the environment to be taken forward on common grazings.

112. Existing legislation already provides for schemes led by the grazings committee or an individual crofter for forestry (either with the consent of the owner or as a joint venture with the owner) or for “other purposes”. However, the provisions relating to “other purposes” are more restrictive than those for forestry schemes, making it harder for the crofters to secure the necessary consents. The regime for forestry can be a model for other types of environmental initiative.

113. Existing legislation allows crofters to undertake work on common grazings, other than agriculture and woodlands. However, if the owner does not approve of the intended use, they can generally prevent it from happening. The Scottish Government proposes to balance the interest of the owner and the crofter, and to ensure that the rights of both parties are considered.

#### *Provisions*

114. Currently, section 50 of the 1993 Act allows for crofters or grazings committees to apply for consent to take forward crofter-led forestry on the common grazing; and section 50A provides a regime under which crofters and the owner of the grazings can agree to take forward a joint forestry venture. The Bill will adapt both these provisions so that parallel arrangements are also available if the initiative is for another environmental purpose such as management and restoration of peatland, habitat creation and restoration, and water management.

115. In addition, the Bill will change the consent process for a crofter-led application under section 50, whether it is for forestry or for another environmental purpose. Currently, the crofters proposing the scheme have to obtain the consent of both the landowner and the Crofting Commission, and if either does not agree, the crofters may take their case to the Scottish Land Court. The Bill will provide that if the landowner refuses consent, the matter should first be considered by the Crofting Commission, which would have power to override the landowner’s refusal, after weighing up the pros and cons of the proposal for all parties. As currently, the applicants or the landowner may appeal to the Land Court if they disagree with the Commission’s decision.

116. The reasons which a landowner may give for refusing such an application are set out in the current legislation and will not change significantly. However, the Bill will change what happens if a landowner does not respond to the application within 6 weeks. Currently, this is taken as a refusal (albeit without any reasons being given). The Bill will provide that it will be taken as a consent, although the landowner will still have the right to make comments to the Commission before it takes its own decision on the matter.

117. Section 50B of the 1993 Act allows for a grazings committee to apply to the Commission to take forward an innovative use of the common grazings. This is the only route available for uses other than grazing livestock (and other traditional uses) and forestry; and other environmental purposes will become another exception. The regime in the current section 50B



holds that a section 50B application cannot be taken forward if there is any detriment to the interests of the landowner, however modest that detriment is. The Bill will provide that if there is a conflict of interest between the shareholders and the landowner, the matter should go to the Commission for a decision – with a subsequent appeal to the Land Court available if necessary. The bar on initiatives that would be detrimental to the use being made of another part of the common grazing will be weakened, but not removed altogether. In future this bar will only apply if the detriment is substantial.

118. The Bill will also repeal some of the subsections of section 50B which set out in detail the processes that a grazings committee must follow when preparing an application under this section. The essential parts of these provisions will be unaltered, but some of it will be left to grazings committees to determine under their grazings regulations.

### ***Restricting separation of grazings shares (section 15)***

#### *Issues*

119. Historically, most crofts comprised an inbye croft combined with a “grazings share” – the right to put a number of livestock on the common grazing land. However, in recent decades some grazings shares have become separated from the ‘parent’ croft and are now deemed to be separate and distinct crofts in their own right. The legislation makes clear that crofting regulation continues to apply to them, which is why stand-alone grazings shares are sometimes referred to as “deemed crofts”.

120. Grazings shares can be separated from the parent croft either intentionally (for example when the crofter applies to assign the share to another person) or unintentionally. The latter has happened on numerous occasions when a tenant crofter has exercised their right to buy their croft, mistakenly assuming that the grazings share would automatically retain its association with the inbye croft. Currently, the grazings share becomes a separate and tenanted entity within crofting tenure, unless the crofter and landowner, through their solicitors, specify that the grazings right is part of the purchase. This has caused many crofters time and expense to put right, while those many shares that remain unattached weaken crofting, given the practical value of the grazings share for any crofter with livestock.

#### *Provisions*

121. The Bill will provide that when a crofter purchases his croft from the landlord, either by agreement or under the crofter’s Right to Buy, any grazings share will remain attached to the croft unless the conveyance actively specifies otherwise. This will prevent any further accidental separations of grazings shares from the inbye croft.

122. The Bill will also make provisions about the management of vacant unattached grazings shares by the Commission. On occasion, a grazings share may become vacant, for example if

there is a failed succession to a deemed croft, or if a grazings share is forfeited by a crofter for persistent breach of the grazings regulations. In this situation, the Bill will provide mechanisms to find a new holder for the vacant unattached share, which mirror the arrangements already in the legislation for vacant crofts. The Commission will invite the landowner to propose a new shareholder, and if the landowner does not make proposals that are acceptable to the Commission, the Commission will then take on the allocation of the share itself, in consultation with the grazings committee.

123. Both landowner and Commission will have the option of allocating the grazings share to a croft which has no share. This will enable a small number of crofts which have lost their shares, to recover them.

***Remove grazings committee's responsibility to report quinquennially on all crofts in their township (within section 3)***

*Issues*

124. Current legislation states that each grazings committee has a duty to report on the condition of the common grazings and on every croft, tenanted and owner-occupied, and must provide this information to the Crofting Commission every five years.

