Views on the Crofting Reform (Scotland) Bill [as introduced] for
The Scottish Parliament's Rural Affairs and Environment Committee

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I will provide my views with reference to the Parts or specific sections of the Bill.

PART 1 – Reorganisation of the Crofters Commission

No Comment.

PART 2 – The Crofting Register

Section 4(b)(i)

Consideration should be given to the burden and cost this provision will put on certain individuals in certain circumstances. For example, if ownership of a Crofting Estate with 100 tenanted crofts on it is being transferred then as part of that conveyancing transaction 100 crofts are going to have to be mapped and registered. It will be a matter of contract between the purchaser and seller as to how this is to be achieved and who will pay for it even if Registers of Scotland expect the purchaser to pay the registration dues. However, it is to be expected that such a burden will be passed to the seller especially insofar as mapping is concerned. This could make the sale of a crofting estate a prohibitively expensive proposition and one that will be very drawn out and neither attractive to the seller or the purchaser. Likewise "whether or not for valuable consideration" means that on the death of an owner of a Crofting Estate, with say 100 tenanted crofts on it, then a transfer to an heir will trigger registration of those 100 crofts at substantial cost, time and trouble to the executry. It does not seem equitable that in such cases the burden of registration of a large number of crofts should fall on one individual in effect meaning that the crofting tenants will not have to deal with registration themselves. In my view section 4(b)(i) should therefore be limited to transfers for valuable consideration only of land on which owner/occupied crofts are situated. If Parliament is insistent on this including tenanted crofts then it should be limited to land on which not more than, say, 5 tenanted crofts are situated.

Section 4(g)(i)

If an entire croft is being resumed why would there need to be a requirement to create a Register entry for land that will no longer be a croft? The words "the croft or" should be deleted. There is, however, also an argument that resumption in any circumstances should not trigger registration. Resumption relates to land taken out of crofting tenure. Why should the removal of an area of land from crofting result in the remainder of the croft being registered?

Comment on First Registration by anyone other than the crofter

The issues that I have already highlighted in respect of sections 4(b)(i) and 4(g)(i) give rise to a general comment: Should registration ever be effected by a transaction that does not directly involve a crofter?

In the case of a transfer of tenanted land by a landlord or resumption by the landlord any registration would not directly involve the crofter. The landlord would be deciding where the croft boundaries were for registration purposes without necessarily having to consult the crofter. Whilst ultimately the crofter would have a right of appeal under section 12 would it not be better for the crofter, who should know the croft boundaries better than anyone, to actually be involved in the registration process? If a crofter is not to be so involved in certain circumstances should those circumstances actually be allowed to give rise to registration?

What is missing from Section 4(3)?

An obvious trigger point to consider would be the grant of an Apportionment under section 52(4) of the Crofters (Scotland) Act 1993 where any land comprising any part of a common grazing has been apportioned for the exclusive use of a crofter. That process involves the land in question being mapped in any event making it ideal for entry in the Crofting Register. In any event, surely, you would want a record of apportionments to appear in the Crofting Register? Indeed the Crofters Commission will hold maps of all apportionments already granted. Could these historical apportionments not simply be transferred to the Crofting Register as part of the proposed mapping of common grazings (it was mentioned at the Future of Crofting Conference in Stornoway on 26 January 2010 that the Scottish Government will pay for the mapping of all common grazings and shareholders interests in it and I assume that the Bill will be amended to reflect this). After all any apportionments will need to be identified in order to determine what the boundaries are of the common grazings remaining.

The Consultation Paper (published in March 2005) on the then Draft Crofting Reform (Scotland) Bill under the heading “Deemed Crofts” stated:-

> “The current legislation provides at section 3(4) and (5) of the 1993 Act that tenanted rights in a common grazing, runrig land and apportionment which are not part of a croft (i.e. they are tenanted separately), should be deemed to be a croft. This wording has allowed confusion as to whether the deemed croft should be entered in the Register of Crofts, thus giving the tenant all the associated rights and duties of a crofter under the current Act.”

The Consultation Paper went on to say:-

> "Section 7 of the draft Bill therefore makes new provisions for recording details of such land or rights in the Register of Crofts."

