

# **CROFTING REFORM (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Crofting Reform (Scotland) Bill introduced in the Scottish Parliament on 9 December 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 35–EN.

### **POLICY OBJECTIVES OF THE BILL**

2. There is widespread concern that crofting is in decline as a consequence of persistently high levels of absenteeism, growing levels of neglect and the continuing removal and development of land from crofting tenure. Many have argued that the existing governance arrangements and regulatory framework have failed to address this decline. The objectives of this Bill are to put in place a robust regulatory and governance framework for the future of crofting that will reverse this decline and ensure that crofting continues to contribute to sustainable economic growth in some of Scotland's most remote, rural communities.

3. The main parts of the Bill are:

- Part 1 proposes reforms that are intended to make the Crofters Commission more effective in delivering its core function of regulating crofting. Through changing the constitution of the Commission to allow for directly elected members, the Bill aims to make the Commission more representative of, and accountable to, the people it regulates. It also proposes to give the Commission greater flexibility to develop regulatory policy so that crofting develops in the interests of crofting communities and the wider public interest. Changes are also proposed to the powers of the Commission to bring it into line with more conventional non-departmental public bodies that receive grant-in-aid and have the flexibility to spend their budgets as they see fit.
- Part 2 of the Bill proposes to create a new Crofting Register which, in effect, will eventually replace the existing Register of Crofts, which is now considered to be incomplete and outdated. The Bill gives responsibility for establishing the new register to the Keeper of the Registers of Scotland, who is responsible for maintaining other property registers in Scotland. The new Register will be map-based and will clearly define the extent of, and interests in, a croft and other land held in crofting tenure, such as common grazings. In addition to providing crofters

with greater security over their croft, an accurate and current legal register is considered to be important in the effective regulation of crofting.

- Part 3 of the Bill defines “owner-occupier crofters” and puts in place a new process for addressing absenteeism and neglect on croft land. At present, the Commission has a discretionary power to tackle absenteeism and action on neglect is dependent on either a complaint being made or the consent of the landlord being given. The new process places a duty on the Commission to take action in respect of absenteeism and neglect by both tenant and owner-occupier crofters. This will help to ensure that crofting contributes to economic growth by requiring crofters to be resident on, or near, their croft and to put it to some form of productive use.
- Part 4 of the Bill makes other changes to the Crofters (Scotland) Act 1993 that are intended to deliver a number of policy goals. Sections 25 to 29 aim to tackle speculation on the development value of croft land through strengthening the grounds under which the Commission may reject an application to decroft. At present, the Commission regards itself as obliged to approve applications to decroft where outline planning consent has been granted. These provisions enable the Commission to reject applications to decroft where it considers the cumulative effect of such applications to have a negative impact on crofting in the area, the long term sustainability of the community in which crofting takes place and the corresponding environmental, cultural and landscape benefits derived from crofting. A change to the requirement for approval for the enlargement of crofts is also included at section 30 of the Bill and section 31 proposes changes to the processes for obtaining Commission consent to make this process simpler and more efficient.
- Part 5 of the Bill includes general provisions concerning matters such as regulations and orders, ancillary provision, minor and consequential amendments and repeals, and crown application. In addition, section 32 includes a power to make modifications of enactments relating to crofting ahead of proposed consolidation, which will allow for the simplification and clarification of crofting law.

## **BACKGROUND AND CONSULTATION**

### **The Crofting Reform etc. Bill and the establishment of the CoIoC**

4. During the passage of the Crofting Reform etc. Bill through the Scottish Parliament in 2006/07, it was agreed that certain parts of that Bill would be dropped and a Committee of Inquiry on Crofting (CoIoC) would be established to take an independent look at the changes that were needed to secure the future of crofting. It was considered that crofting was in decline as a consequence of absenteeism, neglect and speculation on croft land for purposes other than crofting and that the provisions in that Bill did not adequately address these issues.

5. Consequently, the CoIoC was given a remit to develop a vision for the future of crofting that would contribute to the goals of sustaining and enhancing the population; improving economic vitality; safeguarding landscape and biodiversity; and sustaining cultural diversity. They were invited to identify any administrative or legislative changes needed in: the basis for regulation; the role and functioning of the Crofters Commission as a regulator; and the role of other regulations and incentives with an impact on crofting.

## **CoIoC report and Government response**

6. Chaired by Professor Mark Shucksmith, the CoIoC reported to Ministers on 12 May 2008<sup>1</sup>. The CoIoC made recommendations in five main areas. These were: land and environment; strong rural economies; affordable housing; crofting regulation and enforcement; and young people and new entrants. The Government considered the Committee's report over the summer of 2008 and published its response to the Committee's report on 1 October 2008<sup>2</sup>.

7. The Government's response accepted some of the recommendations made by the CoIoC, rejected other recommendations and agreed to give further consideration to some recommendations. Since the publication of its response, the Government has moved forward with the recommendations it accepted that can be delivered administratively. This has included focusing the Crofters Commission on its core function of regulation and transferring responsibility for development to Highlands and Islands Enterprise. Highlands and Islands Enterprise propose to deliver this function through their new Growth at the Edge (GatE) approach. The Government has also transferred responsibility for administering the Government's Crofting Counties Agricultural Grants Scheme (CCAGS) to its Rural Payments and Inspections Directorate. The Government has recently received approval from the European Commission to amend CCAGS to re-orient support to registered crofters, to extend the scheme to the whole of the Highlands and Islands area (which will incorporate the proposed new areas for crofting<sup>3</sup>) and to provide a 10% uplift in support to new entrants to crofting.

8. The CoIoC report and the Government response to that report also included a number of measures that would require changes in legislation. The CoIoC proposed that the Crofters Commission should be abolished and replaced with a Federation of Local Crofting Boards. The Government rejected this proposal but recognised that the Committee was seeking to make the Commission more democratic, accountable and responsive to local crofting practices. Instead of abolishing the Crofters Commission, the Government proposed to make the Commission more democratic and accountable through the introduction of Area Committees, which would include a majority of crofters elected by crofters.

9. The Government accepted the CoIoC's proposal that the Keeper of the Registers of Scotland should be given responsibility for establishing and maintaining an accurate and legal register of crofts, which indicate the interests in, and boundaries of, a holding (including ancillary rights such as common grazings).