125. These requirements, introduced to the legislation by the 2010 Act, have caused difficulty with many committee clerks who are particularly uncomfortable about the obligation placed on them. Individuals have expressed concern that they are expected to provide reports on family members, friends and neighbours which could lead to local and personal tensions. The Commission has invited grazings committees to provide the information, but has never pressured them to do so, fearing that such pressure would simply lead many committee members to resign their role. The Commission has rightly sought to encourage more crofters to volunteer to serve on the grazings committee.

*Provisions*

126. The Bill will remove the requirement for a grazings committee to report on each croft, while retaining its duty to report every five years on the overall condition of the common grazings.

***Appointment and removal of a grazings committee (sections 16 and 17)***

*Issues*

127. In the current legislation, there are a number of requirements for the holding of meetings, for example, a public meeting for appointing a grazings committee or a meeting of shareholders to discuss and vote on a proposal to use the common grazing for other purposes. It is not entirely

clear whether such meetings have to be in person or whether online and hybrid meetings are permitted.

128. The Commission has powers, in certain circumstances, to remove a grazing committee or grazings clerk from office, and to make its own appointment of a committee or grazings constable. Unlike other Commission decisions, an appeal against such a decision cannot be made to the Land Court, but only to the Court of Session.

#### *Provisions*

129. For avoidance of doubt, the Bill will make clear that where the 1993 Act requires a public meeting, such as for the election of a grazings committee, these meetings may also be held online or in hybrid fashion, at the discretion of those calling the meeting. It is expected that this will make it easier for members of crofting communities to attend meetings that affect them.

130. It will also provide that a meeting to elect the next grazings committee can be held up to 3 months before the previous committee's term ends.

131. The Bill will provide that an appeal against a decision by the Commission to put a grazing committee out of office, or to appoint a grazings committee or grazings constable, can be heard in the Land Court rather than the Court of Session, like appeals against other Commission decisions.

### **The Crofting Register**

#### ***Roles of the Registers of Scotland and the Crofting Commission in registration (sections 23, 25 and 27)***

#### *Issues*

132. The Crofting Register was introduced under the 2010 Act, to supplement the Crofting Commission's Register of Crofts, and to provide an authoritative register of crofts and common grazings, including – for the first time – registered maps of each croft and common grazings. The Registers of Scotland's role in creating, populating and updating the Crofting Register was to be funded by a registration fee paid by each crofter or landlord when their details required updating. The Crofting Commission had a supporting role, funded by the public purse: to lead on the registration of common grazings and, more generally, to assist with the administration of the Crofting Register. In particular, the Crofting Commission has a responsibility to check, for first registrations, whether the information submitted by the applicant is compatible with the information already held in the Register of Crofts.

133. These basic elements of the system have worked well and will continue; but at a detailed level, some of the dovetailing between the Registers of Scotland's role, the Commission's role,

and the role of the Scottish Government, are inefficient or confusing. It is proposed to change three aspects.

#### *Provisions*

134. **Collection of fees for registration:** Currently, although the fees for registration belong to the Registers of Scotland (RoS), they are collected by the Crofting Commission and then forwarded to RoS. This results in double handling of all the payments, with both bodies having to check the completeness of the payments received. The Bill will replace this with a system used by RoS in its other registers: at the application stage, instead of remitting a payment to the Commission, the applicant will be required to provide “arrangements satisfactory to the Keeper”, that will enable RoS to collect the payment once the process is ready to complete.

135. **Specification of forms:** The Act currently provides that the content of the application forms for registrations, are specified by the Scottish Ministers by Order. That power will remain as a reserve power, but in addition, the Bill will enable RoS to specify and modify its own application forms, after consulting the Crofting Commission.

136. **Notifications of first registrations:** A key part of the first registration process is the system of neighbour notifications, whereby all those with an ownership or crofting interest in the croft or any neighbouring land, are informed of the boundaries that are being registered, and are entitled to challenge them if they do not agree. Currently, letters to provide this information to neighbours are issued by the Crofting Commission, although they do so on behalf of RoS: the registration is the responsibility of RoS and any challenge is to the Land Court. The Bill will provide that RoS will issue neighbour notifications. It will also make clear that the responsibility for providing names and addresses of the neighbours requiring notification rests with the applicant for registration; and that the Commission has the power to pause an application – before it is even forwarded to RoS – if it does not believe the applicant has provided a complete list for neighbour notifications.

137. In the event that the neighbour notification process does not work as intended, the Bill will also clarify that liability rests with RoS or the Commission for any mistakes made by them.

#### *Alternatives considered*

138. The crofting consultation also invited views on more extensive changes to the registration processes, whereby all unregistered crofts would need to be registered before an assignation application (or alternatively, any application) was made to the Crofting Commission. This proposal is still under consideration.

***Purchase from landlord to trigger first registration of a croft (section 22)***

*Issues*

139. Registration of a croft on the Crofting Register confirms the crofter’s rights to the land and informs others of those rights too. It is in the public interest, and the interests of crofters, landlords and others with a stake in crofting communities, for the Crofting Register to be populated as quickly as possible. Any crofter may choose to register their croft at any time. However, the main legislative provisions which promote the completion of the Crofting Register are the “trigger events” – events such as assignation which cannot be progressed unless the croft is also registered.

