



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

Crofting Reform (Scotland) Bill at Stage 1

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The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 2 and 23 February 2010, the Subordinate Legislation Committee considered the delegated powers provisions in the Crofting Reform (Scotland) Bill at Stage 1. The Committee submits this report to the Rural Affairs and Environment Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

OVERVIEW OF THE BILL

2. The Crofting Reform (Scotland) Bill (“the Bill”) was introduced in the Parliament on 9 December 2009 by the Cabinet Secretary for Rural Affairs and the Environment, Richard Lochhead MSP.

3. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).¹

4. Correspondence between the Scottish Government and the Committee is reproduced in the Annexe.

5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in sections 4(4), 5(3), 6(8), 11(6), 16(2), 20(3), 34(1), 37(2) and schedule 1, paragraph 3(4).

Delegated powers provisions

Section 2(2) - power to confer functions on, remove functions from or otherwise modify functions of the Crofting Commission

6. Section 2(1) of the Bill substitutes a new set of general functions for the Crofting Commission (“the Commission”), replacing those currently set out in section 1(2) of the Crofters (Scotland) Act 1993 (“the 1993 Act”). Section 2(2) of the Bill adds a new section 2A to the 1993 Act. New section 2A(1) provides that

¹ Crofting Reform (Scotland) Bill. Delegated Powers Memorandum. Available at: <http://www.scottish.parliament.uk/s3/bills/35-CroftReform/b35s3-introd-dpm.pdf>

the Scottish Ministers may, by order, confer functions on, remove functions from, and otherwise modify functions of, the Commission. New section 2A(2) provides that the Scottish Ministers may make an order under section 2A(1) only where they consider it appropriate to do so, to ensure that the Commission carries out its functions efficiently and effectively. New section 2A(3) provides that an order under section 2A(1) may (a) confer on the Commission a function exercisable under the Act by the Scottish Ministers (other than a function to make regulations or orders) and (b) modify any enactment (including this Act).

7. This power is particularly wide and is almost identical to the power in section 10 of the Public Services Reform (Scotland) Bill (“the PSR Bill”), which provides that the Scottish Ministers may, by order, make any provision which they consider would improve the exercise of public functions, having regard to efficiency, effectiveness and economy. “Public functions” are functions of the persons, bodies and office holders listed in schedule 3 to the PSR Bill. The Crofters Commission is listed in schedule 3. The provision which may be made in exercise of the power includes the modification, conferring and abolition of any function.

8. Given that an almost identical power is in section 10(1) of the PSR Bill, the Committee questioned the need for the power in section 2(2) and the difference in substance between the two powers.

9. The Committee acknowledges that the power in section 2(2) is narrower in scope than the power in section 10(1) of the PSR Bill, as the Government suggests in its response. However, no explanation is given for the need for the power in section 2(2), given the power in section 10(1) of the PSR Bill, nor is there an indication of the difference in substance between the two powers.

10. The Committee notes that the Scottish Government will reflect on the progress of the PSR Bill and consider the implications of that Bill upon the proposed delegated power in section 2(2) of this Bill. The Committee assumes that the power in section 2(2) is a “back stop” in case the power in section 10(1) of the PSR Bill is not passed by the Parliament. However, if the proposed power in section 10(1) of the PSR Bill is enacted in its present form, the Committee recommends that the Scottish Government reconsider the need for the power in this Bill.

11. The Committee acknowledges that section 10(1) of the PSR Bill may not be enacted in its present form. Consistent with the position the Committee adopted regarding that section, the Committee recommends that, in the event that the power under section 2(2) is retained in the Bill, any orders under section 2(2) should be subject to super-affirmative procedure. This would require a proposed draft order to be laid before the Parliament together with the relevant explanatory document for a prescribed period. This would permit public consultation on the terms of the proposed order prior to the Scottish Ministers presenting a draft order in final form to the Parliament for approval.

12. The Committee also recommends that Ministers should be required to consider comments received and provide an explanation to the Parliament as to the extent to which such comments have been addressed in the final order.