Section 7 of the draft Bill introduced amendments to section 41 of the 1993 Act. However, I have been unable to see where exactly, either in the Bill as a consultation draft, as introduced, amended or passed the position was actually covered. This point should now be addressed and dealt with once and for all in the latest Draft Crofting Reform (Scotland) Bill.

Section 4(3)(i)

The making of an application for consent to the subletting of a croft under section 27(2) of the 1993 Act should also trigger first registration.

Section 4 - Make first registration compulsory for all crofters?

Why not radically alter section 4 and set out to achieve a full, complete and authoritative Crofting Register within say 5 years (maybe 10 years) with a system of compulsory registration based on returns to be submitted by each party holding a crofting interest?

Section 5 - Registration of events affecting registered crofts

Section 5(2)(k)

The granting of consent to the subletting of a croft under section 27(2) of the 1993 Act should also be registered.

Section 6 – Application for Registration

Section 6(2)(c) states that an application for first registration should be submitted 'at the same time as' a step mentioned in section 4(3) is taken. However, section 6(3)(b) states that an application for registration in respect of an event affecting a registered croft is to be submitted 'as soon as reasonably practicable after' a step mentioned in section 5(2). I assume that the reason for this is to ensure first registration whether or not an application that induces it is actually granted whereas a subsequent registration is only going to happen if the event in question actually happens. However, rather than create a two stage process for the latter would it not make more sense for any application made to the Crofting Commission under section 5(2) to include an application for registration in the Crofting Register in the event of the 'step' in question being taken? Any registration fee involved could be paid up front and refunded if the application is not granted. The benefit of this would be to facilitate registration of the event promptly after it happens and avoid the possibility of a delay in or non registration of an event which should be registered. It would cut down the administration involved for both the Crofting Commission and the crofter applicant.

Section 6(6)(b)

Whilst a practical matter and not one that needs specification in the Bill it is hoped that the Crofting Commission and Registers of Scotland will work together to ensure that payment of any applications submitted by solicitors can be dealt with via the Registers of Scotland existing FAS system and by direct debit.

Section 6(8)

Surely ownership is transferred for the purposes of subsections (2)(b) and (3)(a) on registration of the transfer in the Land Register of Scotland or General Register of Sasines (which could still happen in the case of a transfer that is not for valuable consideration of land that has not yet been registered in the Land Register)? Is it not simply a case of stating this obvious fact rather than leaving it for the Scottish Ministers to make provision by regulations? The position would, in any event, require to be made clear as soon as Part 2 comes into force.

Section 7 – Acceptance of applications for registration

Section 7(3)

The Keeper should be obliged to acknowledge receipt of an application for registration in the Crofting Register in the same way as the Keeper currently issues acknowledgements of receipt of applications for registration in the Land Register or General Register of Sasines. Such acknowledgements should, I consider, be issued by the Keeper to both the Crofting Commission and also to the actual applicant.

Section 8 – Completion of registration

No Comment

Section 9 – Completion of registration: further provision on first registration

Section 9(2)(a)

The word “the” should be inserted before the word “croft”.

10 – The title sheet

It is suggested that where a croft is registered in the Crofting Register and title to the croft in question is also registered in the Land Register then there should be a cross entry made in each register i.e. a note should be added to each title sheet to the effect that information concerning the subjects is also available from the other register. This would provide a connection between the two registers and be very useful for solicitors

dealing with transactions involving the transfer of title to land that is subject to crofting tenure.

Section 10(2)(b)

The name and designation of any sub-tenant of the croft and any tenant under a short lease of the croft should be entered by the Keeper on the title sheet.

Reference is made to the owner-occupier crofter of the croft and to the landlord of the croft and to the owner of the croft. An owner-occupier crofter will also be the owner of the croft but not a landlord. A landlord of the croft will also be the owner of the croft but not the owner-occupier of the croft. Why therefore is there a need to specify “owner of the croft” in addition to the owner-occupier crofter of the croft and the landlord of the croft?

11 – Challenge to first registration

Section 11(3)

I would make the same comment about the need for reference to “the owner of the croft” as I did above in respect of section 10(2)(b). This would also apply to reference to “the owner of any adjacent croft”.