10. The Government rejected the CoIoC's proposal to introduce a real burden on both croft houses and houses built on land previously under crofting tenure in order to address absenteeism and require crofters to live on the croft. It considered that strengthening existing provisions relating to absenteeism and neglect would be sufficient to address those issues. However, the Government did agree to consider an occupancy requirement for houses built on decrofted land,

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<sup>1</sup> <http://croftinginquiry.org/Documents/final-report>

<sup>2</sup> <http://www.scotland.gov.uk/Publications/2008/09/25154550/0>

<sup>3</sup> A Scottish Statutory Instrument to designate new areas for crofting tenure was introduced to the Scottish Parliament under affirmative procedure on 8 December 2009. The power for Ministers to designate such areas by Order, and for small landholders in such areas to convert to crofting tenure, was introduced by the Crofting Reform etc. Act 2007.

which would require them to be used as permanent residences. It was considered that this might be an effective means of tackling speculation on croft land.

11. The CoIoC also recommended that the Registration of Leases (Scotland) Act 1857 should be amended to make a crofting lease registrable and hence eligible for standard securities. In its response, the Government accepted the principle that crofters should be able to obtain loan finance without the necessity of decrofting, but considered that it was likely to require more than amending the 1857 Act.

### **Consultation on draft Bill**

12. On 19 May 2009, the Government published a consultation document on a draft Crofting Reform (Scotland) Bill, that would deliver the changes in legislation that would be necessary to give effect to the proposals outlined previously<sup>4</sup>. It contained provisions that would:

- reform the Crofters Commission;
- allow for the establishment of a new Crofting Register;
- strengthen the reformed Commission's ability to tackle absenteeism and neglect;
- allow for tenant crofters to grant a standard security over their tenancies; and
- put in place an occupancy requirement on houses built on land removed from crofting tenure in order to tackle speculation.

13. The consultation on the draft Bill closed on 12 August 2009 and 422 consultation responses were received from both individuals and organisations. The Government carefully considered the consultation responses and published a report on the analysis of the consultation on 4 November 2009<sup>5</sup>.

14. The draft Bill was amended in light of the consultation responses and introduced to Parliament in December 2009. It represents the next step in the Government's commitment to reform crofting, recognising the unique contribution that small scale land management practices can make in terms of public benefits to the environment.

15. Consultation on these proposals began in May 2007 when the CoIoC was tasked with gathering evidence from a wide range of crofting stakeholders about issues affecting crofting. They were asked to make recommendations to the Scottish Ministers about how to protect the future of crofting. In undertaking this work, the CoIoC spent over a year consulting, gathering evidence and drawing up its recommendations. Its final report was published in May 2008. Subsequently, the Government produced its response to the CoIoC final report on 1 October 2008 and this formed the basis of the draft Crofting Reform (Scotland) Bill.

16. The draft Crofting Reform (Scotland) Bill was published on 19 May 2009. This launched the beginning of a 12 week consultation which took the form of written responses, public meetings and other meetings with stakeholder organisations. Over 3,000 copies of the draft Bill

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<sup>4</sup> <http://www.scotland.gov.uk/Publications/2009/05/11145108/0>

<sup>5</sup> <http://www.scotland.gov.uk/Publications/2009/11/03094225/0>

were issued to stakeholders, including grazings committees, assessors, organisations and to individuals upon request. In total, 422 written responses to the consultation on the draft Bill were received.

17. 19 public meetings took place during June and July 2009, and these were held in the same locations as the CoIoC's public meetings, with the addition of two meetings in Durness and Wick. In total, 540 people attended the public meetings. A minute of each meeting was recorded and was used as part of the consultation analysis. The meeting notes can be accessed on the Government website<sup>6</sup>. In addition, officials met with the following public bodies:

- local authorities in the Crofting Counties and proposed new crofting areas;
- Crofters Commission;
- Highland and Islands Enterprise; and
- Registers of Scotland.

18. The Minister for Environment, Roseanna Cunningham, also met with MSPs, the Crofters Commission, the Scottish Crofting Foundation and the Scottish Rural Property and Business Association following the conclusion of the consultation to discuss their responses to the draft Bill. All forms of response to the consultation were considered before an analysis of the consultation responses to draft Crofting Reform (Scotland) Bill was published on 4 November 2009.

19. Significant changes have been made to the Bill as a result of the consultation. Changes include:

- in place of the proposal for Area Committees of the Commission, it is now proposed that members of the Commission are directly elected to ensure that it consists of a majority of crofters. In order to retain a link with the community, the Bill proposes to retain the assessors' network.
- the policy behind the Crofting Register provisions remain largely unchanged, although significant work has been undertaken to improve the quality of the provisions and to consider how the cost of registering croft land might be reduced. Following further discussions with RoS, the estimated average cost has reduced from £250 to between £80 and £130. The costs have reduced, in part, due to a slight amendment in how the registration process is expected to operate in practice – registration maps will be issued by ROS to the registrant to ensure consistency which, in turn, will reduce the level of work anticipated by ROS. The purpose of the legislation is to provide a mechanism for delivering the Register, therefore costs associated with the Register will be subject to subordinate legislation.
- there were significant concerns about the proposal to provide crofters with the option of using their tenancy as security for a loan. Although the Committee of Scottish Clearing Bankers indicated that they were satisfied that the proposals provided a sufficient framework for lending, other responses to the consultation indicated that crofters would prefer to continue with current arrangements where they decroft a

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<sup>6</sup><http://www.scotland.gov.uk/Topics/farmingrural/Rural/crofting-policy/reform-programme/Bill/public-meeting-minutes>

house site in order to access loan finance. As a result, this proposal has been dropped from the Bill.

- there has been a significant modification to the proposals to address speculation on croft land. The occupancy requirement proved to be very unpopular, however, it was evident that consultees wanted the issue of speculation to be addressed. In place of the occupancy requirement, it is proposed that the powers of the Crofters Commission to reject decrofting applications will be strengthened. This will be achieved through enabling them to reject an application to decroft where they consider it to be detrimental to the interests of crofting and the wider public benefits associated with crofting such as landscape and environmental benefits. It will also be possible for them to reject decrofting applications where planning permission has already been granted. Furthermore, the Bill also increases the clawback period from proceeds of a subsequent sale of decrofted land to be shared 50-50 between the crofter and the previous landowner from 5 years to 10 years.
- finally, the proposals in the draft Bill to define owner-occupier crofters and provide clear duties on the requirement to be resident on, or within 16km, of the croft and to put the land to productive use remain largely unchanged. The consultation demonstrated that there was support for treating tenant and owner-occupier crofters alike and in addressing the problems of absenteeism and neglect.