140. Many changes involving a croft are ‘triggers’ that require the croft to be registered if it is not already in the Crofting Register. However, an exception is when a tenant crofter exercises the right to buy and becomes an owner-occupier crofter. As this process involves a conveyance of a defined piece of land, the additional administration required for entry in the Crofting Register will normally be straightforward.

*Provisions*

141. The Bill will provide that a tenant crofter’s purchase of the croft land from the landlord, or an application to the Land Court to compel the landlord to sell the croft land, will be a trigger event for the registration of the croft. A crofter taking such a step, whose croft is not already registered, will be required to apply for a first registration of the croft.

***First registration applications to be notified to landlords (section 24)***

*Issues*

142. The process for “first registration” of a croft, which sets the croft boundaries in a Register for the first time, has a number of checks and balances. Before registration, the Crofting Commission checks whether the proposed boundaries are consistent with their knowledge of the croft; and after registration, neighbours are notified and are allowed 9 months to challenge the registration if they wish to do so. However, it has been pointed out that many crofting estate landlords also have information about the boundaries of crofts, which could assist in ensuring accurate boundaries are registered.

*Provisions*

143. The Bill will provide that a tenant crofter preparing to make a first registration application, must give their landlord 14 days in which to make any comments on the proposed application. When submitting their application, the crofter must confirm to the Commission that this opportunity has been given; and the Commission can decline to forward the application to RoS if this confirmation is not provided.

144. There will be no compulsion on the landlord to scrutinise or comment on the proposed application; and if the landlord does comment, there will be no compulsion for the crofter to make any changes to the application. Nevertheless, many landlords and crofters will wish to take advantage of this additional step, in the interests of ensuring the accuracy of first registration applications.

***More flexible powers for making rectifications to the Crofting Register (section 26)***

*Issues*

145. Current legislation provides that the Keeper of the Registers of Scotland may rectify the Crofting Register in three instances:

- a) Where a mistake has been made by the original applicant, who requests a rectification;
- b) Where a mistake has been made by the Crofting Commission, which requests a rectification;
- c) Where a mistake has been made by the Keeper.

146. Around 80% of rectification applications relate to the size of the area of the croft or common grazings. The majority of these errors result from applicant error and there is a financial cost associated with their correction. Currently, unless the Keeper is responsible for the registration error, they cannot take the initiative to rectify the mistake but must wait until either the original applicant or the Crofting Commission asks them to do so. In some cases, manifest errors which conflict with previous documentation such as decroftings or conveyances, cannot be corrected.

*Provisions*

147. The Bill will introduce new powers for the Keeper and the Crofting Commission to correct mistakes in the Crofting Register, without needing to wait for a rectification to be requested by the original applicant. These powers come in three parts:

- a) The Keeper will have the power to correct typographical, clerical or administrative errors, without needing to inform anyone of doing so.
- b) The Keeper will have the power to correct a material error where the means of correcting it is manifest. After making such a correction, the Keeper must notify all interested parties.
- c) The Commission will have the power to direct the Keeper to make a change to the Crofting Register, to correct a material error, where the means of correcting it is manifest. Before exercising this power, the Commission must give 28 days' notice to all interested parties, and must consider any representations they make.

148. It is emphasised that, in keeping with the provisions of the Bill, the Keeper and the Commission will only be entitled to use these powers in the case of manifest, material errors where the means of correcting them is also clear. Should the Commission or the Keeper introduce new errors by the use of these powers, there would be recourse to the Land Court, and the Bill will provide that the party responsible for the mistake would be liable to indemnify anyone who had suffered loss as a result.

149. In addition, it is proposed to give the Scottish Ministers power to add to the list of those who are entitled to request a rectification of the register. Currently, apart from the Keeper and the Commission, the only person who can request a rectification is the original applicant, though the Land Court has ruled that this should be interpreted as including an executor of the original applicant. The power is taken in case it proves necessary in future to make further, similar adjustments to the provision.

150. Taken together, these changes will provide a simpler and more cost-effective approach to Crofting Register rectification for clear and straightforward inaccuracies, allowing greater accuracy to be achieved; and will minimise the number of Scottish Land Court challenges, thereby providing a more cost-effective approach to maintaining the Crofting Register for all involved, especially crofters.

## **Electronic communications**

### ***Use of electronic means for giving notifications and for advertising (sections 28 and 29)***

#### *Issues*

151. There are a number of requirements in the current legislation for public notification to be made by either an applicant or the Crofting Commission. This process involves placing an advert in one or more newspapers circulating in the district in which the subject croft or common grazing is situated. The notification of first registration of a croft requires the applicant to give notice by placing an advertisement in a local newspaper for two consecutive weeks.

152. Crofters and stakeholders have pointed out that the newspaper requirement can be overly prescriptive and costly, and that it fails to allow the use of new or evolving digital platforms that may be more appropriate. A common complaint is that people do not see adverts if they do not read a particular newspaper, and it is not always possible to identify a local newspaper circulating in the subject area. It is said that the requirement of advertisements to be placed for “two consecutive weeks” unjustifiably rules out newspapers that may circulate on a fortnightly or monthly basis.

