The Committee will meet at 10.00 am in Committee Room 4.

1. **Decision on taking business in private**: The Committee will decide whether to take item 10 in private.

2. **Subordinate legislation**: The Committee will take evidence on the draft Crofting (Designation of Areas) (Scotland) Order 2010 from—
   Roseanna Cunningham MSP, Minister for Environment, Magdalene Boyd, Solicitor, Solicitors Rural Affairs Division, Phil Burns, Policy Officer, Crofting Branch, Rural Directorate, and Iain Matheson, Head of Crofting Branch, Rural Directorate, Scottish Government.

3. **Subordinate legislation**: Roseanna Cunningham MSP to move S3M-5505—
   that the Rural Affairs and Environment Committee recommends that the draft Crofting (Designation of Areas) (Scotland) Order 2010 be approved.

   Roseanna Cunningham MSP, Minister for Environment, Kirsten Simonnet-Lefevre, Principal Legal Officer, Rural Affairs Division, Ian Strachan, Branch Head, Animal Health and Welfare Division, and Andrew Voas, Veterinary Adviser, Animal Health and Welfare Division, Scottish Government.

5. **Guidance subject to approval**: Roseanna Cunningham MSP to move S3M-5504—
that the Rural Affairs and Environment Committee recommends that the Scottish Government Code of Practice for the Welfare of Dogs (SG 2009/279) be approved.

6. **Guidance subject to approval:** Roseanna Cunningham MSP to move S3M-5503—

that the Rural Affairs and Environment Committee recommends that the Scottish Government Code of Practice for the Welfare of Cats (SG 2009/280) be approved.

7. **Subordinate legislation:** The Committee will consider the following negative instruments—

   the INSPIRE (Scotland) Regulations 2009 (SSI 2009/440);

   the Shetland Islands Regulated Fishery (Scotland) Order 2009 (SSI 2009/443);

   the Inshore Fishing (Prohibition of Fishing for Cockles) (Western Isles) (Scotland) Order 2009 (SSI 2009/444); and


8. **Crofting Reform (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   Professor James Hunter CBE FRSE, Director, University of the Highlands and Islands Centre for History;

   and then from—

   Bruce Beveridge, Deputy Director, Rural Communities Division, Lyndsey Cairns, Policy Adviser, Rural Communities Division, Iain Dewar, Bill Team Leader, Rural Communities Division, Richard Frew, Policy Adviser, Rural Communities Division, and Alexander McNeil, Solicitor, Rural Affairs Division, Scottish Government.

9. **Crofting Reform (Scotland) Bill (in private):** The Committee will review the evidence heard earlier in the meeting.

10. **UK Flood and Water Management Bill (UK Parliament legislation):** The Committee will consider a report on the legislative consent memorandum lodged by Richard Lochhead MSP (LCM(S3)24.1).
The papers for this meeting are as follows—

**Agenda Item 2**

The Crofting (Designation of Areas) (Scotland) Order 2010 (SSI 2010/draft)  
RAE/S3/10/2/1

**Agenda Item 4**

RAE/S3/10/2/2

The Scottish Government Code of Practice for the Welfare of Cats (SG 2009/280)  
RAE/S3/10/2/3

**Agenda Item 7**

The INSPIRE (Scotland) Regulations 2009 (SSI 2009/440)  
RAE/S3/10/2/4

The Shetland Islands Regulated Fishery (Scotland) Order 2009 (SSI 2009/443)  
RAE/S3/10/2/5

The Inshore Fishing (Prohibition of Fishing for Cockles) (Western Isles) (Scotland) Order 2009 (SSI 2009/444)  
RAE/S3/10/2/6

The Action Programme for Nitrate Vulnerable Zones (Scotland) Amendment Regulations 2009 (SSI 2009/447)  
RAE/S3/10/2/7

Extract from Subordinate Legislation Committee report  
RAE/S3/10/2/8

**Agenda Item 8**

SPICe briefing paper (private)  
RAE/S3/10/2/9

**SPICe briefing paper - Crofting Reform (Scotland) Bill**  
RAE/S3/10/2/10

Written submission from Professor James Hunter  
RAE/S3/10/2/11

**Agenda Item 10**

Draft report (private)  
RAE/S3/10/2/12

**For Information**

Recent Developments  
RAE/S3/10/2/13
INSTRUMENTS SUBJECT TO ANNULMENT

The INSPIRE (Scotland) Regulations 2009 (SSI2009/440) (Rural Affairs and Environment Committee)

42. The purpose of the Regulations is to partially implement in Scotland Directive 2007/2/EC of the European Parliament and Council, which establishes an Infrastructure for Spatial Information in the European Community ("INSPIRE"). This Infrastructure relates to spatial information for the purposes of Community environmental policies, and other policies or activities that may have an impact on the environment.

43. These Regulations also aim to improve the ability of public authorities to share spatial data, and make information based on this data more widely available, through defining standards that are necessary to make the information more accessible.

