CROFTING REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Crofting Reform (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. The memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF THE BILL PROVISIONS

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 of its Board, 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create a new Crofting Register to replace the existing Register of Crofts, which is now considered to be incomplete and outdated. The Bill would give 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 would be map-based and would clearly define the extent
This document relates to the Crofting Reform (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 9 December 2009

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 would place 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. It aims 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 would 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. This Part of the Bill also proposes changes to the processes for obtaining Commission consent to make this process simpler and more efficient. A change to the requirement for approval for the enlargement of crofts is also included in this part of the Bill. It also 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.

- 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.

4. Further information about the Bill’s provisions are contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 35-EN and in the Policy Memorandum published separately as SP Bill 35-PM.

RATIONALE FOR SUBORDINATE LEGISLATION

5. Scottish Ministers carefully considered which provisions should be contained on the face of the Bill and which should be included in subordinate legislation. This has resulted in a number of powers in the Crofting Reform (Scotland) Bill to make subordinate legislation and these are explained in greater detail below. In each case, the Scottish Ministers considered the policy intentions behind each of the provisions and the level of parliamentary scrutiny required against the need to:

- ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
• make proper use of valuable Parliamentary time;
• the likely frequency of amendment;
• allow detailed consequential amendments to be made and kept up-to-date within the basic structures and principles set out in primary legislation;
• the need to anticipate the unexpected, which might otherwise frustrate the purpose of any provision in primary legislation approved by Parliament.

6. When considering whether the negative or affirmative resolution procedure should be used, the Scottish Ministers have considered carefully the degree of Parliamentary scrutiny that is thought to be required for the orders, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily.

7. In total there are 16 subordinate legislation provisions in the Bill.

DELEGATED POWERS

8. This memorandum describes the provisions of the Bill which confer powers to make subordinate legislation. It sets out:
• the persons upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised.
• why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision.
• the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject.

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

Power conferred on:    Scottish Ministers
Power exercisable by:   Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

9. Section 2 of the Bill relates to the general functions of the Crofting Commission. Subsection (2) introduces section 2A to the Crofters (Scotland) Act 1993, referred to hereafter as the “1993 Act”. Section 2A proposes a power that would enable Scottish Ministers to make changes to the functions of the Commission by order and includes a power to confer on the Commission functions of the Scottish Ministers under the Bill (other than the function to make regulations or orders). The Scottish Ministers may only make such an order where they consider it appropriate to do so to ensure that the Commission carry out their functions effectively and efficiently.
Reason for taking power

10. The current policy is to focus the reformed Crofting Commission solely on the regulation of crofting. However, it is recognised that in order to respond to the changing needs of crofting as a whole, and the community it regulates, that the functions of the Commission may require change over time. Therefore, this provision would allow for the Scottish Ministers to have the power to add, remove or modify the functions of the Commission so that it carries out its general functions efficiently and effectively.

Reason for choice of procedure

11. It is likely that any changes to the functions of the Crofting Commission will be of great interest to stakeholders. It is therefore considered appropriate that any order should be subject to an affirmative resolution of the Parliament.

Section 4(4) – power to vary the steps that will require registration onto the Crofting Register

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

12. Section 4 outlines the steps that will require a croft to be registered on the new Crofting Register. Section 4(4) provides the Scottish Ministers with the power to add a step, modify the description of a step, or remove a step, which would require registration on the new Crofting Register. These steps generally relate to changes in the extent of a croft or interests in a croft.

Reason for taking power

13. The Crofting Register will be populated over time, either through voluntary registration or at the point of which an application is submitted to the Crofting Commission for a regulatory decision. As the Crofting Register becomes more established, it may become evident that the trigger points require amendment and this power would give the Scottish Ministers the flexibility to be able to add, amend or remove trigger points.

Reason for choice of procedure

14. This power concerns a point of procedure relating to the operation of the Crofting Register and, therefore, it is considered appropriate that negative resolution procedure be applied.
Section 5(3) – power to vary the events that will require amendment to the Crofting Register

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

15. Section 5 outlines the steps that will require the new Crofting Register to be updated to reflect regulatory decisions that change the extent or interests in a croft. Section 5(3) provides the Scottish Ministers with the power to add a step, modify the description of a step, or remove a step, which would require the new Crofting Register to be updated.