153. An alternative proposal is that the Crofting Commission website could be used for the purposes of public notification. Moving online would mean that all crofters, including stakeholders, solicitors etc, would know that there is only one place they would have to look to

get access to public notifications and see what changes are being proposed within their community. It would also allow the Commission to develop a system of automatic notifications to those with an interest, for example, to alert grazings clerks to any regulatory applications or registrations in their area.

154. The 1993 Act also contains an outdated definition of “service of notices”, requiring these to be hand delivered or sent by registered post or recorded delivery. This prohibits the use of electronic communications for this purpose, even when both parties have agreed that email communication would be preferred. Among other things, this applies to the Commission’s annual notices requiring crofters to complete the “census”; these currently have to be issued by post.

#### *Provisions*

155. The Bill will replace those sections pertaining to the service of notices and public notifications with new sections that define these terms in a way that allows for electronic communication methods to be used where the recipient has agreed to this.

156. Service of notices by email will now be permitted provided that the sender and the recipient have agreed that this is an acceptable means of communication. The Crofting Commission already has a list of many crofters who have asked for future notices to be served on them by this manner. The Bill will enable the Commission to work in that way, and will afford the same flexibility for the service of notices between crofter and landlord. Where there has not been an agreement to use email, the default position will remain hand delivery or the use of registered post or recorded delivery. In cases where neither a postal address nor an authorised email address is available then, as currently, it will be possible to serve a notice about a piece of land by affixing the notice prominently on the land, or handing it to a responsible person on the land.

157. Public notification currently relies on newspaper advertisements, but the Bill will pave the way for greater use of the Crofting Commission’s website, by giving a power for the Scottish Ministers, after consulting the Commission, to make changes to the manner in which public notifications may be made. This will apply both to public notifications by the Commission itself, and to those issued by crofters, e.g. when making a regulatory application.

#### ***Crofting census (annual notice) (section 30)***

##### *Issues*

158. The Crofting Commission has a duty to give notice to each crofter to make an annual declaration regarding their croft through the Annual Notice, otherwise known as the Crofting Census. Crofters are asked every year to give any updates to their croft information and also to provide information on whether they are complying with their duties. This process helps to keep



the Commission's information accurate and up to date, and also forms the basis for a key element of its action to ensure breaches of crofting duties are remedied.

159. It is considered essential to conduct a census immediately prior to each 5-yearly crofting election of Crofting Commission board members, to help ensure the list of eligible voters is as accurate as possible.

160. However, many crofters have made it clear that there is a frustration at having to repeatedly send the same information every year. In addition, the Crofting Commission has noted that gathering and processing annual census information is a burden on their resources, which might be more usefully re-directed to supplement the carrying out of its regulatory duties, pursuing those who have not returned their census form, and taking action on those that are in breach. Although there is a strong connection between the Annual Notice and the work of enforcing compliance with crofting duties, there is a case for reducing the frequency with which the Commission is required to conduct the census, although they should have discretion to carry out the exercise as often as they consider necessary.

#### *Provisions*

161. The Bill will require the Crofting Commission to conduct the Census at least every three years, rather than annually. It will also change the official title from "Annual Notice" to "Crofting Census" – the name by which it is already generally known.

### **Simplifications and clarifications of crofting law**

#### ***References to members of crofting communities in the legislation (section 19 and Schedule 2)***

#### *Issues*

162. In 2020, the Law Society of Scotland (LSS) paper on Crofting Law Reform highlighted several issues with the definition and use of the term "crofting community" in the 1993 Act. In 2016, the Scottish Land Court had questioned the logic of the definition in its decision on the case *Eunson v Crofting Commission*. The definition referred to "persons who occupy crofts within a township", although the LSS noted that neither "occupy" nor "township" was itself defined. The LSS further noted that references to crofting communities in the Act were sometimes defined broadly, sometimes more narrowly, and the geographical coverage was sometimes the "locality" or the "area" or the "district" of the croft.

#### *Provisions*

163. The Bill will clarify that the definitive list of "townships" and "parishes" are those held by the Crofting Commission in the Register of Crofts. It will further provide that the "members of the crofting community" are the crofters and other holders of grazing shares associated with a particular township. It will also provide that, contrary to the current definition, where there is

only one croft in a particular township, there is still a crofting community of one. This can be important in cases where “the members of the crofting community” require to be consulted about a landlord initiative.

164. The Bill will restate the current position that for most purposes, membership of the crofting community is to be interpreted locally, i.e. the members of the local township, including those holding unattached grazing shares. Where a wider population is intended, the Bill will make this clear, in particular for the Commission’s assessments of “the sustainability” of crofting and the crofting communities, when deciding a decrofting application. The current legislation allows the Commission discretion whether to make this assessment across a single township or multiple townships. In future, the Bill will require them to assess sustainability across the entire parish.

***Other corrections (sections 20 and 21)***

165. The Bill will confirm that croft tenancies do not count as private rental tenancies for the purposes of the Private Housing (Tenancies) Scotland Act 2016.

166. The Bill will confirm that owner-occupier crofters and owner-occupied crofts are required to be included in the Register of Crofts and provide the same information as tenant crofters, and will remove the requirement for the date of birth of crofting landlords to be recorded.