20. Further reference is made to consultation responses in this document, where consideration is given to alternative approaches that were considered for the Bill.

## **PART 1: THE CROFTING COMMISSION**

### **Policy proposals**

21. The provisions to reform the Crofters Commission are intended to:

- make the Commission more representative and accountable through the direct election of crofters as members; and
- increase its flexibility and effectiveness by providing the Commission with grant-in-aid and bringing its powers in to line with other non-departmental public bodies (NDPBs);

22. The consultation on the draft Bill demonstrated that the majority of respondents were in favour of enhancing the powers and duties of the Commission to make it more flexible and responsive. Therefore, the Bill proposes to enable the Scottish Ministers to provide grant-in-aid to the Commission, which will give it greater control over the use of its resources. At present, the Scottish Ministers provide the Commission with staff, buildings and defray other costs of the Commission. In addition to providing the Commission with its own budget, the Bill proposes to give the Commission powers to enter into contracts to procure goods and services and acquire and dispose of land, all of which will bring the Commission in line with other NDPBs and improve its efficiency. It is proposed that the Commission should also be given the power to appoint employees on such terms and conditions as it determines, subject to Ministerial direction. However, the power of the Scottish Ministers to supply the Commission with civil servants has been retained and it is not intended that there should be any differences in the terms

or conditions of civil servants currently working for the Commission. The proposal is simply intended to give the Commission greater flexibility to recruit where there are pressures or in areas of the Crofting Counties where there are few other opportunities for civil service employment. The cost of any civil servants supplied to the Commission by Ministers will, in future, be deducted from any grant-in-aid.

23. It is anticipated that, as the Commission's work now focuses solely on regulation, over time regulatory applications will be processed with greater expediency and efficiency. The Bill also proposes that the Commission should have the power to fix and recover some of its costs of regulation. No decisions as to which regulatory applications the Commission might charge for, or how much they might charge, have been made but it is anticipated that those regulatory decisions where the crofter is the principal beneficiary, rather than the wider public, will incur a charge. This might include applications to decroft or to apportion part of the common grazing.

24. The CoIoC found that the Commission lacked transparency, accountability and was too centralised. Therefore, the Bill provides for the majority of the members of the Crofting Commission to be directly elected. The Bill provides for the Commission to continue to consist of up to a maximum of nine members, of whom a maximum of six are intended to be registered crofters elected by registered crofters (the detail of who will be able to vote in the elections and who will be able to stand for election will be provided in regulations). The Scottish Ministers will retain the power to appoint additional members of the Commission, including the convener. All Ministerial appointees will continue to be regulated by the Office of the Commissioner for Public Appointments Scotland (OCPAS).

25. In order to stand for election or vote during elections, it is proposed that crofters will need to be registered on either the current Register of Crofts or the proposed new Crofting Register. The Bill contains powers to make subordinate legislation on the conduct of elections, including the age of those who will be eligible to stand or vote in an election. The proposal is that a crofter will be required to be 16 years or over to stand for election or to vote during elections. It is considered that elections will take place every 5 years, with the Crofting Counties broken down into different constituencies from which a member will be elected. Subordinate legislation will also include the constituencies from which members will be elected.

26. Currently, at least one member of the Commission must speak the Gaelic language. The Bill requires that where none of the elected members speak the Gaelic language, then one of the appointed members must speak Gaelic.

27. In the event that a vacancy arises for an elected member, the vacancy will be filled by the next preferred candidate from the elections. However, if there is no next preferred candidate, or in the event that the next preferred candidate declines to take up the position of Commissioner, then the Scottish Ministers will be able to appoint an additional member to the Commission for the remainder of the term. This will ensure continuity and that, over the course of a five year term, the Commission is likely to include a majority of registered crofters.

28. As the proposals for the Commission include a directly elected component, it is considered important to ensure that the reformed Commission has sufficient flexibility to determine regulatory policy. Therefore, the Bill proposes that the Commission will publish a

plan setting out how it proposes to exercise its regulatory decision making functions. Provision has also been made to allow the Land Court to have regard to the Commission's policy when hearing appeals.

29. In relation to meetings of the Crofting Commission, the quorum is 5 members and, where there are at least 3 elected members, the quorum is to include 3 such members. This ensures that, in such circumstances, any decisions taken by the Commission involve a majority of crofters.

30. The Bill requires the Commission to produce an annual "state of crofting" report, giving a broad account of the state of crofting. This will be produced in consultation with Highlands and Islands Enterprise and local authorities.

31. No changes are proposed to the Commission's powers to appoint a panel of suitable persons resident in the Crofting Counties to act as assessors. The importance of the assessors' network in providing a link between crofting communities and the regulator was highlighted during the consultation on the draft Bill. The assessors will continue to assist Commissioners in the local execution of their functions.

### **Alternative approaches**

#### *Do nothing*

32. This would result in the Crofters Commission continuing in its current form with all members being Ministerial appointments. It would continue to have no budget of its own and no powers to spend it in the way it considers to be most appropriate. It was not considered that this approach would address the issues identified in the Shucksmith report (see paragraph 24).

#### *Abolish the Crofters Commission and replace with a Federation of Crofting Boards*

33. The CoIoC recommended that the Crofters Commission be wound up and replaced with a Federation of Crofting Boards. However, this was rejected by the Government as the Crofters Commission is considered to have valuable experience and knowledge of crofting, expertise which the Government believes should be preserved. Furthermore, there was concern that the establishment of separate Crofting Boards would be too bureaucratic and, depending on the constitution of the Boards, result in an increased number of public bodies.