44. Correspondence between the Committee and the Scottish Government is reproduced at Appendix 4.

Questions (2)(a) and (4)

45. These questions were simple matters of clarification, and so are addressed first. It was not evident (in relation to regulations 10(3), (5)(a), and 13(2)), when the United Kingdom as a Member State has exercised the derogations (in terms of Articles 13(1) and 17(7) of Directive 2007/2/EC) which enable the limitations to public access and data sharing set out in those regulations, where this would adversely affect international relations, public security or national defence. Similarly for regulation 11(2), it was not evident when the United Kingdom has exercised the derogation (under Article 14(2) of Directive 2007/2/EC) which enables States to allow public authorities to apply the charges that are the subject of that regulation.

46. The response clarifies that the exercise of those derogations by the Member State as a whole is constituted by making the provisions in these Regulations, and also by the Secretary of State making similar provisions (not extending to Scottish public authorities or third parties) in the INSPIRE Regulations 2009 (SI2009/3157).

Questions (1), (2)(b) and (3)

47. These questions sought to clarify why specific provisions in the Regulations are considered to be within legislative competence.
48. The provisions referred to in these questions make reference to various reserved matters. Specifically—

- telecommunications and wireless telegraphy as contained in Section C10 of Part II, Schedule 5 to the Scotland Act, (including internet services - provided by electronic means at a distance);

- international relations, defence and national security, which are reserved matters by Schedule 5, Part I, paragraphs 7 and 9, and Part II, Section B8 of the Scotland Act.

49. These Regulations generally implement provisions and Member State obligations contained in Directive 2007/2/EC (“the Directive”) on “INSPIRE”, but it was not evident why the provisions cited did not relate to the reserved matters as set out. The Government was asked for further explanation. In summary, by sections 29 and 54 of the Scotland Act 1998, whether any provision in the Regulations relates to a reserved matter is to be determined by assessing the purpose of the provision, having regard to its effects in all the circumstances.

50. The response asserts that the legal purpose of the provisions mentioned is to make law regarding the devolved matter of the creation and operation of infrastructure relating to special information. So far as any provision concerns a reserved matter, this is merely incidental. There is no analysis offered as to the effects of the provisions on the reserved matters cited, nor of any relevance that the provisions implement, for Scotland, Community laws.

51. Given the brevity of the response, the Committee concluded that it is not in a position to recommend that there is a clear case for claiming there is sufficient doubt that the provisions cited relate to the reserved matters.

Question (5)

52. Regulation 15(2) obliges Scottish Ministers to issue guidance to Scottish public authorities and third parties who are responsible for spatial data sets or services, regarding their implementation of the Directive. Regulation 15(3) states that the guidance must include provision relating to the internal complaints procedure which authorities and third parties are required to establish under regulation 14. Regulation 15(4) states that in performing their functions under the regulations, Scottish public authorities and third parties must have regard to that guidance.

53. The Government was asked to explain and justify the basis on which it is considered that those provisions comply with Schedule 2, paragraph 1(c) of the European Communities Act 1972 (“the 1972 Act”). That paragraph provides that the power to make these Regulations does not include power “to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal”
54. The Government does not consider that requiring the issuing of guidance constitutes the conferral of a power to legislate. It argues that it is reasonably common practice for regulations under section 2(2) of the 1972 Act to authorise the issuing of guidance.

55. The Committee does not agree that the conferral of a power to issue guidance will never constitute the conferral of a prohibited power to legislate, as above. The reply does not provide any argument why guidance may not be another type of “subordinate instrument”, in terms of schedule 2, paragraph 1(c).

56. The Committee takes the view that (depending on how particular provisions are drafted) a power to issue guidance and to require public authorities or other parties to comply with the guidance, could breach this prohibition. This could arise if the provisions that could be made in the guidance amount to legislative rather than administrative or procedural provisions. This could render any particular provisions ultra vires. It is not significant whether a subordinate type of instrument is called “guidance” or a “code”, or given another name, if it amounts to a legislating subordinate instrument.

57. However, the Committee concluded that the provisions fall short of the prohibition in Schedule 2, paragraph 1(c). The guidance to be issued is framed in terms of regulation 15(2) simply as guidance regarding the implementation of the Directive by Scottish public authorities and third parties. Specifically, this must include provision as to the internal complaints procedures. This relates to a procedural or administrative matter, rather than a legislative or regulatory matter.

58. The requirement in 15(2) should be interpreted as only relating to guidance on procedure or administrative matters, and not extending to legislative matters, which would breach the 1972 Act prohibition. Further, public authorities and others need only have regard to the guidance; they can consider and reject the guidance if appropriate. This falls short of a legislative duty to comply with the guidance terms.

59. The Committee concluded that the explanation provided by the Government was acceptable. However, it does not agree with the general statement as to the power to issue guidance made by the Government in its reply.

Breath of the 21 day rule

60. The Regulations were laid on 14 December 2009, and came into force on 31 December 2009. The 21 day rule between the laying date and coming into force was breached, and so a letter has been provided to the Presiding Officer.