Reason for taking power

16. As the Crofting Register becomes more established, it may become evident that the events where the Register should be updated require amendment and this power would give the Scottish Ministers the flexibility to be able to add, amend or remove events.

Reason for choice of procedure

17. This power concerns a point of procedure relating to the operation of the Crofting Register and, therefore, it is considered appropriate that negative resolution procedure be applied.

Section 6(8) – power to make provision about when ownership is to be treated as transferred for the purpose of applying to register on the Crofting Register

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

18. Section 6 sets out the process for making an application to register on the Crofting Register. Subsection (2)(b) states that an application for first registration on the Crofting Register is to be made in the case of transfer of the ownership of land on which a croft is situated. Subsection (3)(a) states that an application to amend the register is to be made in the case of transfer of the ownership of any land on which a croft is situated. Section 6(8) allows Ministers to make provision, by regulations, about when ownership is to be treated as transferred for the purposes outlined above.

Reason for taking power

19. There are many different stages associated with the transfer of the ownership of land and this provision affords Ministers the flexibility to determine the stage at which registration is to be required on the Crofting Register. It also provides flexibility in the event of any changes in conveyancing practice that might take place in future.
Reason for choice of procedure

20. This power concerns a point of procedure relating to the operation of the Crofting Register and, therefore, it is considered appropriate that negative resolution procedure be applied.

Section 11(6) (as read with section 11(7)) – Scottish Ministers to prescribe the form that any notice of first registration must take

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

21. Section 11 sets out the process of notification for the first registration of a croft on the Crofting Register. Under section 8, the Keeper is required to issue confirmation of the first registration of a croft to both the applicant and the Crofting Commission. Under section 11(4)(e) and (5), the date upon which the Commission receive notification of a first registration starts the six month period of appeal against any of the information contained in the registration. Subsection (6) then requires the applicant to place an advert in a local newspaper for two consecutive weeks and also to affix a conspicuous notice to the croft in a form prescribed by the Scottish Ministers.

Reason for taking power

22. The Crofting Register provisions allow for an appeal against any of the information contained in the first registration of a croft within a six month period. Where there is no appeal to the Land Court against the registration or, in the event of an appeal, if the Land Court either rejects the appeal or orders an amendment of the registration, the registration then becomes permanent and there will be no further opportunity for appeal. For this reason it is imperative that the notification of the first registration of a croft is conspicuous, therefore the Bill provides the Scottish Ministers with the power to determine the form that any notice should take.

23. This power concerns a point of procedure relating to the operation of the Crofting Register and, therefore, it is considered appropriate that negative resolution procedure be applied.

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

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

24. Section 15 sets out the arrangements for indemnity in the circumstances that someone suffers loss as a consequence of certain matters, including an error made by the Keeper in the
registration of a croft. Subsection (2) sets out the matters where a person is entitled to be indemnified and subsection (3) sets out where no indemnity is payable. Subsection (5) allows Ministers to prescribe, by order, where there is to be no entitlement to indemnity.

**Reason for taking power**

25. There are many possible circumstances where a person might not be entitled to indemnity. It is not possible to list them all but this power would enable Ministers to clarify where indemnity is not an entitlement in the event that it is unclear.

**Reason for choice of procedure**

26. This power concerns a point of procedure relating to the operation of the Crofting Register and, therefore, it is considered appropriate that negative resolution procedure be applied.

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

- **Power conferred on:** Scottish Ministers
- **Power exercisable by:** Rules made by statutory instrument
- **Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

27. Section 16 sets out the arrangements for making rules and prescribing fees in relation to the Crofting Register. Subsection (1) sets out the matters which the Scottish Ministers may, after consultation with the Keeper and the Crofting Commission, make rules for.

28. The Scottish Ministers would have the power to make rules for regulating the making up and keeping of the register. They might also prescribe the form of any search, report or other document to be issued or used, and regulate the issuing of such a document. Rules might cover both the procedure of application for any registration or prescribe the form of deeds relating to registered crofts. Finally, rules can be made to cover any other matters that Ministers consider necessary or proper in order to give full effect to the purposes of the Act.

**Reason for taking power**

29. The Crofting Register is a new register and this power is intended to allow the Scottish Ministers to make rules which would affect its operation and thus give flexibility in relation to the way the Register will work. Any rules must be developed in consultation with the Keeper and the Crofting Commission.