#### *Area Committees proposal*

34. The principles behind the CoIoC's proposals of a more democratic, accountable and responsive Commission were accepted in the Government's response to their final report. Consequently, the draft Crofting Reform Bill proposed the introduction of Area Committees which would have built upon the current assessors' network. The draft Bill proposed the establishment of six Area Committees with a maximum of 12 assessors on each. This proposal would have ensured that crofters would be in the majority on both Area Committees and the Commission itself. The analysis of the consultation responses showed that support for this proposal was mixed. Some questioned the likely effectiveness of Area Committees due to geographical and time constraints and others were concerned that the proposal would result in unfair and unjust decisions being taken as a consequence of favouritism, local disputes and

differing policies. Furthermore, there were concerns that the proposal would increase bureaucracy and costs. Some crofters stated their preference for a centralised regulator over local representation. As a result of this feedback, this proposal was not included in the final Bill.

#### *Election of members from the assessors' network*

35. Another option that has been considered is to elect Commissioners from the network of assessors. Some consider the assessors' network to be democratically representative of the crofting community and that they should have a role in either standing for the position of Commissioner or appointing Commissioners. The assessors' network would continue to provide the Commission with advice, but would not be responsible for taking regulatory decisions. At present, assessors are Commission appointments and the extent to which they are elected or are representative of the crofters in any given area is variable. In some areas the Commission has been unable to appoint an assessor or has appointed the only person willing to be an assessor. It was considered that a far more reliable means of ensuring a democratic and accountable Commission is to provide for direct elections so that every registered crofter is able to express a view on who should sit on the Commission. The option to elect members from the assessors' network was considered to be close to the proposal for Area Committees of assessors, with the main difference being that the Committee would not be responsible for taking regulatory decisions for their area.

## **PART 2: THE CROFTING REGISTER**

### **Policy proposals**

36. The purpose of Part 2 of the Bill is to establish a map-based Crofting Register that will:

- provide crofters with confidence and legal certainty over the extent of, and interests in, their croft;
- better support the successful administration of crofting regulation by the Commission.

37. The Bill gives the Keeper of the Registers of Scotland (RoS) responsibility for establishing and maintaining a Crofting Register. Information will be captured onto the register incrementally through identified regulatory triggers which are considered to have a significant impact on the extent of, and interests in, the croft. This includes changes in the ownership or tenancy of the croft or changes that would affect the boundaries of a croft. It will also be possible for a crofter or a landowner to voluntarily register a croft on the new register.

38. The general process for a first application to register a croft (other than a new croft) on the new register is outlined in Annex A (note that some parts of the process (e.g. the initial issuing of a map by RoS) are not specifically provided for in the Bill but merely reflect how the process is expected to work in practice). In the first instance, RoS will provide a map to the applicant which covers the area in which the croft is located. The croft boundary will then be marked on the map before it is sent, along with the registration form, to the Commission. If the Commission is content with the details in the registration form, they will send the form, map and registration payment to RoS who will provisionally map the croft on the new register. The Commission will write to the landowner and persons with an interest in the croft registration and

they will have six months to appeal to the Land Court against any information held in the provisional registration.

39. Where there is no appeal, the provisional registration will become permanent after 6 months. Where there is an appeal and the appeal is upheld, the provisional registration will be removed or amended following instruction from the Land Court. It is considered that an appeals mechanism is fair and equitable as once permanently registered, the registration will not be open to later challenge. This is important in ensuring confidence in the boundaries of crofts and in ending protracted disputes over boundaries.

40. The following information will be included in the Crofting Register:

- details of the tenant crofter or owner-occupier crofter;
- details of the landlord;
- a map of the croft;
- any contract or agreement made by the crofter by which he is deprived of any right conferred on him under the Crofters (Scotland) Act 1993 (“the 1993 Act”);
- any exclusion of indemnity under 15(4) in respect of the croft;
- such other information as is prescribed by the Scottish Ministers or considered appropriate for inclusion by the Keeper.

41. It is the intention that the Crofting Register will record details of common grazings and any shareholders. This will ensure that all land held in crofting tenure will be captured in the register.

42. RoS operates a cost recovery policy and registrants will be expected to cover the costs of the initial registration and any subsequent amendments to the register. The register will be free for public inspection although a nominal charge will be in place for extracts.

43. The Crofting Commission will need to maintain the current register until such time as it has been completely replaced by the new register. There are other details recorded in the current register that will not be recorded on the new register that the Commission still needs to record in order to administer crofting effectively (for example capturing information regarding any regulatory decisions it has taken). Therefore, it will be important for the Commission to retain an administrative record of each croft and decisions taken in respect of that croft. However, core information on the extent of, and interests in, a croft will be recorded on the new Crofting Register. Once the Crofting Register is complete, it will be necessary to repeal the provisions relating to the current register.

## **Alternative approaches**

### *Do nothing*

44. The current Register of Crofts does not include maps or contain information on the boundaries of crofts. Furthermore, it is not considered to be completely up-to-date, partly as a consequence of a failure to notify the Commission of changes, particularly changes in owner-

occupation. It is considered that no change would result in the continued deterioration of the current register and no resolution to disputes on boundaries.

#### *Update existing Register of Crofts*

45. An alternative option was that the Crofters Commission should continue to have responsibility for maintaining the Register of Crofts. The Commission would be required to bring the register up-to-date and map croft boundaries. The Government agreed with the CoIoC that RoS were the appropriate agency for registering property interests given their expertise and experience in operating other property registers. Furthermore, in order to add value it was considered important to ensure that the register provided greater legal certainty over the interests and extent in a croft, which would be achieved through a register that was more akin to the Land Register than the current administrative Register of Crofts. This would provide greater confidence for those with an interest in croft land and would help to end boundary disputes. It was not considered that updating the existing Register of Crofts to include maps of crofts would achieve the same effect and would, therefore, not add any value to the existing register.

#### *New Crofting Register established and paid for in full by Government*

46. The CoIoC recommended that information in the current Register of Crofts should be assessed for accuracy and that a transition plan should be put into place to update the information before transferring responsibility for the register to the RoS. This option was ruled out for two main reasons. Firstly, the costs of taking forward this option were considered to be prohibitive. In addition to the anticipated costs associated with the establishment of a new register of £1.5 million for capital costs, and £380,000 for mapping common grazings, there would be an additional cost of between £1.4 million and £2.3 million to pay for the cost of registering crofts. The total cost of this option to Government could therefore be in excess of £4 million. Secondly, it was considered important to have in place a robust mechanism for resolving any disputes over the boundaries of a croft given the finality of a permanent registration on the proposed new Crofting Register.