***Appointments to the Commission Board (sections 31 and 32)***

*Issues*

167. The Board of the Crofting Commission comprises 6 commissioners elected by crofters at the 5-yearly elections, and three commissioners appointed by the Scottish Ministers. This is unique among Scottish non-departmental public bodies in having such a high proportion of its Board members elected. Elected Board members bring strong knowledge of crofting and crofting communities, but may or may not bring other experience needed for the leadership of a public body, such as experience of finance or governance. Vacancies in the appointed commissioner positions arise quite rarely, typically one vacancy in 2 or 3 years, and on these occasions the choice of the skill set of the appointee(s) can be at a premium. However, currently, the Act requires that if there is not already a commissioner who represents the interests of landlords of crofts, and if there is not already a commissioner who speaks Gaelic, then the Scottish Government must appoint someone who makes good that deficiency. It is possible that on occasion the requirement might be for a Gaelic-speaking landlord representative, which would narrow the field very considerably.

168. A further restriction is that the legislation provides that the convener (chair) of the Commission must be selected from within the existing serving Board members. There is no

provision for what should happen if none of the existing Board members puts themselves forward for the convener's position or is suitable for the role.

#### *Provisions*

169. The Bill will make the appointment of a representative of landlords a recommendation, rather than a mandatory requirement in all circumstances. It will also require the Scottish Ministers, prior to making any appointment to the Crofting Commission Board, to consult the Commission for its views on the person specification for the advert and selection process.

170. The Bill will give the Scottish Ministers a power to recruit and appoint a chair of the Crofting Commission externally, on any occasion when there is no suitable candidate for the position from within the existing Board.

#### *Alternatives considered*

171. The consultation document invited views on whether there should be more extensive changes to the composition of the Crofting Commission Board, such as a change in the numbers of elected and appointed commissioner posts; but no consensus for change emerged.

### ***Administrative flexibilities for the Crofting Commission (section 33 and Schedule 2)***

#### *Issues*

172. The Bill will correct two inflexibilities in the current legislation, which have proved unhelpful for the Commission in practice. One concerns the chairing of meetings of the Commission and its subcommittees; the other relates to the periodic revisions of the Commission's Policy Plan, a key document which sets out and to an extent governs, the way in which the Commission takes its decisions.

#### *Provisions*

173. The provision which requires the Commission convener to chair any meeting of the Commission or of any subcommittee, if they are present, will be repealed. Instead, the convener will have the authority to delegate the chairing, as will the chair of any Commission committee.

174. The requirement for the Commission to develop, consult on and submit a new Policy Plan within 6 months after each election, will be extended to 12 months. This will provide more time for the Commissioners, many of whom may be newly elected to their positions, to consider and come to a collective view on the whole range of issues connected with the work of the body.

***Other simplifications, corrections and clarifications (Schedule 2, Part 1)***

*Issues*

175. Crofting lawyers, including the Crofting Law Group in their “Crofting Law Sump”, the Crofting Commission, and others have pointed out a number of mistakes, inconsistencies and omissions, in the current legislation. The Bill will correct many of these, including the following which have not been covered in the main sections above.

*Provisions*

176. The Bill will remove from the legislation obsolete cross references, to parts of the Act which have since been repealed, and to the Crofters Holdings Book, which preceded the Register of Crofts.

177. The Bill will correct and clarify the language in the 1993 Act, concerning the processes that are followed if a bequest leaves a croft to more than one person.

178. The Bill will update references to a person’s “wife or husband”, making these instead a reference to “spouse or civil partner”.

179. The Bill will remove a perceived ambiguity, to make it clear that sublets cannot be for more than 10 years (although applications can be made for a new sublet on the expiry of the first one).

180. The Bill will remove a restriction so that a landowner may apply to create a new common grazings even when it is adjacent or contiguous to one or more crofts.

181. The Bill will provide that historic apportionments can be reviewed, in the same manner as more recent apportionments; and will make clear that an apportionment takes effect on the date of its registration, rather than at the date when the Commission makes a decision on the application.

182. The Bill will replace some references to the “convener” of the Crofting Commission with references to the “chair”.

**Part 2 - Land Court and Lands Tribunal**

***Merger***

183. The consultation (see paragraphs 25-30) sought views on whether, following the decision to merge the Scottish Land Court and the Lands Tribunal for Scotland, the merged body should be a court or a tribunal. An overwhelming majority considered that if the bodies were amalgamated, the resultant body should be an expanded Land Court. The Scottish Government

considered the responses to the consultation and recognises the historical significance of the court and that a court would be more suitable for taking on extra functions. As such the Bill provides that the functions and jurisdiction of the Lands Tribunal should be transferred into the new body the Scottish Land Court.

184. It is recognised that the changes required, such as the introduction of a new case management system; court rules, court fee structure and transfer of staff and members will take time. At present the remuneration of the Chair and of the Lands Tribunal members is reserved. In respect of the Chair, the Bill restates the current position. For members of the Lands Tribunal, the Scottish Government will liaise with the UK Government for a section 30 Scotland Act Order in this regard. The proposals therefore set out that the merger will take place on the ‘appointed day (or days)’ and include the power to make further provision in connection with the merger.