How will the Commission know who has an interest in any adjacent croft given that the existing Register of Crofts is not map based? Will the applicant be required to identify the parties upon whom notification will require to be given under section 11(3) in their application made under section 6 (rather like an application for Planning Permission)?

Section 11(6)(a)

Should the form of advertisement not be ‘prescribed’ in the same manner as the notice referred to in section 11(6)(b) is to be prescribed? From a practical point of view I assume that the Keeper should enclose the ‘prescribed’ form along with the certificate. Indeed should this not be added into section 8(2)(b) as a requirement on the part of the Keeper? Is the placing of the advert/notice to be monitored to ensure compliance? In this electronic age should such notices also be published by Registers of Scotland and/or the Crofting Commission via the internet?

Sections 12, 13, 14, 15, 16, 17, 18 & 19

No comment

PART 3 – Duties of Crofters and Owner-Occupier Crofters

Section 20(1)

Is the requirement for a crofter to be ordinarily resident on, or within 16km of, their croft relevant in today's world? At the Future of Crofting Conference Drew Ratter (Convener of the Crofters Commission) referred to this as "a horse and cart distance". Murdo MacLennan (Area Commissioner of the Crofters Commission for the Western Isles) told the Conference that he personally travels 105 miles to work a croft in Harris. Patrick Krause (Chief Executive of the Scottish Crofting Federation) thought that 16km was completely outdated: It should be how far someone could reasonably be expected to commute to and from their place of work in a day. Perhaps 30 to 50 miles he wondered. I share these views.

Section 21 (New Section 19C(2)(a) to the 1993 Act)

The same comments on residency of tenants as expressed above in relation to Section 20(1) applies equally to owner-occupiers.

Section 22 (New Section 21B(5) to the 1993 Act)

The landlord should be allowed the opportunity to provide comments on the application to the Crofting Commission within a set period. This in turn would perhaps result in the 28 day period having to be extended.

There may be instances where the Commission require further information from the applicant or from a local office or Area Commissioner. Again, perhaps the period of 28 days should be extended to take account of this possibility. It could possibly be a 28 day representation period followed by a 14 day decision period as is the case with the proposed new section 26B of the 1993 Act.

Section 23 (New Section 26E(d) & (e) to the 1993 Act)

The Commission cannot take action under the proposed new sections 26H or 26J to the 1993 Act if they have consented to a sublet of a croft or to a short lease of an owner-occupied croft. What if the sub-tenant or the tenant under a short lease, are neglecting the croft? Should the Commission not be able to intervene?

Unless I am missing something, as it stands it would appear that once consented to a sublet of a croft cannot be brought to an end by the Commission. Thus an absentee tenant could enter into a 10 year sub-tenancy arrangement with his brother who resides local to the croft which on the face of it the Commission are happy to consent to. Then the brother does absolutely nothing to cultivate the croft. What are the Commission to do? By simply having consented to the sublet they are now powerless as a result of the

proposed new Section 26E(d)(i) of the 1993 Act. Has the Scottish Government in effect created a loophole for absentee crofters to exploit? If so it should, perhaps, be closed.

Whilst the Commission may terminate a short lease in terms of the proposed new section 29A(4) of the 1993 Act are the Commission, having done so, able to then take action under the proposed new Section 26J of the 1993 Act? This is perhaps unclear as it is arguable that by simply consenting to the let the Commission are then precluded from taking any such action by virtue of the proposed new Section 26E(e)(i) of the 1993 Act. This is perhaps another loophole that needs closing.

As an aside section 28 of the 1993 Act (Special provisions regarding subletting of crofts not adequately used) was completely repealed by section 11 of the Crofting Reform etc. Act 2007 with effect from 25 June 2007. These provisions first appeared as section 12 of the Crofters (Scotland) Act 1961 but, as far as I am aware, were never brought into operation: a Statutory Instrument being required to do so under subsection (17). Parliament may wish to consider whether these provisions would serve any useful purpose if actually re-introduced and brought into operation subject to any necessary amendments.

Section 23 (New Section 26H to the 1993 Act)

Should the crofter not be given the opportunity to assign their tenancy, if they wish to do so, prior to termination?

Section 23 (New Section 26J to the 1993 Act)

Should the owner-occupier not be given the opportunity to sell their croft, if they wish to do so, prior to being required to let it?