### **PART 3: DUTIES OF CROFTERS AND OWNER-OCCUPIER CROFTERS**

#### **Policy proposals**

47. The purpose of the provisions to define duties for owner-occupier and tenant crofters are to:

- ensure that owner-occupier and tenant crofters are treated the same; and
- enable the Crofting Commission to take effective action against absenteeism and neglect.

48. Tenant crofters have, under the current legislation, a requirement to be ordinarily resident on, or within 16 kilometres of, the croft. The statutory conditions of their tenure also require them to cultivate the land or put it to purposeful use. At present, the Commission has a discretionary power to take action to address absenteeism and the enforcement of the statutory conditions is primarily a matter for the landlord, although the Commission does have the ability to take action where a complaint has been made and the consent of the landlord has been secured. Crofting law does not currently define owner-occupiers and they are currently

considered to be landlords of vacant crofts who may be asked to submit letting proposals to the Crofting Commission at any time. In one way, this can be seen to discriminate against owner-occupier crofters who, under current legislation, may have access to their croft lands withdrawn even if they are resident and cultivating the land or putting it to purposeful use, although this is not the policy of the Commission.

49. In order to distinguish between tenant crofters and owner-occupier crofters a robust definition of owner-occupier crofters is required; and that definition should also be capable of distinguishing between a landowner who is an active crofter and one who acts primarily as a landlord to a tenant of his croft. The Bill provides such a definition and ensures that owner-occupier crofters who comply with the statutory duties of residence and working the land will enjoy the same security as tenant crofters.

50. Having defined owner-occupier crofters, the Bill places a clear duty on them and tenant crofters to reside on, or within 16km of, their croft and to cultivate the croft or put it to purposeful use. It also places a clear duty on the reformed Commission to take enforcement action where these duties are not being met. Due to the differences in the rights of tenant crofters and owner-occupier crofters the processes for enforcement are slightly different.

51. In general, a tenant crofter currently faces the risk of having his tenancy terminated for a breach of statutory requirements, which may result in the croft being considered vacant. This would, in turn, trigger the requirement for the landowner to submit proposals for re-letting the croft. The Bill provides that, whilst there is no tenancy to terminate in respect of an owner-occupier, if an owner-occupier crofter fails to meet the duties being introduced, the croft will be effectively declared vacant and the owner-occupier will ultimately face the risk of being required to let to a tenant crofter. The Bill provides for the owner-occupier crofter of a vacant croft to submit letting proposals to the Crofting Commission; and where these prove unsuitable the Commission will invite other applications for tenancy of the croft.

52. Also, tenant crofters are required to seek the consent of the Crofting Commission before they can divide the croft. The Bill provides that owner-occupier crofters must also seek such consent before they can divide the croft, and if consent is withheld, any transfer of ownership will be null and void.

53. The Bill also provides for the Crofting Commission to have the power to divide crofts where the duties listed in new section 26A(1) are not being complied with. This will enable the Commission to take more effective action where crofts are not being worked or where crofters are absent; and free up unworked crofts for new entrants into crofting. For example, where there is a resident crofter who is unable to work the land and is unwilling to sublet the croft, the Commission will be able to divide the croft and let the bareland croft to someone who will use the land whilst, at the same time, enabling the resident to remain in his home. In such a situation, the Commission will be able to terminate the tenancy of the newly created bareland croft and invite the landowner to submit proposals for letting the newly created bareland croft. The Bill provides for a right of appeal to the Land Court against any decision by the Commission to divide a croft at its own initiative (as part of an appeal against action taken under section 26H or 26J).

54. Tenant crofters are currently able to voluntarily sublet a croft to another person for a period not exceeding 10 years, if they obtain the consent of the Crofting Commission. The Bill provides for that ability to be mirrored by permitting owner-occupiers to let their croft, with the lessee not having the status and rights of a tenant crofter. This offers an additional way for prospective crofters to acquire land to work, while offering owner-occupiers an option to grant a short-term tenancy over the land they own, without the risks associated with giving the lessee the full rights of a crofter.

55. The Bill instructs the Crofting Commission to take action to address absenteeism unless there is good reason not to. The introduction of this requirement attempts to remedy absenteeism by agreement, failing which action must be taken to resolve the issue.

56. The Bill provides for action against absenteeism to be flexible and fair, by enabling crofters to apply to the Crofting Commission for approval to be absent. The Commission will be able to consent where they consider there to be a good reason for the crofter to be non-resident on, or within 16 kilometres of, the croft for a specified period of time and subject to conditions placed by the Commission on that absence. The Bill also provides mechanisms for crofters to apply to the Commission for an extension to a consent to be absent, and for the conditions placed on a consent to be varied. There is no prescriptive list of “good reasons”, as the expectation is that the Commission, once elected and in office, will publish the reasons it considers to be appropriate for permitting absence.

57. The Bill provides that where the Crofting Commission considers a crofter (tenant or owner-occupier) to be absent, it is required to invite representations from the crofter regarding the suspected absenteeism. If the Commission decides, having considered any representations received, that the residency duty is not being complied with, it must write to the absentee crofter and invite them to either submit an application to be absent, an application for consent to sub-let or provide a written commitment that they will meet the residency requirement. Where the crofter fails to respond or to fulfil the commitment given to meet the residency requirement, the Commission is required to take the appropriate absentee action.

58. Provision has also been made to amend family assignation provisions in the 1993 Act to the effect that this will not be automatic where the proposed assignee or transferee will be absent. To ensure that the problem of absenteeism is not passed from one crofter to another, the Bill requires the agreement of the Crofting Commission to any proposed assignation. It is considered to be iniquitous that non-family and family assignations should be treated differently and that policy considerations should be the determining factor in any decision.

59. The Bill also removes the right of landlords to object to a bequest. At present, the 1993 Act allows for landlords to object only where the legatee is a non-family member. This also appears to be iniquitous and so the right for the landlord to object to any bequest has been removed.

60. In addition to the requirement to be resident on, or within 16 kilometres of, the croft, one of the statutory conditions is that crofters must cultivate their land or put it to purposeful use. Currently, the Crofters Commission does not have the power to take direct action against a crofter who fails to work the land unless it receives a complaint regarding breach of statutory

conditions or receives the consent of the landlord to take action in respect of misuse or neglect. The Bill provides that the Commission can take action where land is not being put to productive use without requiring a complaint to have been made or requiring the consent of the landlord.