61. The letter explains that the implementation date for the Directive was 15 May 2009. Following correspondence from the EU Commission on this date
being missed, the UK Government indicated that implementing regulations for the whole of the UK would be in force on 31 December 2009. The regulations for the rest of the UK (SI 2009/3157) were made on 1 December 2009, and also came into force on 31 December 2009. The Scottish Government wished to consider the terms of that SI as finalised, before laying the Scottish Regulations. It was therefore deemed necessary to breach the 21 day rule.

62. The Committee is dissatisfied that the circumstances leading to the necessity to breach the rule here appear to have arisen due to the approach taken by the Scottish Government. The Committee notes that the implementation by the Scottish Ministers of the Directive has occurred some seven months late, and this was not dependent on the terms of the Regulations for the rest of the UK.

63. The Committee does not regard it as a sufficient explanation for the breach of the Scottish Parliament’s 21 day rule that the Scottish Government wished to consider the Regulations for the remainder of the UK, before laying these Regulations. This is not a position which gives due regard to the reasons behind the Parliament’s 21 day rule – in order to allow a proper period of scrutiny of negative instruments before they are brought into force.

64. The Committee noted that SI 2009/3157 was made on 1 December 2009, and these Regulations were made on 10 December 2009. There was a period of nine calendar days allowed for the Scottish Government to consider the final terms of SI 2009/3157, and then to finalise these Regulations consistent with them, to come into force on 31 December 2009. That nine day period in effect eroded into the 21 day rule period.

65. The Committee accepts that an explanation has been provided for the necessity for this breach and therefore that the requirements of the Transitional Order have been fulfilled in this respect. Nevertheless, the Committee finds it unsatisfactory that it was the approach to implementation taken by the Scottish Government that has led to the need to breach the Parliament’s rule. The Committee considers that it is not a satisfactory explanation for the breach of the rule that the timing of laying the Scottish Regulations to implement the EC Directive 2007/2 was dependent upon the completion and laying of the Regulations for the remainder of the UK. The Committee considers that, when preparing a timetable for, and delivering implementing regulations, the Government should take full account of the rules which afford sufficient time for Parliamentary scrutiny.

66. The Committee reports that—

- an explanation has been sought from and provided by the Scottish Government as to why regulations 8(2)(c), (4)(c), 10(3), (5)(a) and (c), 11(4) and 13(2)) do not relate to the reserved matters of telecommunications and wireless telegraphy, international relations, defence, national security or intellectual property, which
are reserved matters in terms of Schedule 5 to the Scotland Act 1998;

- while the Committee considers that the explanation provided by the Government to the questions asked could have been a more expansive analysis, ultimately the Committee finds the explanation acceptable;

- an explanation has been sought from and provided by the Government as to when the United Kingdom as a Member State has, in relation to the Regulations, exercised the derogations under Articles 13(1), 14(2) and 17(7) of Directive 2007/2/EC. The Committee finds that explanation satisfactory;

- an explanation has been sought from and provided by the Scottish Government as to why regulation 15(2) does not breach the prohibition contained in Schedule 2, paragraph 1(c) of the European Communities Act 1972. This provides that the power to make the Regulations (under section 2(2) of that Act) does not include a “power to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal”;

- The Committee is satisfied that regulation 15(2) does not so breach that prohibition. However, the Committee does not agree with the view expressed by the Scottish Government in its response that in general terms the requiring of the issue of guidance in Regulations made under section 2(2) of the European Communities Act 1972 does not constitute the conferral of a power to legislate;

- The Committee takes the view that, depending on how any particular provision is drafted, it is possible for provisions to breach that requirement in paragraph 1(c) of Schedule 2 to the European Communities Act 1972, where they confer a power to legislate by means of any subordinate instrument (including one designated as “guidance”), if the instrument will confer a power to legislate in breach of that requirement.

APPENDIX 4

The INSPIRE (Scotland) Regulations 2009 (SSI 2009/440)

On 18 December 2009 the Scottish Government was asked:

(1) Why is it considered that regulation 8(2)(c) and (4)(c), and regulation 11(4), do not relate to the reserved matter of telecommunications and wireless telegraphy contained in Section C10 of Part II, Schedule 5 to the Scotland Act, and which includes internet services (provided by electronic means at a distance)?

(2)(a) For regulations 10(3), (5)(a), and 13(2), when has the United Kingdom as a Member State exercised the derogations in terms of Articles 13(1) and
17(7) of Directive 2007/2/EC, which enable limitations to public access and data sharing, where this would adversely affect international relations, public security or national defence?

(b) Why is it considered that those regulations in (a) above do not have as their purpose international relations, defence or national security, which are reserved matters by Schedule 5, Part I, para 7 and 9, and Part II Section B8 of the Scotland Act?

(3) Why is it considered that regulation 10(5)(c) does not have as its purpose intellectual property (or the protection of it) which is a reserved matter by Schedule 5, Part II, Section C4 of that Act?