PART 4 – Further amendments to the 1993 Act

Section 25

It is pointless extending the ‘clawback’ period from 5 years to 10 years whilst not dealing with the anomaly created by the decision in Whitbread -v- Macdonald 1992 SLT 1144.

It was raised by a delegate at the WS Society/Crofting Law Group Conference in Edinburgh on 12th June 2009 that the Bill was an opportunity to remedy the loophole created by Whitbread -v- Macdonald 1992 SLT 1144. I would endorse that view. A landlord who is being required to sell croft land by order of the Land Court is entitled by section 14(3) of the 1993 Act to seek a second payment or “clawback” on a subsequent disposal to anyone who is not a member of the crofter’s family. But the plain meaning of this provision was affected by the decision of the Court of Session in Whitbread -v- Macdonald. There it was held that when the Land Court authorises acquisition under

section 13(1) of the 1993 Act this is to be viewed as a single transaction and not a separate disposal of the land even where the conveyance is to a nominee outside the crofter's family.

This decision often results in landlords making it difficult for third party purchasers who are not members of the crofter's family to acquire land as a nominee of the crofter rather than directly from the landlord with a resumption application being progressed under section 20 of the 1993 Act and the landlord and the crofter in effect receiving one half of the consideration being paid by the third party. It is undoubtedly the case that as a result of Whitbread -v- Macdonald third parties often do "deals" with crofters resulting in the landlord being deprived of a share in the purchase price that they would otherwise have received. It would appear just and equitable for this anomaly to be closed with the "clawback" provision applying immediately the crofter nominates a purchaser who is not a member of the crofter's family. This would make purchases by third parties who are not members of the crofter's family more straightforward with one simple principle applying whether that party contacted the crofter in the first instance or the landlord in the first instance.

I made these same comments in response to the Consultation Paper (published in March 2005) on the last Draft Crofting Reform (Scotland) Bill and also in my response to the Consultation Paper (published in May 2009) on the latest Draft Crofting Reform (Scotland) Bill.

Patrick Krause indicated, at the Future of Crofting Conference, that the majority of the members of the Scottish Crofting Federation considered the Whitbread loophole to be a "mechanism for cheating" and were happy to close it. There should therefore be little problem in the Scottish Parliament now amending the Bill to do so.

Sections 26 & 27

These sections now deal with an issue I raised in my response to the Consultation Paper (published in May 2009) on the Draft Crofting Reform (Scotland) Bill. They do not, however, go as far as I had suggested which was to streamline the decrofting process. At the moment if a development is proposed on croft land it can take some time to realise that development. Planning Permission must be obtained first and then it can take 13 weeks for an application for a Decrofting Direction to be progressed with a further 42 day appeal period after the granting of a Decrofting Direction before it can take effect. This is frustrating for parties with a genuine need to decroft. The Scottish Parliament should be taking the opportunity of the Bill to streamline the process and speed it up. Possibly by linking the Decrofting and Planning processes together with each happening at the same time and the two bodies involved consulting with one another. Alternatively, allowing an application for a Decrofting Direction to be made

before or at the same time as an application for the grant of Planning Permission with the Crofting Commission being able to grant a Decrofting Direction that is conditional upon Planning Permisson being granted. The Resumption procedure is not as drawn out as the Decrofting procedure is so there is perhaps less need to streamline that. However, the question of resumption being granted conditional upon Planning Permisson being granted would also be worth looking at.

Sections 28, 29, 30 & 31

No comment.

PART 5 – General and Miscellaneous

Section 32

Consolidation of the Crofting Acts should not be a separate process. This should be part of the Bill with a Consolidated Act being produced immediately the Bill is enacted. Indeed the Scottish Parliament should look at this as a matter of policy when introducing any legislation that substantially amends existing legislation.

Sections 33, 34, 35, 36 & 37

No comment.

SCHEDULE 1 – The Crofting Commission

No comment.

SCHEDULE 2 – Minor and consequential Modifications

No comment.

Other matters arising

Whilst not issues arising from the Bill as drafted I consider that the Scottish Parliament should be taking the opportunity of the Bill, on the basis that there is unlikely to be another Crofting Bill for some time, to resolve several issues that arise in Crofting Law.