61. The Bill stipulates that where the Crofting Commission considers that a croft that is being misused, is being neglected or is not being put to any purposeful use, it is required to invite representations from the tenant or owner-occupier crofter. If the Commission decides, having considered any representations received, that the duty is not being complied with it must give written notice to the crofter of this determination. The crofter will be required to submit plans for cultivating the croft or putting the croft to some purposeful use within one month of receiving notification from the Commission. Alternatively, the crofter may make an application to sublet the croft to a lessee who will put the croft to productive use. Any plans require Commission approval and include actions against which progress could be monitored. In the event that a crofter fails to produce a plan or to implement the plan, the Commission will take action. For tenant crofters, it might ultimately make an order terminating the tenancy and declaring the croft to be vacant. Landowners will then be invited to submit proposals for re-letting the croft. For owner-occupiers, the croft will be declared as being vacant and the owner-occupier crofter will be invited to submit proposals for letting the croft.

62. A crofter can currently opt out of cultivating their croft or from putting it to purposeful use if they are conserving the natural beauty of the locality of the croft or the flora and fauna of a croft. The Bill provides for that to continue by allowing tenant crofters and owner-occupier crofters to refrain from an activity for the purpose of conserving the flora and fauna of a locality and conserving the natural beauty of the croft. However, the Bill requires that the Crofting Commission must take action if the crofter is unable to demonstrate that such activity is properly planned and managed.

### **Alternative approaches**

#### *Do nothing*

63. Known absenteeism is currently running at 10% of all crofts and it is considered that a significant number of crofts are not being put to any productive use. Doing nothing would fail to address this issue and would hinder the Government's objective of delivering sustainable economic growth through providing opportunities for persons wanting to live on and work crofts.

#### *Use the current legislation to regulate absenteeism, neglect and misuse more rigorously*

64. While current legislation allows the Crofters Commission to act on absenteeism and neglect, it is currently limited in what it can do to take action on neglect and misuse. At present the power for the Commission to take action in respect of absenteeism is discretionary and it can only act on misuse or neglect if it receives a complaint or gains the approval of the landowner.

65. It is considered that the current powers are not sufficiently rigorous to ensure that the duties placed on crofters to reside on or near the croft and to put the land to productive use are complied with. It is also considered that better enforcement of these duties would be achieved through providing a clear duty on the Commission to address cases of absenteeism and neglect.

## **PART 4: FURTHER AMENDMENTS OF THE 1993 ACT**

### **Policy proposals: summary**

66. The purpose of the provisions to amend the Crofters (Scotland) Act 1993 is to:
- tackle the speculative value of croft land for developments that are not considered to be in the interests of crofting, the crofting community and the wider public, the high value of which is considered to result largely from the apparent demand for sites for second homes. This will have the effect of making crofts more affordable for those wishing to take up crofting; and
  - simplify and make more efficient the processes for obtaining Commission consent to applications, with replacement provisions for approval of enlargement of crofts.

### **Disposal of land, resumption and decrofting**

#### ***Policy proposals***

67. The CoIoC identified that the interests of crofting, and the associated public benefits derived from crofting, were being threatened through speculation on croft land for developments where the individuals were the principal beneficiary rather than the wider community. This, in turn, could result in an over-inflation of the market value of croft land, resulting in prices for crofts that potential crofters could not afford. In particular, the development value of croft land was considered to be inflated by the potential use of housing for second homes, which has resulted in an incentive for crofters to take land out of crofting tenure, thereby reducing the link between a croft house and croft, and steadily eroding the amount of land in crofting tenure. Consequently, the CoIoC proposed an occupancy burden on all houses in crofting tenure and on houses built on land formerly held in crofting tenure.

68. In its response, the Government ruled out a burden for croft houses as it considered that better enforcement of existing residency requirements would address absenteeism in crofts. However, the consultation paper on the draft Bill provided for an occupancy requirement on owners of housing built on land taken out of crofting tenure after 12 May 2008 to ensure that such property was used as a main residence, requiring the resident to live in the property a minimum of 183 days per year. The date of 12 May 2008 corresponded with the publication of the CoIoC report and was necessary to prevent a rush of decrofting applications following the publication of the report. These provisions were removed from the Bill following widespread criticism during consultation and alternative suggestions were considered on how to address speculation on croft land. In considering responses to the draft Bill consultation, the Government decided that two further options for addressing speculation on croft land, as suggested by, for example, the Scottish Crofting Foundation, should be included in the Bill for introduction to Parliament. These proposals are detailed in the following paragraphs.

69. Firstly, while the Crofters Commission can already decide to approve or reject an application to decroft land under sections 24 and 25 of the 1993 Act, Part 5 of the Bill is designed to strengthen both the ability of the Commission to reject applications for decrofting and the ability of the Scottish Land Court to reject applications to resume land. The Bill therefore provides further grounds for the Commission and the Land Court to refuse applications to decroft or resume land from crofting tenure. In particular, provision is made to enable

applications to be refused even where planning consent has already been granted. This addresses the present difficulty which has arisen from the Land Court's ruling in *Mr & Mrs John Inkster & Mr & Mrs Michael Inkster v Crofters Commission* (SLC/168/04) that "it is not appropriate to use a control designed to protect crofting interests for the purpose of acting as a second planning authority". The consequence of this ruling is that the Commission feels unable to refuse a decrofting application where planning consent has already been granted.

70. Many crofters are currently unhappy with the Commission for failing to protect the interests of crofting by allowing decrofting for the purpose of developments that are not considered to be in the interests of crofting or the crofting community. Local authorities have stated that applications to decroft are a matter for the Crofters Commission, but the Commission considers that the rulings of the Land Court have left it with no choice.

71. The Bill also provides for the construction of additional grounds for rejecting applications to decroft, such as that it would affect the sustainability of crofting in an area and the long term sustainability of associated landscape and environmental benefits, or it could be demonstrated that approving the application would result in detriment to crofting, croft land or to the crofting community in that area. The legislation also clarifies that it is still possible for a decrofting application to be refused, even where planning consent has been given. Whilst the refusal to decroft will not prevent a person from executing the planning consent, the effect of these provisions is expected to result in less speculation on croft land for development as the Commission might consider that the proposal to decroft will harm crofting and the wider public benefits associated with crofting.