13. **The Committee considers that the power in section 2(2) is unnecessary, given the proposed power in section 10(1) of the Public Services Reform (Scotland) Bill, and recommends that the Scottish Government should reconsider the need for this power.**

14. **The Committee recommends that, in the event that the power under section 2(2) is retained in the Bill, any orders under section 2(2) (new section 2A(1) of the 1993 Act) should be subject to super-affirmative procedure, requiring a proposed draft order to be laid before the Parliament together with the relevant explanatory document for a prescribed period. This would permit public consultation on the terms of the proposed order prior to the Scottish Ministers presenting a draft order in final form to the Parliament for approval. The Committee recommends that Ministers should also be required to consider comments received and provide an explanation to the Parliament as to the extent to which such comments have been addressed in the final order.**

15. **The Committee will consider the power again after Stage 2.**

Section 15(5) – power to prescribe circumstances when there is to be no entitlement to indemnity from the Keeper in relation to the Crofting Register

16. Section 15(1) provides that a person who suffers loss in consequence of matters specified in section 15(2) is to be indemnified by the Keeper of the Registers of Scotland (“the Keeper”) in respect of that loss. The matters specified include a mistake in the Register made by the Keeper and the loss or destruction of any document while lodged with the Keeper. There are two significant qualifications to the right to an indemnity. The first is in section 15(4) which provides that the Keeper may, on the registration of a croft, exclude in whole or in part any right to indemnity in respect of anything appearing in, or omitted from, the title sheet of that croft. The second is in section 15(5), which provides that the Scottish Ministers may, by order, prescribe circumstances in which there is to be no entitlement to indemnity under section 15.

17. The Committee did not accept that it was not possible to list circumstances in which a person is not to be entitled to an indemnity. Section 12(1) of the Land Registration (Scotland) Act 1979 (“the 1979 Act”) provides for circumstances in which a person who suffers loss as a result of errors on the part of the Keeper in relation to the title sheet for a property to be entitled to be indemnified by the Keeper. Section 12(3) provides an extensive and detailed list of circumstances in which there is to be no entitlement to indemnity under section 12. There is no power in section 12 to prescribe, by order, for circumstances where there is to be no indemnity for loss.

18. The DPM (paragraph 26) describes the power as dealing with matters of procedure, although the power deals also with matters of substance, as it deprives someone of a right (specifically an entitlement to an indemnity) to which they are entitled by express provision in primary legislation.

19. The Committee notes the response from the Government and acknowledges that the Crofting Register and the Land Register respectively contain information

which is different in nature, but considers that this is not a material difference of principle. The Committee considers that the underlying principle with respect to the prescription of circumstances in which there is to be no entitlement to indemnity is the same. The Committee is not persuaded that an approach which was considered appropriate (and which appears to have worked) for the Land Register is not appropriate for the Crofting Register.

20. However, the Committee does accept that it may not be possible at this stage to identify or anticipate all the circumstances in which there will be no entitlement to an indemnity. A power to provide for circumstances in which there is to be no entitlement to indemnity could provide the flexibility for further exceptions to be introduced in the future, in the light of operational experience or otherwise. But the Committee does not consider this to be a justification for not setting out in the Bill those circumstances which have already been identified by the Scottish Government as being circumstances in which there is to be no entitlement to an indemnity. The Committee therefore considers that the Scottish Government should be able to identify and to prescribe such circumstances, and that this is not a matter which should be left entirely to future action under subordinate legislation.

21. The Committee therefore—

- **suggests to the lead committee that it pursue the issue of specification in the Bill of those circumstances which have already been identified by the Scottish Government as circumstances in which there is to be no entitlement to indemnity;**
- **accepts the need for a power to provide for additional circumstances in which there is to be no entitlement to an indemnity;**
- **notes the Scottish Government's commitment to review the effect of the exercise of the power and to consider whether affirmative procedure may be more appropriate;**
- **recommends that the power should be made subject to affirmative procedure since it is concerned with substantive rights.**

22. The Committee will consider the power again after Stage 2.

Section 16(1) – power to make rules for the Crofting Register

23. Section 16(1) provides that the Scottish Ministers may, after consulting the Keeper and the Commission, make rules in respect of the matters specified at (a) to (e). These include rules regulating the making up and keeping of the Register (element (a)) and regulating the procedure on application for any registration (element (c)). Element (e) provides that the rules to be made in exercise of this power may concern such other matters as seem to the Scottish Ministers to be necessary or proper in order to give full effect to the purposes of Part 2 of the Bill, which concerns the Crofting Register.