**Reason for choice of procedure**

30. This power concerns the administration and mechanics of operating the Crofting Register and, therefore, it is considered appropriate that negative resolution procedure be applied.
This document relates to the Crofting Reform (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 9 December 2009

Section 16(2) – power to prescribe fees payable in respect of the Crofting Register

Provision

31. Section 16 sets out arrangements for making rules and prescribing fees in relation to the Crofting Register. Section 16(2) provides the Scottish Ministers with the power to make an order prescribing the fees to be paid for registration and for the Keeper of the Registers of Scotland (RoS) to provide searches, reports, certificates or other documents, or copies of documents, or of information from the Crofting Register.

Reason for taking power

32. Whilst the Government has agreed to fund the establishment of the Crofting Register, it will not fund the operation and maintenance of the register. RoS operates a cost recovery policy in relation to its other core property registers and it is considered that the same should apply in respect of the Crofting Register. Costs will inevitably fluctuate over time and the power can be exercised from time to time to reflect this. Therefore, it is necessary for Ministers to be able to prescribe the fees that will be payable in respect of the Crofting Register.

Reason for choice of procedure

33. This power concerns the setting of fees relating to the Crofting Register. The power, which is likely to be exercised from time to time as necessary, is very limited in scope since it relates only to fee-setting. It is not considered appropriate to take up parliamentary time with such matters, similar reasoning being applied in relation to other powers to set fees. It is, therefore, considered appropriate that negative resolution procedure be applied.

Section 20(7) and section 21 – power to amend the meaning of neglect (for both tenant and owner-occupier crofters)

Provision

34. Sections 20 and 21 set out the duties of tenant and owner-occupier crofters to live on, or near, their crofts and to work the land. Subsection 20(3) replaces section 5B of the 1993 Act which sets out the tenant crofter’s duty not to misuse or neglect their croft. The replacement subsection 5B(3) describes what is to be considered as neglect of a croft and subsection 5B(7) enables the Scottish Ministers, by order, to amend the meaning of neglect. Similarly, section 21 inserts new section 19C to the 1993 Act which sets out the equivalent duty for owner-occupier crofters not to misuse or neglect their croft. Subsection 19C(4) also defines neglect and subsection 19C(8) enables the Scottish Ministers, by order, to amend the meaning of neglect.
Reason for taking power

35. The definition of neglect refers to the Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Regulations 2004 and, therefore, any changes to that scheme could have a direct impact on the definition of the neglect of a croft. Also, whilst the definition outlined in the Bill is considered suitable for the purpose of defining and identifying neglect, as the Commission becomes more proactive in tackling these issues, this definition may become redundant or may be superseded or modified in future. This reflects the fact that minimum standards expected of agricultural enterprises may change over time. Also, it would run counter to the policy objectives if the Commission were prevented from taking effective action against damaging cases of neglect if action could be circumvented because the definition was too restrictive and could not be modified quickly.

36. The present provision in section 5B(10) and (11) of the 1993 Act provides the power for the Scottish Ministers to amend the meaning of “neglects” by order under affirmative resolution of the Scottish Parliament. For consistency, and in recognising that this power enables the Scottish Ministers to amend primary legislation, it is proposed that the Scottish Ministers should continue to have the same power to amend the meaning of neglect by order, subject to the scrutiny and debate of the Parliament through the affirmative resolution procedure.

Reason for choice of procedure

37. The Scottish Ministers consider a change to the meaning of neglect to be sufficiently significant that any order made under these powers should be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

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

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

38. This provision enables the Scottish Ministers to modify crofting law, by order, to facilitate the consolidation of the law on crofting.

Reason for taking power

39. 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 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. The power to modify enactments relating to crofting allows the Scottish Ministers to modify crofting law to assist in the consolidation of crofting law.
Reason for choice of procedure

40. As this power allows for the amendment of primary legislation by subordinate legislation for the purpose of consolidation, which is aimed at clarifying and simplifying crofting law, it is considered that the affirmative procedure would be the most suitable procedure for this provision given the scope of the power.

Section 34(1) – Ancillary provision

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Affirmative resolution of the Scottish Parliament

Provision

41. This provides the Scottish Ministers with power to make such incidental, supplementary or consequential provision as they consider appropriate, if such provision is in consequence of, or to give full effect to, provisions of the Bill. By virtue of section 33(2)(b), an order under section 34(1) may include such transitory, transitional or saving provision as Ministers consider necessary or expedient.