185. The Scottish Government is of the view that this provides the flexibility required to ensure successful completion of the merger. It is accepted that it will take time to develop a new set of court rules, fee structure and importantly rectify the current inconsistencies in the remuneration of members of the two bodies.

186. It is anticipated that further consultation will be required for the development of court rules and a new court fee structure.

### ***Eligibility to act as members of the Upper Tribunal for Scotland***

187. The merger of the Scottish Land Court and the Lands Tribunal for Scotland provides an opportunity to widen the judicial membership of the Upper Tribunal. At present, the Chairman of the Scottish Land Court, judges of the Court of Session and sheriffs are eligible to act as judicial members of the Upper Tribunal for Scotland by virtue of holding those offices. Members of the Lands Tribunal and other members of the Scottish Land Court are not eligible to act in the Upper Tribunal by virtue of holding office in either of those bodies.

188. The Bill provides for suitably qualified members of the merged Court to act in the Upper Tribunal. Appeal volumes in the Upper Tribunal are demand led, and the policy rationale is to ensure that there are sufficient numbers of judicial members available to assist with any fluctuations in case volumes in the Upper Tribunal. This will improve the resilience of the Upper Tribunal and allow it to have access to a broader range of expertise and knowledge if required. The Scottish Government is of the view that this provides increased flexibility in the deployment of resource. It is intended that usage of this resource would be used only when there is a need for particular expertise which is not freely available from within the Upper Tribunal’s existing membership.

189. The eligibility to act in the Upper Tribunal will still be subject to various safeguards. Suitability to act in the Upper Tribunal will firstly be determined by the Chair of the Court,

before requiring authorisation from the President of the Scottish Tribunals. Approval from the Lord President and the members themselves is also required. The process for authorisation is therefore very similar to the existing arrangements for authorisation as outlined in the Tribunals (Scotland) Act 2014. Equivalent provision is in place in respect of the transitory provision for members of the Lands Tribunal. The policy intent is to provide for safeguards in respect of deployment of this resource but with an element of flexibility as to the arrangements for deployment.

190. Transitory provision is made to ensure that suitably qualified members with appropriate expertise in the Lands Tribunal for Scotland are available to the Upper Tribunal prior to the date of the merger of the Lands Tribunal and Scottish Land Court, allowing such members to be eligible to act in the Upper Tribunal quickly.

## **Schedule 1**

### ***Part 1 - Administration and organisation of the Court***

191. The policy intention is to replicate the provisions of the Scottish Land Court Act 1993 as far as is practicable, and where possible update provisions to align with the policy intention of the Court Reform (Scotland) Act 2014.

#### *Appointment of members and Chair of the Court*

192. The restrictions on the eligibility of individuals who can apply for the role of Chair have been restated as these reflect the necessary experience required to hold the office of the Chair. For the other members of the Land Court, the policy of the Bill is to permit Scottish Ministers by way of regulations to set out the eligibility for appointment. It is anticipated that the views of the Chair and the Lord President will be sought to inform eligibility requirements so that the right people with the right level of experience and expertise will be appointed.

193. The Scottish Government recognises that Gaelic is an integral part of Scotland's heritage and national identity. The Gaelic Language (Scotland) Act 2005 was passed by the Scottish Parliament with a view to securing the status of the Gaelic language as an official language of Scotland. The Scottish Government is committed to ensuring that Gaelic has a sustainable future in Scotland and recognises the importance of Gaelic within the crofting community. As such the Bill retains the requirement for a Gaelic speaking member of the Land Court.

#### *Tenure of office and remuneration*

194. The Scottish Government is cognisant of the differences in remuneration (including current pension arrangements) between the members of the Lands Tribunal and Land Court and the difficulties this may present upon merger of the two bodies.

195. The Scottish Government is committed to ensuring that any future transfer of members into the Land Court will be on a no detriment basis. The Bill supports this position by providing for a phased approach to the transfer of Tribunal members with Tribunal members authorised to sit in the Court until such time as a suitable Scotland Act Order can transfer them.

196. The Bill provides for Scottish Ministers to determine remuneration of Land Court members, this is a move from the current position of the SCTS being responsible for determining the salary and expenses of Land Court members. This change will treat members of the Land Court similarly to summary sheriffs. The policy intention is to reflect the change to the designation of members of the Scottish Land Court to judicial office holders as defined by the Judiciary and Courts (Scotland) Act 2008. This change was brought about by the Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017, which also specifies that the Scottish Land Court, as of 1st April 2017 is one of “the Scottish courts” within the responsibility of the Lord President.

197. As judicial office holders the Scottish Government believes that members of the new Land Court should be included in the Judicial Pension Scheme (JPS) and receive a judicial pension (currently Lands Tribunal members receive a judicial pension however Land Court members do not). However, the JPS is run by the UK Government and the Scottish Government is still engaging with the UK Government on this matter.

198. The policy remains that the Bill should provide for the reimbursement of expenses incurred, and that the test should be whether the expenses had been reasonably incurred by the judicial officer in the performance of duties and the reimbursement of expenses should be a function of SCTS.