24. The Committee considered that the exercise of the power is not restricted to the administration and mechanics of the Register, as stated in paragraph 30 of the

DPM. Part 2 includes provisions with respect to many substantive matters such as ranking (section 13) and appeals (section 17). It was not clear to the Committee whether the power was intended to be restricted to administrative and procedural matters and, if so, why it is not expressed in terms which restrict its exercise to that extent. Clarification on this issue was sought from the Scottish Government.

25. The Committee accepts that the items referred to in paragraphs (a) to (d) of section 16(1) are administrative or procedural matters. But the issue of concern to the Committee is the fact that the power in paragraph (e) as drafted may extend to matters which go beyond administrative and procedural matters. The Committee must consider the power at its broadest. Its concerns are therefore not addressed by the Government statement that "The exercise of the power is restricted as it is exercisable only when the Scottish Ministers consider that the making of the rules are necessary or proper and may only be exercised after consultation with the Keeper and the Commission". In the Committee's view the requirement for a subjective assessment of what is necessary and proper does not restrict the use of the power to administrative and procedural matters.

26. Given that the intention appears to be to restrict the exercise of the power to administrative and procedural matters, the Committee considers that the power should be expressed in terms which restrict its exercise to that extent.

27. The Committee recommends that, if it is intended that the exercise of the power in paragraph (e) is to be restricted to matters which are administrative or procedural in nature concerning the operation of the Crofting Register, the Scottish Government should amend the power to express it in terms which limit its exercise to this extent. The Committee notes that, at present, the power appears to extend to other matters within Part 2 such as ranking and appeals which are substantive in nature.

28. The Committee will consider the power again after Stage 2.

Schedule 1, Paragraph 2(2)(d) – Power for the Crofting Commission to charge in respect of its functions

29. Paragraph 2(2) provides that the Commission may charge, in respect of such of their functions as may be prescribed by the Scottish Ministers, such reasonable amounts as may be prescribed. The general functions of the Commission are set out in section 2. The Commission also has such other functions as are conferred on it by the Bill or any other enactment (section 2(2)(b)). The functions for which the Commission can charge and the level of charges are to be determined by the Scottish Ministers.

30. The Committee was concerned that there is no requirement for the Scottish Ministers to consult the Commission, the crofting community, landowners, or the public at large in advance of determining which functions are to attract charges, or on the level of charges. The Committee considered it conceivable that the charging regime could enable Scottish Ministers to exercise a considerable degree of de facto control over the Commission's activities through control over its charging regime, which could potentially undermine the independence, or the public perception of independence, of the Commission.

31. The Committee therefore asked the Scottish Government whether it intended to consult in advance of making regulations under this power and whether a requirement to consult could be stipulated in the Bill.

32. The response gave the Committee no indication of the Scottish Government's intentions with respect to consultation. While it understands the need in principle for a power of this nature, the Committee observes that it is entirely at the discretion of the Scottish Ministers to determine in respect of which functions charges should be levied and the level of those charges. The Committee notes that there are no criteria specified to which the Scottish Ministers must have regard in determining which functions are to attract charges. The Committee considers that the financial implications of the charging regime could impact on the independence, or on public perceptions of independence, of the Commission. A provision for consultation may, therefore, be an important consideration. However, the Committee accepts that this is a policy issue and not one on which it may properly express a view.

33. The Committee finds the proposed power acceptable in principle and that it is subject to negative procedure. However, the Committee draws to the attention of the lead committee the absence of any requirement on the Scottish Ministers to consult in advance of the exercise of the power.

Schedule 1, Paragraph 7(1) – power to make provisions for the election of members to the Commission

34. Paragraph 7(1) of schedule 1 provides that the Scottish Ministers may, by regulations, make provision for, or in connection with, the election of members to the Commission. There is no restriction on what the regulations may provide for, but paragraph 7(2) sets out particular matters in relation to which regulations may be made. These include: the voting system to be used for elections; the persons eligible to vote; the frequency and timing of elections; the number of constituencies, and the demarcation of constituency boundaries.

35. The Committee acknowledges that due to their extent, complexity and detail, it may not be appropriate or practicable to set out all such matters in primary legislation. The Committee also accepts that provisions may have to be changed from time to time in the light of operational experience. However, the Committee considers that there are key elements of any system of elections for which, by virtue of their significance or otherwise, primary rather than secondary legislation is more appropriate or necessary. These include the question of franchise – i.e. eligibility to vote – and, if it was proposed that offences should be created, a power to create offences. This issue was raised with the Scottish Government.