(4) For regulation 11(2), when has the United Kingdom as a Member State exercised the derogation under Article 14(2) of Directive 2007/2/EC, which enables States to allow public authorities to apply the charges that are the subject of that regulation?

(5) For regulation 15(2), can it be explained why that provision conferring power on the Scottish Ministers to issue guidance regarding their implementation of that Directive (which by 15(4) public authorities and third parties must have regard to in performing functions) does not breach the prohibition in Schedule 2, para 1(1)(c) of the European Communities Act, which prohibits a power to legislate by means of subordinate instruments, other than rules of procedure for a court or tribunal?

The Scottish Government responds as follows:

Questions (1), (2)(b) and (3)

We do not consider that the provisions referred to relate to (or have as their purpose) any of the reserved matters mentioned. Whether a provision “relates” to a reserved matter and is thus outwith devolved competence does of course fall to be determined by reference to the purpose of the provision (see section 29(3) of the Scotland Act). In our view, the purpose of each of the provisions mentioned is to make law regarding the devolved matter of the creation and operation of infrastructure relating to spatial information. So far as any provision concerns a reserved matter, this is merely incidental. In relation to the provisions mentioned in questions (2)(b) and (3), the approach taken on competence would appear to be in line with that taken in the Freedom of Information (Scotland) Act 2002 (asp 13) and in the Environmental Information (Scotland) Regulations 2004 (SSI 2004/520). Both contain relevant provisions (similar to those in SSI 2009/440) on national security and defence and on international relations (see sections 31 and 33 of the 2002 Act and regulation 10(5)(a) of the 2004 Regulations). In addition, regulation 10(5)(c) of the 2004 Regulations concerns intellectual property rights.
Questions (2)(a) and (4)

Exercise of the derogations referred to is constituted by making the provisions in these Regulations and by the Secretary of State making similar provisions (not extending to Scottish public authorities or third parties) in the INSPIRE Regulations 2009 (SI 2009/3157).

Question (5)

Paragraph 1(1)(c) of Schedule 2 to the European Communities Act 1972 prevents regulations under section 2(2) of that Act conferring a power “to legislate”. We do not consider that requiring the issuing of guidance constitutes the conferral of a power to legislate. It is reasonably common practice for regulations under section 2(2) of the 1972 Act to authorise the issuing of guidance.
RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

COFTING REFORM (SCOTLAND) BILL

WRITTEN SUBMISSION FROM PROFESSOR JAMES HUNTER

I have been asked to give evidence to the committee on Wednesday 20 January 2010. I am director of the UHI Centre for History, Dornoch, Sutherland. I have written extensively about the evolution of crofting, principally in my books, *The Making of the Crofting Community* (first published in 1976, with a new edition in 2000 and with a further new edition due this year) and *The Claim of Crofting* (published in 1991). I have also had active involvements with crofting and with the Highlands and Islands more generally. For example, from 1985 until 1990 I was director of the Scottish Crofters Union (now the Scottish Crofting Federation) which I helped to establish, and between 1998 and 2004 I was chairman of Highlands and Islands Enterprise. This statement summarises the historical development of crofting and touches on the historical background to problems that the Crofting Reform Bill attempts to address.

Crofting took shape in the years around and after 1800. Its emergence was bound up with the eighteenth-century collapse of clanship and the subsequent transformation of clan chiefs into commercially-minded landlords whose standing, once reliant on the number of fighting men their lands supported, now depended on their capacity to raise cash from their estates.

There were two main sources of such cash. One was wool – needed to clothe the UK’s burgeoning urban population. The other was kelp – an industrial alkali made from seaweed and, in the early 1800s, an even more lucrative commodity than wool.

To make way for the large-scale sheep farming which answered the demand for wool and provided Highland lairds with greatly increased rents, thousands of families were removed, or cleared, from inland areas and relocated on the coast. There settlements in which arable land had formerly been held in common were now divided into crofts, each occupied by a single family. Crofts were seldom more than a few acres in extent. This was to ensure that their occupants could not make a livelihood from agriculture but would be forced to join the huge seasonal workforce needed for kelp harvesting – a miserable business involving wading into icy waters to cut the growing seaweed.

*From the outset, then, crofts were intended to be, from an agricultural perspective, part-time units. Most of them remain so today.*

As well as dividing pre-existing settlements into crofts, landlords deposited evicted families in coastal localities that had not been previously cultivated. In such localities crofts had to be created from scratch.
There were parts of the Highlands and Islands, such as Sutherland and Shetland, where crofters were expected to become fishermen rather than kelpers – but the principle of manipulating the tenure system to force people into providing their lairds with a workforce was everywhere the same.

Although arable, or inbye, land was thus divided into individually-tenanted crofts, pasture land or hill grazings continued, as in the pre-clearance era, to be held in common. This is still the case.

Much is now made of the attractions of the crofting way of life. But the first recipients of crofts, many of them cleared from more productive areas, were deeply resentful of what was done to them by their lairds. Many people preferred to emigrate rather than become crofters. However, their departure was resisted by their landlords – who feared the loss of a kelping workforce and who, with government backing, took legislative and other measures to stop emigration.