199. The Scottish Land Court Act 1993 makes provision for the retiring annuity of the Chair (paragraph 4(1) of Schedule 1). This has not been replicated in the Bill as the Chair of the Court is part of the JPS and is included in the scheme by virtue of schedule 1 of the Judicial Pensions and Retirement Act 1993. It is therefore unnecessary to make provision for the Chair’s retiring annuity in the Bill.

## ***Part 2 - Jurisdiction of the Court***

200. At present the Lands Tribunal has both reserved and devolved functions. As such an order under s.104 of the Scotland Act 1998 will be required to effect the transfer of any reserved functions. The Scottish Government will engage with the UK Government on this point.

201. The Bill provides the opportunity for additional functions to be added to the new body. In the first instance, this can be viewed as a ‘tidying up exercise’, with the addition of a number of less well-known jurisdictions presently exercised by the Sheriff Court to the expanded Scottish

Land Court, such as the March Dykes Act 1661, the March Dykes Act 1669, the Runrig Lands Act 1695 and the Division of Commonties Act 1695.

202. The Bill will also transfer the sheriff's role in the "right to buy" provisions of the Land Reform (Scotland) Act 2003 and the Land Reform (Scotland) Act 2016 to the Scottish Land Court, with the aim of bringing greater cohesion to the diffuse appeal provisions which accompany these rights.

203. The Bill also contains provision to transfer right of responsible access (also known as "right to roam") cases under section 28 of the Land Reform (Scotland) Act 2003 from the Sheriff Court to the Land Court. This will allow the Land Court to develop expertise in this area; at present, individual sheriffs are unlikely to gain extensive experience in the determination of these cases, leading to the risk of a lack of consistency of approach.

204. The Scottish Government recognises that there may be calls for the Land Court to take on the functions of a specialised environmental court. There are both criminal and civil elements to environmental justice. The Scottish Government does not consider it appropriate for the expanded Land Court to take on the functions of a criminal environmental court. With regard to civil cases, the Scottish Government has been criticised by the Aarhus Convention Compliance Committee for non-compliance with Article 9(4) of the Aarhus Convention, which sets out that access to justice in environmental matters should be "fair, equitable, timely and not prohibitively expensive." At present Aarhus cases are brought either by means of judicial review or as a statutory appeal under the Town and Country Planning (Scotland) Act 1997; both types of cases are heard in the Court of Session, and although Protective Expenses Orders can be made in environmental cases, in general such actions are very expensive.

205. Aarhus cases are defined in the Court of Session etc. Fees Order 2022 as an appeal to the Court of Session under section 56 of the Freedom of Information (Scotland) Act 2002 as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004; relevant proceedings which include a challenge to a decision, act or omission on grounds subject to the provisions of Article 6 of the Aarhus Convention; or relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.

206. The Scottish Government published the "Report on the Effectiveness of Environmental Governance" under section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 in 2023. That report sets out the Scottish Government position, that it does not see a strong argument for the creation of a specialist court. It is however intended that consideration will be given to the expanded Land Court taking on new functions in relation to Aarhus cases in time to come; the Bill allows for this by permitting Scottish Ministers to adjust what is (or is not) within the competence and jurisdiction of the Court.



*Fitness for office and removal of members of the Court*

207. The policy objective is to treat Land Court members as judicial office holders and as such the fitness for office provisions replicate those that are in place for all other judicial office holders.

***Part 3 - Rules Procedure Expenses and Powers***

*Rules of Court*

208. The policy is that very general powers are given to the Court of Session, the provisions within the Bill are intended to remove any doubt that that Court has the vires to make any rules relating to the procedure and practice of the Land Court.

*Procedure*

209. The Scottish Government believes that the Chair is best placed to select a member or members to deal with a particular case, type of case or group of cases. The Chair has the requisite knowledge and experience required to make this decision and as such it should fall to them.

210. This duty remains subject to the Lord President's overall responsibility for the efficient disposal of business in the Scottish courts under the Judiciary and Courts (Scotland) Act 2008.

211. The provisions within the Bill set out that the decision of the Land Court in respect of crofting and crofting community right to buy arising under the Crofters (Scotland) Act 1993 or the Small Landholders (Scotland) Acts 1886 to 1931, or under the Land Reform (Scotland) Act 2003 (except to the extent otherwise provided in Part 3 of that Act), is final.

212. With some specified exceptions, a decision of the Land Court can be appealed on a point of law to the Inner House of the Court of Session for a final determination, either at the request of the party or if the Land Court thinks fit to do so.

*Powers, Enforcement, Expenses & Accounts*

213. The policy objective is to replicate the provisions contained within the Scottish Land Court Act 1993.

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

### **Equal opportunities**

214. The assessment of the impact of the proposals on equalities has supported the development of the Bill. The Bill will serve to update the crofting legislation, make it more understandable and workable, and allow the Commission to better regulate crofting.

215. In addition, the provisions of the Bill provide for the amalgamation of the Scottish Land Court and the Lands Tribunal for Scotland, and update the legislation and jurisdiction of the Scottish Land Court in the process. The amalgamation is primarily administrative in nature and it is intended to provide structural coherence for service users.