36. The Committee agrees with the Scottish Government that subordinate legislation is appropriate for making much of the detailed provision required to support elections. However, the Committee considers that certain elements of what may be required cannot be described as detail, as there are a number of substantive issues which may have to be addressed. These include franchise and provision for offences. While it considers that it is not appropriate to address such issues by means of subordinate legislation, the Committee acknowledges that,

ultimately, this may be a policy matter, given the restricted scope of this form of election.

37. The Committee has on many occasions expressed the view that, if it is intended to create offences in subordinate legislation, an express power to this effect must be contained in the relevant primary legislation. There is no such power in the Bill. The Committee is therefore of the view that the power as currently expressed does not permit the Scottish Ministers to create offences with respect to elections to the Crofting Commission.

38. The Committee suggests to the lead committee that it considers whether key elements of the system for elections (including franchise) should be set out in the Bill, leaving more administrative matters to be addressed in secondary rather than primary legislation. The Committee reports that, in the absence of an express power to create offences in primary legislation, the Scottish Ministers will not be able to create offences in respect of elections under the power in schedule 7, paragraph 7(1).

Section 32(1) – power to make modifications of enactments relating to crofting, or otherwise in connection with the consolidation of the law on crofting

39. The DPM comments on the complexity of crofting law and on the recommendation by the Committee of Inquiry on Crofting that steps should be taken to clarify and simplify it. The DPM explains that the Scottish Government acknowledged this in its response to the Final Report of the Committee of Inquiry and agreed that new legislation would 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.

40. Section 32(1) provides that the Scottish Ministers may, by order, make modifications of enactments relating to crofting law if the Scottish Ministers consider that the modifications would facilitate, or otherwise be desirable in connection with, the consolidation of crofting law. Section 32(2) provides that an order may not be made unless a Bill consolidating the law on crofting has been introduced in the Scottish Parliament. Section 32(3) provides that if an Act resulting from such a Bill is passed, the order comes into force immediately before the commencement of the Act.

41. The Committee notes that the power in section 32(1) is identical to the power in Part 4 of the Interpretation and Legislative Reform (Scotland) Bill (“the ILR Bill”) which has been examined in detail by the Committee. The Committee draws attention to its discussion on Part 4, and its conclusions on the power, at paragraphs 290-293 and 298 of its Stage 1 report². The Committee considers that the effect of the power is to enable changes in respect of policy matters to be made by the Government without full parliamentary scrutiny. The Committee was

² Scottish Parliament Subordinate Legislation Committee. 51st Report 2009: Stage 1 Report on the Interpretation and Legislative Reform (Scotland) Bill. Available at: <http://www.scottish.parliament.uk/s3/committees/subleg/reports-09/sur09-51.htm>

strongly opposed to the Part 4 power and recommended its removal. The Committee is of a similar view with respect to the power proposed here.

42. The Committee notes that the Scottish Government has stated in its response to the Committee's Stage 1 report on the ILR Bill that it will bring forward an amendment at Stage 2 to remove Part 4 from that Bill.

43. The Committee considers that the identical power in clause 32(1) of this Bill should also be removed.

44. The Committee recommends that Part 5 of the Bill should be amended to remove the power of the Scottish Ministers to make pre-consolidation modifications of enactments relating to crofting by order.

Response from Scottish Government

Crofting Reform (Scotland) Bill at Stage 1

Section 2(2) - power to confer functions on, remove functions from, or otherwise modify, functions of the Crofting Commission

The Scottish Government was asked:

Given that section 10(1) of the Public Services Reform (Scotland) Bill contains an almost identical power (albeit one which is more comprehensive in its application), what is the need for the power in section 2(2)?

What is the difference in substance, if any, between the power in section 2(2) and the power in section 10 of the Public Services Reform (Scotland) Bill?