72. This will provide a platform from which the new Commission could be more pro-active in protecting crofting and the wider public benefits associated with crofting such as landscape and environmental benefits. While the planning system already takes decisions on a public interest basis it is considered that, in some cases, the importance of crofting and the associated public benefits associated with crofting are not fully taken into account. Two high profile cases in recent times have been developments in Taynuilt and Ocraboquoy.

73. The Crofters Commission is now a statutory consultee for local authority strategic development plans and this should help to ensure that fuller consideration is given to developments proposed for croft land. However, it is considered that the reformed Commission should be able to refuse an application to decroft even where planning consent has been granted. Given its experience and interest in crofting, it is considered that the Crofters Commission may be better placed to consider the impact on crofting, and the public benefits derived from crofting, associated with any application to remove land from crofting tenure as a consequence of a proposed development. To date, much of the consideration surrounding the interests of crofting has focused on the agricultural value of the land as opposed to the intrinsic value of the land from landscape and environmental benefits.

74. Secondly, the Bill provides for extension of the period in section 14(3) of the 1993 Act during which the proceeds from subsequent sale of decrofted land have to be shared 50-50 between the crofter and the previous landowner, from 5 years to 10 years. This will apply equally to community landlords as well as private landlords. It is expected that this will discourage the decrofting of land for speculative developments as an individual is likely to want

to secure the financial benefits of any subsequent sale before 10 years has elapsed. This only applies to the onward sale to persons outwith the family as opposed to within the family so this measure will not impact on those seeking to develop land for themselves or their families. It should also help to focus the minds of developers on non-croft land as a priority development area, given the financial consequences of developing on croft land.

75. Increasing the grounds for the Commission to reject decrofting applications will help to suppress the speculative demand for croft land for developments which might be considered to damage crofting and the benefits crofting provides. Supplementing this with an increase in the period for which crofters have to share the profits associated with the onward sale of former croft land with the landowner from which it was acquired will also help to reduce the attractiveness of developing croft land. While these proposals did not feature in the draft Bill for consultation, they were put forward during the consultation as possible alternatives to the occupancy requirement. The Government has accepted the arguments for action to tackle speculation on croft land and has sought the views of key stakeholders on these provisions before including them in the Bill as introduced to Parliament.

76. The Bill also amends sections 11 and 23 of the 1993 Act to require a landlord to submit proposals for re-letting the croft where the Commission declares a croft vacant following intestacy action. Furthermore, the Bill provides that the Commission need not consider a decrofting application from the landlord if it has already requested re-letting proposals from that landlord. The purpose of these provisions is to allow the Commission to take effective action to re-let a croft once the croft has been declared vacant.

### *Alternative approaches*

#### *Occupancy requirement proposal*

77. The draft Bill proposed the introduction of an occupancy requirement that would affect houses built on land taken out of crofting tenure after 12 May 2008 and would oblige the homeowner to ensure the property was used as a main residence for 183 days or more a year, unless one of the exceptions to the proposal was met, such as time spent away from the property for medical treatment. It was considered that the occupancy requirement would have the effect of suppressing speculative demand on croft land for the purpose of building houses that would not be used as a permanent residence. In turn, this might have helped to keep crofts available and affordable to persons interested in crofting. It was proposed that local authorities would have responsibility for enforcing the occupancy requirement and they would have discretion as to whether to suspend or extinguish the requirement or not, depending on housing pressures within their areas. The sanction for failing to meet the requirement would have been a fine of up to £5,000.

78. The occupancy requirement proved to be the most contentious provision within the draft Bill. The majority of respondents considered the proposal to be unfair, unworkable and draconian. Furthermore, discussions and written feedback from local authorities demonstrated that they had significant concerns over the proposals, particularly in relation to costs, resources and difficulties in enforcing and policing the requirement. As a result, the Government opted to drop this provision from the Bill.

*Commission involvement in every planning application pertaining to croft land*

79. This option would require local authorities to consult the Crofting Commission on every planning application pertaining to croft land. The Crofters Commission has recently become a statutory consultee on draft local development plans. However, extending this statutory role to cover all planning applications in respect of croft land would ensure that the Commission is actively involved in the consideration of each planning application. By adding an additional question to the planning application in crofting areas, it would be possible to determine what applications needed to go to the Commission for comment. This approach would ensure that planning officers receive the considered view of the Commission on the impact on crofting and associated benefits should the application be successful. However, the Government rejected this option as local authorities have made efforts to streamline the process for considering planning applications and this option would reintroduce an additional level of bureaucracy. Furthermore, this option could result in a significant administrative undertaking for the Commission.

*Restrict the number of houses built on croft land or the number of decrofting applications*

80. A further option would be to restrict the number of houses built on a croft or on land taken from that croft or to limit the number of decrofting applications a crofter may submit. Whilst this would address the issue of individual crofts being divided into a number of development plots, this approach was considered to be too inflexible as it does not allow for each case to be considered individually and an assessment to be made on the impact it would have for crofting and the benefits derived from crofting. It is not certain how effective this option would be at addressing speculation on croft land and, therefore, the Government rejected this option.

**Commission's approval and consent provisions**

***Policy proposals***

81. The Bill proposes changes to the consent and approval provisions that will simplify the process by which the Crofters Commission makes decisions on regulatory applications. The 1993 Act presently contains various sections relating to consent or approval of the Commission and it is proposed that a common procedure is applied to this process so far as possible. This should achieve consistency in approach for all involved and should enable the Commission to consider each regulatory application rather than the restrictive approach currently in place, which only allows the Commission to intervene in certain circumstances. A change to the requirement for approval for the enlargement of crofts is also included in this part of the Bill to ensure that the Commission is informed of any such enlargement and the new Register is updated accordingly, irrespective of the resultant size of the croft. There is presently no requirement in the 1993 Act for a landlord or crofter to inform the Commission of any enlargement to a croft which does not result in the croft exceeding 30 hectares.

***Alternative approaches***

82. No alternative approaches have been considered in this area.

## **PART 5: GENERAL AND MISCELLANEOUS PROVISIONS**

83. This Part of the Bill mainly deals with certain general matters such as regulations and orders, ancillary provisions, minor and consequential amendments and repeals, interpretation and commencement. However, there are two areas that merit comment.