During the nineteenth century’s opening decades, then, the north-west Highlands and Islands acquired the settlement pattern that, in its essentials, still prevails: a depopulated interior given over to sheep farms (and later sporting estates); a more thickly (once much more thickly) peopled coastal fringe in crofting occupation.

Scarcely had crofting been created when, in the 1820s, with the collapse of kelp prices as a result of new sources of alkali becoming available, the crofting system lost – from a landowning standpoint – its raison d’être. Crofters now became what commentators of the time called ‘a redundant population’. Their departure overseas, though earlier resisted, was now encouraged by both landlords and government.

In the absence of kelp-derived earnings, and lacking the capital to get into fishing, crofters, often too impoverished to emigrate, were thrown back on to the meagre resources of their crofts. There they turned to the one crop that could be grown on a croft in sufficient quantity to come close, in good years, to feeding a family. This crop was the potato – soon almost the sole source of nutrition.

In the later 1840s, potatoes failed repeatedly because of blight. Famine resulted. Contemporary accounts – dealing in ‘children with melancholy looks, big-looking knees, shrivelled legs, hollow eyes [and] strangely swollen bellies’ – underline the fact that conditions in crofting areas were then akin to those now confined to the most deprived parts of Africa.

Famine was accompanied by further clearances – sometimes supplemented by enforced and subsidised emigration. By the 1850s, however, a sort of stability had been reached. Virtually all the areas that could profitably be allocated to sheep farmers had been so allocated. Remaining crofters occupied only a small proportion of the available land – even surviving townships having usually been deprived of some of their grazings and those same townships made still more congested by the common estate
management practice of subdividing already tiny crofts in order to accommodate refugees from localities that had been cleared entirely.

As is still the case, crofters, unlike tenant farmers, had no leases – renting their crofts on a year-by-year basis. Also unlike tenant farmers, whose landlords were responsible for the provision of homes and buildings on farms, crofters, and this too remains the case, had to construct their own homes and provide their own byres, etc.

Even when wholesale clearance ended in the 1850s, individual evictions were easily arranged and remained common – the consequent resentment intensified by the fact that evicted crofters were entitled to no compensation for the loss of homes and other ‘permanent improvements’ they had made to their crofts.

Eventually, in the 1880s, crofters rebelled. They were inspired, in part, by developments in Ireland where the tenurial position was similar to that in crofting areas and where a mass protest movement, the Irish Land League, resulted in the British government, then in charge of all of Ireland, passing the Irish Land Act of 1881 which gave new rights – including security of tenure – to Irish farmers and smallholders.

Starting at Braes in Skye in the winter of 1881-82, crofters, adopting Irish Land League tactics, embarked on a long series of rent strikes and land seizures. One outcome was a royal commission of enquiry into crofting, the Napier Commission.

Napier conceded that crofters had legitimate grievances. But his commission, in essence, wanted to transform crofting into a farming system by conceded security of tenure only to tenants of the largest crofts – and by amalgamating smaller crofts into agriculturally viable units. This was rejected by crofters – organised now into the formidable effective organisation known eventually as the Highland Land League. The league held out for, and in the end got, a Highlands and Islands version of the Irish Land Act – in the shape of the Crofters Act of 1886.

In 1886 all crofters, however small their crofts, were granted security of tenure – of a much more far-reaching variety than has ever been conceded to any other agricultural tenants in Great Britain. A Crofters Commission, not the forerunner of the present Crofters Commission but the ancestor of today’s Scottish Land Court, was set up and empowered, for example, to fix fair rents for crofts – this leading, after 1886, to widespread rent reductions.

All those provisions remain in force – the Land Court, for instance, still being empowered to fix fair rents for crofts. Those rents – often no more than £10, £20 or £30 a year – today seem nominal. This is because, for reasons touched on above, a crofting landlord is considered to have provided a crofter with no more than a small piece of bare land – all value, in the form of home, buildings, fences, etc., being the creation of the crofter and his or her predecessors.
Because it deprived landlords of any meaningful control of croft land in their possession, the Crofters Act of 1886 was a drastic interference with property rights and with the market – a far more drastic interference than any government of any party would contemplate today. Although a tremendous crofting victory, which – by making further clearance and eviction impossible – guaranteed the continuation of crofting into the twenty-first century, the Act was nevertheless condemned as inadequate by crofters of the time. This was because it did not restore to crofters any significant amount of the land lost to them during earlier clearances. Agitation for the return of this land consequently continued – reaching a peak just before and after the First World War.

The result was a further series of radical legislative interventions culminating in the Land Settlement Act of 1919 which empowered the Board of Agriculture for Scotland (the ancestor of today’s SGRPID) to purchase – compulsorily if necessary – estates and sheep farms which were then subdivided and returned to crofting occupation.

Land settlement of this type, which resulted in the creation of thousands of new crofts more especially in the islands, is the reason why the Scottish government, through SGRPID, continues to own extensive crofting estates – making government easily Scotland’s biggest crofting landlord.