The Deemed Croft and resolving an anomaly

The Bill would provide an opportunity to resolve an anomaly concerning Deemed Crofts. Following the decision in Bowman v Guthrie 1997 SLCR 40 it was held that a deemed croft, if not purchased at the same time as the croft to which it pertained, became a stand alone croft which fell outwith the definition of ‘croft land’ in section 12(3) of the 1993 Act as there was no other relevant part to it. Thus there was no right to purchase it even if adjacent or contiguous to the original croft. There appears to be no good reason

for this anomaly and it is one that could be easily resolved by was of a minor provision within the Bill.

Removing land from crofting tenure if already developed for 20 years or more

The Bill would also present an opportunity to resolve an ongoing issue in the crofting counties in relation to land that has not been used for crofting purposes for a considerable time but remains subject to crofting tenure. Where land has been developed for a period of more than 20 years and clearly not been used for crofting purposes for 20 years should it not simply be stated that such land is removed from crofting tenure without the need for a Resumption Order or Decrofting Direction? This is a recurring problem in conveyancing throughout the crofting counties and one where a great deal of time and effort often requires to be employed by conveyancers in ascertaining the historical position of the land involved sometimes dating back to 1886 in order to ascertain whether or not a Decrofting Direction or Resumption Order should have been applied for in respect of the land in question.

Situations arise where houses were built on common grazings after 25th June 1886 being the relevant date on which the term “crofter” was defined by the Crofters Holdings (Scotland) Act 1886 and at which point a crofter obtained security of tenure with there being reserved to the landlord a right to seek resumption of croft land for a reasonable purpose, subject to payment of compensation to the crofter. There are instances where crofters as far back as say 1887 allowed individuals to develop croft land without seeking any compensation in respect thereof. It appears inequitable that more than 100 years later the successors of the crofters in question should now be able to seek compensation on resumption for developments that have taken place over 100 years ago at a level reflecting current day valuations.

A rule could easily be introduced under and in terms of the Bill to ensure that if croft land has been developed and not used as croft land for a period of more than 20 years then it shall be deemed to no longer be subject to crofting tenure. This is a much needed reform of crofting law which would simplify conveyancing in the crofting counties and reduce the work of the Land Court, the new Crofting Commission and solicitors who are involved in resolving such situations on a regular basis. It would also remedy the arguable injustice caused to owners of properties who through no fault of their own have inherited a problem created by their predecessors in title often some considerable time ago and with the obvious consent and concurrence of the crofters involved at the time.

I made these same comments in response to the Consultation Paper (published in March 2005) on the last Draft Crofting Reform (Scotland) Bill and also in my response to the Consultation Paper (published in May 2009) on the latest Draft Crofting Reform (Scotland) Bill.

A croft that has not been registered in the Register of Crofts is not a croft

The Crofting Reform etc. Act 2007 introduced new subsections (1)(f) and (1)(g) to the 1993 Act extending the definition of a croft to include any holding which at the date of commencement of section 21 of the Crofting Reform etc. Act 2007 or on any subsequent date has been entered in the Register of Crofts for more than 20 years. The converse should also be the case with any holding that has not been entered in the Register of Crofts by a specified date not being a croft. This will avoid the ongoing problems in the crofting counties where people try to establish that a holding is a croft when it has never been openly recognised as such. The history of the holding has to be traced from 1886 and the legislation that applied over the years looked at in great detail with the Land Court often being involved to resolve the issue. One final window of opportunity could be given for those that want to establish the position before the door is closed on them. A minor amendment to the Bill would easily achieve this.

Why drop the provisions in respect of standard securities?

Gone completely from the Bill is the proposal that was contained in the Draft Bill to provide crofters with the option of using their tenancy as security for a loan. The Policy Memorandum states that "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 house site in order to access loan finance. As a result, this proposal has been dropped from the Bill." I am unsure of the logic in this given that it perhaps contradicts the provisions that seek to prevent decrofting in respect of speculation of croft land. Furthermore, it does not address the situation of young crofters wishing to raise finance to actually purchase a croft as opposed to "a house site" on a croft. What would have been the harm of leaving these provisions in the Bill and giving crofters the option of granting securities with or without decrofting? Consideration should be given to re-introducing these provisions.

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