### **Pre-consolidation modification of enactments relating to crofting**

84. Crofting law is notoriously complex and it was recommended by the Committee of Inquiry on Crofting that steps should be taken to clarify and simplify it. The Government acknowledged this in its response to the final report of the Committee of Inquiry and agreed that new legislation will be required in future to replace, simplify and clarify the accumulated laws that set the framework for crofting today, probably in the form of a consolidation Bill. The power to modify enactments relating to crofting allows the Scottish Ministers to modify crofting law to assist in the consolidation of crofting law.

85. No alternative approaches have been considered in this area.

### **Transfer of responsibility for small landholdings**

86. Schedule 2 of the Bill, as introduced by Part 5 of the Bill, contains minor and consequential modifications. One area of particular note is the proposal to give the Crofting Commission regulatory powers for small landholdings in any areas designated by order as new crofting areas. The policy wish is that small landholders should be able to convert their holdings to crofts within the new designated areas as long as all parts of the holding come within the Small Landholders Acts. Where two or more landhold units have been amalgamated, or a landhold unit joined with a larger unit the resultant holding is deemed to be a larger agricultural unit which renders them ineligible for conversion to crofts, however the policy is to accept applications even if their landhold holding is comprised within a larger agricultural unit. Amalgamation and restructuring was a feature of the 20<sup>th</sup> century to make units more viable and therefore it is thought that very few landholdings will now be in their original state and thus meet the eligibility criteria for conversion to crofting tenure.

87. Small landholdings in Scotland have previously been regulated by the Scottish Ministers as the successor to the Board of Agriculture, with the most frequent regulatory action being in relation to vacant holdings, and similar to decrofting procedures. Small landholdings are similar in nature to crofts and, indeed, the Crofters (Scotland) Act 1955 returned such holdings in the crofting counties to the status of crofts and brought them under the regulatory sphere of the Commission. While, after 1955, no small landholdings had a legal basis in the crofting counties, it is possible that not all have been registered as crofts.

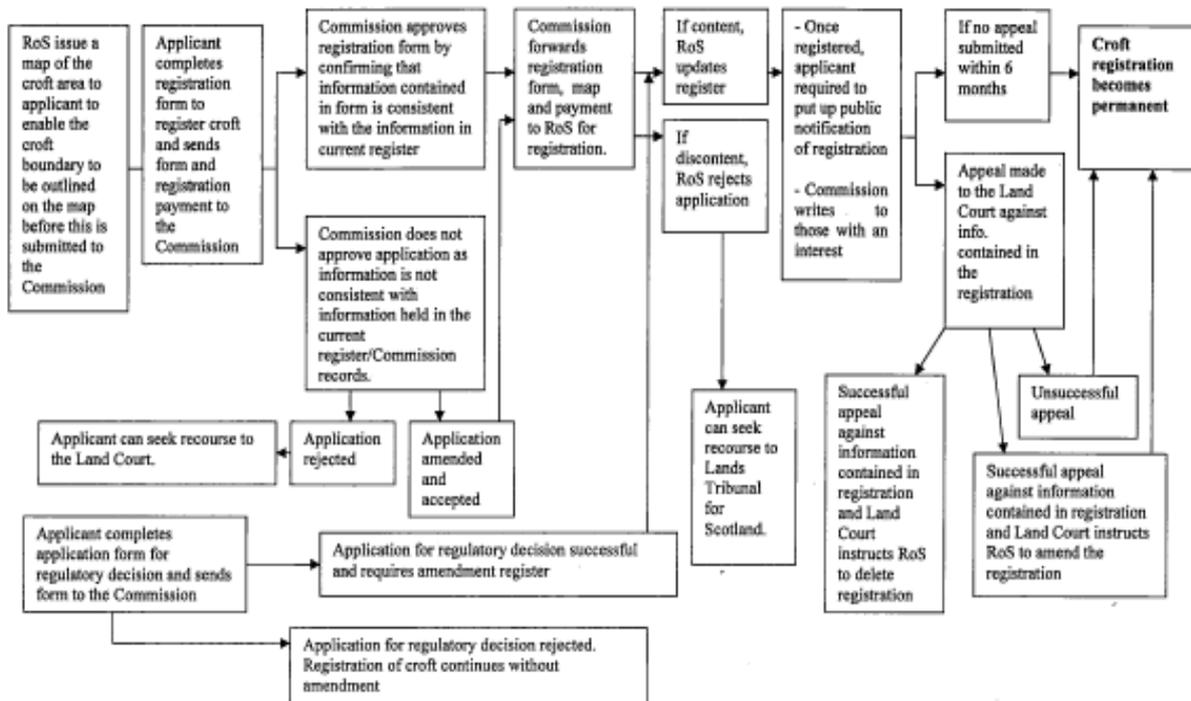
88. Schedule 2 of the Bill amends the Small Landholders (Scotland) Act 1911 to provide powers to the Commission to, in any areas designated by order, regulate vacant holdings; regulate construction of additional dwellings; regulate merger and amalgamation of holdings; and suggest model forms of agreements. This gets round the restriction of the 1993 Act limiting powers of the Commission to the seven designated Crofting Counties.

89. No alternative approaches have been considered in this area.

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

90. It is not considered that the Bill will have any impact on equal opportunities, human rights or on local government. The Equality and Human Rights Commission and the Scottish Council for Voluntary Organisations received the consultation document, and neither suggested the proposals in the draft Bill would have a differential or discriminatory impact against any persons defined by age. An Equality Impact Assessment of the Bill has been published on the Government’s website and the proposal for an occupancy requirement, which would have had an effect on local authorities, has been removed from the Bill. Crofting features on the majority of Scottish islands but it is not considered that the Bill will have a differential impact between island and mainland communities. It is considered that the Bill will have a positive effect on the sustainable development of the Crofting Counties and proposed new crofting areas through strengthening the enforcement of the duties of crofters and owner-occupiers to reside on, or within, 16km of the croft and to put the land to productive use. It is considered that this will deliver improvements to the social, economic and environmental development of these areas.

**ANNEX A: FLOW CHART DEPICTING FIRST REGISTRATION IN THE CROFTING REGISTER**





*This document relates to the Crofting Reform (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 9 December 2009*

# **CROFTING REFORM (SCOTLAND) BILL**

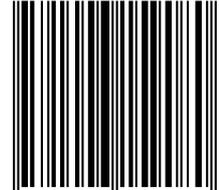
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