Although land settlement restored much land to crofting occupation, it did not solve the many economic and other difficulties confronting crofting communities. As had always been the case, crofts – even new crofts – were mostly small and most crofting families, it followed, depended on non-agricultural sources of income for the bulk of their livelihoods. All too often, such sources of income were unavailable. As a result, population – which in most crofting areas (other than the Western Isles where the peak came in 1914) had reached its maximum just before the 1840s famine – fell steadily as out-migration became endemic. In the 1920s and subsequently, this led to the emergence of a new phenomenon, the absentee crofter.

Absentee tenancy did not exist in the period following the Crofters Act of 1886 – the security of tenure introduced by the Act being limited, reasonably enough, to crofters whose croft was also their home. It became possible only in 1917 when the courts, adjudicating on a test case, interpreted the badly drafted wording of the Small Landholders Act of 1911 – which supplemented and partly superseded the Act of 1886 – to mean that security of tenure was no longer conditional on the occupancy of the holding to which it applied.

The decades-long effort – an effort which includes the Bill now before this Committee – to regulate and control crofting absenteeism was made necessary, then, by a poorly drafted piece of legislation which, from 1917 forwards, created absentee rights that legislators had not intended to create. The simple solution to absenteeism would have been to revert to the commonsense position of 1886 – that you can only be the secure tenant of a piece of land which you actually occupy. Unlike all the other solutions that
have been attempted, and unlike the solution proffered by the present Bill, this one would have had the merit of being both simple and workable.

Faced during the 1920s, 1930s, 1940s and early 1950s with proliferating absenteeism and other problems, the authorities responded, by establishing, in 1955, the present Crofters Commission. A quite different body from its 1886 predecessor, the Commission was empowered to end the tenancies of absenteees, to adjudicate on matters having to do with the transfer, or assignation, of croft tenancies, to create and maintain a register of crofts and otherwise look after crofting – in both the crofting and wider public interest.

Few if any public bodies in Scotland have failed so continually and so conspicuously as the Crofters Commission to do what was asked of them by parliament. For example, despite the creation and maintenance of a Register of Crofts being one of the most basic duties imposed on the Commission by its founding legislation, no effective register has ever been created – which is why it is understandable that crofters resent the proposal in the present Bill that they should now pay one bureaucracy, the Registers of Scotland, to deliver what another bureaucracy, the Crofters Commission (by not doing what parliament instructed it to do) has not delivered in more than half a century.

Just as the Commission has failed to establish an effective Register of Crofts, so it has failed to deal adequately with absenteeism. To be fair to the Commission, it became clear to its principal office-holders within a few years of its formation that the Commission’s powers to deal with absenteeism, just like its powers to regulate the transfer (or assignation) of croft tenancies, were so complex, legalistic and time-consuming as to be ineffective. It was for this reason that the Commission concluded, in the late 1960s, that crofting needed to set on an entirely new basis.

Rather like the crofters of eighty years before, the Commission looked to Ireland for an answer to its problems. There the security of tenure granted by the Land Act of 1881 had been only a transient stage on a journey to the outright owner-occupation brought about, when British governments still ruled Ireland, by a series of Land Purchase Acts which enabled government to buy out Irish landlords and transfer the land thus acquired to its occupiers.

Hence the Crofters Commission proposal of 1968 that the same thing should happen in the Highlands and Islands – where, on a legislatively determined date, all land in crofting tenure would be bought compulsorily by the state and promptly handed on to its crofting occupiers. This would have brought crofting tenure, crofting law and crofting administration to an end and would thus have terminated the need for the Commission – which, in a gesture unique among quangos, was thus calling for its own abolition.

The Commission’s advocacy of a wholesale move to owner-occupation was, of course, controversial. The outcome, in the shape of the Crofting Reform Act of 1976, was the worst possible sort of compromise. While there might have been advantages to be gained from universal owner-occupation, just as there
might have been advantages to be gained from leaving matters as they were, to do as the 1976 Act did – enable individual crofters to opt for (a) owner-occupation or (b) a continued existence as secure tenants – was inevitably to create an even worse mess, not least in relation to absenteeism, than had prevailed before.

It needs underlining, in this context, that post-1976 owner-occupying crofters are not owner-occupiers in the commonly understood sense of that term. Because their land (and this is not at all what the Commission proposed in 1968) remains subject to crofting law, they are technically landlords of vacant crofts – i.e., crofts without tenants. And because, from the 1886 Act forward, provisions have existed to ensure that landlords of vacant crofts can be obliged to place tenants on them, the Crofters Commission can, in principle, force any so-called owner-occupier at any time to place a tenant on his or her croft.

It is illustrative of the Alice in Wonderland thinking inherent in this state of affairs that the present Bill seeks to oblige all owners of crofts to live on or near them. Needless to say, no such provision would be contemplated for a moment in the case of other owners of land. The Scottish government is presumably confident that the court of public opinion, to say nothing of courts of law, will see no inconsistency or injustice in the law of Scotland forcing the owner of a five-acre croft to reside in its immediate vicinity while leaving the owner of a 50,000-acre estate perfectly free to live permanently on the other side of the world. I do not share the government’s confidence.