216. Based on the findings of the EQIA, it is considered that the policies set out in the Bill are neither directly nor indirectly discriminatory under the Equality Act 2010; and it is not anticipated that the provisions contained in the Bill will directly impact on individuals with protected characteristics. In particular, the crofting provisions are unlikely to have any negative impact on protected characteristics or minority groups and will provide the same opportunities to all members of the crofting community. There is nothing to suggest that any of the provisions will affect one member of the crofting community differently to another due to their protected characteristics or being a member of a minority group. The provisions are expected to have a positive impact on different age groups and demographics and will apply equally and consistently to all members of the crofting community.

### **Human rights**

217. The Scottish Government has considered the impact of the provisions of the Bill on human rights, with particular regard to Article 6 (right to a fair hearing) and Article 1 Protocol 1 (A1P1) (right to peaceful enjoyment of possessions) of the European Convention on Human Rights (ECHR). The Scottish Government considers that the provisions of the Bill are ECHR compliant.

218. There are several measures in the Bill which impose restrictions on how crofters use or transfer their land, which may be considered a control on the use of property for the purposes of A1P1. For example, the changes to the process for securing approval for proposed environmental uses of common grazings may mean that a proposal to which the landlord has not given consent is approved by the Crofting Commission. For such controls to be lawful, they must satisfy the established three-part test: legal certainty, legitimate aim, and proportionality. The measures which control the use of property will be in primary and secondary legislation, providing clarity and legal certainty to landlords and crofters. The measures also pursue legitimate aims, including promoting agricultural and environmental sustainability, preserving crofting as a distinct system of land tenure and protecting the interests of crofting communities.

219. In relation to the test of proportionality, the Scottish Ministers consider that the measures achieve a fair balance between protecting individual property rights and the broader public interest in sustainable land management and the preservation of crofting communities. For example, where a proposed environmental use is under consideration, the process requires meaningful engagement with the landlord and is subject to clear procedural safeguards. This includes a right of appeal to the Scottish Land Court, ensuring independent and impartial oversight. Any interference with property rights is limited and proportionate, with the framework incorporating such safeguards to ensure fairness and provide effective protection to those affected.

220. Both the Lands Tribunal and the Land Court currently operate and discharge their functions in compliance with Article 6. The merged Scottish Land Court will remain an independent and impartial tribunal established by law.

221. The day to day procedure of the new Court may change however this is still to be determined in court rules. The functions of the court are capable of being exercised compatibly by the court, it will be for the Court of Session to ensure any court rules made are compatible with ECHR requirements, including Article 6. The fundamental aspects such as access to the Court and the right to appeal to the Court of Session remain the same in the new Scottish Land Court as they did in the former Land Court and the Lands Tribunal.

#### **Statement of compatibility under section 23(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024**

222. The Cabinet Secretary for Land Reform and Islands, Mairi Gougeon MSP, has made the following statement regarding children's rights:

“In accordance with [section 23\(1\) of the United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Act 2024](#), in my view the provisions of the Crofting and Scottish Land Court Bill are compatible with the UNCRC requirements as defined by [section 1\(2\) of that Act](#).”

#### **Island communities**

223. Many crofting communities are situated in the Islands of Scotland, in the Western Isles, Shetland, Orkney, Highland, Argyll and North Ayrshire. The Bill's provisions to strengthen the crofting system will be of particular benefit to the many island communities where there are crofts.

224. A full assessment of the impacts of the proposals contained in the Bill on island communities has been undertaken. The crofting proposals are designed to strengthen and support the sector and ensure that croft land, including common grazings, is actively managed. They are

not expected to have an impact on island communities that is significantly different to mainland or other island communities.

225. The proposals concerning the Scottish Land Court and Upper Tribunal are anticipated to be neutral or positive in respect of their impact on island communities. With reference to the Land Court provisions, the Land Court will still be based in Edinburgh and will retain the ability to hold hearings in locations appropriate for the affected parties.

### **Local government**

226. There are no direct impacts on local government. The crofting system does interact with the Planning System, but no specific changes are being made that will affect Planning.

227. The amalgamation of the Land Court and Land Tribunal is primarily administrative in nature and will have no direct impact on local government.

### **Sustainable development**

228. The Bill will provide new flexibilities and opportunities for crofters to expand their crofting businesses in both economic and environmental terms, and will support population retention in remote areas.

229. The amalgamation of the Land Court and Land Tribunal is primarily administrative in nature and will have no direct impact on sustainable development.

### **CROWN CONSENT**

230. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign. The Scottish Government's view is that none of these considerations applies to this Bill.

231. For the source of the requirement for Crown consent, see paragraph 7 of schedule 3 of the Scotland Act 1998,<sup>14</sup> and rule 9.11 of the Parliament's Standing Orders.<sup>15</sup> For further information about the considerations that go into determining whether Crown consent is required for a Bill see Erskine May,<sup>16</sup> the guide to procedure in the UK Parliament.

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<sup>14</sup> [Scotland Act 1998 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>15</sup> [Chapter 9 Public Bill Procedures | Scottish Parliament Website](#)

<sup>16</sup> [Erskine May - UK Parliament](#)



*This document relates to the Crofting and Scottish Land Court Bill (SP Bill 71) as introduced in the Scottish Parliament on 2 June 2025*

# **CROFTING AND SCOTTISH LAND COURT BILL**

## **POLICY MEMORANDUM**

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