Reason for taking this power

42. This is a general provision in fairly standard terms which allows the Scottish Ministers to make provision by order to support the full implementation of the Bill.

Choice of procedure

43. Ancillary provisions frequently deal with minor issues, and in general are subject to negative resolution procedure. But an exception is made where the order adds to, replaces or omits any part of the text of an Act. In that case, affirmative resolution procedure applies. This approach on procedure is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.

Section 37(2) – Power to appoint the day on which the provisions of the Act come into force

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** No procedure

Provision

44. This provision allows the Scottish Ministers to make provision by order as to commencement of the majority of the provisions of the Bill. Sections 33 and 34 are exempted from the coverage of this power and will therefore come into force on any Act resulting from the Bill receiving Royal Assent.
Reason for taking power

45. Arrangements need to be put in place before bringing any provisions into force and it is not possible to know exactly when these arrangements will be finalised. Therefore, it is necessary to have the flexibility provided by the ability to make commencement orders whenever they are required.

Choice of procedure

46. In line with general practice, commencement orders under section 37(2) will not be subject to any Parliamentary procedure.

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

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Provision

47. Schedule 1, paragraph 2 sets out the general powers of the Crofting Commission. Subparagraph (2) in particular gives the Crofting Commission the power to charge in respect of its functions. The functions for which it can charge, and the level of charges would be determined by the Scottish Ministers.

Reason for taking power

48. The consultation on the draft Bill proposed that the Commission should be given the power to charge in respect of carrying out its functions. It was considered that the entire cost of regulation should not be borne by the taxpayer and the consultation asked what the balance of costs should be between the taxpayer and the individual applicant. Of those who responded to this question, 51% of respondents considered that the individual applicant should contribute to the balance of costs. In particular, it was considered that the individual should contribute where they would be considered to be the principal beneficiary of the regulatory application rather than the wider public. The type of application that the Commission could charge for and the level of charge have not been determined, although both must be prescribed by the Scottish Ministers.

Reason for choice of procedure

49. This power enables Ministers to identify which functions of the Commission ought to be charged for and to set the amounts chargeable in the regulations. The amounts must be reasonable. Since this is a power relating to procedural matters concerning the Commission, it is considered appropriate that negative resolution procedure be applied.
Schedule 1, Paragraph 3(4) – Changes to the membership of the Crofting Commission

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

50. Schedule 1, as introduced by section 1(3), replaces Schedule 1 to the 1993 Act and makes further provisions relating to the constitution and general functions of the Crofters Commission. Paragraph 3 of the schedule relates to the membership of the reformed Crofters Commission and sets out the numbers of elected and appointed members. Sub-paragraph (4) allows Ministers to modify the number of members, the number of appointed members and the number of elected members by order. However, this provision would not enable any order to result in the majority of members not being elected members, unless the appointment of additional members by Ministers under paragraph 6(3) or 9(3) of the schedule means that such a majority cannot be maintained.

Reason for taking this power

51. Presently, the Board of the Crofters Commission consists solely of Ministerial appointees. The Bill proposes to reform the Commission to ensure it is more representative of those it regulates and is constituted in a more democratic fashion. Whilst the Bill proposes that there should be up to nine members of the Commission, up to six of whom would be elected by crofters and the remainder would be Ministerial appointees, this provision gives flexibility to amend these numbers to ensure flexibility in the longer term.

Choice of procedure

52. Modifications to the number of members of the Crofting Commission and the mix of appointed and elected members is likely to be of interest to a number of stakeholders and for this reason it was considered that the provision should be subject to affirmative procedure.

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

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

53. This provision would give the Scottish Ministers the power to make regulations associated with the election of members to the Crofting Commission.

Reason for taking this power

54. The Bill allows for crofters to be elected as members of the Crofting Commission. Provision relating to elections requires a large amount of detail pertaining to conduct of these elections to be set out on issues such as the voting system to be used for the election, the persons
eligible to vote and the constituencies in which elections are to be held. Sub-paragraph (2) sets out particular matters in relation to which regulations may be made. There is precedent for the details of elections to be made in subordinate legislation (for example, see schedule 1 to the National Parks (Scotland) Act 2000), in order to provide for the efficient and effective running of elections.

Choice of procedure

55. It is anticipated that any subordinate legislation associated with these provisions would be of interest to a variety of interested parties. In order to ensure a higher degree of scrutiny, it is proposed that these regulations be subject to the affirmative procedure.
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