Suppose (and the family circumstances here are entirely imaginary) that I, a history professor in Dornoch, am left the tenancy of a croft in South Uist, say, on the death of my father. Once upon a time, I could only have staked my claim to the croft by living on it. Now I don’t have to. So I tell myself that it will be nice to retire one day to the family croft – or, even if I never get round to so doing, it will be equally nice for my daughter to have that opportunity. So I retain the tenancy – which costs me just £15 a year in rent.

But in South Uist there are young folk in search of crofts. So the Crofters Commission, looking to assist them, starts absentee proceedings against me. I have good lawyers and those proceedings go on for ever and a day – until, in the end, I agree to assign the tenancy of my croft to someone else. However, I’m now looking to get the best offer for my tenancy and, crofts today being in demand, this comes, not from a young person in South Uist, but from an aspiring crofter in Surbiton.

The Commission, whose powers in this matter are entirely negative, can – and do – veto the chap from Surbiton, but they can’t force me to sell my tenancy to even the most deserving individual in South Uist. So I’m left to come forward with nominee after nominee until, tiring of this charade and now wholly at odds with the Commission, I decide to exercise my purchase rights and buy the croft from the landlord (as crofters have been entitled to do since 1976) for fifteen times the annual rent – being £225.
This all takes forever – just as it takes forever, all over again, when the Commission, as it’s entitled to do, now decides to force me, as the landlord of what’s both a vacant (in law) and unoccupied (in fact) holding, to place a tenant on my croft. (The present Bill will change the definition of a purchased croft but will leave non-resident owners of those crofts open to being forced by the Commission to let their crofts.)

Since I’ve belatedly seen the light, or simply become fed up, I agree to let or sell my croft to a South Uist twenty-year-old – let’s call him Iain – who assures both me and the Commission that he’s determined to make a go of crofting. Unfortunately, one year into his occupancy of the croft Iain loses his job in South Uist and gets another in Glasgow where he marries and settles down.

Five years on, the Crofters Commission gets round to inquiring once more into absenteeism in South Uist and writes to Iain asking when, or if, he intends taking up residence on his croft. He replies that he intends eventually to retire there, just as I once did, and the Commission, still looking to help aspiring crofters in South Uist, starts proceedings against him ...

All of this will have taken many years, occupied many hundreds of man-hours at the Commission, cost the public purse a small fortune and achieved precisely nothing.

Since 1976 a new ingredient has been injected into the crofting mix – money. In part, this is the consequence of a marked upturn in Highlands and Islands prospects. The region’s economy has strengthened. Across much of the area, though not all of it, depopulation has been reversed – population being up by 20 per cent across the region as a whole and by much more in places like Skye. Much of this is down to in-migration – as today, for the first time in centuries, far more people are moving into the Highlands and Islands than are leaving. Some of those incomers want to have crofts. Many of them are cash-rich.

Back in the 1960s, when out-migration left hundreds of crofts vacant, the tenancy of a croft could be got for next to nothing. Now tenancies are being assigned, and ‘owner-occupied’ crofts sold, for sums way beyond the reach of local people – especially younger local people. At the same time, further pressures on an already creaking system are arising from the decrofting and selling of croft land for house sites and the like.

Much of this is paradoxical. In 1886 the market forces – in the form of landlord-organised clearances and landlord-imposed rents – which posed a clear threat to crofting’s survival were fenced out of crofting in order to sustain it.

Now, inside the fence thus put in place, new market forces are at work. This time the beneficiaries are not landlords but crofters – or some crofters. But these new market forces, if left unchecked, will destroy crofting as surely, maybe more surely, than their pre-1886 equivalents threatened to do. All of
this is set out clearly and comprehensively in the report delivered to
government by Mark Shucksmith and his colleagues.

That report advocated a fresh start in the administration of crofting – to be
achieved, in particular, by abolishing the Crofters Commission and making
crofters themselves responsible for crofting’s administration and, indeed, for
its survival. This would have been in accord with the trend towards community
ownership in the Highlands and Islands. It would have been in accord, too,
with the present Scottish government’s stated commitment to other forms of
local control and local empowerment.

Depressingly, however, all of Shucksmith’s more radical and more far-
reaching recommendations have been set aside – ministers and their civil
servants opting instead for a continuation of the demonstrably bankrupt and
busted approach to crofting that has been in place since the 1950s. Hence the
present Crofting Reform Bill which will simply add further layers of legal and
bureaucratic complexity to an administrative structure which is already so
complex as to be incapable of doing what it is meant to do.

As the Shucksmith Report stresses, crofting has delivered many benefits to
the Highlands and Islands and is capable of delivering more – but only if steps
are taken urgently to control the forces now putting the continuation of crofting
at risk.