The Scottish Government responded:

The Public Services Reform (Scotland) Bill ("PSR Bill") has not yet been given Royal Assent and is currently being scrutinised by Parliament. The power in section 2(2) of the Crofting Reform Bill is narrower in scope than the power in section 10(1) of the PSR Bill. The section 2(2) power allows the Scottish Ministers, by order subject to affirmative procedure, to add to, remove or modify the Commission's functions. By the inclusion of the Commission in schedule 3 to the PSR Bill, the Scottish Ministers can by order (a) modify, add to, remove, transfer or provide for the delegation of any function of the Commission or (b) amend the constitution of or abolish the Commission. At present, we consider that section 2(2) of the Bill is appropriate to the Commission's circumstances. However, we will reflect upon the Parliamentary progress of the PSR Bill and we will consider the implications of that Bill upon the proposed delegated power in section 2(2) of the Crofting Reform (Scotland) Bill in the context of the Commission's functions at Stage 2.

Section 15(5) – power to prescribe circumstances when there is to be no entitlement to indemnity from the Keeper in relation to the Crofting Register

The Scottish Government was asked:

Given that section 12(3) of the Land Registration (Scotland) Act 1979 provides an extensive and detailed list of circumstances in which there is to be no entitlement to indemnity from the Keeper under section 12 of that Act, the Scottish Government is asked to explain why it is not possible to list in this Bill all the possible circumstances where a person may not be entitled to an indemnity?

Given that it has been possible in section 12(3) of the Land Registration (Scotland) Act 1979 to provide an extensive and detailed list of circumstances in which there is to be no entitlement to indemnity, the Scottish Government is asked why subordinate rather than primary legislation is considered necessary for this purpose?

Given that the exercise of the power will take away substantive rights provided for in the Bill, on what basis does the Scottish Government consider that the power concerns a "point of procedure" (paragraph 26 of the DPM)? Having regard to the substantive effect

of the exercise of the power, does the Scottish Government accept that affirmative procedure would be more appropriate?

The Scottish Government responded:

The Land Registration (Scotland) Act 1979 makes provision about the Land Register, which serves a different function to the proposed Crofting Register. The Crofting Register will contain information of a different nature and, at this point, it is difficult to be certain about the extent to which that information can be guaranteed as accurate until the Crofting Register is in operation.

A power to prescribe circumstances in which there is to be no entitlement to indemnity has been included to provide flexibility if it becomes obvious over time that it is difficult to ascertain the accuracy of certain matters which are to be included on the Register.

The Government will review the effect of the exercise of this power and consider whether the affirmative procedure may be more appropriate in this case.

Section 16(1) – power to make rules for the Crofting Register

The Scottish Government was asked:

Does the Scottish Government intend the power in section 16(1) to be restricted to administrative and procedural (rather than substantive) matters and, if so, why is it not expressed in terms which restrict its exercise to that extent?

The Scottish Government responded:

The items in referred to in paragraphs (a) to (d) of section 16(1) are administrative or procedural matters and, as such, there is no requirement to state this expressly. Paragraph (e) provides that the Scottish Ministers may make rules concerning other matters to give full effect to the purposes of Part 2 of the Bill relating to the Crofting Register. This rule-making power will be used for limited purposes such as ensuring that the Crofting Register operates effectively. The exercise of the power is restricted as it exercisable only when the Scottish Ministers consider that the making of the rules are necessary or proper and may only be exercised after consultation with the Keeper and the Commission.

Schedule 1, Paragraph 2(2)(d) - Power for the Crofting Commission to charge in respect of its functions

The Scottish Government was asked:

Does the Scottish Government intend to consult the Commission, the crofting community and the public at large in advance of making regulations under paragraph 2(2)(d) of schedule 1 and, if so, does the Scottish Government consider that a requirement for consultation could be provided for in the Bill?

The Scottish Government responded:

The Government has not decided whether to consult in advance of making regulations under Paragraph 2(2)(d) of Schedule 1 and wishes to leave this option open.

Schedule 1, Paragraph 7(1) – power to make provisions for the election of members to the Commission

The Scottish Government was asked:

With reference to the power in schedule 1, paragraph 7(1), has the Scottish Government considered whether key elements of the system for elections, including franchise and any provision for offences should be specified in primary legislation?

The Scottish Government responded:

Subordinate legislation is considered appropriate for the kind of detail required to support elections. Making provision in relation to the elections in subordinate legislation rather than primary legislation will provide greater flexibility to change the election system if required in light of experience. Therefore, it is the Government's intention to include the details of elections, including franchise and any provisions for offences, in subordinate legislation. This would provide greater flexibility whilst ensuring a higher level of scrutiny through the use of the affirmative procedure.

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