The present Bill may be well-intentioned. But by keeping in existence a
Crofters Commission which has achieved little, and by opting for still more of
the same in the shape of an additional raft of externally-imposed rules and
regulations, ministers and civil servants seem determined to ignore the main
lesson to be learned from what has gone before – that this sort of approach to
crofting has not worked and is most unlikely, with or without the injection of an
elected element into the Commission, to work in future. (This is not to criticise
Crofters Commission personnel. It is simply to say that what is expected of
them cannot be delivered.)

Not the least remarkable feature of the Bill now before the committee, it needs
noting finally, is to be found in the fact that its guiding principles are totally at
odds with the much-advertised outlook and philosophy of the present Scottish
government. Here is a government which constantly stresses (I think rightly)
the need for our society to stand tall on its own feet (as is happening,
incidentally, on community-owned estates in crofting areas). And here is the
same government insisting that crofting should be administered from outside
by a highly bureaucratic and paternalist organisation, the Crofters
Commission, which deals (and will continue to deal) with crofting difficulties by
sending commissioners and staff from its Inverness offices to faraway crofting
townships where those same commissioners and their aides, by means of the
hearings they hold there, dispense justice to the natives as if commissioners
were, for all the world, colonial district officers in 1920s Kenya. In twenty-first-
century Scotland we ought to be able to do a bit better than this.
RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

RECENT DEVELOPMENTS WITHIN THE COMMITTEE’S REMIT

Note by the Clerk: Each time an agenda and papers for a meeting are circulated to members, a short paper like this one will also be included as a means of alerting members to relevant documents of general interest which they can follow up through the links included.

Marine (Scotland) Bill

The Cabinet Secretary for Rural Affairs and the Environment has written to the Committee to provide further information on the issues which arose during Stage 2 of the Bill. The letter can be read online at:


Public Services Reform (Scotland) Bill

The Stage 1 debate on the Public Services Reform (Scotland) Bill took place on 7 January and Stage 2 amendments to the Bill can now be lodged with the clerks to the Finance Committee. The Rural Affairs and Environment Committee’s Stage 1 report made recommendations on sections 1 and 2 of Part 1 of the Bill, and also on the order-making powers in Part 2. The deadline for lodging amendments on these parts of the Bill is noon on Thursday 21 January. The Finance Committee’s Stage 1 report can be read online:

http://www.scottish.parliament.uk/s3/committees/finance/reports-09/fir09-08-vol1.htm

Common Agriculture Policy Reform

At the European Members Information Liaison Exchange (EMILE) meeting earlier this week, the group received a short presentation on CAP reform and the Brian Pack Inquiry from the Government’s lead policy official. The relevant extract from the minutes is in the annexe.

Audit Scotland report

Audit Scotland has produced a report entitled “Protecting and improving Scotland’s environment” which looks at progress in improving air quality, the water environment, biodiversity and waste management. The report can be viewed online:

Public petition to ban snaring

The Public Petitions Committee is currently considering a petition to amend the Nature Conservation (Scotland) Act 2004 to introduce provisions to ban the manufacture, sale, possession and use of all snares. The Committee took evidence from the Minister for Environment at its meeting on 12 January 2010 and agreed to give further consideration to the petition at a future meeting. The petition can be read online:

Petition PE1124:  
http://www.scottish.parliament.uk/business/petitions/docs/PE1124.htm

Brussels Bulletin

The monthly Brussels Bulletin produced by the Parliament’s European Officer is available online at:


ANNEXE

CAP Reform & Brian Pack Inquiry briefing

- The Brian Pack Inquiry is looking at all aspects of future support for agriculture in Scotland. Although the review looks in particular at the Single Farm Payment, the remit also covers other funding streams such as the SRDP and LFASS.

- The Inquiry Committee has been appointed and includes;
  - Brian Pack OBE (Chair) – Former Chief Exec of ANM Group
  - Mrs. Wilma Finlay MBE – Managing Director of Cream O’Galloway Dairy Co. Ltd, a farm diversification business employing 19 full-time staff and 35 seasonal staff
  - Professor John Grace - Professor of Environmental Biology at the School of Geosciences in the University of Edinburgh
  - Johnny Mackey – New entrant to farming, building up a cattle and sheep business, and Breed Secretary for Luing Cattle Society Ltd.
  - David MacLeod – Manager of a family farm in Skye, independent rural consultant and member of the Board of the Crofters Commission.
  - Steve McLean – Agriculture Manager for Marks and Spencer plc, responsible for the company’s livestock supply chains and for interaction between the retailer and its farmer producers.

- The committee have agreed a plan of work split into two phases. Phase 1 involved a call for evidence which closed on 30 October with over 100 responses and will result in an interim report in early 2010. Phase 2 will involve
a public engagement exercise including a public consultation and meetings with a final report due by late spring 2010.

- The Inquiry’s recommendations will take account of the National Food and Drink Policy, the Scottish Climate Change Delivery Plan and will draw upon relevant research including the findings of the Rural Land Use Study, which reported in late 2009. It also drew on information and experiences from other countries.

John Brownlee
CAP Reform & Crop Policy
Ext: 46357
December 2009